H.R. 548, "CERTAINTY IN ENFORCEMENT ACT OF 2015", H.R. 549, "LITIGATION OVERSIGHT ACT OF 2015", H.R. 550, "EEOC TRANSPARENCY AND ACCOUNTABILITY ACT", AND H.R. 1189, "PRESERVING WELLNESS PROGRAMS ACT"

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 24, 2015

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Tuesday, March 24, 2015
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 10:02 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg (Chairman of the subcommittee) presiding.

Present: Representatives Walberg, Brat, Stefanik, Wilson, Pocan, Adams, and DeSaulnier.

Also present: Representatives Kline and Scott.

Staff present: Ed Gilroy, Director of Workforce Policy; Christie Herman, Professional Staff Member; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Zachary McHenry, Legislative Assistant; Daniel Murner, Deputy Press Secretary; Michelle Neblett, Professional Staff Member; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Staff Assistant; Denise Forte, Minority Staff Director; Melissa Greenberg, Minority Labor Policy Associate; Carolyn Hughes, Minority Senior Labor Policy Advisor; Eunice Ikene, Minority Labor Policy Associate; Kendra Kosko Isaacson, Minority Labor Detailee; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; Theresa Tilling-Thompson, Minority Special Projects Assistant.

Chairman WALBERG. A quorum being present, the subcommittee will come to order.

Good morning. Today the subcommittee will examine a number of legislative proposals intended to provide greater transparency

and accountability to the Equal Employment Opportunity Commission.

I would like to thank our witnesses for joining us. We have a distinguished panel to help us look at a number of complex and important issues.

All workers deserve strong protections against employment discrimination. Toward that end, there continues to be support for federal laws such as the *Americans with Disabilities Act*, the Civil Liberties—or *Civil Rights Act*, and the *Age Discrimination in Employment Act*, and others.

There is no doubt that every member of the Committee expects the fair and vigorous enforcement of these laws in our nation's workplaces, and that is precisely why we are here today.

The Equal Employment Opportunity Commission plays a vital role ensuring America's workers are free to pursue employment without fear of discrimination based on their race, their gender, their disability, or religion. We need this agency to do its job effectively so that every American has a shot to succeed based on merit and hard work.

Unfortunately, the enforcement and regulatory approach adopted by EEOC in recent years raises serious doubts about whether our nation's best interests are being served.

For example, the Commission has implemented controversial guidance on the use of criminal background checks that will make it more difficult for employers to protect their employees and customers. At a hearing held last Congress, the subcommittee received testimony from Ms. Lucia Bone, whose sister, Sue Weaver, was murdered by a man who months earlier had cleaned the air ducts in her home. A simple criminal background check might have saved this woman's innocent life.

State and local policies requiring criminal background checks are intended to protect Americans who come in contact with workers in vulnerable situations, such as at home and in the classroom. As a result of EEOC's misguided policy, more Americans will be put in harm's way, including women and children.

The EEOC should scrap this misguided policy completely. But if it won't, then Congress should take steps to rein it in and help provide families greater peace of mind the next time they invite a stranger into their home or a child's classroom.

Furthermore, EEOC has challenged employee wellness programs. Employers develop these innovative programs in order to improve the health of employees and their families, increase productivity, and reduce health costs. Yet litigation pursued by the Commission is actually discouraging employers from implementing these programs even though Congress, on a bipartisan basis, has expressed its clear support for employee wellness programs.

Lastly, EEOC is spending more time and resources pursuing systemic or class action investigations, often without any allegation of wrongdoing. The Commission has also been sanctioned in recent years for pursuing claims that are frivolous and without merit.

This is how one federal court—circuit court described the EEOC enforcement action, and I quote: "EEOC brought this case on the basis of a homemade methodology, crafted by witness with no particular expertise to craft it, administered by persons with no par-

ticular expertise to administer it, tested by no one, and accepted only by the witness himself."

Meanwhile, a backlog of discrimination claims filed by individual workers continues to plague the Commission. This is no way to run an agency with a mission as important as the EEOC's, and we must demand better. To help workers succeed in the workplace without fear of discrimination, Congress has a responsibility to hold the Commission accountable for its regulatory and enforcement policies.

We will examine today a number of legislative proposals to help us do just that. Together, these proposals will instill greater transparency and accountability in EEOC, and improve its enforcement activities, and help more workers and employers enjoy the benefits of employee wellness programs.

I look forward to discussing in greater detail with our witnesses the positive reforms in these bills and hope they will receive strong, bipartisan support.

With that, I will now recognize the Ranking Member of the subcommittee, Representative Wilson, for her opening remarks.

[The statement of Chairman Walberg follows:]

AS PREPARED FOR DELIVERY
March 24, 2015

CONTACT: Press Office
(202) 226-9440

Opening Statement of Rep. Tim Walberg (R-MI)
Chairman, Subcommittee on Workforce Protections
Legislative Hearing on H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act."

Today, the subcommittee will examine a number of legislative proposals intended to provide greater transparency and accountability to the Equal Employment Opportunity Commission. I'd like to thank our witnesses for joining us. We have a distinguished panel to help us look at a number of complex and important issues.

All workers deserve strong protections against employment discrimination. Toward that end, there continues to be support for federal laws such as the *Americans with Disabilities Act*, the *Civil Rights Act*, the *Age Discrimination in Employment Act,* and others. There is no doubt that every member of the committee expects the fair and vigorous enforcement of these laws in our nation's workplaces, and that is precisely why we are here today.

The Equal Employment Opportunity Commission plays a vital role ensuring America's workers are free to pursue employment without fear of discrimination based on their race, gender, disability, or religion. We need this agency to do its job effectively so that every American has a shot to succeed based on merit and hard work. Unfortunately, the enforcement and regulatory approach adopted by EEOC in recent years raises serious doubts about whether our nation's best interests are being served.

For example, the commission has implemented controversial guidance on the use of criminal background checks that will make it more difficult for employers to protect their employees and customers. At a hearing held last Congress, the subcommittee received testimony from Ms. Lucia Bone, whose sister, Sue Weaver, was murdered by a man who months earlier had cleaned the air ducts in her home. A simple criminal background check might have saved this innocent woman's life.

State and local policies requiring criminal background checks are intended to protect Americans who come in contact with workers in vulnerable situations, such as at home and in the classroom. As a result of EEOC's misguided policy, more Americans will be put in

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harm's way, including women and children. The EEOC should scrap this misguided policy completely, but if it won't, then Congress should take steps to rein it in and help provide families greater peace of mind the next time they invite a stranger into their home or child's classroom.

Furthermore, EEOC has challenged employee wellness programs. Employers develop these innovative programs in order to improve the health of employees and their families, increase productivity, and reduce health care costs. Yet litigation pursued by the commission is actually discouraging employers from implementing these programs, even though Congress on a bipartisan basis has expressed its clear support for employee wellness programs.

Lastly, EEOC is spending more time and resources pursuing systemic or "class action" investigations, often without any allegation of wrongdoing. The commission has also been sanctioned in recent years for pursuing claims that are frivolous and without merit. This is how one federal circuit court described an EEOC enforcement action:

> "EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."

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We will examine today a number of legislative proposals to help us do just that. Together, these proposals will instill greater transparency and accountability in EEOC, improve its enforcement activities, and help more workers and employers enjoy the benefits of employee wellness programs. I look forward to discussing in greater detail with our witnesses the positive reforms in these bills and hope they will receive strong, bipartisan support.

# # #

Ms. WILSON. Thank you, Mr. Chairman.

Today we will examine four bills that would impact the Equal Employment Opportunity Commission, EEOC, in ways that I fear will compromise the enforcement of civil rights laws. Since 2014, we will have had three hearings regarding the EEOC; yet, we have not once invited the Commissioners themselves to testify about the bills that could severely impact their enforcement of employment civil rights laws.

The name of this subcommittee is Workforce Protections, and by our name alone it is clear that we should be doing our best to protect workers. These four bills appear to be a grab-bag for unscrupulous employers seeking to strip the EEOC of the tools they need to combat employment discrimination on the basis of race, color, religion, national origin, sex, pregnancy, age, disability, and genetic information.

Fifty years ago, after the creation of the enactment of the *Civil Rights Act of 1965* and the creation of the EEOC, the job of the EEOC is far from complete, despite many advances.

Mr. Chairman, these four bills today ignore the fact that race, gender, disability, and age discrimination persist, and we should not be hindering the agency's charge with combatting unlawful discrimination. In fiscal year 2014, just for example, in fiscal year 2014, of the 88,778 discrimination charges filed with EEOC, 35 percent were based on race, 29 percent were based on sex, 29 percent were based on disability status, and 23.2 percent were based on age discrimination.

Mr. Chairman, I am at a loss to understand why we would want to tie the hands of the EEOC, an agency that has a backlog of 70-plus charges.

Here is how we would tie their hands. Number one: Stripping the general counsel's authority to make a determination about what charges the EEOC should pursue to protect American workers, given there is a policy in place to ensure novel legal questions and controversial matters must already—already be submitted to the Commission for approval.

Number two: Limiting the EEOC's disparate impact examination of criminal background checks. Even Clarence Thomas, Commission chair in 1987, adopted the agency's guidance, which says that the criminal background checks, like other hiring requirements that could exclude certain people, should only relate to the job.

Number three: Granting liability exemption to employers who violate employee privacy and civil rights under the *American and Disabilities Act (ADA)* and the *Genetic Information Nondiscrimination Act (GINA)*.

And number four: Finally, undermining the successful conciliation process by imposing legal hurdles to resolving cases and opening the process to extensive litigation based on the adequacy of the conciliation process, rather than resolving the substance of whether or not there are impermissible discrimination.

EEOC's job should be about getting results, not providing full employment for law firms looking for new ways to frustrate resolution of a disputed discrimination case.

Mr. Chairman, I would ask that you call another hearing where we can review these four bills with all five of the EEOC Commis-

sioners. We need to assess the implications of these bills and determine whether there are unintended effects, such as piling on delays in resolving cases.

We need to hear from the Commissioners to determine whether these bills will set up roadblocks for fair and timely resolution of claims by those who face race, sex, age, or disability-based discrimination. We want to determine if these bills, as drafted, will spawn unnecessary litigation and create more confusion.

I thank the witnesses for being here today, and I look forward to hearing your testimony. Thank you so much for coming.

I yield back to the Chairman.

[The statement of Ms. Wilson follows:]

Statement of the Honorable Frederica Wilson (D-FL)
Ranking Member, Subcommittee on Workforce Protections
Legislative Hearing on *The Certainty in Enforcement Act of 2015* (H.R. 548); *The Litigation Oversight Enforcement Act of 2015* (H.R. 549); *EEOC Transparency and Accountability Act* (H.R. 550); and *Preserving Employee Wellness Program Act* (H.R. 1189)
March 24, 2015

Mr. Chairman, today we will examine four bills that would impact the Equal Employment Opportunity Commission (EEOC) in ways that, I fear, will compromise the enforcement of civil rights laws. Since 2014, we will have had three hearings regarding the EEOC. Yet, we have not once invited the Commissioners to testify about the bills that could severely impact their enforcement of employment civil rights laws.

The name of our Subcommittee is *Workforce Protections*, and by our name alone it is clear that we should be doing our best to protect workers. These four bills appear to be a grab bag for unscrupulous employers seeking to strip the EEOC of the tools needed to combat employment discrimination on the basis of race, color, religion, national origin, sex, pregnancy, age, disability, and genetic information.

Fifty-years after the creation of the enactment of the Civil Rights Act of 1965 and the creation of the EEOC – the job of the EEOC is far from complete. Despite many advances, Mr. Chairman, these four bills today ignore the fact that race, gender, disability, and age discrimination persist—and we should not be hindering the agencies charged with combatting unlawful discrimination. In Fiscal Year 2014, of the 88,778 discrimination charges filed with EEOC

- 35% were *based* on race,
- 29.% were based on sex,
- 29% were based on disability status,
- and 23.2% were based on age discrimination.

Mr. Chairman, I'm at a loss to understand why we would want to tie the hands of EEOC – an agency that has a backlog of 70,000-plus charges by:

1) One: Stripping the General Counsel's authority to make a determination about what charges the EEOC should pursue to protect American workers, given there is a policy in place to ensure novel legal questions and controversial matters must already be submitted to the Commission for approval;
2) Two: Limiting the EEOC' disparate impact examination of criminal background checks. Even Clarence Thomas, Commission Chair in 1987, adopted the agency's guidance which says that that criminal background checks, like other hiring requirements that could exclude certain people, should relate to the job;
3) Three: Granting liability exemption to employers who violate employee privacy and civil rights under the American with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA); and,
4) And finally, undermining the successful conciliation process by imposing legal hurdles to resolving cases, and opening the process to extensive litigation based on the adequacy of the conciliation process, rather than resolving the substance of whether or not there was

impermissible discrimination. EEOC's job should be about getting results, not providing full employment for law firms looking for new ways to frustrate resolution of a disputed discrimination case.

Mr. Chairman, I would ask that you call another hearing where we can review these four bills with all five of the EEOC Commissioners. We need to assess the implications of these bills, and determine whether there are unintended effects, such as piling on delays in resolving cases. We need to hear from the Commissioners to determine whether these bills will set up roadblocks for fair and timely resolution of claims by those who face race, sex, age, or disability-based discrimination. We want to determine if these bills, as drafted, will spawn unnecessary litigation and create more confusion.

I thank the witnesses for being here today and look forward to their testimony.

I now yield to the Chairman.

Chairman WALBERG. I thank the gentlelady.

Pursuant to Committee rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearings to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses.

Mr. Paul Kehoe is a senior counsel with Seyfarth Shaw law firm here in Washington, D.C. Mr. Kehoe is a member of the Seyfarth's labor and employment practice group and a former attorney advisor to the Honorable Victoria A. Lipnic, EEOC Commissioner. His practice focuses on all aspects of employment discrimination law, including the development of strategies to prevent and resolve employment discrimination litigation under federal and state anti-discrimination statutes.

Welcome.

Tamara Simon is a managing director with Buck Consultants Knowledge Resource Center here in Washington, D.C. Ms. Simon is responsible for Buck's national multi-practice legal analysis and publications, government relations, research, surveys, training, and knowledge management. She serves as a national resource in compliance issues affecting employers' health and welfare benefits.

Welcome.

Tanya Clay House is the public policy director at the Lawyers' Committee for Civil Rights Under Law here in Washington, D.C. Ms. House works closely with all Lawyers' Committee projects focusing on core issues such as education, voting rights, employment discrimination, fair housing, affirmative action, criminal justice, immigration, and other racial diversity issues.

Welcome.

And finally, Gail Heriot is a professor of law at the University of San Diego School of Law in San Diego, California. Professor Heriot is a member of the U.S. Commission on Civil Rights. She teaches and writes in the areas of civil rights, employment discrimination, product liability remedies, and torts.

Welcome, as well.

I will now ask our witness to—witnesses to stand and raise your right hand, as is the custom in this Committee.

[Witnesses sworn.]

Let the record reflect—you may be seated—the witnesses answered in the affirmative.

Before I recognize each of you to provide your testimony, let me briefly explain the lighting system. Just as in the traffic lights, red means stop, but you get to that by going green for your first four minutes, yellow will be indicative of a final minute before the red light comes on. We will ask you to finish as quickly your thought after the red light appears.

I will ask the same of the panel, though I might not be quite as stiff as our full Committee Chairman, Mr. Kline. Yet, I will do my best to follow suit.

I will now recognize Mr. Kehoe for your five minutes of questioning.

TESTIMONY OF MR. PAUL KEHOE, SENIOR COUNSEL, SEYFARTH SHAW LLP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. KEHOE. Chairman Walberg, Chairman Kline, Ranking Member Wilson, and members of the subcommittee, thank you for inviting me to testify today on behalf of the U.S. Chamber of Commerce.

The Chamber of Commerce is a longstanding supporter of reasonable and necessary steps designed to achieve equal employment opportunity. However, the Chamber has serious concerns as to how these laws are currently being administered and enforced by the EEOC.

No matter how well-intentioned, any law enforcement agency's judgment, including the EEOC, can become clouded by hubris and susceptible to overreach. Too often, courts have taken exception to the EEOC's shoot-first-aim-later tactics.

For example, just last Friday, a judge awarded attorney's fees to two companies forced to defend themselves against what the court called frivolous litigation. Just a month ago, a 4th Circuit judge issued a scathing opinion against the EEOC for not being vigilant enough to avoid abusing the power that Congress bestowed upon it.

These and other litigation embarrassments can be blamed in part on the Commissioners' lack of control over the EEOC litigation program. Only Commissioners have the statutory authority to initiate litigation. In 1996 the Commissioners delegated away much of this authority to the general counsel, who then re-delegated away to regional attorneys.

The Commission partially rescinded this delegation in 2012, but problems persist. Far too often, Commissioners learn about litigation by an EEOC press release or social media. The general counsel or unappointed, unconfirmed regional attorneys are making policy through litigation. However, any EEOC general counsel is the agency's litigator, not its policymaker.

For 40 years courts have reviewed the EEOC's statutory conciliation efforts. In 2013, a 7th Circuit Court rejected this statutory safeguard, finding conciliation not subject to judicial review.

This issue is currently before the Supreme Court in *EEOC* v. *Mach Mining*, where the EEOC argued that, as a law enforcement agency, its actions related to whether it complied with statutory mandates are not reviewable. This position is simply breathtaking in scope and encourages the EEOC to purposefully eschew conciliation in search of the next lawsuit—the opposite of congressional intent.

All of the issues that have plagued the EEOC recently were on full display in *EEOC* v. *Honeywell*, a case filed by the EEOC seeking a preliminary injunction to prohibit Honeywell from offering financial incentives pursuant to the wellness program. The EEOC received charges on October 16, 2014, determined that day that a violation of the ADA and GINA occurred, demanded that Honeywell stop using financial incentives, and filed litigation 11 days later.

However, the *Affordable Care Act*, HIPAA, and joint regulations issued by three cabinet-level agencies permit—indeed, encourage—financial incentives and wellness programs. The EEOC's theory

was that the incentives made participation non-voluntary under the ADA and GINA even if the incentives complied with the *Affordable Care Act* and its implementing regulations.

One district office believed so and filed suit without Commissioner approval, seeing to establish a policy position never adopted by the Commissioners. This rogue agency strategy will likely have a chilling effect on the development and implementation of wellness programs.

Ultimately, the EEOC's choice to focus on systemic litigation with questionable theories has caused it to ignore instances of more traditional types of discrimination, leaving alleged victims and their employers in limbo, literally for years.

A decade ago, the Commission would file almost 375 lawsuits annually. Despite an increased budget in 2010, the EEOC now files only 130. One can rightfully ask what the EEOC is doing with its sizeable budget, as it is clear that all too often they are not investigating promptly, not conciliating in good faith, and not litigating very well.

Justice Brandeis once said that sunlight is the best disinfectant. The four bills under consideration today would provide that sunlight and are common-sense, narrow solutions to these issues.

H.R. 549 will ensure that policymaking is rightfully returned to the commissions—Commissioners in all multi-victim litigation that the EEOC pursues. H.R. 550 will clarify the EEOC's duty to conciliate and ensure that such efforts are reviewable in court. H.R. 1189 will ease the uncertainty created by the EEOC's litigation against Honeywell.

Finally, H.R. 548 provides clarity for employers faced with state or local mandates prohibiting the hiring of certain convicted felons for certain positions. That is all that it does.

Overall, these bills should enhance the EEOC's functionality and accountability, and the chamber supports them.

[The testimony of Mr. Kehoe follows:]

Statement of the U.S. Chamber of Commerce

ON:	**H.R. 548, THE *CERTAINTY IN ENFORCEMENT ACT OF 2015*; H.R. 549, THE *LITIGATION OVERSIGHT ACT OF 2015*; H.R. 550, THE *TRANSPARENCY AND ACCOUNTABILITY ACT*; AND H.R. 1189, THE *PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT***
TO:	**THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS**
BY:	**PAUL H. KEHOE, SEYFARTH SHAW LLP**
DATE:	**MARCH 24, 2015**

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

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

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

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

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

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

TESTIMONY OF PAUL H. KEHOE

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

LEGISLATIVE HEARING

H.R. 548, THE *CERTAINTY IN ENFORCEMENT ACT OF 2015*; H.R. 549, THE *LITIGATION OVERSIGHT ACT OF 2015*; H.R. 550, THE *TRANSPARENCY AND ACCOUNTABILITY ACT*; AND H.R. 1189, THE *PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT*

MARCH 24, 2015

Good morning Mr. Chairman, Ranking Member Wilson, and Members of the Subcommittee. It is a privilege to testify before you today on behalf of the United States Chamber of Commerce.[1] The Chamber is the world's largest business federation, representing more than three million businesses of every size, industry sector and geographical region.

Congress established the EEOC to prevent unlawful employment practices by employers. The EEOC administers Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Genetic Information Nondiscrimination Act ("GINA"), the Age Discrimination in Employment Act of 1967 ("ADEA"), among other federal employment discrimination laws. The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all.[2] Indeed, a properly functioning EEOC is critical for employees and employers alike. However, the Chamber has serious concerns as to how these laws are currently being administered and enforced. No matter how well intentioned, any law enforcement agency's judgment, including the EEOC, can become clouded by hubris and susceptible to overreach.

Under these statutes, the EEOC must (1) properly investigate discrimination charges and reach a determination as promptly as possible, (2) endeavor in the first instance to eliminate any alleged unlawful practice through informal methods, including conciliation and persuasion, and (3) where necessary to ensure compliance with federal equal employment opportunity laws, undertake litigation in federal courts or issue right to sue letters to charging parties. In addition,

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[1] I am a Senior Counsel at the law firm Seyfarth Shaw in Washington D.C. Prior to returning to private practice, I served as an Attorney Advisor to the Honorable Victoria A. Lipnic, EEOC Commissioner from May 2010 through September 2013. During that time, I provided counsel to Commissioner Lipnic regarding all policy matters confronting the Commission, including final regulations and enforcement guidance documents, and regarding all aspects of agency business such as Commission-initiated litigation, systemic litigation, requests for approval to file amicus briefs by the Office of General Counsel, subpoena determinations, and field activities. I would like to thank Seyfarth Shaw LLP attorneys Camille Olson, Lawrence Lorber, and Alex Passantino for their assistance in preparation of this testimony.

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

the EEOC may promulgate regulations under the ADA, GINA, and the ADEA[3] and issue enforcement guidance containing interpretations of the laws within its jurisdiction.

All too often, the EEOC gives short shrift to these statutory prerequisites, and a growing number of courts have taken exception to the EEOC's "shoot first, aim later" tactics used both pre-litigation and after it has filed litigation.[4] Having announced a focus on larger systemic litigation,[5] the EEOC has nevertheless pursued novel and questionable theories:

- against companies that use criminal background checks or provide wellness program incentives to employees,
- where no individual has filed a charge of discrimination,
- pursuant to discredited enforcement guidance, such as its policy against arbitration agreements,
- against companies that implement common sense workplace safety policies,
- against companies who require individuals to return to work after generous leave periods, oftentimes over one year, and more.

All of these theories would expand the EEOC's reach far beyond Congressional intent.

While the EEOC pursues these questionable theories, many individuals who file charges seeking assistance are left to wait years for the EEOC to make a determination on their charge. The EEOC's choice to focus on systemic investigations and press release worthy litigation has caused it to ignore instances of more traditional types of discrimination, leaving alleged victims and their employers in limbo, literally for years.

Despite a budgetary increase of over $23 million (6.7%) in fiscal year 2010, and essentially flat funding since, the EEOC's results have plummeted, and its backlog of unresolved charges remains near historical highs. For example, the EEOC's litigation program filed 133 merits suits in fiscal year 2014, down roughly 50% from fiscal year 2011 and down 65% over fiscal year 2005 levels. EEOC litigation secured a mere $22.5 million for alleged victims of discrimination, down from about $39 million in fiscal year 2013, $91 million in fiscal year 2011 and a high of $168.6 million in fiscal year 2004. The backlog of unresolved charges increased over 7% in fiscal year 2014.[6]

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[3] The EEOC does not have authority to issue regulations under Title VII.

[4] The Chamber has highlighted EEOC's enforcement abuses in a report entitled, *A Review of EEOC Enforcement and Litigation Strategy During the Obama Administration – An Abuse of Authority* (available at https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper.pdf)

[5] Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area.

[6] U.S. Equal Employment Opportunity Commission, *Fiscal Year 2014 Performance and Accountability Report*, available at http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf (last visited March 16, 2015).

With this background, I appear today, at your invitation, to discuss four bills that are pending before this Subcommittee: H.R. 548, the "Certainty in Enforcement Act of 2015"; H.R. 549, the "Litigation Oversight Act of 2015"; H.R. 550, the "Transparency and Accountability Act"; and H.R. 1189, the "Preserving Employee Wellness Programs Act." Each of these common sense bills addresses specific concerns related to the manner in which the EEOC investigates, conciliates, and litigates cases. If enacted, these bills would improve how the EEOC functions and provide greater clarity for employers confronted with contradictory legal requirements related to criminal background checks and wellness program incentives.

The EEOC's Statutory Structure & Litigation Authority

Congress created the EEOC in 1964 with the enactment of Title VII, under which the Commission would be composed of five members, each of whom is appointed by the President and confirmed by the Senate, for staggered five year terms.[7] No more than three members may be from the same political party, and when fully constituted, three Commissioners are from the party of the President.[8] The President designates one member to serve as Chair, who is responsible for all administrative operations of the agency.[9] The other four Commissioners and the Chair vote on regulations, enforcement guidance documents, subpoena determinations, litigation recommendations filed by the General Counsel, contracts over $100,000, and more. In 1964, Title VII did not permit the EEOC to file litigation, but vested that authority with the Department of Justice.

In 1972, Congress amended Title VII and granted litigation authority to the EEOC. Congress invested that authority in the Commission, (i.e., the five members appointed by the President).[10] Congress also created the position of General Counsel, who would be appointed by the President, confirmed by the Senate, and serve a four-year term.[11] Notably, the statute only confers to the General Counsel the right to "conduct," not initiate, litigation on behalf of the Commission.[12] Indeed, the General Counsel is the agency's litigator, not its policy maker.

Congress retained the initial administrative enforcement scheme and determined that the EEOC had to satisfy several conditions prior to filing litigation. For example, the EEOC would have to provide employers notice of the charge within 10 days of filing and to investigate charges.[13] If, after an investigation, the Commission determines that there is reasonable cause to believe that discrimination exists, then before filing suit, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[14] Only after conciliation fails may the Commission initiate litigation.[15]

While debating the 1972 Amendments, Congress considered, but ultimately rejected, exempting the Commission's conciliation efforts from judicial review. An early version of the

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[7] 42 U.S.C. § 2000e-4(a).*Id.*
[8] *Id.*
[9] *Id.*
[10] 42 U.S.C. § 2000e-5(f).
[11] 42 U.S.C. § 2000e-4(b).
[12] *Id.*
[13] 42 U.S.C. § 2000e-5(b).
[14] *Id.*
[15] 42 U.S.C. § 2000e-5(f).

bill expressly stated that the EEOC could proceed with a suit if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be subject to review*."[16] (emphasis added.) However, as ultimately passed, the 1972 Amendments did not exempt conciliation from judicial review.[17]

In 1996, the Commission adopted its National Enforcement Plan, which delegated nearly all of its litigation authority to the General Counsel except for cases (i) involving a major expenditure of resources, (ii) which present an issue in a developing area of law, (iii) which are likely to cause a public controversy, and (iv) all recommendations to participate as amicus curiae.[18] In turn, the General Counsel redelegated this authority to the EEOC regional attorneys, leaving the actual Commissioners with very little say over what lawsuits get filed by the EEOC.[19]

In the early- to mid-2000s, as many as 75-80 litigation recommendations were submitted annually to the Commission for authorization. Also during this time, the Commission filed approximately 375 lawsuits annually. Yet, in recent years, the number of litigation recommendations submitted to the Commissioners for approval has decreased dramatically. Despite the increased focus on massive, systemic litigation, during fiscal years 2010 through 2012, the Commissioners reviewed and approved fewer than 15 litigation recommendations. During the same period, the EEOC filed 633 merits lawsuits, meaning less than 2.4% were filed with Commissioner approval. On many occasions, Commissioners, those *upon whose behalf all litigation is filed*, first learned of case filings through an EEOC press release. Given those statistics, it is clear that Commissioner review of litigation recommendations prior to filing did not impede the General Counsel a decade ago from filing hundreds more cases than today.

In the last two fiscal years, the EEOC has filed 38 systemic lawsuits and 32 non-systemic, multi-victim lawsuits.[20] Of these 70 cases, the General Counsel only submitted approximately 35 cases for Commissioner review. Given that class and systemic litigation is significantly more costly in terms of dollars and personnel hours, it is hard to comprehend how any class case would not be a "major expenditure of resources" that Commissioners must approve. In light of the EEOC's significant failures regarding conciliation and large-scale merits litigation, one should reasonably expect the Commissioners to have greater oversight over the General Counsel's litigation filings.

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[16] S. 2515, 92d Cong. § 4(f) (1971).
[17] 42 U.S.C. § 2000e-5(f)(1).
[18] U.S. Equal Employment Opportunity Commission, *National Enforcement Plan*, available at http://www.eeoc.gov/eeoc/plan/nep.cfm (last visited March 15, 2015).
[19] *Id.* Additionally, in late 2012, the EEOC adopted its Strategic Enforcement Plan, which continued the EEOC's focus on systemic litigation, but partially rescinded the delegation of authority to the General Counsel, which required "many" systemic cases to be submitted to the Commission for review and a minimum of one case per district office for consideration prior to filing litigation. *See* U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan FY 2013-2016*, available at http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited March 17, 2015).
[20] U.S. Equal Employment Opportunity Commission, Fiscal year 2013 Performance and Accountability Report, available at http://www.eeoc.gov/eeoc/plan/2013par.cfm (last visited March 18, 2015); U.S. Equal Employment Opportunity Commission, Fiscal year 2014 Performance and Accountability Report, available at http://www.eeoc.gov/eeoc/plan/2014par.cfm (last visited March 18, 2015).

The EEOC's Conciliation Record

Recently, and with more frequency, the sufficiency or the appropriateness of the EEOC's pre-suit obligations have been successfully challenged by employers in courts. "Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit."[21] These conditions precedent serve all sides -- employees, employers and courts. The regulated community should never have to expend significant resources defending a lawsuit where the EEOC has failed to meet its statutory mandates.

For the last forty years, courts have routinely reviewed whether the EEOC has sufficiently complied with conciliation obligations. Courts in the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits[22] had all determined that the EEOC's conciliation obligations were subject to review under varying standards. In recent years, courts have dismissed or limited actions because the EEOC failed to conciliate.

Despite this statutory language and decades of precedent, the EEOC rejects the notion that its statutory obligation is subject to judicial review; rather, the EEOC contends that courts must simply accept the EEOC's assurance that it occurred. The EEOC argues, that as a law enforcement agency, its actions related to whether it complies with statutory mandates are not reviewable. That position is simply breathtaking in scope, as it encourages the EEOC to purposefully eschew conciliation in search of the next press release worthy lawsuit -- the opposite of Congressional intent.

One of the most egregious examples of the EEOC's failure to conciliate in good faith happened in *EEOC v. CRST Van Expedited, Inc.*[23] There, the Eighth Circuit Court of Appeals largely affirmed a district court's dismissal of an EEOC class action complaint which alleged sexual harassment of behalf of 154 women where the EEOC refused to identify the alleged victims during conciliation. The Eight Circuit described it as follows:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.[24]

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[21] *Occidental Life Insurance Co. of California v. EEOC, 432 U.S. 355, 359-60 (1977);* 42 U.S.C. §2000e-5(b).
[22] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).
[23] 679 F.3d 657, 676-77 (8th Cir. 2012).
[24] *Id.* at 676.

The district court sanctioned the EEOC and awarded $4.7 million to CRST for attorneys' fees and expenses.[25] After almost 10 years of activity and settling the single remaining allegation for $50,000, the award was remanded on appeal.[26] The end result, however, was the same – 153 alleged victims' claims were dismissed without a hearing on the merits – because the EEOC chose not follow its statutory mandate.

Breaking ranks with the large majority of circuit courts which have required EEOC to engage in pre-suit conciliation, in 2013, the Seventh Circuit Court of Appeals rejected this statutory safeguard and held conciliation was not subject to judicial review.[27] The issue is currently pending before the Supreme Court.[28] At the oral argument on January 13, 2015, Chief Justice Roberts was "troubled by the idea that the government can do something and we can't even look at whether they've complied with the law"[29] and that courts should "just trust" the EEOC.[30] Justice Breyer noted that judicial review of agency actions was "hornbook law"[31] and Justice Scalia stated that the EEOC's position - being exempt from judicial review - was "extraordinary. That does not exist in this world."[32]

In recent months, courts have continued to dismiss EEOC litigation for failing to conciliate. A federal court in Illinois ruled that the EEOC could not pursue its novel theory that a retail company's cooperation, non-disparagement, non-disclosure, and general release provisions in a standard severance agreement violated Title VII, for failure to conciliate.[33] Another federal court in Colorado dismissed an EEOC action based on similar provisions contained in a severance agreement, rejecting the EEOC's argument that conciliation is not required under the ADEA and finding that the EEOC failed to conciliate class-wide claims.[34]

Congress has also taken notice of the EEOC's woeful conciliation record. Report language accompanying the Commerce, Justice, Science, and Related Agencies Appropriations Act (H.R. 4660) which passed the House on May 30, 2014 states:

> 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.

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[25] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *21 (N.D. Iowa Aug. 1, 2013).
[26] *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169, 1185 (8th Cir. 2014).
[27] *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013).
[28] *Mach Mining v. EEOC*, No. 13-1019 (S. Ct.).
[29] Transcript of Oral Argument at 11, *Mach Mining v. EEOC*, No. 13-1019, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1019_4f14.pdf (last visited March 16, 2015).
[30] *Id.* at 42.
[31] *Id.* at 33.
[32] *Id.* at 56.
[33] *EEOC v. CVS Pharmacy, Inc.*, No. 14-863, 2014 WL 5034657 (N.D. Ill. Oct. 7, 2014).
[34] *EEOC v. CollegeAmerica Denver, Inc.*, No 14-1232, 204 WL 6790011 (D. Col. Sept. 2, 2014).

Though this language appears to have survived the $1.1 trillion "cromnibus" spending bill which the President signed into law on December 16, 2014, EEOC has not yet responded to this directive.

The EEOC's Litigation Tactics and Failures

Since March 2010, the EEOC has suffered a number of high-profile losses. While no one can expect the EEOC to win every case, Congress and the taxpayers have every right to expect that the EEOC conduct litigation in a responsible manner, both free from sanctions for improper tactics and scathing judicial opinions as to its evidence. Unfortunately, the EEOC's recent track record in its high profile cases is troubling.

Just a few weeks ago, the Fourth Circuit Court of Appeals dealt the EEOC an embarrassing loss in a case alleging that an employer's background policy had a disparate impact on minorities.[35] The Fourth Circuit upheld summary judgment in favor of the employer and focused on the EEOC's expert reports, the "alarming number of errors and analytical fallacies" contained in the reports, and a "mindboggling number of errors and unexplained discrepancies" identified by the district court. The court concluded "sheer number of mistakes and omissions in [the expert's] analysis renders it outside the range where experts might reasonably differ."[36]

Writing separately, Judge Agee delivered a stunning rebuke to the EEOC's tactics, stating:

> Although I concur in Judge Gregory's opinion, I write separately to address my concern with the EEOC's disappointing litigation conduct. The Commission's work of serving "the public interest" is jeopardized by the kind of missteps that occurred here. *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 326 (1980). And it troubles me that the Commission continues to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here. It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well.
>
> The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so.[37]

Other courts have been no more kind to the EEOC where it pursued novel areas of law. In a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[38] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of the fatal false premise of its case during discovery, the EEOC litigated anyway. The court determined that "this is one of those cases where the complaint turned out to be without

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[35] *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2013).
[36] *Id.* at *2.
[37] *Id.* at *3, *7.
[38] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

foundation from the beginning." As a result, the court ordered the EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees after the agency learned that the company did not have the blanket no-hire policy.

A federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, granting summary judgment for the employer, ruling that the EEOC once again did not present sufficient evidence to establish that the employer engaged in a pattern or practice of pregnancy discrimination.[39] The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance and found that class member compensation growth was higher for women who took pregnancy leaves compared to other employees who took non-maternity leaves. The court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required." A motion for attorneys' fees is currently pending.

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.[40] Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, the EEOC's claims were "frivolous, unreasonable and without foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.

While litigating disparate impact claims, which do not require that the EEOC prove intentional discrimination against any alleged victim, the EEOC has fared no better. For example, in an Ohio case alleging that an employer's use of credit background checks violated Title VII, the Sixth Circuit affirmed summary judgment because the EEOC lacked sufficient evidence to even form a *prima facie* case of discrimination.[41] There, the EEOC used a novel "race rating" system to establish that the credit background check had a disparate impact against minority applicants. While castigating the EEOC for using a "homemade" method that the EEOC itself prohibits, the Sixth Circuit noted that "[i]n this case the EEOC sued defendants for using the same type of background check that the EEOC itself uses."

The EEOC ignores these and other decisions at its peril and continues its pursuit of questionable cases. Just last September, it filed a case against a company that owns and operates franchise restaurants for requiring its employees to sign arbitration agreements.[42] In 1997, the EEOC adopted its Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment. This document claims that pre-dispute binding arbitration as a condition of employment is inconsistent with Title VII and that therefore the Commission would "closely scrutinize" all charges involving an arbitration agreement to see if it was entered into "under coercive circumstances (e.g., as a condition of employment)." As the Chamber has noted several times in the past, courts (including the Supreme Court) have now

[39] *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).
[40] *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).
[41] *EEOC v. Kaplan Higher Educ. Corp.*, No. 13-3408, 2014 WL 1378197 (6th Cir. Apr. 9, 2014).
[42] *EEOC v. Doherty Enterprises, Inc.*, No. 14-81184 (S.D. Fla. 2014).

uniformly rejected this guidance and its inconsistency with federal law is no longer subject to legitimate debate. That the EEOC filed *this* case on *this* discredited theory is utterly absurd.

The Litigation Oversight Act of 2015 (H.R. 549) and the EEOC Transparency and Accountability Act (H.R. 550) Would Require That All Alleged Multi-Victim Litigation Be Approved By The Commissioners and Foster More Transparency and Accountability

Justice Brandeis once said that sunlight is the greatest disinfectant. Enacting H.R. 549 and H.R. 550 would shine sunlight upon the EEOC and go a long way in improving both how the Commission functions and how it is regarded by the regulated community.

If enacted, H.R. 549 would prohibit any EEOC General Counsel from filing any major and/or controversial litigation without a majority vote of Commissioners. First, the bill would require Commissioner approval before the General Counsel files any litigation involving multiple victims, any systemic allegations, or any pattern or practice allegation. Second, it would give any Commissioner the right to require a vote prior to any potential litigation filing. The bill does not require Commissioner approval of cases involving only a single alleged victim (though the General Counsel would still be required to submit such a case for approval if it presented an issue in a developing area of the law or would likely cause public controversy).

In addition, if enacted, H.R. 549 would require the EEOC to publish certain information about litigation filed pursuant to Commissioner approval, including how each Commissioner voted. No legitimate reason exists for the Commission to act under the cloak of darkness and secrecy under which it has operated for many years, especially in light of this Administration's purported focus on transparency.

H.R. 549 is thus an effort to return control of the EEOC's litigation to the entity which was created to ensure that the policies and issues litigated are consistent with the policies and issues that the Commission determines is worthy of such action. The EEOC has taken the confirmed Commissioners out of the litigation process and allowed the General Counsel to essentially create policy through litigation. H.R. 549 would reverse that development.

If enacted, H.R. 550 would require the EEOC to publish information not currently posted on its website. For example, the EEOC would have to publish (i) post-judgment litigation information, including fees or sanctions against the EEOC; (ii) the total number of Commissioners' charges filed per fiscal year; (iii) the total number of directed investigations conducted under the ADEA; and (iv) a list of systemic litigation filed within the previous 30 days. Commissioners' charges and directed investigations data would have to be broken down by district and the alleged basis of discrimination. The bill also requires the EEOC to report to Congress any case where a court orders it to pays attorneys' fees or imposes sanctions.

Most important, however, H.R. 550 would amend Title VII to include a good faith conciliation requirement prior to filing litigation and clarify that the EEOC's conciliation efforts are subject to judicial review. In that vein, it would prohibit the EEOC from filing litigation unless the EEOC certifies that its conciliation efforts have reached an impasse, and require the EEOC to provide respondents its legal and factual basis for its findings and monetary demands.

H.R. 550 is an effort to resolve the conciliation issue by statute and require the EEOC to conciliate in good faith, as many courts have already held. It would eliminate the EEOC from effectively predetermining the result of conciliation for cases where it already intends to file litigation. Though, as previously noted, Title VII already requires EEOC to engage in conciliation, H.R. 550 would clarify and strengthen this requirement.

Neither H.R. 549 nor H.R. 550 would impede the efficient prosecution of civil rights enforcement or limit the Commissioners' focus on policy matters. Nor do these bills diminish the protections conferred by the civil rights statutes. Indeed, just a decade ago, Commissioners reviewed up to 80 litigation recommendations per year and filed roughly 375 cases per year. One could reasonably conclude that Commissioners have the capability of reviewing more than 15 cases per year, especially while the EEOC focuses on high-stakes, multiple victim litigation. Indeed, where the American taxpayer is footing the bill for EEOC sanctions and missteps, having the Commissioners approve large-scale litigation and requiring the Commission act in a transparent manner would further the cause of good government.

Wellness Programs

Employer-sponsored insurance remains a crucial element of our health care system – providing the most stable, innovative, and affordable health care coverage to Americans. Though popular, wellness programs can be complicated. When implementing and operating a wellness program, employers must negotiate a series of legal and regulatory requirements. Employers must navigate not just the Patient Protection and Affordable Care Act ("PPACA"), but also the Health Insurance Portability and Accountability Act ("HIPAA"), ADA, GINA and other federal laws. The Department of Labor ("DOL"), the Department of the Treasury ("Treasury") and the Department of Health and Human Services ("HHS") all oversee aspects of employer wellness programs, and issued joint regulations on the matter on June 3, 2013.[43]

HIPAA prohibits discrimination in eligibility, premium costs, benefits and the like on the basis of a health factor, such as genetic information or disability. However, there are some exceptions that permit incentives to encourage employees to meet certain health standards, such as achieving healthy cholesterol or blood pressure levels. Such incentives are commonly embodied in wellness programs. Under PPACA, HIPAA and the Joint Regulations, incentives related to participatory wellness programs (e.g., providing a discount for membership at the local gym), are permitted as long as they are made available to all similarly situated employees.[44] The Joint Regulations do not impose a limits for incentives on these programs.

On the other hand, for health contingent wellness plans, those either based on an activity (e.g., walking, diet or exercise programs) or outcome based metrics (e.g., maintaining a certain cholesterol or blood pressure level), incentives must be capped at 30% of the total cost of an employee's coverage (or 50% for smoking cessation programs).[45] Such a wellness program must also (i) be reasonably designed to promote health, (ii) allow eligible individuals an opportunity to qualify for the reward at least once per year, (iii) be available to all similarly situated employees and (iv) allow employees to achieve the reward through an alternate standard.

[43] 78 Fed. Reg. 33158 (June 3, 2013) (the "Joint Regulations").
[44] *See, e.g.*, 45 C.F.R. § 146.121(f).
[45] *Id.*

Ultimately, the issue for the EEOC is fairly straightforward: are incentives permitted under PPACA and HIPAA nonetheless impermissible under the ADA and GINA because the amount of the incentive makes participation non-voluntary? The EEOC does not have a current policy position on voluntariness in light of PPACA,[46] though it is currently developing a notice of proposed rulemaking to address the issue. However, under the ADA, medical examinations and/inquiries (including biometric screening) are not permitted unless such inquiries are either job related and consistent with business necessity or voluntary.[47] Under GINA, an employer may collect genetic information as part of a wellness plan where the employee provides prior, knowing, voluntary, and written authorization, among other requirements. A wellness program is voluntary as long as an employer "neither requires participation nor penalizes employees who do not participate."[48]

While the signature accomplishment of the Administration and the Joint Regulations from three Cabinet agencies have all permitted, indeed, encouraged, the use wellness program incentives, the EEOC recently filed litigation attempting to force an employer to cease its wellness program under a novel theory never adopted by the Commissioners. This enforcement strategy has left employers wondering if they may be liable for implementing wellness programs and will likely have a chilling effect on the development and innovation of wellness programs.

The EEOC's Litigation To Chill Employers From Offering Wellness Plans and the Preserving Employee Wellness Programs Act (H.R. 1189)

On October 27, 2014, eleven days after receiving a charge, the EEOC sued Honeywell International Inc. seeking a temporary restraining order and preliminary injunction prohibiting it from "impos[ing] penalties on employees who do not participate in its biometric testing, or whose spouses do not participate."[49] This litigation perfectly encapsulates all of the problems that have plagued the EEOC recently as it appears that the EEOC conducted little to no investigation into the matter, did not engage in conciliation (good faith or otherwise), and did not submit the novel theory of law to the Commissioners for review prior to filing.

Employees who participated in the program, depending on income, were eligible to participate in the company's Health Savings Account ("HSA") of up to $1,500. Employees who choose not to participate in the wellness program did not qualify for the company-sponsored HSA and had to pay a $500 surcharge. Honeywell employees and their spouses could also be

[46] That has not always been the case. On January 6, 2009, the EEOC published an informal discussion letter which adopted the then-existing HIPAA standard to determine voluntariness. *See* January 6, 2009 letter, "ADA: Disability Related Inquiries and Medical Exams/Mandatory Clinical Health Risk Assessment" available at http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf. Roughly three months later, the EEOC rescinded that letter. *See* March 2, 2009 letter, "ADA: Disability-Related Inquiries and Medical Examinations; Health Risk Assessment" available at http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html (last visited March 16, 2015).

[47] 42 U.S.C. § 12112(d)(4).

[48] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at Q. 22 (last visited March 16, 2015).

[49] Petition For a Temporary Restraining Order and Preliminary Injunction, *EEOC v. Honeywell Int'l, Inc.*, No. 14-4517 (D. Minn. Oct. 27, 2014).

subjected to a $1,000 nicotine surcharge if they refused to undergo the biomedical testing. Finally, the EEOC requested that Honeywell not provide incentives to spouses for participation.

According to the EEOC's petition, two individuals filed charges on October 16, 2014. The EEOC served the charges on Honeywell by fax and email that same day, and by mail the next day. The EEOC stated that by the time the Chicago District Director served the charges, it appeared that Honeywell's wellness program violated the ADA and GINA. *Within less than one day, the EEOC determined a violation occurred.* The EEOC sought relief pending its investigation and demanded that Honeywell cease providing incentives pursuant to the wellness program.

The district court decision was fast and furious.[50] The court rejected the EEOC's motion and found, among other things, that the EEOC was not likely to succeed on the merits because the only appellate level court to rule on a similar issue found for the employer,[51] as well as the great uncertainty surrounding the interaction between PPACA, the ADA and GINA.

H.R. 1189 Would Continue to Permit Employers To Offer Employees Financial Incentives Up To The Limits Authorized By PPACA

The EEOC's actions in the Honeywell case are in direct conflict with the Joint Regulations issued by three Cabinet agencies and are inconsistent with a clear White House policy favoring wellness plans. At a White House press briefing on December 3, 2014, Press Secretary Josh Earnest stated that, with regard to the Honeywell case, "as a general matter, . . . the administration, and particularly the White House, is concerned that this . . . could be inconsistent with what we know about wellness programs and the fact that we know that wellness programs are good for both employers and employees."[52]

H.R. 1189 would resolve the issue of whether an incentive or surcharge permitted under PPACA is nonetheless impermissible under the ADA and GINA. If enacted, employers would be able to offer financial incentives to employees up to 30% of their health care premiums for participating in and reaching certain health outcomes in a wellness plan (and up to 50% for smoking cessation programs) without fear of running afoul of the ADA or GINA or any forthcoming regulation from the EEOC. In this regard, the Chamber believes that H.R. 1189 merely clarifies existing law.

Second, H.R. 1189 provides that collecting information about a manifested disease or disorder of a spouse would not be an unlawful acquisition of genetic information of the employee under GINA. This permits employers to offer incentives to an employee's spouse for completing a health risk assessment form and otherwise participating in a wellness program. The regulated community has, for years, raised concerns about EEOC investigations into incentives offered to employee spouses for completing health risk assessments where inquiries about the spouse's manifested conditions are made. The legislation would address that concern.

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[50] *EEOC v. Honeywell Int'l, Inc.*, No 14-4517, 2014 WL 5795481, at *4-5 (D. Minn. Nov. 6, 2014).

[51] *See Seff v. Broward Cty.*, 691 F.3d 1221, 1223 (11th Cir. 2012) (affirming district court decision that found an employer wellness program that included a blood test and a $20 per paycheck incentive a "term" of a group health plan and thus protected by the ADA's safe harbor provision).

[52] *See* http://www.whitehouse.gov/the-press-office/2014/12/03/press-briefing-press-secretary-josh-earnest-1232014

H.R. 548 Would Permit Employers to Reject Applicants Convicted of Crimes For Positions Where A State Law Prohibits Hiring That Individual

In April 2012, the EEOC adopted its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple - employers commit race discrimination if they choose to hire applicants without criminal histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. The EEOC fails to provide any justification for this logical flaw - that an unsuccessful applicant who received an individualized assessment is not discriminated against while the same unsuccessful applicant who did not receive an individualized assessment has been discriminated against.

A second flaw in the EEOC's guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII,[53] the EEOC provided no guidance on how an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job related and consistent with business necessity. It is an expensive endeavor for a child care facility or a nursing home to show that not hiring a serial rapist or drug dealer pursuant to state law is job related and consistent with business necessity, yet that is what this guidance contemplates.

The Commission could have informed the public that it would use its prosecutorial judgment and not file cases involving state laws. To date, it has not filed any such cases. But the threat of a long, expensive investigation and litigation remains real. H.R. 548, the Certainty in Enforcement Act of 2015, would settle the narrow state law issue by statute. It provides that the "consideration or use of credit or criminal records or information, as mandated by Federal, State or local law... shall be deemed job related and consistent with business necessity" and cannot be used as a basis for disparate impact litigation. This common sense solution preserves federalism and states' rights, while also not placing employers at risk of expensive litigation where an employer is prohibited from hiring that individual under state law in the first place.

As described above, the EEOC has not been successful in litigating background check cases. The Commission has lost three major cases in this area, but none of those courts actually reached the merits of the EEOC's underlying theory. Indeed, the EEOC lost in *Peoplemark* because it pursued a violation based on a companywide policy that did not exist. The EEOC lost in *Kaplan* because it failed to show a *prima facie* case of disparate impact and, at least in part, because the EEOC maintained a credit and criminal background check policy for its own employees. Finally, the EEOC lost in *Freeman* because its expert analyzed data from the wrong period of time. While these losses suggest that EEOC may have difficulty developing the proof necessary to even establish a *prima facie* case of discrimination, employers are nonetheless

[53] 42 U.S.C. § 2000e-7.

placed between a rock and a hard place when determining whether to exclude an applicant from employment.

Conclusion

Combating discrimination in the workplace is a worthy goal and one that the U.S. Chamber of Commerce supports. However, the EEOC's abusive enforcement tactics can no longer be ignored. While some federal judges are pushing back in some cases, EEOC clearly has not received the message. Moreover, relying on judges as the final check on EEOC enforcement is often a case of "too little, too late": by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations. In other words, even when employers win, they lose. As the EEOC has continued to ignore the problem, Congress should enact these common sense bills to increase transparency and accountability, and to provide clarity related to an employer's use of criminal background checks and ability to offer incentives as permitted under other federal law.

Chairman WALBERG. Thank you.

Now recognize Ms. Simon for five minutes of testimony.

TESTIMONY OF MS. TAMARA SIMON, MANAGING DIRECTOR, KNOWLEDGE RESOURCE CENTER, BUCK CONSULTANTS, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE AMERICAN BENEFITS COUNCIL

Ms. SIMON. Good morning, Chairman Walberg, Chairman Kline, Ranking Member Wilson, and members of the subcommittee. My name is Tami Simon and I am managing director of the Knowledge Resource Center and the Career Practice at Buck Consultants and Xerox Company. It is my honor to testify today on behalf of the American Benefits Council, of which Buck Consultants is a member.

Collectively, the Council's members either sponsor directly or provide services to employee benefit plans that cover over one million Americans. Many of the council's members are at the forefront of developing wellness programs to help employees live healthier lives.

I have three points that I would like to share with you today. First, why are wellness programs good for America? Second, what are the current challenges that employers are facing with their wellness programs today? And third, why is legislation necessary?

First, why are wellness programs good for America? Wellness programs help achieve better health outcomes for employees and also have the potential to increase employee productivity by helping to reduce absenteeism due to sickness and disability, improve workforce morale and engagement, and reduce health care spending.

The prospect of a healthier workforce has compelled a growing number of companies to develop and implement wellness strategies; 65 percent of respondents to Buck's 2014 wellness survey indicated that they have a wellness strategy. That is up from 49 percent in 2007. Other surveys estimate that more than 75 percent of U.S. employees now have access to wellness programs.

A critical component of encouraging employers to offer meaningful wellness programs is consistent federal policy that promotes the health of Americans and is aligned across multiple agencies and Congress.

As such, employers applaud Congress for working on a bipartisan basis to craft the wellness provision in the *Patient Protection and Affordable Care Act* that built on the existing wellness program framework created by HIPAA. This is a rare bipartisan provision in the controversial health care reform law and reflects Congress' approval of offering incentives for health-contingent wellness programs.

Now, as you may recall, HIPAA prohibits group health plan wellness programs from discriminating against individuals in eligibility, benefits, and premiums based on a health factor, which includes, among other things, disability. And for many such programs, the law imposes financial limits, notice obligations, and alternative standards for those unable to meet the program standards.

HIPAA also contains privacy and security rules protecting individual health information. Information that is obtained through a wellness program is part of the group health plan, can't be used without an authorization for any reason other than treatment, payment, or health care operations.

So what is the current challenge? Notwithstanding employers' interest in establishing legally compliant wellness programs and the bipartisan support of Congress and the administration, a great deal of uncertainty exists in current EEOC guidance regarding what constitutes a voluntary wellness program under the *Americans with Disability Act* and how the *Genetic Information Nondiscrimination Act* applies to common wellness program designs.

This legal uncertainty has been exacerbated by enforcement actions initiated by the EEOC regional offices against some employers' HIPAA and PPACA-compliant wellness programs. These actions allege that incentives or penalties associated with participation in a group health plan's wellness program violate the ADA and GINA.

These actions have had a chilling effect on employer wellness programs.

To put it more plainly, currently employers just don't know what to do. On the one hand, they are designing programs that comply with HIPAA and PPACA's clear and comprehensive nondiscrimination rules, but on the other hand, still face the risk of litigation for not complying with EEOC's unclear standards. This is very frustrating for employers that care about the well-being of their employees and take seriously their compliance obligations.

So what is the solution? Chairman Kline has introduced the *Preserving Employee Wellness Programs Act of 2015*, or H.R. 1189, which supports the existing HIPAA and PPACA legislative framework with regard to wellness programs, striking, we believe, the right balance between providing certainty to employers and ensuring an appropriate role for the EEOC to protect employees from discrimination.

The council fully supports advancement of H.R. 1189 and urges members of the subcommittee and full committee to please join Chairman Kline as cosponsors.

Thank you for the opportunity to testify, and the council and I look forward to working with you to restore certainty to employers focusing on improving the health of their workforce.

[The testimony of Ms. Simon follows:]

TESTIMONY OF

TAMARA M. SIMON,
MANAGING DIRECTOR,
KNOWLEDGE RESOURCE CENTER &
CAREER PRACTICE
BUCK CONSULTANTS

ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON H.R. 548, "CERTAINTY IN ENFORCEMENT ACT OF 2015"; H.R. 549, "LITIGATION OVERSIGHT ACT OF 2015"; H.R. 550, "EEOC TRANSPARENCY AND ACCOUNTABILITY ACT"; AND H.R. 1189, "PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT"

MARCH 24, 2015

My name is Tamara M. Simon, and I am the Managing Director of the Knowledge Resource Center and the Career Practice at Buck Consultants, a Xerox Company. I am testifying today on behalf of the American Benefits Council (the "Council"), of which Buck Consultants is a member.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans. Many of the Council's members are at the forefront of the workplace wellness revolution, developing programs to help employees live healthier lives.

As stated in the Council's recent public policy strategic plan, *A 2020 Vision: Flexibility and the Future of Employee Benefits*,[1] employer-sponsored benefit plans are now being designed with the express purpose of giving each worker the opportunity to achieve personal health and financial well-being. This well-being drives employee performance and productivity which, in turn, drives successful organizations.

The Council has asked me to testify on its behalf because of my experience in assisting employers, spanning a wide range of industries, to implement wellness programs. As a compliance consultant, my primary role is to help employers and their legal counsel understand their legal obligations regarding their group health plans and wellness programs. I also work closely with the health and productivity consultants that help our clients to design and operationalize these programs.

We applaud Congress for having worked on a bipartisan basis to craft the wellness provisions in the Patient Protection and Affordable Care Act (PPACA) that built on the existing framework created in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). PPACA's bipartisan wellness provisions increased employer flexibility in designing programs to improve the health of employees and their families. Additionally, it signaled a recognition that wellness programs are a cornerstone of health reform.

Notwithstanding employers' increasing interest in establishing wellness programs, a great deal of legal uncertainty exists with respect to the application of both the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA) to these programs. To address this, the Council's recent public policy strategic plan, *A 2020 Vision: Flexibility and the Future of Employee Benefits*, notes that "A critical component of encouraging employers to offer meaningful wellness programs is consistent federal policy that promotes the health of Americans and is aligned across multiple agencies and Congress." Unfortunately, existing guidance from the U.S. Equal Employment Opportunity Commission (EEOC) is not clear regarding what constitutes a

[1] http://www.americanbenefitscouncil.org/newsroom/2020vision.cfm

voluntary wellness program for purposes of the ADA and questions remain regarding how GINA applies to various aspects of some common wellness program designs.

My testimony will describe the current state of employer-sponsored wellness programs. Not only are these programs important for achieving better health outcomes for employees, they also have the potential to increase employee productivity, improve workforce morale and engagement and reduce health care spending. The bulk of my data is drawn from Buck Consultants' 2014 survey report Working Well: A Global Survey of Health Promotion, Workplace Wellness and Productivity Strategies,[2] which represents the views of 1,041 employer respondents based in 37 countries, including 562 respondents in the United States alone.

I will also explain how ongoing legal and regulatory uncertainty is preventing more employers from sponsoring wellness programs, and how House Education and the Workforce Chairman John Kline's Preserving Employee Wellness Programs Act (H.R. 1189) can help alleviate the problem.

WHAT IS A WELLNESS PROGRAM?

HealthCare.gov defines a wellness program[3] as "a program intended to improve and promote health and fitness that's usually offered through the work place, although insurance plans can offer them directly to their enrollees. The program allows your employer or plan to offer you premium discounts, cash rewards, gym memberships, and other incentives to participate. Some examples of wellness programs include programs to help you stop smoking, diabetes management programs, weight loss programs, and preventative health screenings."

As we study wellness at Buck, with the benefit of a broad range of employer experience, we have learned to subdivide wellness strategies into three distinct phases.

Wellness 1.0 demonstrates a focus on general health promotion and prevention activities, such as fun runs, competitions, and health risk appraisals, and some interventions such as tobacco cessation. Within this phase, the employer makes little or no measurement of outcomes.

Wellness 2.0 incorporates rapid adoption of health risk appraisals and biometric screening to assess the health of the employee population. These more advanced approaches are increasingly integrated with employee assistance programs (EAPs)[4]

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[2] Buck Consultants, Working Well: A Global Survey of Health Promotion and Workplace Wellness and Productivity Strategies (2014)

[3] See https://www.healthcare.gov/glossary/wellness-programs/

[4] According to the IFEBP, an EAP is an "employment-based program designed to assist in the

and/or disease management programs, often leveraging portals and tracking of incentives. External (often financial) incentives are more frequently used to motivate participation in various activities, sometimes with the goal of meeting defined clinical outcomes.

Wellness 3.0, the most advanced approach to wellness, encompasses a broader focus on *overall* well-being, including a more holistic view and integrated approach to supporting employees in their health, wealth and careers, with employers taking a shared responsibility for well-being as part of a compelling value proposition for employees. Sophisticated measurement and metrics guide a health and human resource strategy that is directly tied to the overall success of corporate objectives. While external incentives are often still used, Wellness 3.0 relies on the development of intrinsic incentives/motivators and the value a supportive company culture and workplace environment can play in behavior change, leveraging newer personal engagement methods such as social media, gamification, mobile technology, automated coaching, and personalized challenges. Very often, these programs are extended more fully to the family and sometimes to the community at large.

This holistic approach is consistent with the Council's *2020 Vision*, in which we posit that health and retirement benefits will no longer be considered in separate silos, instead focused on the concept of "personal health and financial well-being," encompassing physical and mental health as well as financial security, both when actively employed and in retirement.

To start on this path, employers have developed a variety of wellness program designs. The most recent Buck Consultants survey lists the following health promotion/wellness components, from most prevalent to least prevalent, in the United States:

1. Employee Assistance Program (EAP)
2. On-site immunizations/flu shots
3. HR policies (e.g., flexible work schedules, break policies, paid time off policies)
4. Regular communications (e.g., online mailings, posters)
5. Health risk appraisal (health and lifestyle questionnaire)
6. Nurse line or other health decision phone support
7. Biometric health screenings (such as blood pressure, cholesterol, glucose, body fat)
8. Ergonomic adaptations and awareness

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identification and resolution of a broad range of employee personal concerns that may affect job performance. These programs deal with situations such as substance abuse, marital problems, stress and domestic violence, financial difficulties, health education and disease prevention. The assistance may be provided within the organization or by referral to outside resources. Also called an employee assistance plan." International Foundation of Employee Benefit Plans, Benefits and Compensation Glossary, 12th Edition, 185 (2010)

9. Work/life balance support (e.g., legal, financial services, elder or child care support)
10. Telephonic chronic disease management support or coaching

The fastest-growing wellness programs in the United States include:
1. Telephonic physician support (telemedicine services)
2. Cycle-to-work program
3. On-site healthy lifestyle programs and coaching (e.g., nutrition, weight loss, stress reduction, smoking cessation)
4. Personal health record (electronic summary of personal health information)
5. On-site medical facility

In particular, telehealth services are projected to grow at an annual rate of 56 percent through 2018, suggesting that program design and technological advancement go hand-in-hand.[5]

Some wellness program designs include a reward or incentive element generally attempting to encourage participation in wellness programs, to increase overall participation, and to encourage employees to strive for healthy results. Data indicates that positive reinforcement or "carrots" are more likely to be used than penalties or "sticks" in connection with wellness programs.

90 percent of U.S. employers with wellness programs responding to the Buck survey currently offer incentives, including rewards, penalties, or both, to encourage participation in wellness initiatives. The most common activities for which incentive rewards or penalties are offered include the completion of a health risk appraisal or screening, or participation in workplace health "challenges" (such as walking or weight loss).

Incentives most frequently take the form of gift cards, travel, merchandise or cash awards, although some employers offer reduced premium cost-sharing or lower deductibles, or provide for additional employer contributions to an account-based arrangement (such as employer flex credit contributions to health flexible spending arrangements or employer contributions to Health Savings Accounts or health reimbursement arrangements.)

According to *The Wall Street Journal*, "Studies have shown that [wellness] program participation rates can be pushed from 40 percent without an incentive to more than 70 percent with a $200 incentive and to 90 percent when incentives are built into health-

[5] The Council's *A 2020 Vision* includes a specific goal and recommendations related to the use of continually evolving technology, including (1) clear guidelines for privacy of individualized information, (2) adoption of a "presumption of good faith" standard for the use of technology and (3) adoption of a "least burdensome compliance" standard for benefit plan regulations related to technology.

plan premiums or deductibles."[6]

While incentives can be tied to participation, wellness programs may also be designed to link receipt of the incentive to the achievement of a specific health outcome. For example, a recent survey by Aon Hewitt found that 58% of responding employers offer incentives for completion of a lifestyle modification program (*e.g.*, participating in a smoking cessation or weight loss program), and approximately 25% offer incentives for progress toward or attainment of a specified health goal (*e.g.*, improved blood pressure, BMI, blood sugar or cholesterol).[7]

A company's wellness strategy is dictated not only by its choice of programs but also by its participant scope. Our survey found that 62 percent of programs include spouses, 52 percent include domestic partners and 43 percent include children. A separate study found that 17 percent of responding firms offer wellness programs to their retirees.[8]

Additionally, as suggested in the Council's recent testimony[9] before the Senate Health, Education, Labor and Pensions Committee, delivered by Catherine Baase, Chief Medical Officer for The Dow Chemical Company, population health is best achieved with business strategies that address employees as well as the community. Consistent with the Center for Disease Control and Prevention's "Health in All Policies" efforts, the worksite is a critical venue to address health needs and health improvement.

WHY WELLNESS?

The development and implementation of a wellness strategy requires substantial financial, intellectual and human capital on the part of employers. This investment is justified by the promise of improved employee well-being, increased productivity and lower long-term health costs.

While "improving worker productivity and reducing presenteeism (the practice of attending work while sick)" is cited as the most important wellness program objective on a global basis (with 82 percent of respondents calling it "very important" or "extremely important"), these programs hold the promise of more direct economic benefits under the principle that successful preventive actions, better-managed chronic conditions and fewer episodes of care will result in reduced health service utilization and fewer claims.

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[6] Michael P. O'Donnell, Should Employees Get Insurance Discounts for Completing Wellness Programs?, *Wall Street Journal*, Feb. 18, 2013, at R5.

[7] Aon Hewitt, 2012 Health Care Survey 35 (2012).

[8] Optum, Fifth Annual Wellness in the Workplace Study: An Optum Research Update 7 (2014)

[9] See http://www.help.senate.gov/imo/media/doc/Baase2.pdf

The potential for cost savings is particularly appealing to U.S. employers, with 88 percent of respondents in the United States telling Buck that "reducing health care or insurance premium costs" is "very important" or "extremely important." While measurement is still inconsistent even among program sponsors, 28 percent of employers told us that their wellness program had an impact on their population's health care trend rate, and 68 percent of those respondents reported a trend rate reduction of two percent or more. The potential of wellness programs to reduce costs is particularly important for employer health plan sponsors as they assess the impact of the PPACA's 40 percent excise tax on "high-cost" plans on their health benefits coverage.[10] Although the tax is not effective until 2018, employers are already responding by considering and implementing changes to health benefits coverage to help avoid the excise tax.

A 2013 RAND Employer Survey[11] examining wellness program outcomes, sponsored by the U.S. Department of Labor, found that while it is not clear at this point whether improved health-related behavior will translate into lower health care cost, there is reason to be optimistic. Fully 60 percent of respondents indicated that their wellness program reduced health care cost,[12] with reductions in inpatient costs accounting for 68 percent of the total cost reduction, compared to outpatient costs (28 percent) and prescription drug costs.[13]

The available evidence also supports the aspirational goals of wellness programs – like improving productivity, morale and safety. Data from the 2013 RAND survey shows 78 percent of responding employers stated that their wellness program has decreased absenteeism and 80 percent stated that it increased productivity.[14] Likewise, 32 percent of respondents to a 2014 Mercer Survey said specifically that the health risks of the population served by their wellness programs were improving.[15]

These results support published research findings that workplace wellness programs can improve health status, as measured with physiological markers (such as body mass index, cholesterol levels and blood pressure).[16] According to our data, 53 percent of responding employers were measuring specific outcomes from health promotion programs in 2014, as compared to only 35 percent in 2012.

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[10] Code section 4980I imposes a 40 percent excise tax on an "applicable employer-sponsored coverage" offered an employee that exceeds specified statutory thresholds (For 2018, the thresholds are $10,200 for self-only coverage, and $27,500 for coverage other than self-only, subject to certain adjustments).

[11] RAND, Workplace Wellness Programs Study: Final Report (2013)

[12] Id at 53

[13] Id at 57

[14] Id at 53

[15] Mercer, Taking health management to a new level (2014) via Sloan Center, *supra* note 2, at 3

[16] RAND, *supra* note 4 at 61

The evidence that workplace health promotion is effective continues to evolve, with employers and vendors making greater use of population strategies and evidence-based approaches. As they do, existing strategies will evolve correspondingly and adoption of new programs will begin.

THE CURRENT STATE OF EMPLOYER SPONSORSHIP OF WELLNESS PROGRAMS

The prospect of a healthier workforce has compelled a growing number of companies to develop and implement wellness strategies. A full 65 percent of respondents to Buck's 2014 survey indicated that they have a wellness strategy, up from 49 percent in 2007. This 65 percent includes the 29 percent who said their strategy was fully implemented and another 31 percent who said their strategy was partially implemented. These results are consistent with other recent broad-based surveys from Willis,[17] SHRM[18] and The Families and Work Institute.[19]

The trend is particularly strong among large employers. According to the Kaiser Family Foundation's Employer Health Benefits 2014 Annual Survey,[20] 98 percent of large U.S. companies (with 200 or more workers), compared to 73 percent of smaller U.S. companies, offered at least one wellness program in 2014. Large firms are also more likely to offer financial incentives to employees for participating (36 percent vs. 18 percent).[21]

It is estimated that more than 75 percent of U.S. employees now have access to wellness programs.[22]

The remarkable take-up of these programs by employers and employees, combined with the capacity and incentives for growth, make wellness an area of tremendous promise for the future of health care and employer-sponsored benefits. The Council believes that public policy should generally support private sector investment in wellness by giving all employers the flexibility they need to administer these programs while encouraging smaller employers to develop their own strategies.

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[17] Willis, The Willis Health and Productivity Survey Report (2014)

[18] SHRM, State of Employee Benefits in the Workplace - Wellness Initiatives (2013)

[19] Matos, K., & Galinsky, E., Families and Work Institute, 2014 National Study of Employers (2014)

[20] Kaiser Family Foundation, Employer Health Benefits 2014 Annual Survey - Wellness Programs and Health Risk Assessments 196 (2014)

[21] Id at 197

[22] Sloan Center on Aging & Work at Boston College, Fact Sheet 38: Health and Wellness Programs in the Workplace 1 (July 2014)

CHALLENGES WITH CURRENT PUBLIC POLICY

Employers applaud Congress for working on a bipartisan basis to craft the wellness provisions in the PPACA that built on the existing framework created in the HIPAA. PPACA's bipartisan provision increased employer flexibility in designing programs to improve the health of employees and their families. Additionally, the PPACA has helped to cement wellness programs as one of the cornerstones of health reform.

A critical component of encouraging employers to offer meaningful wellness programs is consistent federal policy that promotes the health of Americans and is aligned across multiple agencies and Congress. We appreciate the work of this committee in introducing the Preserving Employee Wellness Programs Act, a bill that clarifies that wellness programs that comply with HIPAA and the PPACA will not violate the ADA or GINA. We look forward to continuing to work with this committee, the Equal Employment Opportunity Commission (EEOC) and other stakeholders to provide legal and regulatory certainty to employers offering wellness programs to their employees.

Legal Landscape

Wellness programs are subject to the jurisdiction of the Department of Labor ("DOL"), the Department of the Treasury ("Treasury"), the Department of Health and Human Services ("HHS"), and the EEOC via a range of federal statutes and regulations. Many states have laws governing wellness programs, as well. The discussion below sets forth the basic federal legal framework applicable to the oversight of wellness programs. This is not intended to be an exhaustive discussion of all federal legal issues related to wellness programs but rather to provide a basis for understanding compliance and other issues employers face with regard to wellness programs.

Health Insurance Portability and Accountability Act of 1996

For years, wellness programs have been subject to extensive regulation by the DOL, HHS, and Treasury through the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPAA"). HIPAA provides privacy and nondiscrimination protections to consumers in connection with group health plans.

Specifically, Titles I and IV of HIPAA added provisions to the Internal Revenue Code ("Code"), the Employee Retirement Income Security Act ("ERISA"), and the Public Health Service Act ("PHSA")[23] that generally prohibit group health plans and group health insurance issuers from discriminating against individuals in eligibility, benefits, or premiums based on a health factor, which includes, among other things,

[23] *See* Code § 9802, ERISA § 702, PHSA § 2705.

disability.[24] An exception to the general rule allows plans and issuers to provide premium discounts, rebates, and cost-sharing modifications in return for an individual's adherence to certain programs of health promotion and disease prevention, such as a wellness program.[25]

Final regulations issued by the DOL, HHS and Treasury to implement these provisions of HIPAA took effect in 2007, and impose rules that certain wellness programs must satisfy in order to allow incentives to be provided to participants.[26] Programs that either do not require an individual to meet a standard related to a health factor in order to obtain a reward or that do not offer a reward at all ("participatory wellness programs") are not subject to the additional rules if participation in the program is made available to all similarly situated individuals.[27] Programs that require individuals to satisfy certain health factor standards in order to obtain a reward ("health-contingent wellness programs") must satisfy a host of requirements in order to satisfy the HIPAA nondiscrimination rules.[28]

The requirements are intended to prevent discrimination in the use of incentives in connection with wellness programs based on a health factor such as disability. In particular, the requirements that a wellness program (1) "not be a subterfuge for discriminating based on a health factor, and not be highly suspect in method," and (2) the requirement that a "reasonable alternative standard (or waiver of the otherwise applicable standard)" be provided to individuals for whom it is unreasonably difficult due to a medical condition to satisfy the standard or for whom it is medically inadvisable to attempt to satisfy the standard each provide stringent protections to individuals with disabilities.

Patient Protection and Affordable Care Act

Congress signaled its strong support for wellness program incentives in a bipartisan provision of the PPACA. Specifically, PPACA Section 1201 codifies the HIPAA regulations and increases the permitted incentive from 20 percent to 30 percent (and

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[24] *See* Code § 9802(a)(1) ("... a group health plan may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan based on ... [d]isability." Other health factors are (i) health status, (ii) medical condition (including both physical and mental illnesses), (iii) claims experience, (iv) receipt of health care, (v) medical history, (vi) genetic information, and (vii) evidence of insurability (including conditions arising out of acts of domestic violence).

[25] Code § 9802(a)(1).

[26] Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. 75,014 (Dec. 13, 2006).

[27] *See* 26 C.F.R. § 54.9802-1(f)(1). Examples of participatory wellness programs include reimbursement of gym memberships, diagnostic testing that does not condition receipt of reward on attainment of certain outcomes, and a program that reimburses employees for the costs of smoking cessation programs regardless of whether an employee stops smoking.

[28] *See* 26 C.F.R. § 54.9802-1(f)(2). Examples include not smoking, attainment of certain biometric screening results, and achieving exercise targets.

permits regulators to increase incentives up to 50 percent in their discretion). This is a rare bipartisan provision in the controversial health care reform law and reflects Congress's approval of the offering of incentives for health-contingent wellness programs.

On June 3, 2013, the DOL, HHS and Treasury issued final rules on "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans."[29] These final HIPAA wellness rules are based on the same general framework as the 2007 HIPAA wellness rules and incorporate the changes detailed in the PPACA.

Under the PPACA - as under the previous HIPAA rules - plans first must determine whether their wellness program is Participatory or Health-Contingent. A program will be considered Participatory if none of the conditions to obtain a reward are based on an individual satisfying a health standard, and thus participatory programs are not required to meet the HIPAA wellness rule requirements. Health-Contingent programs must meet the additional requirements of the HIPAA wellness rules in order to be in compliance with the HIPAA nondiscrimination rules. A wellness program is considered to be Health-Contingent if it requires an individual to satisfy a standard related to a health factor in order to obtain a reward. The June 3, 2013, final rules break the Health-Contingent category down further into Activity-Based and Outcome-Based, with different requirements for each depending on the type of program.

These provisions demonstrate the clear intent of Congress and the Obama Administration that wellness programs should be incorporated into the new reformed health care system, and that the employer role in sponsoring wellness plans should be supported.

Genetic Information Nondiscrimination Act of 2008

Wellness program design and implementation is also affected by the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233 ("GINA"). Title I of GINA, which is under the jurisdiction of DOL, HHS and Treasury, addresses whether and to what extent group health plans may collect or use genetic information, including family medical history. Title II of GINA, under the jurisdiction of EEOC, restricts how employers and certain other "covered entities" (collectively referenced herein as "employers" for purposes of clarity) may collect and disclose genetic information and prohibits employers from using genetic information in employment decisions.

Title I: Title I of GINA, in relevant part, prohibits group health plans and health insurance issuers in the group and individual markets from discriminating against covered individuals based on genetic information. Interim final rules were published in

[29] 78 Fed. Ref. 33158

the Federal Register on October 7, 2009.[30] Title I applies to a wide variety of group health plans, including wellness programs that constitute or are related to group health plans. Title I generally prohibits a group health plan and a health insurance issuer in the group market from:

- increasing the group premium or contribution amounts based on genetic information;
- requesting or requiring an individual or family member to undergo a genetic test; and
- requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.[31]

The prohibition on requesting, requiring or purchasing genetic information at any time for underwriting purposes affects wellness programs. The term "underwriting purposes" is defined broadly to include rules for eligibility for benefits and the computation of premium or contribution amounts, and it does not merely encompass activities relating to rating and pricing a group policy.[32] The regulations clarify that the term "underwriting purposes" includes changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing a health risk assessment (HRA) or participating in a wellness program.[33] "Genetic information" is defined for purposes of GINA Title I to include family medical history.[34]

Wellness programs cannot provide rewards for completing HRAs that request genetic information (including family medical history), because providing rewards would violate the prohibition against requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes. A plan or issuer can collect genetic information through HRAs under Title I of GINA as long as no rewards are provided for such genetic information (and if the request is not made prior to or in connection with enrollment).[35] A plan or issuer can provide rewards for completing an HRA as long as the HRA does not collect genetic information.

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[31] Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans, 74 Fed. Reg. at 51,665.

[32] Code § 9832(d)(10)(B).

[33] 26 C.F.R. § 54.9802-3T(d)(1)(ii); 29 C.F.R. § 2590.702-1(d)(1)(ii); 45 C.F.R. § 146.122(d)(1)(ii).

[34] 26 C.F.R. § 54.9802-3T(a)(3); 29 C.F.R. § 2590.702-1(a)(3); 45 C.F.R. § 146.122(a)(3).

[35] Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans, 74 Fed. Reg. at 51,669.

Title II: Title II of GINA, which is under EEOC's jurisdiction, restricts how employers may collect and disclose genetic information and prohibits employers from using genetic information in employment decisions. Final regulations under Title II were published in the Federal Register on November 9, 2010.[36]

The final Title II regulations provide that it is unlawful for an employer to discriminate against an individual based on his or her genetic information with regard to, among other things, privileges of employment.[37] Where a wellness program is considered to be a privilege of employment, the sponsoring employer may be subject to regulation under Title II with respect to the wellness program.

Title II generally prohibits employers from requesting, requiring or purchasing genetic information of an individual or a family member of the individual. An exception is provided where health or genetic services are offered by the employer, including where they are offered as part of a wellness program, if the employer meets certain requirements:

- The provision of genetic information by the individual is voluntary, meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it;

- The individual provides prior knowing, voluntary, and written authorization, meaning that the covered entity uses an authorization form that (1) is written in language reasonably likely to be understood by the individual from whom the information is sought, (2) describes the information being requested and the general purposes for which it will be used, and (3) describes the restrictions on disclosure of genetic information;

- Individually identifiable genetic information is provided only to the individual (or family member and the health care professional or genetic counselor providing services); and

- The information cannot be accessed by the employer (except in aggregate terms).[38]

Incentives may not be offered for individuals to provide genetic information.[39] Thus,

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[36] Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010).

[37] *See* 29 C.F.R. § 1635.4.

[38] 29 C.F.R. §1635.8(b)(i). *See also* Commission Informal Discussion Letter (June 24, 2011), http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html.

[39] *See* 29 C.F.R. § 1635.8(b)(2)(ii).

an employer may offer an incentive for completing an HRA (a common component of wellness programs) that includes questions about family medical history or other genetic information, provided that the employer specifically identifies those questions and makes clear, in language reasonably likely to be understood by those completing the HRA, that an individual need not answer the questions that request genetic information in order to receive the incentive.

In addition, the final regulations provide that an employer may offer an incentive to encourage individuals who have voluntarily provided genetic information that indicates they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs that promote healthy lifestyles, and/or to meet particular health goals as part of a health or genetic service. However, to comply with Title II of GINA, these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition but who have not volunteered genetic information.[40]

Americans with Disabilities Act

The EEOC also regulates wellness programs pursuant to Title I of the Americans with Disabilities Act ("ADA"). Title I of the ADA prohibits discrimination against qualified individuals with disabilities.[41] The ADA prohibits employers from conducting medical examinations or making inquiries regarding disabilities at any point during the hiring process or during employment, with certain limited exceptions.[42]

Title I of the ADA allows employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at a work site. Any medical information acquired as part of the program is kept confidential and separate from personnel records. There is little guidance regarding what the term "voluntary" means in this context.

The EEOC has issued numerous informal discussion letters that generally provide that a wellness program is considered voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.[43] The EEOC has stated in

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[40] 29 C.F.R. §1635.8(b)(2)(iii).

[41] 42 U.S.C. § 12112(a).

[42] 42 U.S.C. § 12112(d).

[43] *See* Commission Informal Discussion Letter (Jan. 18, 2013), http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html; Commission Informal Discussion Letter (June 24, 2011), http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html; Commission Informal Discussion Letter (May 6, 2009), http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html. *See also* American Bar Ass'n, Questions for the EEOC Staff for the 2009 Joint Committee of Employee Benefits

certain of these informal discussion letters that it has not taken a position on whether, and to what extent, Title I of the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of an HRA) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes). The EEOC has also issued Enforcement Guidelines providing, among other things, that a wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.[44]

The EEOC has, on at least two occasions, come close to providing clarifying guidance. In 1998, the EEOC stated in an informal discussion letter that "[i]t could be argued that providing a monetary incentive to successfully fulfill the requirements of a wellness program renders the program involuntary" and that "where an employer decreases its share of the premium and increases the employee's share, resulting in a significantly higher health insurance premium for employees who do not participate or are unable to meet the criteria of the wellness program, the program may arguably not be voluntary."[45]

In addition, on March 6, 2009, the EEOC rescinded part of a January 6, 2009, informal discussion letter which provided, in part, that:

> [A] wellness program would be considered voluntary and any disability-related inquiries or medical examinations conducted in connection with it would not violate the ADA, as long as the inducement to participate in the program did not exceed twenty percent of the cost of employee only or employee and dependent coverage under the plan, consistent with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act.[46]

Although rescinded, the above language indicates that the EEOC has at least contemplated allowing a certain level of incentives to be offered in connection with disability-related inquiries or medical examinations conducted in connection with a wellness program. It further indicates that the EEOC has, on at least this one occasion, looked to HIPAA guidance to shape the contours of the ADA.

At least partly as a result of the EEOC's silence, the Eleventh Circuit weighed in on

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Technical Session (2009), http://www.abanet.org/jceb/2009/EEOC2009.pdf.

[44] *See* Equal Employment Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), Q&A 22 (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[45] *See* Commission Informal Discussion Letter (Jan. 23, 1998) (on file with Council).

[46] *See* Commission Informal Discussion Letter (Mar. 6, 2009), http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html.

the treatment of wellness programs for purposes of the ADA. The particular concern has to do with a common design that conditions receipt of an incentive upon mere participation rather than outcomes-based wellness programs. In *Seff v. Broward County*,[47] the Eleventh Circuit upheld the district court's decision as to whether a participatory wellness program satisfied the ADA where it imposed a $20 charge on each biweekly paycheck issued to employees who enrolled in the group health insurance plan but refused to participate in the County's wellness program, which required in part that employees complete online HRAs and take blood tests to measure their glucose and cholesterol levels. Employees diagnosed with asthma, hypertension, diabetes, congestive heart failure or kidney disease were given the opportunity to receive disease management coaching and certain free medications related to those conditions. Instead of looking at whether the wellness program is "voluntary" within the meaning of Title I of the ADA, the court relied on other provisions in the ADA (a provision creating a safe harbor for "bona fide benefit plans") to find that the wellness program complied with the ADA. We note that, despite the decision in *Seff*, the EEOC's regional offices continue to undertake enforcement actions based on the "voluntary" standard and employers do not have the guidance from the EEOC necessary to comply with the ADA.

KEY CONCERNS FOR EMPLOYERS AND POLICY RECOMMENDATIONS

Notwithstanding employers' increasing interest in establishing wellness programs, a great deal of legal uncertainty exists with respect to the application of both GINA and the ADA to these programs. As noted above, existing guidance from the EEOC is not clear regarding what constitutes a voluntary wellness program for purposes of the ADA. Moreover, questions remain regarding how GINA applies to various aspects of some common wellness program designs, including the use of wellness incentives in connection with spousal and dependent HRAs.

I testified on behalf of the Council before the EEOC[48] in a May 2013 hearing, describing employers' strong concern about the ongoing legal uncertainty that exists with respect to the application of the ADA and GINA to wellness programs. The Council also urged "federal agencies promulgating regulations should proceed in a consistent, collaborative manner that supports participatory and outcomes-based wellness initiatives" in the Council's *A 2020 Vision* strategic plan.

This legal uncertainty has been exacerbated by certain enforcement actions initiated by regional offices of the EEOC with respect to employers' HIPAA and PPACA-compliant wellness programs. Recent enforcement actions brought by the EEOC allege certain wellness programs violate the ADA and GINA by imposing penalties on employees who decline participation in the company's biometric screening program.

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[47] *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012).

[48] http://www.americanbenefitscouncil.org/documents2013/wellness_eeoc_council-simon-testimony050813.pdf

These legal actions have had a chilling effect on employer wellness programs.

Additionally, the EEOC announced in its most recent semi-annual regulatory agenda that it intends to issue regulations later this year addressing wellness programs under the ADA and GINA. However, the actual timetable for the issuance of such guidance is uncertain.

Unfortunately for employers operating in good faith, the EEOC decided to pursue litigation before issuing guidance on this matter. This is very frustrating for employers who care about the well-being of their employees and take seriously their compliance obligations. It is impossible for employers to abide by rules that do not exist.

The unfortunate result of continued legal uncertainty would be that many American workers who could benefit from access to meaningful wellness would be left without.

BUILDING ON THE HIPAA AND PPACA FRAMEWORK BY PASSING THE PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT

To address this legal and regulatory uncertainty, Chairman Kline has introduced the Preserving Employee Wellness Programs Act of 2015 (H.R. 1189). (The measure has also been introduced in the Senate by Health, Education, Labor and Pensions Chairman Lamar Alexander (R-TN).)

The Council believes that H.R. 1189 supports the existing HIPAA and PPACA legislative framework with regard to wellness programs, striking the right balance between providing certainty to employers and ensuring an appropriate role for the EEOC to protect employees from discrimination.

Under The Preserving Employee Wellness Programs Act:

- Plans that comply with the wellness provisions of HIPAA that were amended by PPACA (included in Section 2705(j) of the Public Health Service Act) shall not violate the ADA or GINA by offering rewards in compliance with PHSA Section 2705(j). In general, this protection extends to health contingent wellness programs, including activity-only and outcome-based programs.

- Participatory programs shall receive the same protection if the reward is less than or equal to the maximum reward amounts applicable to health contingent wellness programs.

- The collection of information about the "manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information with respect to another family member participating in workplace wellness programs" and shall not violate GINA.

- The bill also includes two rules of construction. The first states nothing should be construed to limit the continued application of the *bona fide* benefit plan exception to wellness programs. The second rule of construction states that nothing "shall be construed to prevent an employer that is offering a wellness program to an employee from establishing a deadline of up to 180 days for employees to request and complete a reasonable alternative standard."

The Council fully supports advancement of H.R. 1189 and urges members of the subcommittee and full committee to join Chairman Kline as cosponsors.

CONCLUSION

It is my hope that this testimony has strongly reinforced the imperative to support and strengthen the efforts of employers to be effective in their role of advancing the health of their employees and their family members.

The Council fully respects the EEOC's existing and longstanding authority to implement and enforce the ADA, as well as other federal statutes. As the committee considers advancing H.R. 1189, we applaud you for recognizing the comprehensive regulatory framework that already exists, including protections for individuals with disabilities and beyond. The employer community appreciates this committee's recognition of the importance of wellness programs and the existing regulatory framework that protects consumers, and notes PPACA was amended on a bipartisan basis to endorse and expand HIPAA-compliant wellness programs.

As the Council's *A 2020 Vision* states, employer-sponsored benefit plans are now being designed with the express purpose of giving each worker the opportunity to achieve personal health and financial well-being. This well-being drives employee performance and productivity, which drives successful organizations.

Thank you for your interest in employer sponsored wellness programs. I appreciate the opportunity to testify, and the Council and I look forward to working with you to restore certainty to employers focusing on improving the health of their workforces.

Chairman WALBERG. Thank you.

Recognize Ms. House now for your five minutes of testimony.

TESTIMONY OF MS. TANYA CLAY HOUSE, DIRECTOR OF PUBLIC POLICY, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Ms. HOUSE. Thank you.

Chairman Walberg, Ranking Member Wilson, and all the members of the Workforce Protections Subcommittee, I am Tanya Clay House, director of public policy of the Lawyers' Committee for Civil Rights Under Law. I thank you for the opportunity to provide this testimony today in furtherance of the protection of the equal employment and civil rights of all Americans.

The Lawyers' Committee is a nonpartisan, nonprofit organization established in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. As policy director and as co-chair of the Employment Task Force of the Leadership Conference on Civil and Human Rights, I work with the larger civil rights community on the numerous employment issues generally, as well as the necessary enforcement agencies, including the Equal Employment Opportunity Commission as well as the Department of Justice.

In the interest of time, I would like to focus my remarks primarily on the underlying theories that support a more robust EEOC and oppose the passage of legislation that would undermine the civil rights of employees. As this Committee is aware, Congress has assigned the EEOC the primary responsibility for enforcing, in the private sector, most of the provisions prohibiting discrimination in employment of every major civil rights law enacted since 1963.

Yet, H.R. 548, 549, 550, and 1189 all would subtract from the scope of the EEOC's enforcement authority in a way that would primarily serve to eliminate the effective and timely enforcement of civil rights protections for American workers. Furthermore, the claim that such bills would actually enable the EEOC to more efficiently comply with its mandate begs the question of whether supporters of these bills believe the mandate of the EEOC is to eliminate the obligations of employers to not discriminate or allow for the creation of hostile work environments, or instead, to protect the rights of employees to not be unfairly discriminated against.

Unless the EEOC's mandate has changed within the past 24 hours of me writing this testimony, I would submit that it is the latter.

Employee claims of discrimination are not subsiding. Every year during the Obama administration the EEOC has received between 90 to 100 charges of—100,000 charges of discrimination. Despite a relatively small staff, the Commission has been able to conclude 15 or more of the—percent of the—more of the cases resolved every year with some form of compensation or other benefit to the employee who has been charged—who has charged the employer with discrimination.

A recent example is a case that has been prosecuted by the EEOC jointly with the Lawyers' Committee, the state of New York, the city of New York, and in this case, the settlement would poten-

tially provide an estimated $12 million in compensation to 400 workers.

Critics of the EEOC view the Commission as a government agency that needs to be restrained. The Lawyers' Committee and the larger civil rights community fervently reject this belief. In light of the substantial benefits the Commission obtains for employees, it is not reasonable to evaluate the EEOC based upon a small number of reports highlighted by those opposed generally to the EEOC and the law it enforces.

To be clear, H.R. 1189, H.R. 548 would both essentially declare by fiat that certain civil rights laws are null and void in application. Specifically, H.R. 548 would undermine the protections that Title 7 provides by codifying the use of unjust stereotypes by employers.

On the other hand H.R. 1189 effectively works to undermine critical civil rights protections and permits workers to be coerced into disclosing sensitive medical and genetic information to their employers, thus enabling employers to shift the cost of health insurance away from them and onto the employee.

H.R. 549 would eliminate the ability of the EEOC to more efficiently engage in investigations and lawsuits, instead instituting unnecessary, duplicative, and untimely—and ultimately obstructionist approval process for litigation, while H.R. 550 attempts to legislatively require the EEOC to engage in a process that is currently under review at the Supreme Court of—in the case of Mach Mining.

Although the claim was made that all these bills would create a more efficient EEOC, the idea that enabling the blanket disregard of current civil rights laws is incredulous at best. Congress should not disregard the very real existence of ongoing, unjust discrimination against American workers.

For instance, current estimates are the 70 million Americans have an arrest record for criminal offense. Thus, H.R. 548 would automatically exclude all of these Americans—70 million Americans—from the workforce.

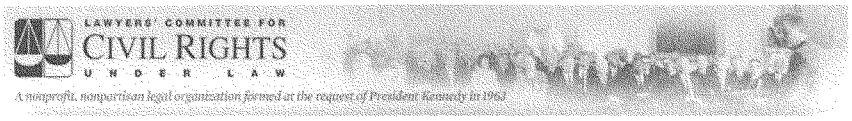
This is not just anecdotal. In the case where the Lawyers' Committee is co-counsel, census records for the 2010 process reveal that between 850,000 and 1 million applicants who had FBI arrest records were diverted into a separate screening process where fewer than 1 percent were hired, while almost 30 percent of the applicants who remained in the regular pool were hired.

The enforcement of our nation's civil rights laws, particularly those in the employment context, is of a paramount importance to the Lawyers' Committee. If the goal is to enable more effective enforcement on behalf of American workers, we suggest the committee provide for proper funding of the EEOC.

I encourage this Committee to not move forward with legislation that would undermine the EEOC. The American workers are depending on you to protect the employment rights and simply do the right thing.

Thank you.

[The testimony of Ms. House follows:]



TESTIMONY OF

THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

SUBMITTED TO:
U.S. HOUSE OF REPRESENTATIVES
EDUCATION AND WORKFORCE COMMITTEE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Hearing on H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act."

MARCH 24, 2015

Testimony of the Lawyers' Committee for Civil Rights Under Law
Submitted by Tanya Clay House, Director of Public Policy

Before the U.S. House of Representatives Education and Workforce
Subcommittee on Workforce Protections
Hearing on H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act."

March 24, 2015

Introduction

Chairman Walberg, Ranking Member Wilson and all the Members of the Education and Workforce Committee, I am Tanya Clay House, Director of Public Policy of the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee). On behalf of the Lawyers' Committee I appreciate the opportunity to provide this testimony in furtherance of the protection of the equal employment and civil rights of all Americans.

The Lawyers' Committee is a nonpartisan, nonprofit organization established in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. The Committee fulfills its mission by using the skills and resources of the bar to address matters of racial justice and economic opportunity through legal actions, transactional legal services, public policy reform, and public education.

For over 50 years, the Lawyers' Committee has advanced racial equality in the areas of community development, criminal justice, educational opportunities, fair employment and business opportunities, fair housing and fair lending, immigrant rights, judicial diversity and voting rights. As a national leader in combating employment discrimination, the Lawyers' Committee has undertaken numerous initiatives, including the Access Campaign, a program that has attacked the indiscriminate use of criminal and credit history information through litigation, public education, federal, state and local legislative advocacy. Additionally, as co-chair of the Employment Task Force of the Leadership Conference on Civil and Human Rights – a coalition of over 150 organizations – I work with the larger civil rights community on numerous

employment issues generally, as well as with the necessary enforcement agencies including the Equal Employment Opportunity Commission (EEOC) and the Department of Justice.

As this Committee is aware, Congress has assigned to the EEOC the primary responsibility for enforcing, in the private sector, most of the provisions prohibiting discrimination in employment of every major civil rights law enacted since 1963. The EEOC's enforcement authority extends to discrimination on the basis of race, color, ethnicity, national origin, religion, gender and pregnancy status, age, disability, and genetic markers. In addition, the Commission investigates and brings "whistleblower" actions - allegations that employers have retaliated against employees for opposing discrimination against their employees. Congress has also assigned the EEOC the responsibility to investigate claims of discrimination and/or retaliation by state and local agency employers, but enforcement actions against public employers are brought by the Civil Rights Division of the Department of Justice. The EEOC has a staff of Administrative Judges who hear and make findings on claims of covered discrimination and/or retaliation brought by federal sector employees.

While we encourage Congress to seek the necessary direct input from the EEOC regarding the highlighted proposals which seek to subtract from the scope of their enforcement authority, this testimony will discuss how the Lawyers' Committee and the larger civil rights community endeavors to work with the EEOC and other federal agencies to achieve fair and effective enforcement of civil rights laws, including those laws prohibiting discrimination in employment. Furthermore, to provide context for this proceeding, I have included in my this testimony some of the information that the EEOC has provided in the past to the Committee when bills with provisions similar to those before you today have been proposed.

Every year, during the Obama Administration, the EEOC has received between 90,000 and 100,000 Charges of Discrimination. This high volume of complaints is staggering considering the relatively small staff of the Commission. This mis-match between the size of this relatively small staff and the huge volume of complaints that Congress has assigned to the EEOC to investigate and, when appropriate, to bring enforcement action, is a continuing challenge for the Commission. In several years during the current administration, the EEOC's budget has required it to operate without filling many authorized positions when staff leaves the Commission, thereby reducing the effective workforce available to fulfill the Commission's responsibilities. Even so, in several recent years the Commission has been able to conclude

enough investigations to close more cases than it has opened. Relevant statistics, provided to this Subcommittee last July, are shown in the following Table[1]:

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

As the Table shows, the Commission is able to conclude 15% or more of the cases resolved every year with some form of compensation or other benefit to the employee who has charged the employer with discrimination. Many of the suits settled provide outstanding relief for large numbers of employees who have been victims of discrimination. The letter to the Subcommittee from which the above table was taken listed seven major settlements between 2010 and 2013 that collectively provided almost $50 million in compensation to employees. In a case that has been prosecuted by the EEOC jointly with the Lawyers' Committee, the State of New York, and the City of New York, another settlement that will provide an estimated $12

[1] This table is taken from the EEOC letter to the Subcommittee, available at http://www.eeoc.gov/eeoc/legislative/hearing_record_july.cfm.

Million in compensation to 400 workers was recently submitted to the federal court for the Southern District of New York and awaiting the court's approval.[2]

Critics of the EEOC view the Commission as a government enforcement agency that imposes unwarranted costs on businesses through abusive tactics that need to be restrained. This view, reflected to some extent in the bills before this Committee today, is that the EEOC's enforcement authority needs to be restricted, both by re-writing the civil rights laws and imposing more burdensome procedural pre-requisites before the Commission can enforce the civil rights laws that remain in effect. This view is typically supported by anecdotes and citations to the same small number of cases in which courts have awarded attorney's fees to employers who successfully defended suits brought by the EEOC.[3]

The Lawyers' Committee and the larger civil rights community fervently reject the belief that the EEOC needs to be restrained. In light of the substantial benefits the Commission obtains for employees based upon the data provided in the previous paragraphs, it is not reasonable to evaluate the EEOC based upon a small number of reports. Further, this limited number of reports does not suggest an issue of systematic abuse of authority. Commissioner Jenny Yang, who became the chair of the Commission just last fall, is deeply committed to revising the EEOC's internal administrative systems to achieve better accountability and quality control of investigations and outcomes for the benefit both of employees alleging discrimination, and of the employers that respond to those charges. We also understand that Chair Yang has already initiated development of many revisions for internal administrative accountability in the EEOC — steps that would undoubtedly be of interest to this Committee.

With these general principles about the work of the EEOC in mind, I will separately address each of the bills before the Subcommittee today.

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[2] EEOC, et al. v. Local 28, Sheet Metal Workers, Case No. 71-cv-2877.

[3] In the case most prominently cited as to sanctions against the agency, *E.E.O.C. v. CRST Van Expedited, Inc.*, the U.S. Court of Appeals for the Eighth Circuit reversed the district court's order awarding $4.7 Million in fees and costs just three months ago. The Eighth Circuit opinion found that much of the attorney time included in the award did not qualify for any award and remanded the case for the district court to reconsider fees under an extremely restrictive standard for awarding fees. 774 F.3d 1169 (2014).

H.R. 548, "Certainty in Enforcement Act of 2015"

H.R. 548, the Certainty in Enforcement Act of 2015, would create an exemption for businesses, when hiring new employees or reviewing the workforce of a newly acquired business, to use stereotypes to exclude millions of Americans from employment without any consideration whatsoever of their work experience and qualifications.

H.R. 548 would undermine the protections that Title VII provides for persons of color with criminal records against employment discrimination on the basis of race. Although the burden of this practice falls most heavily on communities of color, particularly the African American community, Americans of all races and from all walks of life are affected by these unnecessary exclusions from employment. Employers promote fair treatment for all employees, regardless of race, when they follow the evidence-based employment policies that the EEOC recommends to ensure that they apply job-related standards when they hire new workers, or evaluate existing workers or former workers.[4] The indiscriminate disregard of the past contributions to the business when long-time employees are terminated, or told they will not even be considered to be rehired for work they performed well in the past, simply because they were arrested or convicted of a crime long ago, is not only a miscarriage of justice, but an unreasonable, stereotypical business behavior that should not be promoted.

Current estimates are that 70 Million Americans have an arrest record for a criminal offense (that is, not including motor vehicle-related tickets and not including the "summary offenses" that some states use to treat minor misconduct similar to a speeding ticket).[5] Moreover, in addition to providing incorrect data, criminal background check reports often inappropriately include information about sealed or expunged offenses such as juvenile offenses, or arrests that did not lead to conviction. Often, human resources officials are insufficiently trained to properly interpret these records. Evidence has shown that people of color are disproportionately affected by such misinformation. For example, when the Transportation Security Administration (TSA) began to require background checks of the 1.5 million workers

[4] The recommended practices are included in EEOC "Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," April 25, 2012, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[5] National Employment Law Project, "65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment," March 23, 2011, available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1

employed in the nation's ports, 22,000 workers (through July 2009) successfully appealed the accuracy and completeness of their FBI rap sheets (with more than 5,000 cases of such appeals still pending). While African-American and Hispanic workers represent a combined 30% of the port workers, they were 70% of the successful appeals of inaccurate criminal records. [See National Employment Law Project July 2009 report "A Scorecard of the Post-9/11 Port Worker Background Checks."]

H.R. 548 would automatically exclude from the employment sector, these 70 million Americans with arrest records by declaring a federal policy that it is "job-related" for an employer to exclude anyone from employment simply because of an arrest by a law enforcement officer who may have taken the person into custody based on a total misunderstanding (in good faith) of what had actually taken place. Additionally, this bill would codify the stereotype that anyone who has ever been arrested even if just once, is forever unemployable and never deserving of the ability to be a faithful contributor to the American economy. H.R. 548 would also further inappropriate employment practices those employers that terminate people with good work records solely because they have an old criminal record, regardless of the circumstances.

This is what the EEOC has asserted happened at the B.M.W. plant in Greenville, SC, in 2008. A new logistics contractor for the company ran criminal background checks on all existing employees, and refused to rehire 88 employees, 70 of whom (80%) were African Americans, who had been satisfactory employees for periods up to 14 years. All of these employees had been hired by the prior logistics contractor, who only screened employees for convictions in the previous seven years, so one or more of these employees appear to have been refused employment solely due to a conviction more than 20 years earlier.

The case is being actively litigated, and there is no basis for determining yet whether BMW's actions did in fact violate Title VII. But, if the federal district court finds the allegations of the complaint in that case to be true, it will be because BMW was not able to satisfy a very conservative federal judge[6] that it had a "job-related" basis for terminating those workers. While the Lawyers' Committee agrees that there are indeed instances in which past criminal history should be considered, and the current EEOC guidance allows for such consideration, it is poor policy to immunize all uses of criminal arrest and conviction records.

[6] Judge Herlong served as a Legislative Assistant to Senator Strom Thurmond (R-SC) for a period before he was appointed to the federal bench.

Another example, in a case where the Lawyers' Committee is co-counsel, once again the irrationality of the automatic exclusion of American workers with past criminal arrest or conviction records is highlighted. In this situation, the facts reveal that the U.S. Census Bureau had virtually no problems in previous decennial head counts in hiring qualified, law-abiding persons who had old criminal records, as enumerators. But in 2010, many workers with criminal records, who had successfully served as enumerators in one or more prior Census counts, were denied timely consideration for employment because they had an arrest record in the national F.B.I. criminal record database.

Census records for the 2010 process revealed that between 850,000 and one million applicants who had FBI arrest records[7] were diverted into a separate screening process where fewer than one (1%) per cent were hired, while almost 30% of the applicants who remained in the regular pool were hired. The Plaintiffs' Expert Reports presented evidence that approximately 40% of the applicants diverted into the "low hire" pool due to their arrest records were African American, although only about 20% of all applicants were African American. On the other hand, while over two thirds of the total applicant pool consisted of white workers, fewer than 50% of the applicants diverted to the disfavored screening process because of arrest records were white. Statistical analysis confirmed that these percentages demonstrated disparate impact not only on African Americans, but also on Latino applicants. In July of 2014, the federal district court for the Southern District of New York certified a class of African-American and Latino applicants that attorneys in the case estimate numbers 300,000 to 450,000 workers.[8] As this case continues to be litigated, one cannot deny the blatant inequities revealed by the facts in evidence. This case is representative of the larger issue at play which is the unfair and unjust exclusion of high proportions of potential American workers from the workforce because of bias and stereotypes.

On a practical level, the fears that the EEOC's Enforcement Guidance on the Use of Arrest and Conviction Records would cause employers to stop doing criminal background checks — fears expressed by opponents of the Guidance — have proved to be unfounded. The

[7] For the 2010 Census, almost 20% of the applicants for temporary jobs had arrest records in the F.B.I. database. An additional 10% of the applicants had an initial "name match" with an arrest record in the database, but on review the Census determined that the person with the record with a matching name was not the applicant.

[8] *Houser et al. v. Blank, Secretary, U.S. Department of Commerce (originally filed as Johnson et al. v. Bryson)* (S.D.N.Y. Case No. 10-cv-3105).

2014 Annual Survey by EmployeeScreen IQ, a major Background Screening provider, indicated that 88 per cent of employers who responded to the survey had adopted some form of the EEOC's recommended procedures, including 64% who provided individualized review of continuing risk for applicants who had criminal convictions. Most employers continue to obtain criminal conviction information from applicants, including 78% who ask applicants to self-disclose criminal history information at some point in the hiring process. Employers are responding pragmatically to the problem of fair treatment of applicants with criminal records. There is no substantive evidence that supports a need for Congress to immunize from all legal scrutiny employers policies and practices about the use of criminal and credit history information.

HR 549: "Litigation Oversight Act of 2015"

H.R. 549 would reverse the EEOC's decision in 1996 to delegate most decisions to commence litigation to the General Counsel, an official confirmed by the U.S. Senate. Instead, the proposed bill would mandate that every case involving more than one complainant ("multiple plaintiffs")[9] must be approved by a majority vote of the Commission before it files suit or intervenes, and would enable any single Commissioner to require a Commission vote on the decision for the EEOC to bring suit even on behalf of a single charging party.

The mandatory requirements of H.R. 549 are, in fact, unnecessary because the current Strategic Enforcement Plan of the EEOC (2012) requires approval by a majority vote of the Commission of the following[10]:

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;

[9] When the EEOC brings an enforcement action, it is the only party "plaintiff" in the action, unless the Charging Party seeks and obtains court approval to intervene as a plaintiff in the action. The language of the proposed bill does not accurately reflect the language of the Federal Rules of Civil Procedure.
[10] See October 9, 2014, letter for the record from the Commission, available at http://www.eeoc.gov/eeoc/legislative/hearing_record_october.cfm.

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."

In practice this means that the Commission already votes on the cases mandated by the bill.[11] 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." Further, as the Commission wrote to this Subcommittee last year, most of the cases that have become the focus of criticism in recent years were approved by the Commission before filing.[12] Thus, H.R. 549 would propose an unnecessary solution for a nonexistent problem. On the other hand, H.R. 549 would instead create the potential for a single Commissioner to become obstructionist, creating a source of inefficiency that we hope is not desired by anyone – particularly those who wish to see the federal government use taxpayer funding more effectively.

HR 550: "EEOC Transparency and Accountability Act"

H.R. 550 would require the disclosure of certain information regarding pending cases, with the focus on any sanctions imposed on the Commission. While this bill is virtually unchanged from his previous iteration in the 113th Congress, there has been one change in the "disaggregation" reporting requirements, changing the level of reporting from each state to each Commission District. Since the EEOC is the only competent source to advise the Subcommittee on whether that change is sufficient to mitigate the threat to privacy and confidentiality that the Commission identified in the bill last year, I will direct my comments on this bill to three points: (1) the provisions in Section 3 creating express statutory authority for substantive judicial review of whether the Commission has engaged in "bona fide good faith efforts" to conciliate a case prior to filing it; (2) the provisions in Section 4 (a)(2) requiring that the Commission present a

[11] See id.

[12] "Nearly every case cited by Mr. Dreiband [former EEOC General Counsel and a witness before the Subcommittee at a hearing in September, 2014] 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: *Peoplemark, Kaplan, Freeman, Catastrophe Management, Sterling, Bass Pro,* and *Dillard's*." See idem.

report to Congressional committees, including material from interviews with staff attorneys, within 90 days of the entry of any sanction order; and (3) the provisions in Section 4 (b) requiring that the Commission present a report to Congressional committees, within 60 days of the entry of any sanctions order, "detailing the steps the Commission is taking to reduce instances in which a court orders the Commission to pay fees and costs or imposes a sanction on the Commission," and requiring the Commission to post that report on its public website within 30 days after submission to Congress.

1. "Bona fide good faith efforts" to conciliate cases before filing.

Some employers who never sought to engage in substantive conciliation efforts before the EEOC filed suit have found a federal district court sympathetic to any argument that renders enforcement of equal employment laws more difficult, including arguments that the Commission has to engage in specific claim identification and to attempt to settle the claim of every individual potential victim of discrimination before filing an enforcement action in federal court. We believe that the only reasonable response of a federal court to such a claim is to order the Commission and the employer to meet with a mediator to try to settle the case as soon as the issue is raised in the lawsuit. However, a few district courts have instead dismissed cases with prejudice, depriving employees who asserted claims of discrimination any day in court — not because of any failure of proof of their claims, but simply because the Commission failed to work as hard to settle the case as the federal judge thinks it should have.[13] While the Lawyers' Committee agrees that this problem deserves the Committee's attention, H.R. 550 is silent on the injustices suffered by victims of discrimination whose claims are dismissed because of an employer's questionable claim that the Commission skipped a step in the pre-suit process required by Title VII.

This problem is particularly acute because no other federal enforcement agency — not the Department of Justice, not the Securities and Exchange Commission, not the Food and Drug Administration, or even the Federal Trade Commission -- has ever been subject to having its enforcement cases dismissed because a federal judge believed that the EEOC had taken an unreasonable settlement position prior to filing suit. In this context, the Lawyers' Committee asserts that any ambiguity in the scope of the EEOC's duty to conciliate is a serious barrier to its

[13] District court opinion dismissing a case due to inadequate conciliation: *EEOC v. Bloomberg LP*, 967 F.Supp.2d 802 (S.D.N.Y. 2013).

efforts to file enforcement actions when necessary to obtain compliance with civil rights laws. The proposed language of Section 3 — which tracks language from some appellate and district court decisions — is too vague to cure the ambiguities some courts have found in the statute, ambiguities that concerned the Supreme Court just two months ago in the arguments on the *Mach Mining* case. [14]

The issue of the EEOC's responsibility in conciliation efforts — efforts that are required by Title VII to remain strictly confidential — is before the Supreme Court in the case of *Mach Mining v. EEOC.* In that case, the Seventh Circuit Court of Appeals had held that the language of Title VII committed to the Commission's sole and unreviewable discretion the determination of when no further conciliation efforts would be useful. As some Justices of the Supreme Court noted, other courts of appeals had found conciliation efforts to be reviewable, but no two of the courts had agreed on the proper standards for such review. The tenor of the argument reported on scotusblog.com and elsewhere, suggested that the Supreme Court will hold that the Commission is subject at least to procedural review.

It is our hope that the Court will provide clear guidance for the EEOC and for employers as to the contours of the settlement process required by Title VII; but even if the Court's decision lacks clarity, the language of the proposed bill is not helpful. H.R. 550 would only perpetuate the confusion that has evolved in the courts of appeals about court supervision of the Commission's duty to conciliate and further inhibit the ability of employees and employers to achieve fair and reasonable settlements.

2. Requiring reports on EEOC actions leading to sanction orders.

Section 4 (a)(2) of this bill requires that after any sanctions order is entered, the Inspector General of the Commission must "conduct an investigation to determine why an order for sanction, fees, or costs was imposed by the court..." Among other things, such investigation must include conducting "interviews and affidavits of each member and staff person of the Commission involved in the case...." Based on this investigation, the Commission must submit a report to two Congressional committees within 90 days of the entry of the sanctions order.

The effect of these provisions of H.R. 550 would have serious detrimental consequences, both from the practical standpoint of legal enforcement and from the prudential standpoint of requiring an investigation of an order that may well be reversed on appeal. As an outstanding

[14] *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, No. 13-1019, 134 S.Ct. 2872 (2014).

example of the effect of appeals, critics of the EEOC have been very vocal about the sanction of $4.7 Million imposed by a federal district judge in the Northern District of Iowa in 2013. This case has been prominently featured, for example, in the report by the U.S. Chamber of Commerce last year that harshly criticized the EEOC. However, just three months ago, the entire amount of that award was reversed by the U.S. Court of Appeals for the Eighth Circuit, in a unanimous panel opinion written by a judge appointed by President George W. Bush and joined by the Chief Judge of the circuit, also appointed by President Bush. That case is being remanded, and a sanction in some amount may eventually be awarded against the Commission again. But, as a matter of practice, no evaluation of the sanction should be required until the sanction is final, and the EEOC knows in fact what the courts have determined to be the sanctionable conduct. Anything less simply serves to sow confusion and misunderstanding.

The reporting requirements here also reflect an inadequate reflection both of the role of members of the Commission in litigation matters and of the limits of Congressional authority to probe the discussions, deliberations, and decisions of attorneys conducting litigation on behalf of an executive agency. H.R. 550 requires production to Congressional Committees of information from "each member ... of the Commission involved in the case." Yet, once the Commission has approved filing of or intervention in a case, the involvement of Commission members is over. And, any inquiry into the reasoning of members of the Commission in approving the filing of the litigation is foreclosed by various privileges, particularly the deliberative process privilege. That same deliberative process privilege would foreclose the EEOC being required to report to outside bodies, including Congressional Committees, the information considered and the reasoning followed by District Directors and Regional Attorneys in authorizing the filing of litigation or recommending that the Commission approve filing litigation.

Similarly, it is hard to imagine any detailed information of much interest about the preparation of a case for court proceedings that is not protected either by the attorney-client privilege or by the attorney work product privilege — or both — from disclosure to outside parties, including Congressional Committees. These privileges are part of the Federal Rules of Evidence, promulgated by the Federal Judicial Conference and approved by Congress. It is not within Congress's authority to modify or abrogate those rules without following a complicated set of procedures which are not delineated in H.R. 550.

In sum, these requirements in H.R. 550 primarily serve to impose substantial resource burdens on an enforcement agency that is already operating with insufficient staff resources — and as an indirect attempt to undermine effective enforcement of the civil rights anti-discrimination statutes relating to employment.

3. Requiring reports after each order of steps to reduce instances of sanctions.

The text of Section 4 (b) would require a new report to be provided to Congressional Committees every time a sanction order is entered, without waiting for the final court determination of appeals. This is another inappropriate provision that, whatever the intent of the authors, in practice would simply function to drain resources from the EEOC and thereby obstruct enforcement of the nation's civil rights laws protecting employees. These concerns are further highlighted below.

The reporting requirement is unreasonable. If there was evidence of a systemic problem with the EEOC's actions, a more appropriate response would be to require that the Commission include an assessment of sanctions orders that have become final each year in its annual reports. To require a separate report each time that a trial court enters a sanctions order a waste of many taxpayer funded resources, including staff time, paper for presenting the report, and the cost of server space for transmitting the report electronically and storing it for access through the public website.

As evidence of a lack of a systemic problem, the EEOC reported last year that sanctions are awarded in less than one percent of the cases that the Commission has in active litigation.[15] The Report prepared by the U.S. Chamber of Commerce in June of last year identified only nine cases where there were judicial criticisms or sanctions orders in the five-and-a-half years of the Obama administration. And, the sanctions awards that served as one of the centerpieces of that report was reversed three months ago, as noted earlier. *E.E.O.C. v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014).[16] Other cases cited in the Chamber's report involved sanctioned

[15] See October 9, 2014, letter for the record from the Commission, available at http://www.eeoc.gov/eeoc/legislative/hearing_record_october.cfm.

[16] Similarly, in another case listed in the Chamber Report, the sanction was for the conduct of one trial level attorney's handling of instructions to the claimant about preserving records of mitigating damages, a matter that has little if any system-wide implications. *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 WL 37860 (M.D.N.C. 2014), *appeal pending*, No. 14-1958 (4th Cir.). At the other end of the spectrum, the sanction was limited to the attorneys' fees awarded under FRCP 16(h)(1) for fees incurred in bringing a single motion to compel; the court observed that the conduct the court sought to control was delays and inconsistency in responding to proposed solutions to provide discovery of social media materials from alleged victims (over whom the agency had no

conduct that began under prior presidents and had entirely concluded before President Obama finally succeeded in 2010 in making recess appointments of General Counsel Lopez and several Commissioners.[17] This handful of cases, including both minor decisions and cases that have been successfully appealed, does not provide a credible basis to claim that the EEOC, under its current leadership, has a systematic problem with sanctionable litigation conduct.

H.R. 1189, Preserving Employee Wellness Programs Act

H.R. 1189, the Preserving Employee Wellness Programs Act would automatically declare that employer wellness programs are not in violation of certain non-discrimination statutes including the Americans with Disabilities Act of 1990 (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA). It would also automatically declare that the collection of data through such wellness programs is not an unlawful acquisition of genetic information in violation of GINA. H.R1189 would severely undermine the civil rights of all Americans as protected by the ADA and GINA.

In recent years workplace wellness programs have increasingly begun to collect private medical information from employees. These programs often cast a broad net, asking employees to disclose: specific diagnoses like cancer; markers that may indicate a particular diagnosis, like high blood pressure that may indicate heart disease or certain blood glucose levels that may indicate diabetes; indicators of mental health needs; the medications employees are taking; family history or other genetic information; and whether an employee is or plans to become pregnant. These are just a few examples of the kinds of private medical information being collected on questionnaires called "health risk assessments," through physical examinations of employees, and by sampling blood and urine.

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control) who were allegedly harassed sexually by the defendant's general manager, a type of discovery where the relevant contours of obligatory production were murky.

[17] This included the case involving the second largest sanction award, about $750,000, *EEOC v. Peoplemark, Inc.* *Peoplemark* illustrates how case management can be complex: the employer's general counsel apparently made unequivocal statements in the EEOC investigation that the company had an absolute, fixed policy of refusing to hire any applicant with a felony conviction record and suit was commenced on the understanding that the company had an absolute policy, but the general counsel was poorly informed about the company's practices, and the agency had difficulty sorting out first what the actual practice of the company had been and then deciding whether the company's practice was a violation of Title VII. The case was dismissed by stipulation about the time that the first Obama appointees assumed their duties at the agency.

Many workplace wellness programs penalize or deny rewards to employees who choose not to disclose private medical information on health risk assessments, not to undergo invasive physical exams or not to provide blood and urine samples. The civil rights community is deeply troubled by this trend. The sweeping collection of private medical information in the workplace directly affects people with disabilities and with particular genetic markers. It may also adversely impact women, minorities and older workers, because these protected groups are more likely to include members with certain kinds of disabilities or genetic markers.[18] Racial minorities are more likely to have high blood pressure,[19] heart disease,[20] and diabetes.[21] Women are more likely to have obesity[22] and arthritis,[23] and of course will be singularly impacted by inquiries about pregnancy or plans to become pregnant. Older workers are more likely to have high blood pressure,[24] high cholesterol,[25] obesity,[26] diabetes,[27] heart disease,[28] and arthritis.[29] Congress enacted specific protections in the ADA and GINA to prohibit employers from requiring employees to disclose this kind of information. And with good reason. Prior to the

[18] *See, generally,* Leandris C. Liburd, et al., "Looking Through a Glass, Darkly: Eliminating Health Disparities," *Preventing Chronic Disease,* Vol. 3, No. 3 (July 2006), available at: http://www.cdc.gov/pcd/issues/2006/jul/pdf/05_0209.pdf (last visited Mar. 20, 2015).

[19] *See* U.S. Dep't Health & Human Services, Office of Minority Health, "Heart Disease and African Americans" (June 12, 2014), available at http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19 (last visited Mar. 20, 2015).

[20] *Id., see also* Ctrs. for Disease Control and Prevention, "Prevalence of Coronary Heart Disease - United States, 2006-2010," (Oct. 14, 2011) available at www.cdc.gov/mmwr/preview/mmwrhtml/mm6040a1.htm (last visited Mar. 20, 2015).

[21] *See* Ctrs. for Disease Control and Prevention, "Age-Adjusted Incidence of Diagnosed Diabetes per 1,000 Population Aged 18–79 Years, by Race/Ethnicity, United States, 1997–2011," available at www.cdc.gov/diabetes/statistics/incidence/fig6.htm (last visited Mar. 20, 2015).

[22] *See* Cynthia L. Ogden, et al., Nat'l Center for Health Statistics, "Obesity Among Adults in the United States - No Statistically Significant Change Since 2003-2004" (2007), available at www.cdc.gov/nchs/data/databriefs/db01.pdf (last visited Mar. 20, 2015).

[23] *See* Ctrs. for Disease Control and Prevention, "Prevalence of Doctor-Diagnosed Arthritis and Arthritis-Attributable Activity Limitation - United States, 2007-2009" (Oct. 8, 2010), available at www.cdc.gov/mmwr/preview/mmwrhtml/mm5939a1.htm?s_cid=mm5939a1_w (last visited Mar. 20, 2015).

[24] *See* Ctrs. for Disease Control and Prevention, "High Blood Pressure Facts," available at www.cdc.gov/bloodpressure/facts.htm (last visited Mar. 20, 2015).

[25] *See* Ctrs. for Disease Control and Prevention, "Cholesterol: Conditions," available at www.cdc.gov/cholesterol/conditions.htm (last visited Mar. 20, 2015).

[26] *See* Ctrs. for Disease Control and Prevention, *Morbidity and Mortality Report,* "Vital Signs: State-Specific Obesity Prevalence Among Adults - United States, 2009" (Aug. 3, 2010), available at www.cdc.gov/mmwr/preview/mmwrhtml/mm59e0803a1.htm (last visited Mar. 20, 2015).

[27] *See* U.S. Dep't of Health & Human Services, Office of Women's Health, "Diabetes Factsheet," available at http://womenshealth.gov/publications/our-publications/fact-sheet/diabetes.cfm#d (last visited Mar. 20, 2015).

[28] *See* U.S. Dep't of Health & Human Services, Nat'l Heart, Lung & Blood Inst., "Who Is at Risk for Heart Disease?" available at www.nhlbi.nih.gov/health/health-topics/topics/hdw/atrisk.html (last visited Mar. 20, 2015).

[29] *See* Ctrs. for Disease Control and Prevention, "Arthritis: The Nation's Most Common Cause of Disability," available at www.cdc.gov/chronicdisease/resources/publications/aag/arthritis.htm (last visited Mar. 20, 2015).

ADA and GINA the disclosure of employee medical and genetic information resulted in workplace discrimination, including denials of employment, harassment and termination. The important protections that Congress provided workers in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act prohibit workplace policies that have a disparate impact based on race, gender and age.

The Preserving Employee Wellness Programs Act would eliminate these critical civil rights protections and permit workers to be coerced into disclosing sensitive medical and genetic information to their employers—including information unrelated to their ability to do their jobs. The bill would also restrict protections that were provided in the Affordable Care Act allowing employees to avoid financial penalties for not meeting wellness program health targets when a disability makes it inadvisable or unreasonably difficult to do so.

People with disabilities, older adults, people with genetic markers, women, and people of color fought hard for the important protections provided by the ADA, GINA, Title VII, and the ADEA. They deserve better than to have these key workplace protections gutted in the name of wellness. And "wellness" should not mean forcing people to pay thousands of dollars more for health insurance or turn over their private medical and genetic information to their employers. It would be particularly appalling for Congress to remove ADA protections as we approach the 25th anniversary of the ADA's passage.

Conclusion

The enforcement of our nation's civil rights laws, particularly those in the employment context, is of paramount importance the Lawyers' Committee and the broader civil rights community. The EEOC plays a critical role in this process and should be afforded the proper authority and respect to fulfill the responsibilities and obligations originally delineated by Congress in 1963. The evidence presented in this testimony and by others in the broader civil rights community, highlights the continued need and importance of a strong and robust EEOC for the protection of all American workers. We encourage this Committee to not move forward with legislation that would undermine the ability of the EEOC and of our nation's civil rights laws to strive for the creation of fair and equitable employment opportunities for all who are able and willing to partake in the American dream. Thank you.

Chairman WALBERG. Thank you.

Now, Professor Heriot, we will recognize you for your five minutes of testimony.

TESTIMONY OF MS. GAIL HERIOT, PROFESSOR OF LAW, UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, SAN DIEGO, CALIFORNIA

Ms. HERIOT. Thank you for this opportunity to testify in support of the proposed *Certainty in Enforcement Act*.

The bill is aimed largely at correcting a narrow problem created by the EEOC's April 25, 2012 guidance, a controversial document aimed at restricting an employer's ability to take into consideration a job applicant's criminal record when hiring. The guidance purports to draw its authority from Title 7, which prohibits employment discrimination based on race, color, religion, sex, or national origin.

Of course, it requires some gymnastics to get from that kind of discrimination to discrimination on the basis of criminal record. To do so, the EEOC employs disparate impact theory.

Under this controversial theory, which, alas, was approved by the Supreme Court back in the 1970s in *Griggs* v. *Duke Power Company*, intent to discriminate on the basis of race, color, et cetera is irrelevant. It is enough the employer's actions have an effect on some—have more effect on some protected groups than others if they are not justified by business necessity.

I should add at this juncture that in addition to the narrow problem dealt with with the proposed act, there are many other things wrong with this guidance. But given the difficulties of passing major legislation, this bill must be regarded as a good start—one that should enjoy bipartisan support.

So let me get to the narrow point to the bill. The bill seeks to resolve a conflict between federal law, or at least the EEOC's conception of federal law, and state law. On the one hand, the guidance is aimed in very vague terms at limiting an employer's discretion to make employment decisions based on the employee's criminal record. Unfortunately, after reading it, even experienced attorneys won't know how to resolve particular cases.

But on the other hand, state law sometimes requires employers to decline to hire employees based on their criminal records. So what is the employer to do?

The guidance forces employers into an impossible bind. Employers are told that maybe—but only maybe—federal law forbids what state law requires, and that if so, it is their duty to obey federal, not state law.

According to the guidance, it depends on the circumstances of each situation since even the EEOC is not foolish enough to believe that a convicted pedophile should be hired as a camp counselor or that a convicted necrophiliac should be able to get a job at the morgue.

Nobody knows where the EEOC will draw the line. All they know is that the agency has been pushing the line very far towards not permitting employers to take criminal convictions into account.

The one thing that is clear is that if, in the EEOC's view, federal law forbids what state law demands, the employers allegiance must

be to federal law. Employers are apparently expected to make their best guess as to whether federal law overrules state law in any particular case. In the end it will be utterly unclear to any conscientious employer exactly what, if anything, the EEOC is attempting to require it to do.

Now, it is true that under the supremacy clause federal law trumps state law, but the guidance's lack of clarity makes the situation extremely unfair to employers. It shouldn't be that way. When a law contains catch-22s of this kind, jobs get exported overseas.

Expect two kinds of errors. An employer may wrongly conclude that the guidance does not forbid her to follow state law, or she may wrongly conclude that it does. In either case, she is going to be in hot water with some government agency, be it federal or state.

The proposed *Certainty in Enforcement Act* throws the hapless employer a lifeline. It clarifies federal law in one respect: It tells employers that they are free to comply with state law without fear of being found in violation of Title 7 on a disparate impact theory. Again, very, very narrow.

Since I have a few seconds left on the clock, let me say that an even better proposal would be to overrule the EEOC entirely and restore employer discretion to take into account an employee's criminal record according to her best judgment. Simply exempt decisions based on criminal records from liability for disparate impact.

Note that I am not saying that the federal government should do nothing to encourage the hiring of ex-offenders. The government already does this by providing a tax deduction for employers who hire ex-offenders.

This carrot approach works much better than the stick because it allows employers to fit the right ex-offender into the right job. Pressuring employees to hire ex-offenders against their better judgment will only result in problems.

[The testimony of Ms. Heriot follows:]

Testimony of Gail Heriot
Professor of Law, University of San Diego &
Member, U.S. Commission on Civil Rights
Before the House Subcommittee on Workforce Protections
March 24, 2015

Chairman Walberg, Ranking Member Wilson and distinguished Members of this Subcommittee, thank you for this opportunity to testify before you today on the proposed Certainty in Enforcement Act, currently embodied in H.R. 548. It is a bill I strongly support.[1]

H.R. 548 is aimed largely at correcting a narrow problem created by the EEOC's April 25, 2012 guidance ("the *2012 Guidance*").[2] The *2012 Guidance* itself is a controversial document aimed at restricting an employer's discretion to make employment decisions (e.g. decisions to hire, fire or promote) based on an employee's[3] criminal record.[4] It purports to draw its authority from Title VII of the Civil Rights Act of 1964 (as amended), which prohibits discrimination in employment based on race, color, religion, sex or national origin. To get from discrimination on the basis of "race, color, religion, sex or national origin" to discrimination on the basis of criminal record, it employs disparate impact theory. Under this theory, intent to discriminate on the basis of race, color, religion, sex, or national

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[1] I am testifying here today in my capacity as one member of the U.S. Commission on Civil Rights and not on behalf of the Commission as a whole. In its report on the general subject matter relating to my testimony, the Commission did not make recommendations and did not deal specifically with H.R. 548 since that bill was not yet in existence. See U.S. Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy (December 2013).

[2] EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012).

[3] When I use the term "employee," I mean to include a job applicant.

[4] H.R. 548 also covers employment decisions based on an employee's credit history. Because the U.S. Commission on Civil Rights has examined the criminal background issue but not the credit history issue, my testimony will be limited to the former. See U.S. Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy (December 2013).

origin is irrelevant. It is enough that the employer's actions have a disparate impact on such protected group.

It is worth noting that in addition to the problem dealt with in H.R. 548, there are many other things wrong with the *2012 Guidance* and also with the EEOC's aggressive enforcement efforts surrounding it.[5] But given the difficulties of passing major legislation reforming the EEOC, H.R. 548 must be regarded as a good start—one that should enjoy bipartisan support.

H.R. 548 seeks to solve a potential conflict between federal law (or at least the EEOC's conception of federal law) and state or local law. On the one hand, the *2012 Guidance* is aimed in very vague and general terms at limiting an employer's discretion to make employment decisions based on an employee's criminal record. Alas, after reading it, even experienced attorneys won't know how the EEOC wants employers to resolve particular cases. But on the other hand, state and local laws sometimes *require* employers to decline to hire or dismiss employees based on their criminal records.

The *2012 Guidance* forces employers into an impossible bind. Employers are told that maybe, but only maybe, federal law forbids what state or local law requires and that, if so, it is their duty to obey federal law and ignore state or local law. According to the guidance, it depends on the circumstances of each situation. The one thing that is clear is that *if* federal law demands the opposite of what state or local law demands, employers' allegiance must be to federal law. Employers are apparently expected to make their best guess as to whether federal law overrules state or local law in any particular case. In the end it will be utterly unclear to any conscientious employer exactly what, if anything, the EEOC is attempting to require them to do.

The EEOC is, of course, correct that under the U.S. Constitution's Supremacy Clause, federal law trumps state or local law. But the lack of clarity in the *2012 Guidance* makes the situation extremely unfair to employers. It doesn't have to be that way. But it is quite clear that the EEOC is not going to fix the problem. The job therefore falls to Congress.

Two kinds of errors are likely to occur. First, an employer may mistakenly conclude that the *2012 Guidance* does not forbid her to follow the state or local law, and she will therefore follow it. Because she is wrong about the guidance, the aggrieved employee and/or the EEOC itself may unleash their fury. Second, an employer may refrain from complying with a

[5] For a more general critique of the EEOC's policy on criminal background check, see infra at 12-19.

state or local law in the mistaken belief that this is what the *2012 Guidance* requires. In this case, she will be in violation of valid state or local law and vulnerable to action by the state or local authorities.[6]

Note the following further complication: Even if the employer is correct about what the EEOC would want her to do under the circumstances of the particular case, (1) the EEOC's interpretation of Title VII may be wrong;[7] and (2) there is real question whether the disparate impact liability

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[6] Another way in which the employer's error might come up is through a lawsuit for negligent hiring. See, e.g., *Stacy v. HRB Tax Group*, 516 Fed. Appx. 588 (6th Cir. 2013); *Underberg v. Southern Alarm, Inc.*, 643 S.E.2d 374 (Ga. App. 2007). Of course, if a decision to hire an ex-offender, made under pressure from the EEOC, results in an employee who commits a tort in the course of his employment, the employer will be liable under the common-law doctrine of respondeat superior. The fact that the employee is an ex-offender will never come up, although it may in fact be true that if the employer had followed state or local law and rejected the ex-offender's job application (or, where no state or local law exists, the employer had acted on her own initiative to reject the employee), the tort would never have occurred.

[7] The *2012 Guidance* was not a bolt from the blue. There are earlier EEOC guidances and decisions on the topic of an employer's authority to act on an employee's criminal record (although the *2012 Guidance* goes further than previous guidances in several key ways, including its insistence that the need to comply with state or local laws in situations where the employer cannot otherwise demonstrate "business necessity" to the EEOC's satisfaction). See EEOC Policy Statement on the Use of Statistics Involving the Exclusion of Individuals with Criminal Records from Employment (Jul. 29, 1987); EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (February 4, 1987); Commission Decision No. 78-35, CCH EEOC Decisions, Para. 6720 (June 8, 1978). There is also some case law on the issue. See *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). All were premised on the theory of disparate impact liability first endorsed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *But see* Hugh Davis Graham, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 at 387 (1990)("THE CIVIL RIGHTS ERA")("Burger's interpretation [in *Griggs*] of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964"); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PENN L. REV. 1417 (2003)(arguing that the 88th Congress would have been astonished at *Griggs*). For a fuller discussion of this history and of why the *2012 Guidance* is bad policy, see Statement of Gail Heriot in U.S. Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy (December 2013).

theory used in Title VII is constitutional.[8] Being right about what the EEOC wants will not prevent her from being in violation of valid state or local law if it turns about the EEOC has no statutory or constitutional authority for its position in drafting the guidance.[9]

H.R. 548 throws the hapless employer a lifeline. It clarifies federal law in one respect: It tells employers that they are free to comply with state or local laws without fear of being found in violation of Title VII on a disparate impact theory.[10] Its operative paragraph states in full:

> *(o) Notwithstanding any other provision of this title, the consideration or use of credit*[11] *or criminal records or information, as mandated by Federal, State, or local law, by an employer, labor organization, employment agency, or joint labor management committee controlling apprenticeships or other training or retraining opportunities, shall be deemed to be job related and consistent with business necessity under subsection (k)(1)(A)(i) as a matter of law, and such use shall not be the basis of liability under any theory of disparate impact.*

The* 2012 Guidance *Is Vague and Uncertain as to the Employer's Duty in Part Because of the Intricacies of Administrative Procedure Law and In Part Because the EEOC Apparently Likes It That Way.

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[8] In *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009)(Scalia, J. concurring), the question of the constitutionality of disparate impact liability was raised in a Supreme Court decision for the first time. Justice Scalia wrote: "[This decision] merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII ... consistent with the Constitution's guarantee of equal protection?" For a concise discussion of the question, see Brief of Amicus Curiae Gail Heriot & Peter Kirsanow in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 13-1371 (U.S. Sup. Ct. filed November 20, 2014). See also Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. L. REV. 1505 (2004); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

[9] In addition, the employer may correctly perceive her legal duty, and the federal, state or local governments may incorrectly perceive that duty and attempt to enforce in the courts what they incorrectly perceive to be the law. This costs the employer too.

[10] H.R. 548 also covers conflicts between the EEOC's policy and other federal laws.

[11] See supra n.4.

Note that the *2012 Guidance* is just that—guidance. It is obviously not a federal statute; only Congress can enact statutes. It is not a rule. When Congress created the EEOC in 1964 as part of Title VII, it consciously denied the EEOC the authority to promulgate rules, and it remains the case that the EEOC has no authority is promulgate rules pursuant to Title VII. Even if the EEOC had been given that authority, it could not have issued the *2012 Guidance* as rule, since the Administrative Procedure Act permits rules to be promulgated only after a period of notice and comment on the draft rule.

A guidance can interpret a statute like Title VII and it can reveal something about the agency's enforcement priorities. But it cannot impose duties on regulated persons (in this case mainly employers) that are not already required by the statute it is enforcing. Only a rule can do that (and then only in a very limited way).[12] Guidances issued as interpretations of very general statutes must ordinarily be general themselves, since it is difficult to be specific without pushing past the statute's actual prohibition. When guidances transform the statute into a set of step-by-step instructions, they almost inevitably go beyond what the statute actually requires and hence are not really interpretations.

Guidances nevertheless can pack quite a punch. For one thing, they are very difficult to challenge in court.[13] See, e.g., *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir 1974). The best and sometimes the only way to get the issues they raise before a court is to violate the guidance, get sued and then make the argument that the guidance is

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[12] An agency with rule-making authority may promulgate rules that go somewhat beyond what the statute prohibits, provided the rule is a reasonable prophylactic intended to ensure that the statute itself is being complied with and not an simply effort to extend the statute beyond what Congress intended (and provided further that it complies with the Administrative Procedure Act's notice and comment and other procedures). For example, suppose a statute that requires the owner of a tiger to "construct housing for such animal that will properly contain it." The agency with rulemaking authority can promulgate a regulation requiring that they be kept in enclosures with walls of at least 8 feet, even though some tigers (such as very feeble ones) could be safely contained in enclosures with lower walls and hence for those owners the rule would be going somewhat beyond what the statute requires. Doing the same thing through a guidance, however, would be inappropriate. See *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165 (7th Cir. 1996)(similar facts).

[13] Nevertheless, guidances, unlike rules, are not entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If a court disagrees with the interpretation of a statute laid down in a guidance, it is free to so rule. See *United States v. Meade Corp.*, 533 U.S. 218 (2001).

misinterprets the statute. Such a strategy is obviously high risk. It is not surprising that regulated persons tend to fall in line with guidances. Indeed, some commentators have expressed serious concern about the ability of federal agencies to wield excessive power through the use of guidances. See Robert Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992). The more vague a guidance is, the more effective it can be in constraining the behavior of regulated parties anxious to stay on the right side of the law. If an EEOC guidance is vague, timid employers will bend over backwards to be sure that they come nowhere near the wrong side it. But if it is clear, employers can comfortably cozy up to the line, secure in the knowledge that they have not crossed it. No wonder so many federal agencies prefer to issue vague guidances rather than clear rules.

So what exactly does the *2012 Guidance* require employers to do? In the broadest terms, it purports to remind employers that: (1) African Americans and Hispanics have higher rates of arrest and incarceration than the population at large; and that therefore (2) under a theory of disparate impact liability, an employer can be held liable for making employment decisions based on an employee's previous conviction for a criminal offense unless the employer can demonstrate a "business necessity" for doing so. As mentioned above, intent to discriminate is irrelevant under this theory. It is enough that the employer's actions have a disparate impact on some protected group. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Of course, hardly anyone is foolish enough to advocate a complete ban on the consideration of the criminal record of employees. Convicted pedophiles should not be hired as children's camp counselors, just as convicted necrophiliacs should not be hired by the morgue. Much of the *2012 Guidance* must therefore be devoted to discussing what constitutes "business necessity"—i.e. the circumstances under which an employer may fire, fail to promote or decline to hire an employee on account of his previous convictions.

In part, the *2012 Guidance*'s vagueness and uncertainty is because the meaning of the term "business necessity" is vague and uncertain.[14] Some

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[14] One thing everyone seems to agree on is that the Civil Rights Act of 1991, which uses the term, and the case law that preceded it are ambiguous as to the meaning of "business necessity" in the context of disparate impact liability. Oklahoma City University law professor Andrew Spiropoulos describes the problem this way:

> [T]he [Supreme] Court articulated two very different versions of the business necessity defense: a strict one that would be very difficult for employers to meet and a lenient one that would give employers more discretion. ... [T]hose who contend that the Act establishes a strict

have argued that to establish "business necessity" an employer must be able to establish that the continued operation of its business is at stake. Others—much more plausibly—advocate various less stringent standards.[15]

But even if the meaning of "business necessity" were clear, its application to actual cases would not be. The *2012 Guidance* states that it "does not necessarily require individualized assessment in all circumstances ...." But it fails to give any safe alternative and instead states that "the use of a screen that does not include individualized assessment is more likely to violate Title VII ... [and] the use of individualized assessments can help employers avoid Title VII liability...." One can be confident that employers will read this as requiring individualized assessments at least for members of the groups for whose benefit the policy is intended (African Americans and Hispanics). They would be fools not to.

What exactly does an "individualized assessment" require? Again the guidance is far from clear. At the very minimum it appears to require an employer have a policy that takes into account (1) the nature and gravity of the employee's offense or offenses; (2) the time that has passed since the conviction and/or completion of sentence; and (3) the nature of the job the employer seeks to fill.[16] But it also appears to require a case-by-case opportunity for job applicants to make their case based on their unique circumstances. The *2012 Guidance* contemplates that employers will

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> business necessity defense and those who argue that the Act enacted the more lenient business necessity defense both have plausible arguments for their interpretations founded in two different lines of Supreme Court precedent. ... [N]either side can conclusively show that their interpretation was embodied in the Act.

Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV.1478, 1483-85 (1995). As Professor Spiropoulos describes, this ambiguity was built into the Act by Congress. *Id.* Put simply, Congress punted. It left the issue to be decided in future litigation.

[15] See, e.g., Susan Grover, *The Business Necessity Defense in Disparate Impact Employment Discrimination Cases*, 30 GA. L. REV. 387, 429 (1996)("That defense [the business necessity defense] should require an employer to prove that its discriminatory practice is crucial to its continued viability"). Professor Grover clarifies her use of the term "continued viability" by stating that it means that "relinquishing the discriminatory practice will compel the employer to cut back on its business, resulting in employee layoffs." Id. at n. 5.

[16] This part of an individualized assessment can trace its pedigree back to *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).

provide "notice that [the job applicant] has been screened out because of a criminal conviction, an opportunity to ... demonstrate that [the employer's policy] should not be applied due to his particular circumstances; and ... whether the additional information ... warrants an exception ... show[ing] that the policy as applied is not job related and consistent with business necessity." *2012 Guidance* at 15.

Put differently, the *2012 Guidance* requires that employers telegraph to job applicants that they have been screened out on account of their criminal records. It thus exponentially increases the odds of a lawsuit. The vague discussion of business necessity and individualized assessment in the guidance means that reasonable minds will disagree as to whether the employer has sufficient reason to reject a job applicant on account of his criminal record. The employer knows that ultimately it is not her judgment that matters; rather, it is initially the disappointed job applicant's judgment, since he may file a complaint.[17] It then becomes the EEOC's judgment and later the court's. All have the power to impose huge costs on the employer.

This leaves an employer in an extremely awkward position. She may have her own view of whether "business necessity" justifies a decision not to hire a job applicant with a criminal record in a particular case. But she has no way of knowing whether the EEOC or the courts will agree with her (and she can be pretty confident that the rejected job applicant will seldom agree or else the applicant wouldn't have applied for the job in the first place). One of the last things an employer wants is to get caught up in an EEOC investigation or in litigation, either of which could be costly. All employers therefore have a strong incentive to err on the side of not conducting criminal background checks at all or of not acting on them when they bring felony convictions to light.

All of this is arguably bad enough by itself (since the sad truth is that those who have committed crimes in the past are more likely to do so in the future than those who have never committed crimes). But when employers are instructed that they must ignore state and local laws that require them to reject job applicants with certain types of criminal convictions, the problems multiply. Yet that is exactly what the *2012 Guidance* does when it claims to trump any state or local laws of this type.

Employers are thus placed between a rock and hard place. The *2012 Guidance* itself is extremely vague about when an employer's desire to avoid having an employee with a criminal record rises to the level of "business necessity." The employer is thus faced with a choice between *possibly*

[17] The fact that ex-offenders are sometimes *un*reasonable should not be lost sight of.

violating federal law or *certainly* violating state or local law. Woe to the employer who chooses incorrectly.

In this respect, it is worth pointing out that the EEOC does not have a particularly good track record in enforcing its policy on criminal convictions. Twice U.S. Courts of Appeals have slapped the agency down decisively. See *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013), aff'g 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. 2011); *EEOC v. Freeman*, __ F.3d __ (4th Cir. February 20, 2015), aff'g 2013 U.S. Dist. LEXIS 112368 (D. Md. 2013).

In *Peoplemark*, the EEOC wrongly accused the employer of having a more stringent policy on criminal convictions than it in fact had. The trial court ordered EEOC to pay Peoplemark $751,942.48 in attorneys' fees, expert witness fees and costs, and the Sixth Circuit affirmed. In *Freeman*, the trial court excluded an expert's report on the disparate impact of Freeman's criminal convictions policy on the ground that the expert's report was rife with error. On that basis, it granted summary judgment to Freeman. The Fourth Circuit affirmed, citing "an alarming number of errors and analytical fallacies" in the expert's report. A concurring opinion by Judge Agee catalogs "a pattern of suspect work" in EEOC cases by the same expert, who the EEOC had nevertheless continued to use.

It is fair to characterize all these opinions, both at the trial and appellate levels, as scathing. But rather than elaborate on them in my testimony, I urge the members of this subcommittee and staff members to read the opinions for yourselves.[18] I am confident that you will agree that are not your ordinary, everyday criticisms of a federal agency.

These fully-litigated cases may be just the tip of the iceberg. The EEOC's pattern of enforcement on this issue has been marked by something akin to religious fervor. It has targeted employers whose line of work is sensitive enough that the need for clean criminal records should be viewed as an obvious business necessity.[19] For example, at the briefing on the *2012 Guidance* held on December 7, 2012,[20] the Commission heard testimony from Julie Payne, Chief Legal Office of G4S's American Region and General

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[18] Electronic versions of these opinions are attached to the electronic version of this testimony as Exhibits A, B, C, and D.

[19] The fact that Title VII makes EEOC investigations and mediations confidential adds to the degree to which EEOC policymaking has tended to escape both public scrutiny and government oversight. 42 U.S.C. § 2000e-5(b).

[20] The transcript of this briefing is available on the web site of the U.S. Commission on Civil Rights.

Counsel to G4S Secure Solutions (USA) Inc. Ms. Payne detailed the long investigation that G4S was undergoing. Note that G4S is a company that furnishes security guards to other businesses. This is a strange case for the EEOC to be pushing given the obvious need for trustworthy security guards.

The EEOC's own judgment about when employers ought to be able to make employment decisions on the basis of an employee's criminal record is poor. Under the circumstances, it is expecting a lot of employers to guess correctly about what the EEOC wants from them and/or what federal law actually requires. This makes the need for the Certainty in Enforcement Act all the greater.

A Congressionally-Enacted Statute that Explicitly Defers to State and Local Law Would Limit the Reach of the* 2012 Guidance *in Situations in Which a Democratically-Elected Body Has Determined that Criminal Background Checks Ought to be Mandatory.

State laws requiring employers to reject job applicants with criminal records tend to be very sensible. Deferring to the judgment of democratically-elected state legislatures and other state and local law-making bodies is itself entirely sensible.

For example, in the Commonwealth of Virginia, nursing homes are forbidden to hire anyone with certain specified criminal convictions. Among the specified crimes are murder, manslaughter, abduction, robbery, aggressive use of a machine gun, and abuse and neglect of incapacitated adults. See Va. Code Ann. § 32.1-126.01. Licensed homecare organizations are similarly limited in whom they can hire. See Va. Code Ann. § 32.1-162.9:1.

State legislators in Virginia have obviously decided that case-by-case analyses are less appropriate than hard-and-fast rules in those industries. It is unlikely that this is because they cannot imagine a case in which a rational nursing home or licensed homecare organization might want to hire an ex-offender. There are hundreds of thousands of ex-offenders in Virginia. Each one has a different story and no doubt some would do well working for a nursing home or licensed homecare organization. But the legislature made the judgment that more mistakes will be made if employers are told to exercise their discretion than if they are told they must refrain from hiring those with specified convictions. I know of no evidence suggesting that the legislature's judgment was in any way unsound. The *2012 Guidance* will only serve to confuse Virginia employers covered by these laws as to where their legal duty lies.

Texas similarly prohibits certain facilities that serve the elderly, the disabled and the terminally ill from hiring anyone with certain specified criminal convictions. The crimes on the list include criminal homicide, aiding suicide, Medicaid fraud, and improper relationship between educator and student. Tex. Health & Safety Code § 250.004. Again, I know of no evidence that the legislature's judgment was in any way unsound. The same goes for similar requirements in Illinois, Mississippi and New Hampshire. See 225 ILCS § 46/25 (prohibiting employers from hiring certain types of healthcare workers if they have certain kinds of criminal convictions); Miss. Code. Ann. § 43-11-13 (requiring healthcare employers and long-term care facilities to refrain from hiring individuals with convictions for certain crimes); N.H. Code, title XII, § 170-E:7 (requiring child daycare providers to do criminal background checks and to take "corrective action to remove the individual" if an employee is found to have past criminal convictions involving harm to children).

Freeing employers from the bind created by the *2012 Guidance* is the very least Congress can do to help these employers. When employers are caught in such a bind, they are apt to hesitate to hire at all. That is obviously not in anyone's interest.

But there are a couple of concerns that deserve mention at this juncture. First, the Mississippi statute mentioned above has a procedure for waivers. The proposed Certainty in Enforcement Act needs to make clear whether employers are required to seek such a waiver before its protections kick in. I would recommend that it not be required, since in most cases it will be obvious that it will not be granted and thus a waste of time. If the proposed Certainty in Enforcement Act is to achieve its goal of certainty, then it needs to be mindful of situations like those that are apt to arise in Mississippi. Note that a Mississippi employer could still seek a waiver if she so desired.

Second, there are state laws that may raise problems with the Certainty in Enforcement Act as currently proposed, because they require criminal background checks, but do not explicitly require employers to reject job applicants if a felony conviction is uncovered. For example, Texas law requires "in-home service" and "residential delivery" companies to conduct background checks, but it does not require the employer to make specific up-or-down decisions about job applicants based on the results. Instead, it creates a rebuttable presumption against any claim of negligent hiring if the job applicant had a clean record for a specified period of time. Tex. Civ. Pract. & Remedies Code § 145.

Even though no explicit action is mandated by the Texas statute, it is clear that the Texas legislature viewed "in-home service" and "residential delivery" companies to be a special case where extra vigilance is necessary. But it also thought that under the circumstances the employer's judgment—provided that it is informed—would be superior to legislation flatly prohibiting employers from hiring job applicants with particular criminal convictions. Again, I would recommend deference. If the area was viewed as important enough for the state legislature to require criminal background checks, Congress should allow employers to exercise their discretion, free from the fear of liability for violation of Title VII as interpreted by the *2012 Guidance.* As the Texas legislature's action makes clear, a lot rides on the trustworthiness of employees of in-home service and residential delivery companies. Everyone has an interest in ensuring that employers are erring on the side of safety and not on the side of pleasing the EEOC.

Congress Should Consider Going Beyond H.R. 548.

H.R. 548 is certainly commendable, but it solves only a small problem among the many problems created by the EEOC policy on criminal convictions. A Congressional enactment exempting employers from Title VII disparate impact liability altogether when they make employment decisions based on an employee's criminal record would be even better. This would leave the matter up to employer discretion supplemented by state and local law and by federal liability for disparate *treatment* (i.e. actual discrimination as opposed to mere disparate impact).[21]

This is not to say that Congress should not be concerned about the integrating ex-offenders into the workforce. It should be very concerned. Indeed, we all must be. But there are good ways and bad ways to do this, and the EEOC is employing a very bad way. Among other things, the need to integrate ex-offenders into the workforce and into mainstream society in general would exist even the absence of the race and national origin issue. Yet under the EEOC's approach, it is African American and Hispanic males who have the standing to sue. But what about the Japanese-American female ex-offender? Statistically, Japanese-American females commit far less than their "fair share" of crimes and hence are less likely to have criminal records. But for the Japanese-American female who happen to be an ex-offender and is having a difficult time getting a job, this is cold comfort.

[21] Under this approach an employer who rejects African Americans with criminal records, but not whites with criminal records would still be liable under federal law.

For contrast, consider the Work Opportunity Tax Credit Program. See Small Business Job Protection Act, Pub. Law 104-188 (1996).[22] Under that program, employers who choose to hire a qualified ex-offender get a small tax credit. No one is forced or threatened with litigation to participate. Those businesses that perceive themselves as benefiting from the arrangement will be the ones that take advantage of it. Eligibility and other ground rules are clearly defined, so no one need be confused about what the law permits. The tax credit applies—as it should—to ex-offenders of all races and both sexes.

Employers have many things to worry about when they hire. All employers are vulnerable. If they make a wrong choice, they can wind up with someone who is undependable, difficult to work with or incompetent. A bad employee can steal from the employer, harass fellow employees, drive away the customers, and cause devastating harm.[23] Employers can end up legally responsible for the actions of their employees under doctrines of negligent hire or supervision, respondeat superior and actual or apparent authority. The need to fire an employee often brings lawsuits and thus must be avoided where possible. No wonder employers are sometimes hesitant to hire. Policymakers need to avoid making them more hesitant.

But that doesn't mean that no employer will find hiring ex-offenders an attractive option. Jobs vary immensely. Some provide the employee with very little opportunity for wrongdoing; others can be made that way by adding a little extra supervision. Individuals with criminal records vary immensely too. There are some whose integrity is not open to serious doubt; there are others who will likely do well when working with colleagues who are aware of their weaknesses and sensitive to the need to avoid creating problems. A modest tax credit can be a useful tool to persuade an employer who is considering hiring an ex-offender but has not yet taken the plunge. In the long run, if administered properly, this program can reduce crime and save the taxpayer money.[24]

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[22] The Work Opportunity Tax Credit Program was originally set to expire on September 30, 1997. 110 Stat. 1772. It has been revised and extended on several occasions since, most recently the Tax Increase Prevention Act of 2014, P.L. 113-295 (2014).

[23] See *Employee Kills 8, Himself in Connecticut Shooting Rampage*, L.A. TIMES (August 4, 2010).

[24] I do not mean to suggest that the tax code is an instrument to which Congress should routinely resort to achieve goals that are unrelated to revenue raising. It should be used sparingly for that purpose.

The Work Opportunity Tax Credit Program allows the employers who are in the best position to offer employment to ex-offenders (or to a particular ex-offender) to self-select. Some employers may find that they are in a good position to hire a large number of ex-offenders; others may prefer to hire none. The latter group won't have to worry about their ability to prove to the satisfaction of any government bureaucrat that they had good reason for their decision; instead, they simply won't be able to enjoy the tax credit that employers who make the opposite decision will enjoy. The important thing is that the decision will be made by individuals who are intimately familiar with the actual job and job applicant at issue and have an incentive to make the right decision instead of by far away bureaucrats and judges, who have no such familiarity with the situation. The decision is not subject to second guessing.

The EEOC's policy has none of the virtues of the Work Opportunity Tax Credit Program. The *2012 Guidance* ham-fistedly discourages all employers from even checking into the criminal backgrounds of its job applicants and especially from acting on the information they obtain if they do. Each employer knows that it is not her own best judgment that will be decisive, but rather the judgment of the disappointed job applicant who can choose to sue her, of the EEOC which can subject her to long investigations and litigation and ultimately of the courts.

This is disturbing in view of the original purpose of Title VII, which was hardly intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin; criminal background checks are, of course, not mentioned at all.[25] As Representative William M. McCulloch, et al. put it:

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[25] Section 703. Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive ... any individual of employment opportunities or adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin.*

42 U.S.C. sec. 2000e-2 (emphasis added).

> "[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices."[26]

See also Case & Clark Memorandum, 110 Cong. Rec. 7247 (Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."). [27]

At the time, Ranking Member McCulloch's point was likely seen as obvious, but important. Free enterprise has always been the engine that drives the nation's prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow peaceable and honest

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[26] Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964). McCulloch was the ranking member of the House Judiciary Committee and was considered by many to have been indispensable in drafting and securing the passage of the Act.

[27] Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill's co-managers on the Senate floor, repeatedly assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them in their famous interpretative memorandum:

> "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

Case & Clark Memorandum, 110 Cong. Rec. 7213.

Note that Case and Clark used the term "bona fide qualification tests," meaning qualification tests adopted in good faith, and not "necessary" or "scientifically valid" qualification tests. To Case and Clark the issue was whether the employer chose a particular job qualification *because* he believed that it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex or national origin.

individuals the freedom to run their own business affairs. When exceptions become necessary (as they did in 1964), they were understood by most as precisely that—exceptions. They were not intended to swallow the rule.

While few grasped it at the time, all of this began to change when the Supreme Court interpreted Title VII to ban not just actual discriminatory treatment, but also actions that have a disparate impact on a protected group in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). A significant problem with disparate impact theory is that *all* job qualifications have a disparate impact. It is no exaggeration to state that there is always some protected group that will do comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinent Indian Americans are disproportionately more likely to have experience in motel management than Norwegian Americans, who more likely have experience growing durum wheat. African Americans are over-represented in many professional athletics as well as in many areas of the entertainment industry. Unitarians are more likely to have college degrees than Baptists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(recognizing that disparate impact liability applies to subjective as well as objective job qualifications).[28]

The result is that the labor market is anything but free and flexible. All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture. Note that disparate impact liability applies to promotions and terminations too. *See George v. Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).[29]

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[28] Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when it is called for by an employer. *See* Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. TIMES, May 26, 1995. The reasons behind other disparities may be more obvious: Non-Muslims are more likely than Muslims to have an interest in wine and hence develop qualifications necessary to get a job in the winemaking industry, because Muslims tend to be non-drinkers.

[29] Supporters of disparate impact liability sometimes argue that disparate impact's ubiquity is not a problem, because the EEOC has agreed to abide by a "four-fifths rule." Under the Uniform Guidelines on Employee Selection Procedures, if a particular job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded by federal enforcement agencies as evidence of adverse

Some might argue that this is water under the bridge.[30] But even if they are right, there is no reason that Congress cannot exempt the most sensitive areas from the disparate impact policy. I can think of no better candidate from exemption than an employer's policy and practices on hiring and retaining employees with criminal convictions. It is not just that it is abusive to use coercive "sticks" to force an employer to hire or retain an employee whose criminal record causes her to feel uncomfortable when non-coercive "carrots" like the Work Opportunity Tax Credit Program are much more useful in matching the right ex-offender to the right job. It is also that the policies embodied in the *2012 Guidance* may be counterproductive for the EEOC's professed purpose of improving job opportunities for African Americans and Hispanics.

In Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006)("*Perceived Criminality*"), the authors discussed the double effect of using criminal background checks. As they explain, it must be kept in mind that African-American and Hispanic men are not simply more likely to have a criminal record, they also are likely to be perceived that way. Consequently, if the *2012 Guidance* discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these groups are somewhat more likely to have criminal records than white or Asian American female applicants. Put differently, the EEOC's

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impact." This is cold comfort. First of all, particularly when the population is broken into multiple ethnic groups, selection rates of less than four-fifths relative to the ethnic group with the highest rate are the rule and not the exception.

Consider, for example, the horse racing industry. Of the five top-grossing North American jockeys of 2012, all are Hispanic males. Height and weight restrictions make it less likely that an African- or Irish-American male will qualify. Furthermore, this supposed limitation on disparate impact is not binding on private litigants (and does not even guarantee which approach federal agencies will take).

Moreover, while the "four-fifths" rule purports to be practical, it is useless in practice. Prior to adopting a particular job qualification, employers usually have no way of knowing what the selection rates will be. All they can be sure of is that the results won't be equal across the board, since nothing ever is.

[30] The Civil Rights Act of 1991 acknowledged, but did not expressly embrace disparate impact liability. 42 U.S.C. § 2000e-2(k).

attempt to prevent the "disparate impact effect" creates an incentive for a "real discrimination effect."

Of course, prohibiting real discrimination is exactly what Title VII was supposed to do. Congress was well aware that some discrimination—call it "statistical discrimination"—is rooted in stereotypes that may or may not have some basis in fact. For example, women really are on average less physically able to lift heavy weights than men. But if an employer wanted an employee who was able to lift heavy weights, Congress took the position that the employer should look for evidence of those characteristics and not depend on stereotypes. But the success of that approach depends upon the ability of employers to seek evidence of the actual desired traits. If the employer is looking for trustworthy employees who will not commit crimes, they need some source of information. The applicant's criminal record (or lack of a criminal record) is often the best method for separating the cases that are most likely to be a problem from those that are not. It is a window into the content of their character, and while it is an imperfect window, there is no such thing as a perfect window. If employers are prohibited from using it, they may be tempted, consciously or unconsciously, to use race as a proxy for criminal record. This will be hard to detect.

Other employers may make adjustments to their hiring policies that are not in any way motivated by race, but which ultimately decrease the likelihood that African-American and Hispanic job applicants will be hired. Suppose, for example, an employer regularly hires young high school drop-outs as packers for his moving van business. Given the business location's demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of "individualized assessments" made excluding applicants with criminal records too risky, he had been doing criminal background checks on all job applicants and declining to hire most of those with a record. But after he stopped conducting those checks, he hired a young, white 19-year-old who ended up stealing from the customers. Another recent hire turned out to have a drug problem. The employer does not know it, but criminal background checks would have identified these employees as risky. All the employer knows is that he is not satisfied with his recent hires, so he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the school's demographics, this yields an overall labor pool that has proportionately fewer minorities. The EEOC guidance would have accomplished precisely the opposite its intentions.

From a policy standpoint, the obvious question is which effect dominates—the disparate impact or the disparate treatment effect. The

answer to that question is clear: Nobody knows.[31] But that is just the problem: The EEOC policy is pushing employers to hire and retain employees with criminal convictions when doing so is against the employers' better judgment. One would think at the very least the EEOC would have strong evidence that this accomplishes the task that it views itself as carrying out—improving the employment prospects of African American and Hispanic men.

In conclusion, I urge that H.R. 548—the proposed Certainty in Enforcement Act be passed into law. But I also urge that Congress consider more far-reaching legislation that would exempt employment decisions based on an employee's criminal conviction record from disparate impact liability. By all means, the federal government has a role to play in helping ex-offenders re-enter the workforce. But attempting to accomplish this through Title VII disparate impact liability is the wrong way to do it.

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[31] The evidence adduced in *Perceived Criminality* suggests that it may be the disparate treatment effect that dominates. That article examined the answers to interview questions provided by slightly over 3000 employers that hired workers without college degrees in four cities during the early 1990s. Approximately half of those employers either always or sometimes conduct criminal background checks on job applicants. Further data collected in 2001 in Los Angeles showed this number had climbed from 48.2% to 62.3% for that city specifically.

The article found that employers who conduct background checks were more likely to have recently hired an African-American applicant than employers who do not. Among those employers who were unwilling to hire ex-offenders, the employers who checked were 10.7% more likely to have recently hired an African American. This finding was highly significant. It is always difficult to distinguish cause from effect. In conducting studies of this kind, one could argue that the reason that employers who undertake background checks are more likely to hire African Americans is that they face labor pools that are heavily African American and are biased against African Americans.

Research has been undertaken attempting to confirm or refute the hypothesis that easy availability of criminal background information benefits black males as a group overall by comparing the black-to-white wage ratio in states that make criminal records broadly available to that in states that do not. Shawn D. Bushway, *Labor Market Effects of Permitting Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUSTICE 276 (2004). Bushway's data did indeed show that states that make criminal records broadly available have higher black-to-white wage ratios, but those data were too skimpy for this difference to be statistically significant. Bushway has called for more research. *Id.* at 288-89.

Chairman WALBERG. Thank you.

And thank you, each of the panelists, for your testimony. I am sure it will elicit some strong questions.

And for that, I recognize the Chairman of the full Committee, Mr. Kline, sponsor of H.R. 1189, for first round of questioning.

Mr. KLINE. Thank you, Mr. Chairman, for your courtesy in allowing me to ask the first question. Actually won't get you anything, but thanks so much, and thanks to the witnesses——

Chairman WALBERG. I didn't expect that.

Mr. KLINE. He tries, though.

Thanks to the witnesses for being here. We appreciate very much your expert testimony.

Because 1189 is my bill, the *Preserving Employee Wellness Programs Act*, I want to dig into that a little bit.

And, Ms. Simon, I am going to go to you.

We have had very expert testimony from all of you, but I am—as you say in your testimony, quote: "It is impossible for employers to abide by rules that do not exist." EEOC's lack of a clear position is what prompted my bill, so the businesses would have a clear path forward. So we are trying to get a legislative fix.

But last week the EEOC apparently recognized this problem, at least to some degree, and sent a proposed rule to OMB that will purportedly address concerns that we have been talking about today. In your opinion, what should this regulation include to address the issues that we were talking about of clarity and flexibility for employers in their employee wellness programs?

Ms. SIMON. Thank you, Chairman Kline, for your question. Great question.

And, you know, I look forward to seeing that EEOC guidance very much. We have certainly been waiting a long time for it. And hopefully it is going to prove to be as responsive and as flexible as your bill without placing any new requirements on employers.

In our opinion, the EEOC should deem employer-sponsored group health plan wellness programs that offer incentives and are currently compliant with HIPAA and PPACA as meeting the wellness exception of the ADA and GINA.

You know, employers are investing significant resources and compliance efforts into their wellness programs to ensure that all employees can take advantage of them and so that all of them are treated fairly. And what they really need is comprehensive, workable, and consistent standards to follow, and they need those right now.

Mr. KLINE. Thank you. I also am eagerly waiting to see what comes out of OMB. I would like to say I am optimistic, but we still very well may need H.R. 1189. But we will see.

So there have been some questions raised about privacy, of course, and that people don't want employers to have all of their personal information. So let's talk about HIPAA.

And, Ms. Simon, I am going to stay with you if that is all right. Under HIPAA, can an employer see the private health information of the employee or their family who participates in the wellness program?

Ms. SIMON. Again, thank you. That is a very important question and one that certainly employers take very seriously.

If a program—a wellness program—is part of the group health plan then it would be covered by the HIPAA privacy and security rules, which I mentioned earlier in my testimony. Now, that rule says that the information could not be used without an express authorization for anything other than treatment, payment, or health care operations, as set forth in that law. Thus, nobody outside of that HIPAA firewall would be able to discuss that information for purposes other than those that are intended within the group health plan.

The rules are very, very specific and put the onus on the covered entity—and in this case it is the group health plan—to protect the information as mandated by HIPAA. And the law requires extensive policies and procedures to be drafted and met, notice to be given to plan participants, risk assessments to be completed, and training to be provided to any individuals handling the protected health information. Your bill is aimed at wellness programs provided under a group health plan, so the HIPAA rules do, in fact, provide that protection.

In most cases, with large employers there is usually a wellness vendor that is the go-between the employee and the employer, and so it would be considered a HIPAA business associate. While that vendor is technically an agent of the employer, most contracts specify that the employer will really only receive information that is de-identified from that vendor.

And so business associates, because they are held as liable and to that same threshold as covered entities under HIPAA, we are hoping that then any third party that does have a business associate agreement with the group health plan would be held to that same level, that same standard, and the information would then, of course, be protected.

Mr. KLINE. Thank you.

I see my time is expired. I yield back.

Chairman WALBERG. Thank the gentleman.

I now recognize the gentleman from Virginia and the Ranking Member of the full Committee, Mr. Scott.

Mr. SCOTT. Thank you, thank you, Mr. Chairman.

Mr. Kehoe, does your testimony include the statement that the EEOC does not have the authority to issue regulations under Title 7?

Mr. KEHOE. Yes, it does. The EEOC does not have authority to issue substantive regulations under Title 7; procedural regulations are okay.

Mr. SCOTT. Well, I just want to enter into the record with unanimous consent the Title 7 U.S.—42 USC 2000e–12 subsection (a), "The Commission shall have the authority from time to time to issue, amend, rescind suitable procedural regulations to carry out the provisions of this chapter. Regulations issued under this section shall be in conformity with the standards and limitations of subsection two." I would like unanimous consent to have this in the record?

[The information follows:]

§2000e–12. Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

(Pub. L. 88–352, title VII, §713, July 2, 1964, 78 Stat. 265.)

CODIFICATION

In subsec. (a), "subchapter II of chapter 5 of title 5" substituted for "the Administrative Procedure Act" on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDELINES ON RELIGIOUS HARASSMENT

Pub. L. 111–117, div. B, title V, §506, Dec. 16, 2009, 123 Stat. 3150, provided that: "Hereafter, none of the funds made available in this or any other Act may be used to implement, administer, or enforce any guidelines of the Equal Employment Opportunity Commission covering harassment based on religion, when it is made known to the Federal entity or official to which such funds are made available that such guidelines do not differ in any respect from the proposed guidelines published by the Commission on October 1, 1993 (58 Fed. Reg. 51266)."

Similar provisions were contained in the following prior appropriation act:

Pub. L. 111–8, div. B, title V, §506, Mar. 11, 2009, 123 Stat. 595.

Pub. L. 103–317, title VI, §610, Aug. 26, 1994, 108 Stat. 1774, provided that:

"(a) FINDINGS.—The Congress finds that—

"(1) the liberties protected by our Constitution include religious liberty protected by the first amendment;

"(2) citizens of the United States profess the beliefs of almost every conceivable religion;

"(3) Congress has historically protected religious expression even from governmental action not intended to be hostile to religion;

"(4) the Supreme Court has written that 'the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires';

"(5) the Supreme Court has firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the content of the ideas is offensive to some;

"(6) Congress enacted the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.] to restate and make clear again our intent and position that religious liberty is and should forever be granted protection from unwarranted and unjustified government intrusions and burdens;

"(7) the Equal Employment Opportunity Commission has written proposed guidelines to title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.], published in the Federal Register on October 1, 1993, that expand the definition of religious harassment beyond established legal standards set forth by the Supreme Court, and that may result in the infringement of religious liberty;

"(8) such guidelines do not appropriately resolve issues related to religious liberty and religious expression in the workplace;

"(9) properly drawn guidelines for the determination of religious harassment should provide appropriate guidance to employers and employees and assist in the continued preservation of religious liberty as guaranteed by the first amendment;

"(10) the Commission states in its proposed guidelines that it retains wholly separate guidelines for the determination of sexual harassment because the Commission believes that sexual harassment raises issues about human interaction that are to some extent unique; and

"(11) the subject of religious harassment also raises issues about human interaction that are to some extent unique in comparison to other harassment.

"(b) CATEGORY OF RELIGIOUS HARASSMENT IN PROPOSED GUIDELINES.—For purposes of issuing final regulations under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.] in connection with the proposed guidelines published by the Equal Employment Opportunity Commission on October 1, 1993 (58 Fed. Reg. 51266), the Chairperson of the Equal Employment Opportunity Commission shall ensure that—

"(1) the category of religion shall be withdrawn from the proposed guidelines at this time;

"(2) any new guidelines for the determination of religious harassment shall be drafted so as to make explicitly clear that symbols or expressions of religious belief consistent with the first amendment and the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.] are not to be restricted and do not constitute proof of harassment;

"(3) the Commission shall hold public hearings on such new proposed guidelines; and

"(4) the Commission shall receive additional public comment before issuing similar new regulations."

§2000e–13. Application to personnel of Commission of sections 111 and 1114 of title 18; punishment for violation of section 1114 of title 18

The provisions of sections 111 and 1114, title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

(Pub. L. 88–352, title VII, §714, July 2, 1964, 78 Stat. 265; Pub. L. 92–261, §8(g), Mar. 24, 1972, 86 Stat. 110.)

Chairman WALBERG. Hearing no objection, it will be entered.

Mr. SCOTT. Thank you.

Ms. House, can you remind us why the Griggs decision was so important?

Ms. HOUSE. With regard to Title 7's application?

Mr. SCOTT. Right. If you didn't have the disparate impact—if you had a discrete person with ill intent, what would happen if you didn't have Griggs?

Ms. HOUSE. Well, if we weren't able to have—without Griggs we would not be able to sufficiently provide the necessary evidence and showcase the discrimination that has been occurring across this country unintentionally, but effectively, particularly against communities of color, against those who have traditionally been discriminated against, those women as well as people with disabilities. That is a critical component within civil rights law that I think is effectively utilized within civil—you know, across the civil rights community.

Mr. SCOTT. Now, if you had a disparate impact but it was job-related, would Griggs prohibit the consideration of a job-related criteria, although it had a disparate impact?

Ms. HOUSE. No, it would not.

Mr. SCOTT. It would not? Does federal law guidance—does EEOC guidance require employees—employers to hire those with criminal records in violation of state law?

Ms. HOUSE. No, it does not.

Mr. SCOTT. How does Ban the Box fit into this discussion?

Ms. HOUSE. Well, Ban the Box is an attempt to eliminate the blanket elimination of those that have a criminal history. There are those employers that summarily dismiss those with a criminal history, even potentially an arrest record, from even applying for any type of job within that sector or with that employer. And Ban the Box eliminates that exclusion—that blanket exclusion—and it is something that I know the Lawyers' Committee, the entire civil rights community has been very supportive of, and we have been working with other companies and other organizations to eliminate that blanket exclusion.

Mr. SCOTT. Does the Banning the Box prohibit consideration of criminal records?

Ms. HOUSE. No, it does not. In fact, what it does, it eliminates a blanket exclusion; it does not prohibit an employer from having an individualized assessment of those that might have a criminal record.

In fact, it just allows for there to be an equitable consideration of an employee as they are attempting to apply for a job and allow them the opportunity to provide the necessary review that they deserve, should this—if their criminal history does become an issue within their employment.

Mr. SCOTT. Now, is the guidance consistent with or in violation of the Griggs principle?

Ms. HOUSE. No, it is not. In fact, it specifically creates and allows for there to be—an employer to provide a business necessity, should they have a particular exclusion of those that have certain criminal histories.

I think that there has been a use of—you know, the continued use of hyperbole when we talk about those that have a background of sexual assault, and they being allowed to work in day care or child care environments. That would not be allowable nor acceptable under the current guidance that has been issued by the EEOC, and in fact, it is not something that would be permissible and that any of the civil rights community would allow.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Continuing that bit of questioning, I recognize myself for my five minutes of questioning.

Professor Heriot, I appreciated your testimony and the real-life examples that I would never have thought of—of hiring a necrophiliac for a job in a morgue. I guess we do have to consider what our laws do and what guidelines are in place.

In your testimony you said EEOC's 2012 enforcement guidance on criminal background checks is vague and uncertain as to an employer's duty. The employer will have no way of knowing whether EEOC will agree with its judgment in using background checks.

You also note that—recent background check cases in which EEOC lost and was harshly criticized by the courts. Is the EEOC's enforcement guidance going to be of any help to the general counsel or regional attorneys pursuing cases brought against employers for using background checks?

Ms. HERIOT. Yes, I get your drift. If it is so easy for employers to understand when an employer can be legally liable for failing to hire an applicant on account of a criminal record then why does the EEOC itself get it wrong so often?

There have actually been a number of cases where the EEOC has brought actions and they have been slapped down by the courts.

Chairman WALBERG. Any specifics you can give of that for example?

Ms. HERIOT. The two cases that come to mind for me, because they have both been in the U.S. Court of Appeals, are the *Freeman* case and *Peoplemark*. In both those cases the EEOC brought an action against an employer based on their criminal background checks policy, and in both cases both the district court and the court of appeals slapped the EEOC down pretty hard.

And if the EEOC itself is having a difficult time figuring out what constitutes a good case, then how are employers supposed to get that right?

In addition, the EEOC has been conducting investigations against companies that you would think would have a pretty strong case, like G4S, which testified in front of the U.S. Commission on Civil Rights—one of their officers did. And they are a company that hires security guards. I mean, that is their business—they supply security guards to other companies.

That is a job where you would think that the argument that they should be able to consider criminal background was very strong. But the EEOC did not agree and has—had conducted a very, very long investigation of that company.

Chairman WALBERG. Okay. Thank you.

Mr. Kehoe, in a number of cases in recent years the EEOC has been sanctioned in order to pay defendant's attorney's fees and

costs pursuing claims that are frivolous, groundless, and without merit. In other cases, the agency has lost on summary judgment, has been severely criticized by the courts.

From your position, having consulted with an EEOC Commissioner, should Congress be concerned about these outcomes or do you consider them to be the normal course of business in an agency authorized to enforce federal laws and litigation?

Mr. KEHOE. Chairman WALBERG, thank you for that question.

Of course Congress should be concerned. Congress has given a budget of $360 million to the EEOC to go eradicate discrimination, and on many of its large cases the EEOC is, to put it in Monopoly words, failing to get past go because they can't even establish a prima facie case of discrimination.

The EEOC has immense subpoena power to get this information before filing any sort of litigation, and while no one would expect the EEOC to bat 1,000 on all of its cases, the troubling trend—and, you know, if it were only one or two cases then maybe Congress should be less concerned, but there are dozens of cases where the EEOC has been sanctioned and had their cases thrown out of court——

Chairman WALBERG. Would the Commissioners' involvement in overseeing some of these cases and looking into them beforehand—before moving forward be helpful for the general counsel?

Mr. KEHOE. Having Commissioner review adds another layer of oversight—a layer of oversight to the regional attorneys who want to bring the case, a layer of oversight to the general counsel who signs all the filings. It absolutely has the potential to ensure that better cases are being brought.

The review period for Commissioners allows Commissioners to ask questions. The issue is on many cases that are filed by the EEOC, the Commissioners find out by press release or social media. They are not even involved.

And I think the issue of when making policy through litigation comes up, at the end of the day the general counsel is not the agency's policymaker; he is just the litigator—any general counsel.

Chairman WALBERG. Thank you.

My time is expired.

I now recognize the ranking member of this subcommittee, Ms. Wilson, the gentlelady from Florida.

Ms. WILSON. Thank you, Mr. Chair.

And thank you, to the Committee. I enjoyed listening to your testimony.

I have a question first for Ms. Clay House. This year is the 50th anniversary of the EEOC opening its doors. Now, these are three questions.

Do you believe that the EEOC's mission is as relevant today as it was 50 years ago? What do you believe are the most pressing and emerging forms of discrimination that merits the EEOC's attention? And could you please share your views on some of the challenges that face the EEOC?

Ms. HOUSE. Thank you for those—that three-part question.

You are right, it is 50 years since the opening of the doors of the EEOC. And though we may not face some of the blatant discriminatory policies that existed when the EEOC was originally found-

ed, we still face enormous discrimination within the employment. And if that was not the case, we would not have upwards of 90,000 to 100,000 claims that have been—that are continually submitted to the EEOC—complaints of discrimination.

I think that some of the most pressing issues that we are facing today are with regard to what we have spoken about already—the criminal and credit history checks. I think that is particularly important because we are right now dealing with an economy that has—had been failing but is on the upward swing.

However, as a result of that failure, we have millions of people who have had their credit history affected; we have those that have criminal background checks; we have one in four African-American men that are—have been in prison or are in prison at this point in time, and therefore have criminal background history.

And if we are summarily eliminating—prohibiting—all of those individuals that have bad credit or a prior conviction from the employment sector, we are eliminating millions of people from the work—from the economy. And that is not good for anyone, and I would hope that that is not something that any of these—any of the members of Congress here would advocate here today.

With regard to the challenges, I think that we need to look at a number of issues, particularly the hiring practice, as I said, of employers right now. We need to consider the pay disparities that exist—continue to exist between men and women, as well as people with disabilities.

And I think that we need to consider and look at the implicit bias that continues to exist, particularly when you are talking about the same and similarly situated resumes that are submitted to employers, yet with a different name—one that might be more ethnically diverse. And you have instances where that resume with a more ethnically diverse name would be eliminated or excluded. And that type of implicit bias is very—has been prevalent, as we are seeing, not only in the employment sector but other sectors, as well.

Ms. WILSON. Thank you.

This question is for Ms. Heriot.

Ms. Heriot, I have a long background in helping African-American boys and men achieve their status in life, and there is a real problem with the school-to-prison pipeline. So my concern has to do that in 100 cities and counties and 14 states they have adopted the Ban the Box policies because they realize that our criminal justice system is biased and that the people of color are disproportionately institutionalized and arrested and harassed.

So I want to ask you, if cities and counties are trying to ban the box, why do you think the EEOC is overreaching?

Ms. HERIOT. Well, I think that employers, like cities and counties, should have the option to ban the box, and that is perfectly acceptable. And many employers would ban the box, as well—many private employers.

I think the federal tax deduction that allows employers to make the choice to hire someone who they know is an ex-offender is an excellent program. But the notion that the private employers should be coerced in this way I think is a big mistake.

There are many jobs for which it makes perfect sense for an employer to decide this is not, you know, a situation where I want to take a chance on an ex-offender. And nobody is in a better position to make that decision than the employer itself.

If the EEOC is in a position to second guess them, then what is going to happen is that employers will bend over backwards to avoid the possibility that they will be brought into an EEOC lawsuit. And when that happens, you know, tragedies are going to ensue.

It is not always appropriate to hire an ex-offender in a job. Jobs that involve visits to private citizens' homes; jobs involving, say, nursing homes; schools—that is not a good place to put an ex-offender in every case.

There are exceptions. But the best person to make the judgment about when that exception has come up is not the EEOC, but rather, the employer, because the employer knows the job and the employer often knows something about the ex-offender that the EEOC does not know. It is not always possible to govern these things inside the beltway, as it were.

Chairman WALBERG. Thank you.

The gentlelady's time has expired.

I now recognize the gentleman from Virginia, Mr. Brat.

Mr. BRAT. Thank you, to all that are with us today, for your testimony.

I taught economic justice for the last 18 years at Randolph-Macon College and so I think it is the intent of everyone here, and the—sometimes the partisan hyperbole goes a little overboard, but I think everyone here is in favor of justice for everybody and equal treatment under the law for everybody. And so I applaud all of you for your statements. I think it just comes down to kind of common sense and where the pendulum is.

And so I think you have all done an outstanding job today, of showing us that it looks like the—previous comments just offered up—the EEOC is overreaching in some cases, or the employer is the better judge of what should be taking place. And at the same time, we don't—our justice system allows for individuals under law to contest that.

And so I don't have much more to add beyond what our panelists today have offered up.

Thank you very much for being with us.

I yield back, Mr. Chairman—my time back to the Chairman, yes.

Chairman WALBERG. Thank you. Thank you for yielding your time. It is always good to get time from a professor.

And I appreciate that because I have a couple more questions I would like to try to get in here.

Mr. Kehoe, the Supreme Court has granted review in *Mach Mining* v. *EEOC* to decide whether the agency's statutory duty to conciliate must be performed in good faith and is subject to judicial review. Why is it important, from your perspective and your placement with EEOC before this, for courts to be able to review EEOC's conciliation efforts?

Mr. KEHOE. Thank you for that question.

I think the most important reason for courts to be able to review whether the EEOC complies with its statutory mandate is because

it is a statutory mandate. Title 7 requires the EEOC to conciliate because the goal of the employment discrimination laws is to reach a settlement prior to actually filing litigation.

For 40 years courts have reviewed whether or not the EEOC has complied with its conciliation requirements. Congress, in the 1972 amendments to Title 7, considered whether to exempt the EEOC's conciliation requirements from judicial review.

They reviewed a bill; they didn't enact that bill. So it is pretty clear that congressional intent requires the EEOC to conciliate in good faith, because here is the situation——

Chairman WALBERG. Have they consistently abused that process of conciliation?

Mr. KEHOE. Well, there have been several cases that have been thrown out of court for failure to conciliate. The biggest one is *EEOC* v. *CRST*.

The court had awarded $4.7 million in damages, and though that award has been remanded by the 8th Circuit back to the trial court, at the end of the day, in *CRST* the EEOC spent 10 years investigating and litigating, brought a huge class case for 154 women who were allegedly sexually harassed, and they settled the case after just about 10 years for $50,000 after 153 women who claimed they were sexually harassed were left out in the cold because the EEOC didn't follow the rules.

Chairman WALBERG. Let me move on to another case. In the *U.S. Steel* case, EEOC alleged that random drug and alcohol testing, as agreed to in the collective bargaining agreement entered into by U.S. Steel and the Steelworkers Union, violated the *Americans with Disabilities Act*.

The policy applied to very dangerous jobs where following safety rules were critically important. I worked for U.S. Steel on some of those same dangerous jobs myself as a U.S. Steel—Steelworkers Union member.

Predictably, the court held the policy was job-related and consistent with business necessity, dismissing the case on summary judgment.

Clearly this was not a good case either. Why would EEOC bring such a case, and what does it say about the EEOC and how it decides to file lawsuits?

Mr. KEHOE. Well, I think specifically with *U.S. Steel*, the first point of order would be that was one of those cases where a good amount of Commissioners found out about the case via a press release. That case was brought essentially—the policy that U.S. Steel had implemented essentially said: for probationary employees, you can't show up to work drunk at the steel mill.

And the EEOC decided that that was a violation of the ADA to do random alcohol testing. Now, it would stand to reason that any sort of safety policy that requires people in steel mills to show up to work sober would clearly be job-related.

Chairman WALBERG. My time is expired, and I think that punctuates it.

I now recognize the gentleman from Wisconsin, Mr. Pocan.

Mr. POCAN. Thank you, Mr. Chairman.

And thank you, to the witnesses.

I am going to comment, and I got the feeling I am going to be doing this every subcommittee. We did a good job of lawyering up again; we have got a lot of lawyers on the panel. It would be nice maybe to have some of the small business owners who are affected.

We are going to have to change the name of the committee pretty soon to Education and Workforce via the Judicial System at the rate we are going. But we do have a lot of lawyers——

Chairman WALBERG. I would just for the record say the business owners are afraid of being sued so they send their attorneys.

Mr. POCAN. Yes, but that is sometimes why we get the creative answers that we get, and sometimes I would much rather have things—coming from—being a small business owner for 28 years and not being a lawyer, I guess maybe that is the realm I deal with. And since it is going to affect the business, I would like to have it from that.

Let me ask Ms. Heriot just a quick question.

Do you view the EEOC's arrest and conviction guidance as a radical departure in enforcement?

Ms. HERIOT. Back a few years ago—quite a few years ago, during—mostly during the Carter administration, this was kind of a hot issue, what to do about criminal background checks and such. And there were a few cases a little bit before that, as well. And it was very hot at the time.

And then the EEOC started backing away from the policies at that point. For example, the policy that someone mentioned today about—that involved Clarence Thomas was actually moving back—cutting back on the policy, not putting it forward.

So there is a history. But the April 2012 guidance goes much further in several ways. It basically returns that issue—to that issue with kind of a vengeance, I would say.

First of all, it states that even if there is a state or local law that requires a background check and requires that employers refuse to hire——

Mr. POCAN. If I can reclaim my time—and this is the problem I have. No offense. I know you are a law professor but, you know, the answer was—usually falls in the yes or no sort of realm——

Ms. HERIOT. But it can't. I mean, the answers don't really do that. That is why I came here.

But at any rate, it does——

Mr. Pocan. I reclaimed my time. I am sorry, ma'am. Please let me finish.

So what I was trying to ask you, and which you did your best to dance around, was that this is the policy in place since I believe it is 1987 when then Commissioner—and you mentioned Clarence Thomas was there, so——

Ms. HERIOT. No.

Mr. POCAN. Well, it is. It is exactly what it is.

So let me do this. Let me ask the question—in Madison, Wisconsin we recently had a shooting of a young African-American male, 19. Brought up a lot of issues around—we have eight times the arrest record of African-American males in Madison area, twice the state incarceration of African-American males.

Clearly this affects employment. I recently went to the job center in Dayton County and we met with people who are chronically em-

ployed; 70 to 75 percent of the people who we met with had a felony on their record.

That is the real problem. You can have all the legal talk—and by the way, you do get the point for the most creative answer of saying jobs will be exported overseas because of this. It is going in my little board back in the office, because that was beyond amazing on creativity.

But the bottom line is this affects real people.

And so let me go to Ms. House specifically. You know, I know that you like to talk anecdotally through legal cases when we know 93 percent of the cases EEOC brings to—in federal court is successful, and 82 percent of those that are systemic cases are successful, so this little anecdote—governing by anecdote is always very dangerous.

You brought up a study—a very specific study that said 850,000 to a million people in this study who had arrest record. Of that 70 million people 1 percent got hired, versus 30 percent in the other pool. Can you just talk a little bit more about that, because that is specific and relatable, rather than anecdotal? And if you can do it in a succinct, non-lawyerish answer, I would really appreciate it.

Ms. HOUSE. Sure. Absolutely.

That is actually an ongoing case that the Lawyers' Committee is in litigation with. And that is a case against the U.S. Census Bureau.

And the reason that we—I mentioned this is because, well, as you said, it is not anecdotal. This is reality. We are talking about almost a million people that were summarily excluded from even being census workers even though they—most of them had previously been census workers.

And so, as you properly indicated, we are talking about, you know, one—most of those being excluded and being sent to a secondary review, and so therefore, not included in the initial application for the Census Bureau. And I think that that is extremely important to recognize.

We are in ongoing litigation so I can't get into more specifics regarding the negotiations and what that will entail, but I do think it is particularly relevant.

Mr. POCAN. I can see the yellow light up, Mr. Chairman. I will be cognizant of that.

But, you know, specifically I think in the testimony that Ms. Heriot brought up she talked about, you know, the problem in Virginia, I think in nursing homes. Yet EEOC didn't file any cases against nursing homes for using criminal background checks as a basis of employment in Virginia.

So again, I think what we are finding is often certain people are using anecdotes and hyperbole when the reality that I am seeing, at least back home in Wisconsin, is that when we have got 70 to 75 percent of the people who are chronically employed specifically with a felony—and I have done this for 28 years. I am a small business owner. I know it is——

Ms. HERIOT. Employers can wait until they are sued by the EEOC. They have got to——

Chairman WALBERG. The gentleman's time is expired. We will move on with the next questioning.

And I recognize now the gentlelady from North Carolina, Ms. Adams.

Ms. ADAMS. Thank you, Mr. Chair.

And thank you all for your testimony.

Ms. House, during your testimony on the *Certainty in Enforcement Act* you mentioned that 70 million Americans would automatically be excluded from the employment sector because of criminal background searches, with the greatest impact being felt in the African-American community. According to the Crime and Delinquency Journal, by age 23, 49 percent of black males and 44 percent of Hispanic males have been arrested.

Can you speak to the effect that this legislation would have on already high employment rate for African-Americans and Hispanics and how it in turn would affect their respective communities?

Ms. HOUSE. Sure. As I indicated previously, it would exclude a great proportion and disproportionately impact, as you indicated, African-Americans, communities of color, particularly Hispanics and other traditionally disenfranchised.

And I think that what you are talking about is you are disenfranchising people throughout their careers. So essentially, because of a arrest—it could be an arrest, because I will say for the record that many of the databases that we are—that employers are reviewing are including arrests. So you may not have ultimately been convicted.

And so therefore, you do have, as a result of these past arrests or convictions that could have happened upwards of 10 to 15 years ago, that people are no longer able to obtain good employment, that ultimately affects their entire family—not only just them, but throughout their livelihood.

Ms. ADAMS. Okay. So what, then, would be the impact on the already high employment rate for African-Americans and Hispanic——

Ms. HOUSE. It increases. I mean, you—the unemployment rate continues to increase. It does not go down despite any potential job creation programs that this administration or other would employ, because employers are automatically excluding those that actually—that have an arrest or a conviction record.

Ms. ADAMS. Okay. Can you touch for a moment on the overcriminalization of people of color in the U.S. and how this bill would exacerbate that?

Ms. HOUSE. Well, I think that this bill, as I—it codifies the stereotype that those that have a prior arrest record or conviction are therefore unemployable and not fit to engage in the American dream and provide for their families. It is a stereotype; it is a bias.

And I—I have heard that. We continue to hear that throughout many of those who oppose the guidance.

But I will say that there are a variety of research material that indicates that, in fact, those that have prior convictions or arrest records over 10 years are no more likely to commit another crime than someone of that same age without a previous arrest or a conviction record.

Ms. ADAMS. Okay. People of color more often than not have poor credit because of past forms of discrimination and limit education or employment, borrowing, and housing opportunities. This is espe-

cially alarming in the African-American community, where only 25 percent of households have a credit score of about 700.

So how can the use of someone's credit score—credit history perpetuate extended unemployment and poverty?

Ms. HOUSE. Sure. Currently, because we are still awaiting further guidance on how employers will properly—or how they should properly utilize credit history checks, what it does—what is happening right now is that, similar to criminal background checks, employers are using credit checks without properly understanding exactly what is the rationale for people's bad history. They are using that as a similar type of exclusionary policy to be employed with certain positions.

So, for example, someone's credit could be detrimentally affected by a medical procedure or by—as a result of prior inability to pay for hospital bills after they were sick or their family member was sick. However, that, because it does detrimentally affect their credit, they are therefore excluded from potentially additional employment, say, within a bank because they have bad credit. And there is no individualized assessment given to them with regard to whether or not this is, in fact, a related or a proper use of a credit history check.

Ms. ADAMS. Thank you.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentlelady.

Now I recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman.

And like my friend from Wisconsin, I struggle with being a small—former small business owner who was going to go to law school and chose not to and continued to follow that choice. And I appreciate the Chairman's comments as well, as being a small employer who worried about lawyering up.

So my questions are about an issue that I spent a good deal of time on in the California legislature and with a constituent who was a longtime chairman of Safeway and tried to do employee wellness programs, but he did that through the meet and confer process for all of his non-management folks. So while I believe that there is evidence that obviously wellness programs are good for everybody, they help to control costs.

But I also believe, as a former employer, that sometimes—to sort of borrow what Professor Heriot said—that although you can't mandate from the beltway, sometimes—oftentimes managing people you try to do it collaboratively and—rather than force them to do things.

So the question is to Ms. House to begin with. The *Genetic Information Nondiscrimination Act* made sure that wellness programs and that information were given up voluntarily. The *Preserving Employee Wellness Programs Act* that Congress currently is considering overrides the GINA provision that requires that participation in wellness programs are voluntary.

So much of this is being defined in the court system right now. Is that not true, in——

Ms. HOUSE. I am sorry. I couldn't hear that last——

Mr. DESAULNIER. In terms of the decision of whether it is voluntary to ask for these—this information or not, there are court

cases, are there not, right now, that may or may not help us determine that?

Ms. HOUSE. Yes. There is ongoing litigation. I don't have at my disposal all of that case law to present to you. I can provide that for you after this hearing is finished.

But yes, I mean, there continues to be ongoing litigation, and I think that we need to—that is something that continually needs to be assessed, but the primary focus should be voluntary——

Mr. DESAULNIER. Right.

Ms. HOUSE [continuing]. That this is not something that should be forced upon an employee and that ultimately create a situation where they are providing unnecessary information that would detrimentally affect their ability to obtain proper insurance.

Mr. DESAULNIER. And it is my understanding that the research so far, although it is not conclusive, is that these decisions are best made between an individual and their doctor. Is that not true?

Ms. HOUSE. I would submit that, yes, but I will say that I am not as well versed on some of the documentation with regard to the wellness programs so I don't want to give you misinformation. But yes, I mean, that is reasonable, yes.

Mr. DESAULNIER. Anyone else care to comment on the panel—anyone with more expertise or a different opinion?

Ms. SIMON. Well, actually, if you don't mind, I wouldn't mind commenting a little bit on your question about voluntariness.

Mr. DESAULNIER. Yes.

Ms. SIMON. You know, I think that we understand the term "voluntary," as used, certainly, in the medical examination and disability inquiry provisions. I think that the first question to ask is, does the provision, under the ADA and also when we are talking about GINA, allow voluntary to first have a dollar figure attached to it, which seems to be one of the first issues that we hear about in the employer community.

And the answer to that question was actually answered in GINA guidance, where the EEOC shows how an HRA can legally ask about health conditions and offer a $150 incentive so long as the questions related to family medical history aren't required to be answered to receive the financial inducement. The quote is: "We have concluded that covered entities may offer certain kinds of financial inducement to encourage participation in health services under certain circumstances."

So first, with respect to voluntariness, we know that a financial incentive would probably be okay. So then the next question is, how much?

Mr. DESAULNIER. Excuse me.

Ms. SIMON. Yes.

Mr. DESAULNIER. That is under existing law.

Ms. SIMON. Yes. Yes. And I can give you citations for the record if you would like.

So the next question is, how much of a financial incentive would be okay for the incentive to be considered voluntary, because clearly the $150 figure was just illustrative. And to that we can again turn to other agencies and your congressional intent and point to the 30 and 50 percent rule under HIPAA.

Even though the HIPAA rule doesn't actually use the word——

Mr. DESAULNIER. I am going to jump in here and stop you before the red light goes on.

So my comment would be that all of that is consistent with the current law, so——

Ms. SIMON. That is absolutely correct.

Mr. DESAULNIER [continuing]. I would just conclude is, what is the necessity of the new proposal to change that?

Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And I thank the witnesses for your attention to our questions and responses.

And before we go to closing comments, for the record I would like to submit a number of letters that were supplied to us on this issue expressing their concerns, their ideas, from business groups, child care groups, et cetera, that would be good to have in our record.

[The information follows:]

The ERISA Industry Committee

Annette Guarisco Fildes
President & CEO

March 13, 2015

Representative Tim Walberg
House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Walberg,

On behalf of the ERISA Industry Committee (ERIC), thank you for being an original co-sponsor of HR 1189, the "Preserving Employee Wellness Programs Act". ERIC is the only national trade association dedicated exclusively to advocating on behalf of the health and retirement policy issues of concern to the country's largest employers.

ERIC applauds you for your role in advancing this legislation, as it would provide legal certainty and eliminate confusion caused by the Equal Employment Opportunity Commission (EEOC) for employers offering wellness programs to their employees. This issue is significant for ERIC members as their wellness plans are part of the comprehensive health benefits they provide to millions of active and retired employees and their families. ERIC has a strong interest in proposals that affect its members' ability to deliver high-quality, cost-effective benefits.

Over time, it has become more and more difficult for ERIC members to continue to deliver these benefits due to spiraling costs. In addition, the expense and administrative complexity of implementing the numerous – and exceedingly complicated – rules of the Affordable Care Act (ACA) have made this task even more challenging. Now large companies with mainstream employer-based wellness programs also face the possibility of threatening legal action from the EEOC, which has created significant roadblocks to even those wellness programs that fully comply with the ACA.

In the face of these new threats, we are especially appreciative of your efforts to eliminate the impediments caused by the EEOC and to ensure that the wellness regulatory environment offers employers the flexibility they need to continue their positive achievements in this regard.

Sincerely,

Annette Guarisco Fildes

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President and CEO

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March 22, 2015

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 2015* (H.R. 548).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 approximately1,500 community-based centers and employer partnerships, and before- and after-school academic enrichment programs and summer camps through more than 400 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 last year, the Congress passed and the President signed into law the *Child Care and Development Block Grant Act of 2014* (P.L. 113-186) which requires 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 2015* (H.R. 548) would provide a needed safe harbor and legal

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,

Celia Hartman Sims
Vice President, Government Relations

March 23, 2015

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

The Honorable Frederica S. Wilson
Ranking Member
Subcomittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing to express our strong support for *The Preserving Employee Wellness Programs Act* (H.R. 1189), which would ensure that employers can continue to administer wellness programs for their employees without fear of undue government interference or litigation.

ABC members know exceptional jobsite safety and health practices are inherently good for business. For the last several years, ABC members have embraced innovative approaches that encourage preventive health care, improve employee health outcomes, and reduce overall health care costs and premiums. These important benefits are increasingly valued by both employers and their employees.

Wellness programs offered by ABC members, such as health risk assessment, weight loss, exercise regimen and gym enrollment, are a critical component of an employee's overall benefit package. Such efforts have contributed to employees making healthier lifestyle choices, improving individual participant health, and lower health care costs.

Although successful wellness programs are a "win-win" for both the employer and their employees, they are currently under attack by the Equal Employment Opportunity Commission (EEOC). Within the last several months, the EEOC has filed lawsuits against some employers claiming their wellness programs may not be lawful. The EEOC argues such plans violate the Americans with Disabilities Act (ADA) and/or the Genetic Information Nondiscrimination Act (GINA), even though they are in full compliance with provisions of the Affordable Care Act (ACA).

The EEOC's actions have caused widespread concern among employers that their proactive and innovative measures to change an employee's behavior and quality of life are now at risk. ABC strongly supports H.R. 1189 because it provides clarity to employers that wellness programs in compliance with the ACA will not violate ADA or GINA, and they can continue to encourage and promote healthier lifestyle choices among their employees.

ABC members are committed to the health and wellbeing of their employees and their families, and they should have the right to continue to put in place programs that contribute to lower health care costs while promoting a healthier workforce. ABC commends the Subcommittee for its attention to this important issue and urges the immediate passage of H.R. 1189.

Sincerely,

Geoffrey Burr
Vice President, Government Affairs

EARLY CARE AND EDUCATION CONSORTIUM

Early Care and Education Consortium

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

March 23, 2015

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:

As the House Education and Workforce Committee prepares to consider H.R. 548, The Early Care and Education Consortium (ECEC) wishes to voice its 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 the Child Care and Development Block Grant (CCDBG).

Congress recently reauthorized CCDBG through the Child Care and Development Block Grant Act of 2014 (P,L. 113-186).. The new law 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 CCDBG reauthorization language includes key policy reforms that strengthen the program's quality and accountability. ECEC supports H.R.548'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

IPMA-HR
INTERNATIONAL PUBLIC MANAGEMENT
ASSOCIATION for HUMAN RESOURCES

March 23, 2015

The Honorable Tim Walberg
Chairman
House Subcommittee on Workforce Protections
2175 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frederica Wilson
Ranking Member
House Subcommittee on Workforce Protections
2175 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson,

The International Public Management Association for Human Resources (IPMA-HR) is writing to express our support for the Certainty in Enforcement Act of 2015 (H.R. 548). Recent Equal Employment Opportunity Commission (EEOC) actions have made it difficult for state and local government employers to conduct criminal or credit checks, even when they are required to do so by state and local government law. Criminal and credit checks help state and local government employers ensure that public servants, who ensure public safety and often serve vulnerable individuals, are reliable and trustworthy.

IPMA-HR has over 8,000 members who are human resource departments and human resource professionals at the federal, state and local levels of government. IPMA-HR The association is committed to enhancing public sector performance by providing human resource leadership, advocacy, professional development, and a community of HR professionals for the sharing of resources and ideas.

While we fully support equal employment opportunity and strongly oppose unlawful discrimination, under the EEOC's current guidance, state and local government employers are subject to potentially conflicting laws and regulations. This bill provides a safe harbor for employers who are following state and local laws requiring criminal or credit checks from being challenged by the EEOC for discriminatory hiring practices. Fair and appropriate use of criminal or credit checks is an important tool employers have to protect themselves and their workers, citizens, and assets. Thank you again for your work on this important issue.

Sincerely,

Neil Reichenberg
Executive Director

1617 Duke Street
Alexandria, VA 22314
703-549-7100
703-684-0948 (fax)
www.ipma-hr.org

March 24, 2015

Dear Chairman Walberg, Ranking Member Wilson 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. 550), the Litigation Oversight Act of 2015 (H.R. 549), and the Certainty in Enforcement Act of 2015 (H.R. 548). 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.[2]

H.R. 548, H.R. 549 and H.R. 550 will help ensure the EEOC better directs its resources towards its mission of ending unlawful discrimination. H.R. 550 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. 548 protects employers that are engaging in employment practices required by Federal, state, or local laws from EEOC prosecution.[3] H.R. 549 will require the Commission to vote on whether or not the EEOC will commence or intervene in litigation involving multiple plaintiffs or where the agency

[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] Id.; *see also* EEOC V. Freeman (U.S. Court of Appeals for the Fourth Circuit, February 20, 2015), which can be found at http://www.ca4.uscourts.gov/Opinions/Published/132365.P.pdf.

[3] 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.

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. 548, H.R. 549 and H.R. 550. Thank you for your consideration of this important issue, and we look forward to working with you.

Sincerely,

American Hotel & Lodging Association

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

International Franchise Association

International Public Management Association for Human Resources

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 Public Employer Labor Relations Association

National Restaurant Association

National Retail Federation

Retail Industry Leaders Association

Society for Human Resource Management

U.S. Chamber of Commerce

March 24, 2015

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

On behalf of the undersigned organizations, which represent millions of employers who employ tens of millions of employees, we write to express our support for H.R. 1189, the Preserving Employee Wellness Programs Act, and to thank you for holding a hearing on this important legislation. H.R. 1189 will provide much needed clarification over the legality of voluntary workplace wellness programs and employers' use of financial incentives to encourage participation in such programs. The undersigned organizations strongly support these voluntary programs and are concerned that the Equal Employment Opportunity Commission's (EEOC) current guidance and enforcement positions creates legal uncertainty that will inevitably chill use of wellness programs.

Wellness programs are an essential tool for encouraging healthy lifestyles, improving health outcomes for U.S. workers and their families and lowering overall U.S. healthcare costs. Employers throughout the country have embraced these programs, with 46% of all large employers planning to offer them in 2015. Moreover, existing law, including the Affordable Care Act (ACA), encourages use of these programs, and a bipartisan provision in the ACA specifically permits the use of reasonable financial incentives to encourage employee participation.

Yet despite the endorsement of wellness programs in the ACA, EEOC has recently sued employers for offering programs, claiming key aspects of the programs violate the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). By doing so, the Commission has put at risk these programs, which are critical tools for improving health for millions of Americans.

The Preserving Employee Wellness Programs Act will help eliminate this confusion by reaffirming existing law. The undersigned organizations and associations once again thank you for holding a hearing on this bill. We urge Congress to pass this legislation and put in place effective safeguards to protect proven wellness programs. We look forward to working with you and Congress on this important issue.

Sincerely,

Associated Builders and Contractors

Associated General Contractors

College and University Professional Association for Human Resources

HR Policy Association

Independent Electrical Contractors

International Foodservice Distributors Association

International Franchise Association

International Public Management Association for Human Resources

National Association of Manufacturers

National Association of Wholesaler-Distributors

National Council of Chain Restaurants

National Federation of Independent Business

National Grocers Association

National Public Employer Labor Relations Association

National Restaurant Association

National Retail Federation

Retail Industry Leaders Association

Society for Human Resource Management

U.S. Chamber of Commerce

WorldatWork
The Total Rewards Association

March 26, 2015

The Honorable John Kline
Chairman, House Committee on Education and the Workforce
2439 Rayburn House Office Building
Washington, DC 20515

The Honorable Tim Walberg
Chairman, Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515

The Honorable David P. Roe
Chairman, Subcommittee on Health, Employment, Labor and Pensions
407 Cannon House Office Building
Washington, DC 20515

Re: H.R. 1189—Preserving Employee Wellness Programs Act

Dear Chairmen Kline, Roe and Walberg:

WorldatWork, a nonprofit human resources association for professionals and organizations focused on compensation, benefits and totals rewards, is writing today in support of H.R. 1189—Preserving Employee Wellness Programs Act.

The proposed legislation addresses the need to clarify federal law allowing workplace wellness programs. WorldatWork has long supported the use of wellness programs in the workplace and is optimistic that this legislation will further the expansion of these programs into more companies and benefit their employee's health and well-being.

A growing number of employers are incorporating wellness programs into their company's healthcare benefit. A September 2014 survey by the Henry J Kaiser Family Foundation found that 18% of employers today are using outcome-based wellness incentives for their workforce. The same survey found that 48% of employers plan to add a program by 2017. WorldatWork's own March 2015 wellness practices survey found 82% of employers offered these programs to improve employee health, and 78% also found them useful to decrease medical premiums and claim costs.

WorldatWork applauds your leadership for this commonsense reform and looks forward to working with you and members of the House Education and Workforce Committee on this bill, as well as future legislation.

Sincerely,

Cara W. Welch

Cara Woodson Welch, Esq.
Vice President, External Affairs & Practice Leadership

CC: Speaker John Boehner
Minority Leader Nancy Pelosi
Members of the House Committee on Education and the Workforce

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April 6, 2015

VIA FIRST-CLASS MAIL

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

Re: Supplemental Testimony Submitted for March 24, 2015 Hearing on H.R. 548, the Certainty in Enforcement Act of 2015; H.R. 549, the Litigation Oversight Act of 2015; H.R. 550, the Transparency and Accountability Act; and H.R. 1189, the Preserving Employee Wellness Programs Act

Dear Chairman Walberg:

Thank you again for inviting me to testify on behalf of the U.S. Chamber of Commerce on March 24, 2015. I write to correct some of the oral and written comments made by other witnesses at the hearing which misstated the legal effects of the bills under consideration. While legislation is always open to interpretation, I believe certain descriptions of the bills were simply wrong as a matter of law. I hope that this supplemental testimony will help you to clarify the true legal effect of some of the bills that were subjects of the hearing.

I. H.R. 548, the Certainty in Enforcement Act of 2015

In her written testimony, witness Tanya Clay House describes the legal effect of H.R. 548, the Certainty in Enforcement Act of 2015, as the following:

> H.R. 548 would automatically exclude from the employment sector, these 70 million Americans with arrest records by declaring a federal policy that it is "job-related" for an employer to exclude anyone from employment simply because of an arrest by a law enforcement officer who may have taken the person into custody based on a total misunderstanding (in good faith) of what had actually taken place.

This characterization of H.R. 548 is simply incorrect. Rather than the broad sweeping impact described above, H.R. 548 is in reality a very narrow bill that would only apply in a limited set of circumstances.

As described in my written testimony, H.R. 548 merely addresses a flaw in the EEOC's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 ("Guidance"): a distinct lack of guidance for employers who must comply with certain state laws that limit employers' abilities to hire certain individuals for certain jobs. For instance, a state might have a law prohibiting an individual who has been convicted of a violent or theft-related crime from working at an assisted living facility. Yet, the EEOC's Guidance states 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." This ambiguity in the Guidance raises the distinct possibility that an employer could face a discrimination lawsuit simply for excluding an individual for employment as instructed to do so by state law.

In such situations, employers are faced with a dilemma: do they follow EEOC Guidance and violate state law (and subject themselves to negligent hiring liability), or do they follow the state law and risk being sued by EEOC? This very specific question is addressed by H.R. 548, which simply states that if, in order to comply with a state law, an employer uses criminal background information while making a hiring decision, he or she will not be liable under a disparate impact theory of discrimination (however, the bill would still permit liability for intentional discrimination). Quite clearly, the bill is not a blanket safe harbor for employers to refuse to hire anyone with an arrest record and it is surprising that it would be described as such.

II. H.R. 1189, the Preserving Employee Wellness Programs Act

Witness Tanya Clay House provides the following analysis of the legal effects of H.R. 1189:

> H.R. 1189, the Preserving Employee Wellness Programs Act would automatically declare that employer wellness programs are not in violation of certain non-discrimination statutes including the Americans with Disabilities Act of 1990 (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA).

Like the characterization of H.R. 548, this description of H.R. 1189 is dramatically overblown, and in a word, wrong. Rather than "automatically" declaring that *all* employer wellness programs are non-discriminatory, H.R. 1189 carefully tracks the non-discriminatory language as set forth in the Health Insurance Portability and Accountability Act ("HIPAA") and the Patient Protection and Affordable Care Act ("PPACA") and their joint regulations. As noted in my written testimony, "If [H.R. 1189 is] enacted, employers would be able to offer financial incentives to employees up to 30% of their health care premiums for participating in and reaching certain health outcomes in a wellness plan (and up to 50% for smoking cessation programs) without fear of running afoul of the ADA or GINA or any forthcoming regulation from the EEOC." Thus, H.R.

1189 simply clarifies that it is permissible for employers to use incentives to encourage employee participation in wellness programs – something that HIPAA, PPACA and the joint regulations from three Cabinet agencies already expressly permit.

Contrary to the testimony noted above, if H.R. 1189 becomes law, employers would still be liable if provisions of their wellness programs were not permitted by HIPAA and PPACA. For example, an employer who cancels an employee's insurance for his or her refusal to participate in wellness program-related medical screenings would likely violate the Americans with Disabilities Act. Therefore, the representation of H.R. 1189 as a bill which automatically deems lawful any and all wellness plans is a gross mischaracterization.

* * *

Thank you again for the opportunity to provide this supplemental testimony. I trust that this statement will help to clarify the record with regard to H.R. 548 and H.R. 1189. Please feel free to contact me or the Chamber's Labor, Immigration and Employee Benefits Division if we can be of further assistance in this matter.

Respectfully submitted on behalf of
The U.S. Chamber of Commerce

Paul H. Kehoe
Seyfarth Shaw LLP

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April 7, 2015

The Honorable Tim Walberg, Chairman
The Honorable Frederica Wilson, Ranking Member
Subcommittee on Workforce Protections, House Education and the Workforce Committee
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of our more than 37 million members and workers age 40 and older who constitute roughly 55 percent of the labor force, AARP submits this statement for the record of the Subcommittee's March 24, 2015, hearing on several bills related to the regulatory and enforcement activities of the Equal Employment Opportunity Commission (EEOC).

Age discrimination in the workplace persists as a serious and pervasive problem. Approximately two-thirds (64%) of older workers (ages 45-74) say they have seen or experienced age discrimination in the workplace. Moreover, a disproportionate number of workers with disabilities are older workers. At a time when the workforce is aging and more older workers report that they need or want to work past normal retirement age, it is critical that every American worker is treated fairly on the job, regardless of age or disability.

AARP considers it imperative for the EEOC to retain *and use* all enforcement tools at its disposal, especially in the most difficult cases when only the EEOC is in a position to act. Accordingly, AARP is very concerned with both some of the bills under consideration as well as some of the criticism raised at the hearing.

Two of the bills discussed at the hearing would greatly restrict the authority and operational ability of the Commission to investigate, conciliate, and take legal action in cases in which the EEOC determines there is reasonable cause to believe employment discrimination has occurred. Before the EEOC could take action on a meritorious charge, H.R. 550 would require the EEOC to exhaust its "conciliation obligations" and require the Commission to certify that negotiations are at an impasse, even making the EEOC's determination that it had engaged in good faith efforts at conciliation subject to judicial review. Another bill, H.R 549, would bar the Commission from delegating *any* litigation decisions to the General Counsel and potentially require Commission votes in all cases, regardless of how routine or straightforward. The bill takes particular aim at "systemic" and "pattern and practice" cases, requiring Commission votes on all such cases. These are the cases where it is particularly vital for the EEOC to be able to step in and act – where discrimination is egregious and widespread, and where many workers have been denied equal opportunity.

Taken together, these bills would have the effect of tying the EEOC's hands and creating unnecessary procedural requirements to enforcement of employer violations of the civil rights laws. To be clear, the Commission *already* has every incentive to conciliate, as do the parties. Proving discrimination is *already* extremely difficult.[1] Commissioners appointed by both Democratic and Republican Administrations have delegated many litigation decisions to the General Counsel because it makes the complaint process faster and more efficient. And Commissioners appointed by both Democratic and Republican Administrations have made systemic litigation a strategic enforcement priority because it is a more efficient way to combat large-scale violations. There is no need to make the enforcement process lengthier, more arduous, or more individually focused, as these bills would do.

Though not addressed directly in the bills that were the subject of the March 24 hearing, several Subcommittee members at this and other recent Committee hearings[2] have been highly critical of instances in which the EEOC has launched directed investigations of discriminatory conduct or has itself brought systemic litigation on behalf of workers who may or may not have filed individual complaints. These investigations and lawsuits have been variously called "victimless cases," "suits with no complainants," and even cases of "entrapment" of employers. Such criticisms of directed investigations and systemic litigation as enforcement tools reflect a misunderstanding of how discrimination manifests itself in the workplace and how tough it is to detect and challenge.

Directed investigations represent a very small portion of the agency's docket, but they are critical to protecting the rights of workers, especially those who for various reasons cannot complain or are unwilling to complain out of fear of retaliation. In such cases, the EEOC is often uniquely positioned to speak on behalf of these workers. Indeed, AARP is particularly concerned that major EEOC enforcement initiatives that have recently been criticized at this and other recent hearings are ones involving age discrimination and practices that particularly impact older workers.

One such area of EEOC criticism involves hiring discrimination cases – a notoriously difficult area for job applicants to detect discrimination. Rejected applicants, unlike incumbent employees, rarely know who their competition was, what factors drove the hiring decision, or whether there is any pattern or practice that might explain why they were not hired. They may suspect discrimination, but unlike the EEOC, they lack subpoena authority, so they cannot discover the facts they need to support a discrimination complaint. Because the EEOC has the resources and means to investigate the facts and access data, the agency is better situated than the private bar to address discrimination in hiring, which is why the Commission made the elimination of barriers in recruitment and hiring one of its strategic enforcement priorities.[3]

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[1] *See* K. Clermont & S. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 3, 18 (2009).

[2] *See e.g.*, Subcommittee hearings on "Legislation to Provide Greater EEOC Transparency and Accountability" (Sept. 17, 2014); "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders" (June 10, 2014); and "Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission" (May 22, 2013).

[3] *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan: FY 2013-2016*, at 9 (undated), *available at* http://www.eeoc.gov/eeoc/plan/upload/sep.pdf.

Two recent Age Discrimination in Employment Act (ADEA) hiring cases brought by the EEOC were based on directed investigations – *EEOC v. Texas Roadhouse*, Civ. No. 1:11-cv-11732-DJC (D. Mass.), and *EEOC v. Darden Restaurants, Inc. et al.*, Civ. No. 1:15-cv-20561 (S.D. Fla.). While some have criticized the EEOC for having brought these challenges on its own initiative, agency investigators found strong evidence of blatant age bias occurring at numerous facilities of both defendant companies. In both these cases, the EEOC had evidence that numerous restaurants refused to hire older workers as servers and other customer-facing positions, and found that hiring officials made obviously ageist comments.

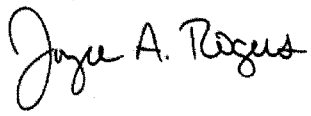
Another category of age discrimination cases in which the EEOC's use of directed investigations has drawn unjustified criticism, despite the facial age discrimination involved, has been in the area of mandatory retirement practices. In congressional testimony before this Subcommittee, one representative of the accounting industry condemned the EEOC for investigating the supposed "victimless" offense of forced retirement – in some instances at the remarkably low age of 60 or 62 – of accounting firm employees, claiming they were not "true victims of discrimination" because they had voluntarily signed their partnership agreement. Yet, often, such employees are "partners" in name only, with no meaningful control over management of the firm, and thus are entitled to the protections of the ADEA. Moreover, they may be in no position to challenge the imposition of a mandatory retirement age because this practice is all-too-typical in fields such as accounting and law; these experienced workers want to keep working, and daring to file a complaint could ruin any prospects of ever finding a job in the industry again. Also, even those who make the courageous choice to challenge a partnership agreement mandating involuntary retirement usually find that the agreement is governed by a boiler-plate, mandatory (i.e., "forced") requirement to resolve any such dispute in private arbitration. In circumstances like these, the EEOC is the best plaintiff – or the only possible plaintiff.

Certain corporate "wellness" policies and programs are yet another area of recent controversy concerning EEOC-initiated discrimination claims on behalf of workers. In these cases, employees were charged substantial financial penalties, faced cancellation of their health insurance, and even termination if they refused to submit to coercive exams as part of their employer's workplace wellness program. In all three cases it brought, the EEOC found violations of express prohibitions in the Americans with Disabilities Act (ADA). (While such cases would not be "age discrimination" cases based on the ADEA, they would very likely affect disproportionate numbers of older workers with disabilities.) Fundamentally, individuals harmed by these policies may be afraid that if they complain, they may lose their health insurance or even their jobs, placing them in a far worse position than if they had simply remained silent and accepted the monetary sanctions. In general, workers who have been discriminated against rarely come forward to file a charge for fear of retaliation; many of those fortunate enough these days to have a job that offers health coverage are unlikely to risk it all to complain about the company wellness program. Once again, the EEOC's involvement is necessary to vindicate rights that would otherwise go unenforced.

There are a multitude of situations in which workers who have been discriminated against don't complain, and it is not because victims of discrimination do not exist. Directed investigations are a critical tool in the EEOC's civil rights enforcement arsenal. The agency needs to be able to address the most difficult cases – the ones that couldn't or wouldn't otherwise be brought. This can only happen if the EEOC retains the ability – unhindered by unnecessary and unduly burdensome procedural obstacles – to take the lead in investigating and challenging workplace discrimination. AARP urges the Committee to reject efforts to restrict EEOC's ability to do its job.

Thank you for the opportunity to submit this statement for the record. If you have any questions, please don't hesitate to contact me, or please have your staff call Deborah Chalfie (202-434-3723) on our Government Affairs staff.

Sincerely,



Joyce Rogers
Senior Vice President
Government Affairs

Cc: House Education & the Workforce Committee Members
The Honorable Jenny Yang, Chair, EEOC
The Honorable Constance Barker, Commissioner, EEOC
The Honorable Chai Feldblum, Commissioner, EEOC
The Honorable Victoria Lipnic, Commissioner, EEOC
The Honorable Charlotte Burrows, Commissioner, EEOC
David Lopez, General Counsel, EEOC

Writer's Direct Dial: 202.408.7407
Writer's email: eellman@cdiaonline.org

April 7, 2015

The Honorable Tim Walberg
Chairman, House Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

Re: Supplemental Submission for the Record on the March 24, 2015 Hearing on H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act"

Dear Chairman Walberg:

I write on behalf of the Consumer Data Industry Association (CDIA) to congratulate you for a hearing that again calls attention to confusion the EEOC has created with its criminal history guidance and to support H.R. 548. Attached is supplemental testimony from CDIA. We hope you will make this supplemental submission part of the hearing record as a number of misstatements were made at the hearing about credit and criminal background checks.

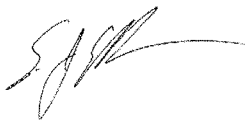
CDIA was founded in 1906 and is the international trade association that represents more than 100 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment screening, tenant screening and collection services.

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In a climate of economic uncertainty it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of credit criminal histories offer

one important tool among many for employers to protect themselves, their other employees, and their customers.

We feel that we have an important contribution to make to the hearing record. We hope you will make this supplemental submission part of the hearing record as a number of misstatements were made at the hearing about credit and criminal background checks.

Respectfully submitted,



Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

Written Comments Submitted for the Record

from the

Consumer Data Industry Association

to the

House Subcommittee on Workforce Protections

in connection with the Committee's Hearing on March 24, 2015 on

H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act"

1090 Vermont Avenue, NW • Suite 200 • Washington, DC 20005 • Fax (202) 371-0134 • www.cdiaonline.org

On March 24, 2015, the House Subcommittee on Workforce Protections held a hearing that again calls attention to the confusion the Equal Employment Opportunity Commission (EEOC) has created with the Commission's criminal history guidance. One of the bills discussed at the hearing, the Certainty in Enforcement Act of 2015, H.R. 548, would go a long way to clearing up employer confusion and making safer and more stable workplaces.

A number of statements were made during the March 24 hearing that require clarification and elaboration. That is the focus of this submission.

Founded in 1906, the Consumer Data Industry Association ("CDIA") is the international trade association representing the companies that conduct credit and criminal background checks on behalf of their employer and residential owner/manager clients. CDIA represents more than 100 consumer data companies. Our members are the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment screening, tenant screening, and collection services.

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In 2014, GFK Roper surveyed the nation and found that 91% of Americans supported employers using conviction records at least some of the time. This same survey found that 79% of Americans would feel safer as employee working for an employer that conducts a criminal history background check on its employees.

In a climate of economic uncertainty, it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of credit criminal histories offer one important tool among many for employers to protect themselves, their other employees, and their customers.

CDIA offers the following points: (1) The use of credit and criminal records is comprehensively addressed by the Federal Fair Credit Reporting Act ("FCRA"); (2) Employers use criminal histories fairly and responsibly; (3) Criminal histories are reliable and tested in the marketplace every day; (4) There is no certain point of redemption when an ex-offender is no longer likely to reoffend; (5) There were outlandish statements made that if H.R. 548 passed, 70 million people with criminal histories would never work again; and (6) A number of misstatements were made about the role credit checks play in employment screening.

1. The use of credit and criminal records is comprehensively addressed by the Federal Fair Credit Reporting Act ("FCRA").

Since 1971, the FCRA has served employers and applicants alike to allow lawful use of criminal history information, provisions to ensure maximum possible accuracy and consumer protections, and substantial systems to correct any inaccuracies that may exist. The FCRA is "an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information."[1] Many states have their own state FCRA laws.[2]

A. General protections

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.[3] There are many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.[4]

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[1] Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.
[2] *Eg.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*
[3] *Id.*, § 1681e(b).
[4] *Id.*, § 1681s-2(a)(1)-(2).

- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders and the law requires dispute resolution within 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.[5]
- A consumer reporting agency that violates federal law is subject to private rights of action, enforcement by the Federal Trade Commission ("FTC"), and state attorneys general.[6]

B. Protections specific to employment screening

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes.

For example, under § 1681k of the FCRA, a consumer reporting agency which "furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment," such as criminal record information, must either

- notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the employer to whom such information is being reported; or
- "maintain strict procedures designed to insure" that the information being reported is complete and up to date, and such information "shall be considered up to date if the current public record status of the item at the time of the report is reported."

As a result of these requirements, consumer reporting agencies that are including criminal record information in an employment report must either notify the consumer of that fact or access directly the most up-to-date information.

In addition, although the FCRA allows employers to review the criminal histories of prospective and existing employees,[7] this legal privilege comes with certain obligations. Under § 1681b(b) of the FCRA:

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[5] *Id.*, § 1681i(a)(1), (5).
[6] *Id.*, § 1681n, 1681o, 1681s.
[7] *Id.*, § 1681b(a)(3)(B).

- An employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.
- Prior to requesting a consumer report, an employer must provide to the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and the consumer must authorize the employer's use of a consumer report. The disclosure document provided to the consumer must contain only the disclosure.
- Prior to taking an adverse action, the employer must provide to the consumer a copy of the consumer report and the summary of rights mandated by the FTC. The employer must provide a second adverse action notice if an adverse action is actually taken.

Criminal background checks under the FCRA are dependable and trusted.

2. Employers use criminal histories fairly and responsibly

In July 2012, the Society for Human Resource Management ("SHRM") released a study on employer use of criminal histories. Of the 69% of employers that do conduct a criminal background check on employees, SHRM reported 69% consider criminal histories because the position requires a fiduciary duty or financial responsibility; 66% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; 55% will review a criminal history for positions with access to corporate or personal property, including technology; 48% of employers will consider criminal histories for senior executive positions; and 37% for safety-sensitive positions, like transportation and the operation of heavy equipment. The SHRM study shows that employers weigh different offenses differently, consider the severity of the crime, and examine the distance in time between an offense and the job application.[8] In short, employers use criminal checks in a responsible and focused manner.

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[8] *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resource Management, July 19, 2012, http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx.

3. Criminal histories are reliable and tested in the marketplace every day

The public and private sectors make regular use of criminal background checks.[9] These checks are done to help employers reduce crime and violence in the workplace, especially when those workplaces are in homes. There is a clear value to criminal background checks.

4. There is no certain point of redemption when an ex-offender is no longer likely to reoffend.

Tanya Clay House, for the Lawyers' Committee for Civil Rights Under Law, in her response to a question, said that there are studies that suggest that after a certain number of years a person is less likely or no more likely to reoffend than anybody in the general society might. We presume Ms. House was referring to the work of Alfred Blumstein and Kiminori Nakamura.

Even if the Committee considers Profs. Blumstein and Nakamura's latest findings, as was the case with their 2009 study[10], their 2012 report remains incomplete and "some important next steps should still be pursued."[11] No matter how much research is undertaken, the search for a single bright redemption line is likely doomed

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[9] In the public sector, for example, the Office of Personnel Management ("OPM") conducts over two million investigations each year. http://www.opm.gov/investigations/background-investigations/.

[10] Blumstein, A. & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2) ("Blumstein & Nakamura, 2009").

[11] Alfred Blumstein and Kiminori Nakamura, Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, Oct. 2012, available at https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf ("Blumstein & Nakamura, 2012"), 90. For example, the authors acknowledge that:

> The estimates of redemption shown in this report are based on the length of time since the *first* arrest or conviction. In this sense, we only address redemption for first-time offenders. Although such *first-time* offenders can be viewed as most deserving of redemption, it is possible to extend the concept of redemption to people with more than one prior criminal event. Employers also routinely receive applications from individuals with multiple arrests or convictions who have stayed clean a reasonable length of time. How do the redemption estimates vary with the number of prior crime events?"

Id., 90-91 (emphasis original).

to fail. Not only do the authors concede "[t]hose with no prior record . . . are inherently less risky than those with a prior record,"[12] but separately, Prof. Blumstein himself has acknowledged the overwhelming difficulties facing those trying to predict and compare future criminal behavior by ex-offenders and non-offenders:

> [A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten years. But neither of these individuals can be judged to be less or equally likely to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions of comparable low-probability events is extremely difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct.[13]

Since even the latest research from Profs. Blumstein and Nakamura has been criticized, a redemption period may not exist and, in any event, it may be impossible to predict.

5. There was an outlandish statements were made that if H.R. 548 passed, 70 million people with criminal histories would never work again.

In her opening statement, Ms. House gave in to bold exaggeration when she said, without equivocation, that "H.R. 548 would automatically exclude all of these Americans -- 70 million Americans -- from the workforce." That statement may be hyperbole at its best. One would think that before the EEOC passed its criminal guidance no ex-convict ever had a job, when we know that is not so. It is irresponsible to suggest that no one with a criminal record will ever work again.[14]

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[12] *Id.*, 90.

[13] *El v. SEPTA*, 479 F.3d 232, 246 (3d Cir. 2007) (citing expert testimony of Dr. Alfred Blumstien. App. 953) (internal citations omitted in original) (emphasis added).

[14] Before the EEOC drafted its guidance, it heard at a public meeting from an exemplary employer who hires ex-offenders. *Hearing before the U.S. Equal Employment Opportunity Commission, Hearing to Examine Arrest and Conviction Records as a Hiring Barrier, written statement of Michael Curtin, CEO, DC Central Kitchen, July 26, 2011*, available at http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm, ("we graduated 91 students, seventy-one of those were ex-offenders)."

In 2005, long before the EEOC passed its guidance, the Idaho Department of Commerce & Labor, in Partnership with Idaho State Police and Idaho Department of Corrections, surveyed Idaho employers "to measure how receptive Idaho employers are to hiring ex-offenders".[15] The results might surprise those who feel ex-offenders will never find a job, ever. The Idaho "[s]urvey results indicate a high disposition on the part of Idaho employers to hire ex-offenders."[16]

The survey focused in on several trades and professions and the willingness of employers in these areas to hire ex-offenders. In the building and construction trades, for example, between 74% and 88% of businesses would hire ex-offenders for jobs like welding, commercial trucking, and electrical wiring. These are "good" paying jobs according to the survey.[17] And for public-facing jobs, 86% of employers in accommodation and food service would hire ex-offenders and 72% of retail employers.[18]

The SHRM data and the research from Idaho Commerce & Labor shows how strongly employers value second chances and how there are and will be many opportunities for ex-convicts in the workplace.

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[15] *Enhancing Employment Opportunities for Ex-Offenders: A Survey of Idaho Employers by Idaho Commerce & Labor in Partnership with Idaho State Police and Idaho Department of Corrections*, Idaho Commerce & Labor, 2006, 1, available at https://labor.idaho.gov/publications/Employment_Oppor_ExOffenders.pdf.

[16] *Id.*, 7.

[17] *Id.*, 3, 6.

[18] *Id.*, 4.

6. A number of misstatements were made about the role credit checks play in employment screening.

A. Credit scores are not used in employment, but credit histories are reliable predictors of risk.

Representative Adams suggested African-Americans were excluded from the workforce because they have low credit scores. However, it is well-established that credit scores are not used by employers to make hiring decisions.[19]

Credit histories are used by employers because they are reliable predictors of risk. So much so that the EEOC has determined that "[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations."[20] Because of the risk that delinquent debt can pose, the EEOC runs credit checks on applicants for 84 of the agency's 97 positions.[21]

B. Employers use credit history checks in a responsible and focused manner

We know that our member companies – and most employers – use credit checks in a responsible and manner. CDIA data shows that just 15% of all employee background checks involve a credit history review. In July 2012, SHRM released a survey on employer use of credit histories. The SHRM survey found that 47% of employers conduct a credit background check on employees, down from 53% in 2010. SHRM also reported that of those 47% that do conduct credit background checks, most employers use credit for selected positions within their companies. 87% consider credit

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[19] *Eg.,Tales from the Unemployment Line: Barriers Facing the Long-Term Unemployed, Before the S. Committee on Health, Education, Labor & Pensions*, 112th Cong. (Dec. 8, 2011), S. Hrg. 112-877, 52-52 (Response to Questions of Sen. Enzi by Christine L. Owens) ("The reference to 'credit ratings' in my written testimony was a mistake… It does not include the individual's credit score, but the underlying information provided above gives rise to the individual's credit score.").

[20] *EEOC v. Kaplan*, No. 1:10-cv-02882-PAG (U.S.C.A. 6th Cir.) Doc #: 103-16, Jan. 3, 2013, 20 of 26, page ID No. 5112. Positions subject to credit checks include not just criminal investigators, senior inspector, auditors, and HR and IT professionals, but also for public affairs specialist writer-editors, research librarians and GS-8 secretaries ($47,000). *Id.*, 24 (page ID no. 5116) and 25 (page ID no.5117)

[21] *Kaplan*, 750 (6th Cir.).

histories because the position requires a fiduciary duty or financial responsibility; 42% consider credit histories for senior executive positions; 34% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; and 25% in situations where the person is in a position of financial trust.[22]

The SHRM report goes on to say that 58% of those companies that use credit checks do so only after a conditional job offer is made and 33% do so after a job interview. SHRM reports that negative credit information is not always a bar to employment. It is clear from the SHRM report that the most significant negative credit events are debts in collection (21% to 61% of specific employment positions) and judgments (18% to 31% of specific employment positions). Yet, foreclosures, tax liens, and many other debts will not affect many applicants' ability to get a job. According to the SHRM findings, among organizations that do perform credit history checks, 80% percent have hired someone despite a poor credit reports. Finally, the SHRM data indicates that employers look for significant, long term financial difficulty, not for difficulties that may be associated with a loss of a job.[23] In short, employers use credit checks in a responsible and focused manner.

Conclusion

We are pleased that the House Subcommittee on Workforce Protections held a hearing that again calls attention to the confusion EEOC has created with its criminal history guidance. One of the bills discussed at the hearing, the Certainty in Enforcement Act of 2015, H.R. 548, would go a long way to clearing up employer confusion and making safer and more stable workplaces.

A number of statements were made during the March 24 hearing requiring clarification and elaboration and that is the focus of this submission. We hope that this testimony brings more clarity to the record.

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[22] *SHRM Survey*. See, *Background Checking—The Use of Credit Background Checks in Hiring Decisions*, available at www.shrm.org/Research/SurveyFindings/Articles/Pages/CreditBackgroundChecks.aspx.
[23] *Id.*

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In a climate of economic uncertainty it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of credit criminal histories offer one important tool among many for employers to protect themselves, their other employees, and their customers.

Chairman WALBERG. Hearing no objection, they will be submitted.

I now recognize the gentlelady from Florida, the Ranking Member, Ms. Wilson.

Ms. WILSON. Thank you, Mr. Chair.

In closing, I would like to thank, once again, all of our witnesses for coming.

And I would like to highlight the majority's attempt to roll back a body of laws that have helped protect American workers from race, sex, age, and disability-based discrimination for over 50 years. Fifty years; that is a long time.

The bills we have discussed today would dramatically limit the effectiveness of the EEOC and leave millions of workers vulnerable to an employer's abuse of power and discrimination.

As I mentioned in my opening statement, the name of our subcommittee is Workforce Protections. These bills will essentially undermine the clear and apparent purpose of our subcommittee, which is to provide a safe and amicable working environment for American workers and ensure that employers engage in fair and equitable hiring practices.

All of the detailed postings reporting requirements and H.R. 550 seem to be designed to keep lawyers with a job, to keep fighting lawsuits. Where—tell me where does the average worker who really doesn't want to go to court but wants to do his or her job without experiencing discrimination go to get justice?

You are creating roadblocks by making the EEOC too busy posting things up online, taking notes on cases, getting certified to do conciliation. None of these bills specifically empower the average worker to be protected from discrimination. There are so many roadblocks.

As the EEOC won 93 percent of cases in federal court and 82 percent of systemic cases, 84 percent of the businesses' owners in 2014 responding they are complying with the EEOC's arrest and conviction guidance. And there is a big difference between arrest and conviction, and that is why we need a Ban the Box policy.

As members of this subcommittee we should be doing everything in our power to support American workers and not be in the business of setting up roadblocks to essential protections from workplace discrimination.

Again, Mr. Speaker, I respectfully ask that we call another hearing, and this time we want to hear from the EEOC Commissioners before moving forward so that we can ensure that these bills will not set up unnecessary roadblocks for fair and timely resolution of discrimination claims. Remember, we are the Subcommittee on Workforce Protections. That is the workers.

Thank you, and I yield back the rest of my time.

Chairman WALBERG. I thank the gentlelady.

And I concur. We are the Subcommittee on Workforce Protections and this is our job to do, and we will do it with all due diligence as necessary, including the hearings we have or may have in the future.

We are responsible to make sure that the workforce is protected, but we want to make sure as well as we—when we do that that the places that the workforce work are protected, as well—that we

have that symbiotic relationship that says there will be success in the workplace because there are successful, safe workers that are doing jobs that they are fit and prepared to do. And they are protected against even—should I say unthinking action requirements that don't recognize the reality of the workplace or the workforce.

To think that there would be a steelworker that would go to work drunk in an unsafe situation, like the number two electric furnace that I worked at, and be hurt because U.S. Steel would be prohibited from doing its due diligence and making sure the person meets the needs and the concerns. The fact that we would be putting places—employees in places of work without questioning that they physically could not handle because of age, because of disability.

Even if it is in a restaurant that is high intensity and serves customers from 7 o'clock on, and it takes someone with more stamina than me to be—to work in that restaurant. And yet, because of laws that don't deal with flexibility and look at the issue not to discriminate against a person or a class of persons, but understands the workplace and wants people to succeed, yes, for the benefit of the employer, but also the benefit of the employee as well.

To think that there is a Commission that has been appointed to deal with these issues and make sure that, indeed, employees are cared for and that there are suits that are brought against employers for discrimination on basis of law, that there is a 70,000–person backlog, or case backlog.

And yet, we can talk about the success rate of systemic cases, for instance. Yet there are relatively few. And sadly, a good number of those are being thrown out. And equally as sad, taxpayers are footing the bill to pay for the costs of these frivolous suits.

We have contradictory laws that our employers and employees are expected to carry out and live under—both federal and state, and state and federal. And even federal and federal, with Obamacare versus the Civil Right Act and the Disabilities Act.

Those are concerns, and that is why we have this hearing. And that is why these four bills have been initiated. And that is why we are doing due diligence and making sure that these bills attack the problem that is there and not something that we are just guessing at.

We want workers to be successful. We want people to be not discriminated against. We want employers to be successful and not hindered by laws that go far afield from what they want to do in carrying on with their employees, as well.

So I appreciate the panel today.

I appreciate my subcommittee members and the diligence that you put to this hearing, and we look forward to further movement down the road.

The following opinions were submitted for the record by Ms. Heriot, and are included in the committee archive for this hearing:

[*EEOC* v. *Freeman,* 778 F. Supp. 3d 463 (4th Cir. 2015)]

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

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

[*EEOC* v. *Peoplemark, Inc.,* No. 1:08–cv–907, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011)]

Without further agenda before this subcommittee, I declare it adjourned.

[Additional submissions by Chairman Kline follows:]

[Whereupon, at 11:28 a.m., the subcommittee was adjourned.]

AMERICAN BENEFITS COUNCIL

March 6, 2015

The Honorable John Kline
Chairman
U.S. House of Representatives Committee
on Education and the Workforce
Washington, DC 20515

Dear Chairman Kline:

I write on behalf of the American Benefits Council ("the Council") in support of S. H.R. 1189, the Preserving Employee Wellness Programs Act of 2015.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees, retirees and family members. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The Council believes that employer-based wellness programs are important for achieving better health outcomes for employees and the communities in which they operate. Wellness programs also have the potential to increase employee productivity, improve workforce morale and engagement and reduce health care spending.

Employers applaud Congress for having worked on a bipartisan basis to craft the wellness provisions in the Patient Protection and Affordable Care Act (PPACA) that built on the existing framework created in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). PPACA's bipartisan wellness provisions increased employer flexibility in designing programs to improve the health of employees and their families. Additionally, it signaled a recognition that wellness programs are a cornerstone of health reform.

1501 M Street NW Suite 600 Washington, DC 20005 202-289-6700 Facsimile 202-289-4582 www.americanbenefitscouncil.org

Notwithstanding employers' increasing interest in establishing wellness programs, a great deal of legal uncertainty exists with respect to the application of both the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA) to these programs. To address this, the Council's recent public policy strategic plan, *A 2020 Vision: Flexibility and the Future of Employee Benefits*, notes that "A critical component of encouraging employers to offer meaningful wellness programs is consistent federal policy that promotes the health of Americans and is aligned across multiple agencies and Congress." Unfortunately, existing guidance from the U.S. Equal Employment Opportunity Commission (EEOC) is not clear regarding what constitutes a voluntary wellness program for purposes of the ADA and questions remain regarding how GINA applies to various aspects of some common wellness program designs.

The EEOC announced in its most recent semi-annual regulatory agenda that it intends to issue regulations later this year addressing wellness programs under the ADA and GINA. Unfortunately, for employers operating in good faith, the EEOC decided to pursue litigation before actually issuing guidance on this matter. This is very frustrating for employers who care about the well-being of their employees and take seriously their compliance obligations – and, of course, it is detrimental to the employees and family members served by employers' wellness initiatives.

When Dr. Catherine Baase, Chief Medical Officer for The Dow Chemical Company recently testified on behalf of her company and the Council before the Senate Health, Education, Labor and Pensions Committee, she encouraged Congress and/or the EEOC to work within the existing HIPAA and PPACA legislative and regulatory framework to provide certainty to employers. We sincerely appreciate that H.R. 1189 achieves that objective and also strikes the right balance between providing certainty to employers while also ensuring an appropriate role for the EEOC to protect employees from discrimination.

Under The Preserving Employee Wellness Programs Act:

- Plans that comply with the wellness provisions of HIPAA that were amended by PPACA (included in Section 2705(j) of the Public Health Service Act) shall not violate the ADA or GINA by offering rewards in compliance with PHSA Section 2705(j). In general, this protection extends to health contingent wellness programs, including activity-only and outcome-based programs.

- Participatory programs shall receive the same protection if the reward is less than or equal to the maximum reward amounts applicable to health contingent wellness programs.

- The collection of information about the "manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic

information with respect to another family member participating in workplace wellness programs" and shall not violate GINA.

- The bill also includes two rules of construction. The first states nothing should be construed to limit the continued application of the *bona fide* benefit plan exception to wellness programs. The second rule of construction states that nothing "shall be construed to prevent an employer that is offering a wellness program to an employee from establishing a deadline of up to 180 days for employees to request and complete a reasonable alternative standard."

- The legislation shall take effect as if enacted on March 23, 2010, and shall apply to the ADA and GINA, including amendments made by such Acts.

As the Council's *A 2020 Vision* report states, employer-sponsored benefit plans are now being designed with the express purpose of giving each worker the opportunity to achieve personal health and financial well-being. This well-being drives employee performance and productivity which, in turn, drives successful organizations. To maintain global competitiveness and help achieve good health in our communities, American companies must encourage healthy behavior with every tool in our toolkit. In other words, a healthy workforce is a productive workforce, and a productive workforce makes for a healthier American economy.

We thank you for your sponsorship of H.R. 1189. We look forward to working with you and your colleagues to provide clarity for employer-sponsored wellness programs and to improve the health of American workers and their families.

Sincerely,

James A. Klein

James A. Klein
President

CC: Representative David P. Roe, Chairman, Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions
Representative Tim Walberg, Chairman, Education and the Workforce Subcommittee on Workforce Protections

The ERISA Industry Committee

Annette Guarisco Fildes
President & CEO

March 13, 2015

Representative John Kline
Chair, House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Kline,

On behalf of the ERISA Industry Committee (ERIC), thank you for introducing HR 1189, the ''Preserving Employee Wellness Programs Act''. ERIC is the only national trade association dedicated exclusively to advocating on behalf of the health and retirement policy issues of concern to the country's largest employers.

ERIC applauds you for developing and introducing this legislation, as it would provide legal certainty and eliminate confusion caused by the Equal Employment Opportunity Commission (EEOC) for employers offering wellness programs to their employees. This issue is significant for ERIC members as their wellness plans are part of the comprehensive health benefits they provide to millions of active and retired employees and their families. ERIC has a strong interest in proposals that affect its members' ability to deliver high-quality, cost-effective benefits.

Over time, it has become more and more difficult for ERIC members to continue to deliver these benefits due to spiraling costs. In addition, the expense and administrative complexity of implementing the numerous – and exceedingly complicated – rules of the Affordable Care Act (ACA) have made this task even more challenging. Now large companies with mainstream employer-based wellness programs also face the possibility of threatening legal action from the EEOC, which has created significant roadblocks to even those wellness programs that fully comply with the ACA.

In the face of these new threats, we are especially appreciative of your efforts to eliminate the impediments caused by the EEOC and to ensure that the wellness regulatory environment offers employers the flexibility they need to continue their positive achievements in this regard.

Sincerely,

Annette Guarisco Fildes

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President and CEO

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[redacted]

PROTECTING THE CONSUMER'S FUTURE
NAHU
National Association of Health Underwriters
AMERICA'S BENEFITS SPECIALISTS

March 16, 2015

Representative John Kline
Chairman, House Committee on Education and Workforce
2439 Rayburn House Office Building
Washington, DC 20510

Dear Chairman Kline:

On behalf of the National Association of Health Underwriters representing 100,000 licensed agents and brokers who are engaged in the sale and service of health insurance and other ancillary products and serving employers and consumers around the country, we want to commend you on introducing H.R. 1189, the Preserving Employee Wellness Programs Act.

NAHU members work to help millions of employers of all sizes finance administer and utilize their group health benefit plans on a daily basis. Our members know firsthand the importance of group wellness programs for reducing medical care utilization, reducing use of sick time, reducing injuries, and producing a healthier and happier workforce. These in turn result in reduced insurance claims and help to bring down the overall health care costs. With 60 percent of all employers including 80 percent of large employers participating in wellness initiatives, NAHU supports any effort to help all employers offer meaningful programs to improve overall health and reduce costs.

This bill clarifies Section 1201 of the Patient Protection and Affordable Care Act, a bipartisan provision of the law to further encourage employers to offer wellness programs. Unfortunately, this provision has been hampered by confusion over its interpretation related to potential discrimination of employees who are unable to participate in the employer's wellness initiative. Some programs have been challenged for not conforming to federal anti-discrimination protections under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. This bill helps to clarify the provision so that it can be implemented as originally intended, by offering employers the ability to make reasonable accommodations for individuals who would like to participate in wellness programs with an alternative. This bill allows employees 180 days to determine an alternative program, allows for spouses of employees to participate, and underscores the protections of employees against discrimination in wellness programs.

NAHU has long been a proponent of group wellness programs and we appreciate your leadership on this important issue for employers and employees alike to be able to participate in wellness programs that will help to both improve overall health and reduce the cost of care. With an ever increasing cost of medical care and health insurance coverage, wellness programs have a demonstrated ability to improve health and save money. Efforts to increase the use of wellness programs and encourage all employees to live a healthy lifestyle will only further these results. We look forward to working with you and your colleagues in enacting this legislation this year.
Sincerely,

Janet Trautwein

Janet Trautwein
Chief Executive Officer,
National Association of Health Underwriters

March 17, 2015

The Honorable John Kline
United States House of Representatives
Washington, D.C. 20515

RE: H.R. 1189, the Preserving Employee Wellness Programs Act

Dear Chairman Kline:

I am writing to express HR Policy Association's strong support for the Preserving Employee Wellness Programs Act, H.R. 1189, which would reaffirm the wellness program incentives under the Affordable Care Act (ACA) that allow employee wellness programs to have financial incentives up to 30 percent of the cost of coverage (and 50% for tobacco cessation programs). We urge the House to pass this legislation this year. It is important for Congress to eliminate the legal confusion surrounding wellness program financial incentives that has been caused by the recent legal actions taken by the Equal Employment Opportunity Commission and restore certainty for employers who want to reward their employees for leading healthy lifestyles.

The HR Policy Association is the lead organization representing chief human resource officers of over 360 of the largest corporations doing business in the United States. The member companies, all of whom are large employers, provide health care coverage to over 21 million employees and dependents, and collectively spend more than $76 billion annually on health care in the U.S. Most member companies offer wellness programs to their employees and dependents.

Employers are increasingly offering wellness programs as a means to improve employee health and productivity, bolster employee engagement and reduce health care costs, and the ACA strongly promotes such programs by permitting financial incentives for participation in them. However, in 2014, the Equal Employment Opportunity Commission began filing legal actions against employers with wellness programs its General Counsel views as violating the Americans with Disabilities Act (ADA) without providing any guidance to employers. Moreover, White House spokesperson Josh Earnest referred to one lawsuit as "inconsistent with what we know about wellness programs and the fact that we know that wellness programs are good for both employers and employees." With more and more employers offering wellness programs, it is essential that Congress act to clear up any legal uncertainty by reaffirming existing law, including the application of ERISA preemption of state and local laws to employer wellness programs.

HR Policy supports the provision in the legislation that reaffirms the ADA's existing bona fide benefit plan safe harbor for wellness programs and strongly encourages the House to add a provision reaffirming that the existing ERISA preemption applies to wellness programs as well. We urge Congress not to miss this opportunity to address a serious problem with the ACA, and we look forward to working with you and your colleagues to enact this important legislation.

Sincerely,

Daniel V. Yager
President and General Counsel

cc: Members of the House Education and the Workforce Committee

National Business Group on Health

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Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

March 20, 2015

The Honorable Lamar Alexander
Chair
U.S. Senate Health, Education, Labor and Pensions (HELP) Committee
428 Dirksen SOB
Washington, DC 20510

The Honorable John Kline
Chair
U.S. House Education and the Workforce Committee
2181 Rayburn HOB
Washington, DC 20515

Dear Chairmen Alexander and Kline:

The National Business Group on Health writes in **strong** support of S. 620/H.R. 1189, the Preserving Employee Wellness Programs Act.[1] We applaud your leadership to align government policy and provide legal clarity to support employers' wellness programs and financial incentives that reward healthy lifestyles.

The National Business Group on Health represents approximately 415 primarily large, employers (including 67 of the Fortune 100) who voluntarily provide generous health benefits and other health programs to over 55 million American employees, retirees, and their families.

Voluntary wellness programs are widespread among employers. According to the *National Business Group on Health (NBGH) and Fidelity Investments Sixth Annual Employer-Sponsored Health & Well-being Survey: Taking Action to Improve Employee Health,* in 2015, 96.7% of employers offered lifestyle programs centered around 1) providing feedback to employees on their health status (health risk assessment and biometric screening), and 2) changing unhealthy behaviors (smoking cessation, physical activity programs, weight management, stress management, health coaching and use of fitness centers).

Employers adopt wellness programs for a number of reasons including to: respond to employee interest, improve employee health and productivity, encourage employees and

[1] The act would reaffirm existing law that allows employers to offer voluntary wellness programs that reward employees and their families with financial incentives for attaining health care goals. It would also provide ample time (6 months) for employees to request and complete alternative wellness programs if they cannot participate in the original programs.

their families to choose healthy lifestyles, actively engage in their own health and wellbeing, reduce health care costs and foster a culture of health in the workplace. According to *Virgin HealthMiles and Workforce Management Magazine's The Business of Healthy Employees: A Survey of Workplace Health Priorities*[2], in 2013, of the over 9,900 employee respondents participating in wellness programs, 75% improved their physical activity, 55% reported they are healthier and happier, 48% reported they are more energetic and 49% achieved weight loss goals. Twenty-nine percent also reported improvements in controlling chronic conditions, 22% in reducing sick days and 21% in improving workplace morale.[i]

As you know, employers offer financial incentives as a key component to engage employees to participate in wellness programs and to achieve health goals through such programs. The NBGH/Fidelity Investments survey cited above found that 79% of employers used incentives for these purposes. The Virgin HealthMiles/Workforce Management Magazine Survey found that over 61% of employees participated in employer-sponsored wellness programs specifically to earn the incentives.[ii]

The Equal Employment Opportunity Commission's (EEOC) recent legal actions have caused concern for many employers about the future of wellness programs due to its seeming contradiction with the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA), which encourage the adoption and expansion of these programs.

The National Business Group on Health appreciates your efforts to protect workplace wellness programs. Your proposed legislation would clear up this confusion for employers and the employees who value these programs and aligns the federal government's policy to consistently support wellness programs. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012, if we can be of any assistance or if you would like to discuss our comments in more detail.

Sincerely,

Brian J. Marcotte
President

cc:
The Honorable Orrin Hatch, Chair, U.S. Senate Finance Committee

[2] Since the 2013 survey, VirginHealthMiles has changed its name to Virgin Pulse and Workforce Management Magazine has changed its name to Workforce Magazine.

The Honorable Michael B. Enzi, Chair, U.S. Senate HELP Subcommittee on Primary Health and Retirement Security
The Honorable Johnny Isakson, Chair, U.S. Senate HELP Subcommittee on Employment and Workplace Safety
The Honorable Tim Scott, U.S. Senate HELP Committee
The Honorable Pat Roberts, U.S. Senate HELP Committee
The Honorable Tim Walberg, Chair, U.S. House Subcommittee on Workforce Protections
The Honorable David Roe, Chair, U.S. House Subcommittee on Health, Employment, Labor, and Pensions

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[i] Virgin Healthmiles and *Workforce Management Magazine*. The Business of Healthy Employees: A Survey of Workplace Health Priorities. 2013, http://ihrim.org/Pubonline/Wire/Sept13/Business_HealthyEmployees2013.pdf
[ii] Ibid.

AMERICAN COLLEGE OF
OCCUPATIONAL AND
ENVIRONMENTAL MEDICINE

March 23, 2015

The Honorable Lamar Alexander
Chair
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable John Kline
Chair
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Alexander and Chairman Kline:

On behalf of the American College of Occupational and Environmental Medicine (ACOEM), I am writing to express our appreciation and support for the *Preserving Employee Wellness Program Act* (S.620, H.R. 1189).

There is increasing recognition in the United States that the physical and mental health of the workforce is inextricably linked to the economic health of the workplace. Improved employee health equals improved employee performance, engagement and productivity. Unfortunately, the American workforce is not as healthy as it could or should be. The overall health of Americans is on the decline, with studies showing a dramatic rise in recent years of health risks like obesity and chronic diseases like diabetes, across all age groups.

Workplace wellness programs are emerging as a key building block in this new paradigm, helping promote a true culture of health in the workplace. These programs are based on prevention and integrated health management and are aimed at decreasing the burden of illness overall by focusing health management strategies "upstream" from the onset of chronic disease. Rather than simply treating disease, wellness programs seek to keep healthy people healthy and bring people at high risk back from the brink of illness by managing health risk factors and promoting proactive health maintenance strategies.

This legislation provides legal certainty—and eliminates confusion arising from action by the Equal Employment Opportunity Commission (EEOC)—for employers offering employee wellness programs that lower health insurance premiums to reward healthy lifestyle choices. The legislation provides support for those employers what may be hesitant to provide wellness programs for fear of violating EEOC requirements.

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March 23, 2015
Page 2

Please let us know how we can assist you communicating the importance of the legislation, and please do not hesitate to contact Pat O'Connor, ACOEM's Director of Government Affairs, at 202-223-6222 if ACOEM can be of further assistance.

Sincerely,

Kathryn L. Mueller, MD, MPH

Kathryn Mueller, MD, MPH, FACOEM
President

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Phone: (847) 818-1800 – Fax: (847) 818-9266 – Web: www.acoem.org

[Additional submission by Mr. Roe follows:]

The ERISA Industry Committee

Annette Guarisco Fildes
President & CEO

March 13, 2015

Representative David P. Roe
House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Dr. Roe,

On behalf of the ERISA Industry Committee (ERIC), thank you for being an original co-sponsor of HR 1189, the "Preserving Employee Wellness Programs Act". ERIC is the only national trade association dedicated exclusively to advocating on behalf of the health and retirement policy issues of concern to the country's largest employers.

ERIC applauds you for your role in advancing this legislation, as it would provide legal certainty and eliminate confusion caused by the Equal Employment Opportunity Commission (EEOC) for employers offering wellness programs to their employees. This issue is significant for ERIC members as their wellness plans are part of the comprehensive health benefits they provide to millions of active and retired employees and their families. ERIC has a strong interest in proposals that affect its members' ability to deliver high-quality, cost-effective benefits.

Over time, it has become more and more difficult for ERIC members to continue to deliver these benefits due to spiraling costs. In addition, the expense and administrative complexity of implementing the numerous – and exceedingly complicated – rules of the Affordable Care Act (ACA) have made this task even more challenging. Now large companies with mainstream employer-based wellness programs also face the possibility of threatening legal action from the EEOC, which has created significant roadblocks to even those wellness programs that fully comply with the ACA.

In the face of these new threats, we are especially appreciative of your efforts to eliminate the impediments caused by the EEOC and to ensure that the wellness regulatory environment offers employers the flexibility they need to continue their positive achievements in this regard.

Sincerely,

Annette Guarisco Fildes

Annette Guarisco Fildes
President and CEO

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[Additional submission by Ms. Wilson follows:]

March 20, 2015

The Honorable John Kline
Chairman
Committee on Education and Workforce
House of Representatives

The Honorable Robert "Bobby" Scott
Ranking Member
Committee on Education and Workforce
House of Representatives

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and Workforce
House of Representatives

The Honorable Frederica S. Wilson
Ranking Member
Subcommittee on Workforce Protections
Committee on Education and Workforce
House of Representatives

Dear Chairman Kline, Ranking Member Scott, Chairman Walberg, Ranking Member Wilson and Members of the House of Representatives Committee on Education and Workforce:

We wish to express our strong support for the Genetic Information Nondiscrimination Act (GINA) that was signed into law by President George W. Bush in 2008 and the Americans with Disabilities Act (ADA) signed into law by President George H.W. Bush in 1990. We are concerned, however, by recently introduced legislation that seeks to exempt employer-based wellness programs from GINA and the ADA. **We strongly oppose any policy that would allow employers to inquire about employees' private genetic information or medical information that is unrelated to their ability to do their jobs, and penalize employees who choose to keep that information private.**

GINA ensures that all Americans are free from genetic discrimination by health insurance providers and employers. Insurance providers cannot use genetic information for underwriting purposes nor request patients to undergo genetic testing. Employers cannot discriminate against employees with respect to compensation, terms, conditions, or privileges because of genetic information. Furthermore, GINA not only prohibits discrimination itself but it also greatly restricts access by employers and issuers of insurance to genetic information to minimize the potential for discrimination. In general, employers may not request, require or purchase their employees' genetic information. They are also prohibited from asking employees about the medical conditions of their family members. However, importantly, an exception to this general prohibition allows an employer to offer health or genetic services as part of a wellness program where an employee's participation is *voluntary*.

The ADA protects Americans from workplace discrimination on the basis of disability. Among other things, employers are prohibited from subjecting employees to medical inquiries and examinations that are not job-related and consistent with business necessity, unless those inquiries are *voluntary* and asked as part of a wellness program.

These provisions of GINA and the ADA are carefully crafted to ensure that employers can only obtain or request protected genetic and medical information when the employee *voluntarily* provides it. Under these rules, employees, for example, may enjoy the benefits of an innovative wellness program such as

a clinic provided by their employer that includes voluntary health screening services, while remaining confident that they are protected from potential discrimination.

We oppose provisions within the Preserving Employee Wellness Programs Act (S. 620/H.R. 1189) that would repeal GINA and ADA requirements that wellness program requests for genetic and medical information be voluntary, opening the door to employers coercing employees into revealing their private health and genetic information. Wellness programs are fully able to encourage healthy behaviors within the current legal framework: they need not collect and retain private genetic and medical information to be effective. They do not need exemptions from important federal civil rights statutes like GINA and the ADA, and individuals ought not to be subject to steep financial pressures by their health plans or employers to disclose their or their families' genetic and medical information.

GINA was passed by Congress with very strong bipartisan support. It was passed by the Senate unanimously and in the House of Representatives by a vote of 414-1, demonstrating overwhelming Congressional support for prohibiting genetic discrimination and ensuring genetic privacy for employees. Likewise, the ADA passed the Senate by a vote of 76-8 and was unanimously approved by the House of Representatives. **We, the undersigned, strongly urge Members of the Committee on Education and Workforce to preserve the nondiscrimination protections afforded to all Americans by GINA and the ADA and not pass the Preserving Employee Wellness Programs Act.**

Signed,

5p- Society
Alstrom Syndrome International
American Association on Health and Disability
American Diabetes Association
American Foundation for the Blind
American Heart Assocation
American Society of Human Genetics
Angioma Alliance
Association of Molecular Pathology
Association of University Centers on Disabilities
Autistic Self Advocacy Network
AXYS
Bazelon Center for Mental Health Law
Brain Injury Association of America
CFC International
Coalition of Heritable Disorders of Connective Tissue
Congenital Adrenal hyperplasia Research, Education & Support (CARES) Foundation
Council for Responsible Genetics
Dempster Family Foundation
Disability Rights Education and Defense Fund
Epilepsy Foundation
Fabry Support & Information Group
Families USA

Family Voices of NJ
FORCE: Facing Our Risk of Cancer Empowered
Foundation for Prader-Willi Research
Friedreich's Ataxia Research Alliance
Genetic Alliance
Global Healthy Living Foundation
HHT Foundation International
Inflammatory Breast Cancer Research Foundation
International Myeloma Foundation
International Pemphigus and Pemphigoid Foundation (IPPF)
International WAGR Syndrome Association
Lakeshore Foundation
M-CM Network
MLD Foundation
National Council on Independent Living
National Disability Rights Network
National Hemophilia Foundation
National Urea Cycle Disorders Foundation
NBIA Disorders Association
Ovarian Cancer National Alliance
Paralyzed Veterans of America
Parent Project Muscular Dystrophy (PPMD)
PXE International
Statewide Parent Advocacy Network
Sticker Involved People
Sudden Arhythmis Death Syndromes (SADS) Foundation
Susan G. Komen
The Life Raft Group
Tuberous Sclerosis Alliance
United Leukodystrophy Foundation

National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

March 30, 2015

Chairman Tim Walberg
Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Ranking Member Frederica Wilson
Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Wilson:

I write on behalf of the National Council on Disability (NCD), an independent federal agency, to provide advice and counsel to the Committee on a matter currently pending review and highlighted in the Committee's March 24th hearing regarding employer-based wellness programs' obligations under the Americans with Disabilities Act (ADA). NCD strongly urges lawmakers in both the House and Senate to reject H.R. 1189 and S. 620 as these measures threaten to substantially weaken important protections under the ADA.

By way of brief background, NCD's own identity and policy expertise is inextricably linked to the history of the ADA. NCD began as a small advisory body at the Department of Education, but in 1984, Congress made NCD independent and charged it with reviewing all federal policies and programs as they affect people with disabilities. Two years later, its 15 members appointed by President Reagan delivered on that mandate by calling for enactment of a national civil rights law for people with disabilities; and in 1988, NCD offered the first draft of the law. 25 years ago this July, President George H.W. Bush signed the ADA into law, calling it, "...the world's first comprehensive declaration of equality for people with disabilities..."[1] The Americans with Disabilities Act of 1990 and the ADA Amendments Act of 2008 (ADAAA) can be viewed together as a great victory of bipartisanship. When George W. Bush signed ADAAA in 2008, his father joined him at the White House to mark the occasion, as did Sen. Tom Harkin (D-IA, Ret.), Sen. Orrin Hatch (R-UT) and other luminaries from both sides of the aisle. Similarly, when the Equal Employment Opportunity Commission (EEOC) released its ADAAA regulations, the U.S. Chamber of Commerce applauded the bipartisan nature of the Commission's efforts:

> "The Commission is to be commended for undertaking the hard work needed to reach bipartisan agreement that has been a hallmark of the Americans with Disabilities Act for the last two decades. We know firsthand that these issues can be exceedingly difficult. While we have only begun to review the final regulation, it is clear that the Commission gave substantive consideration to our comments and those of other stakeholders."[1]

Title I of the ADA prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The EEOC enforces Title I and received more than 25,000 complaints of disability discrimination complaints in FY 2014[2]. In response to a documented history of employment discrimination against people with disabilities, including "hidden" disabilities such as psychiatric disabilities, epilepsy, diabetes and many other disabilities, the ADA only permits questions related to medical conditions and disabilities to the extent that these questions are job-related and consistent with business necessity. In 2008, Congress reaffirmed the importance of these protections when it passed the ADAAA and retained the prohibition against disability-related inquires except in narrow circumstances. Notwithstanding this prohibition, employer-based wellness programs that may provide employees with an opportunity to *voluntarily* disclose health information have always been allowed under the ADA. However, these programs have always been subject to scrutiny regarding their voluntariness and the EEOC plays a critical role in developing guidance with respect to the facts and circumstances that reliably indicate that a program is voluntary rather than coercive.

The Affordable Care Act (ACA)'s provisions regarding wellness programs do not conflict with the ADA on this point, nor does it amend, alter, or supersede the ADA's requirements in any way. However, NCD is concerned that a proposed rule of construction in H.R. 1189 (and S. 620) seeks to operate as though it did and suggests that any disability disclosure that would not violate the ACA does not violate the ADA. ACA is not an employment discrimination statute, nor does it purport to describe the facts and circumstances that indicate whether a wellness program's required disclosures are voluntary. While ACA stipulates that rewards for participation in an employer-based wellness program cannot exceed 30% of the cost of employee-only coverage in order to avoid discrimination in *insurance coverage*, it is silent on the question of when a reward or penalty violates the ADA by coercing an employee to disclose his or her disability status.

NCD first recognized the potential for tension between the ACA wellness provisions and the privacy protections offered by the ADA in a letter to EEOC Chair Jacqueline Berrien

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[1] U.S. Chamber of Commerce (2011) retrieved from: https://www.uschamber.com/press-release/us-chamber-applauds-bipartisan-work-eeoc-ada-amendments-regulations

[2] EEOC Charge Statistics, FY 1997-2014, retrieved from: http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

dated June 5th, 2013. In that letter, NCD urged the EEOC to issue guidance that would address:

- When a medical examination or inquiry is part of an employee health program and when a program-related medical exam or inquiry is voluntary and therefore permissible under the ADA;
- What accommodations are required for employees with disabilities who participate in wellness programs;
- Whether the ADA limits the type of voluntary inquiries employers are allowed to ask;
- Ways to ensure that sensitive information remains confidential and wellness programs remain affordable; and
- Whether the ADA's protection against the misuse of medical information is sufficient to address discrimination concerns.

NCD is very concerned that each of the bills under consideration during the Committee's recent hearing in some way erodes the ability of the EEOC to enforce the ADA; and that H.R. 1189 specifically undermines the right of employees and applicants with disabilities to keep disability and health-related information private when the disability is unrelated to the performance of the job.

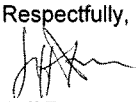
By making a general pronouncement that the ADA cannot be violated by a wellness program operating within the perimeters of the ACA, H.R. 1189 fails to address the aforementioned issues while subverting the EEOC's critical role and expertise in crafting guidance and bringing litigation that would allow the judicial system to further clarify when a wellness program has overstepped and violated the ADA. H.R. 1189 opens the door to discriminatory practices with no remedy, thereby dramatically weakening the ADA and the EEOC's ability to address disability discrimination.

NCD eagerly anticipates the EEOC's clarification regarding the ADA's applicability to employer-based wellness programs in the form of guidance or regulations. It is through this anticipated regulatory process that all stakeholders will be able to offer their thoughts in a transparent manner about the interplay between ACA and the ADA.

In view of the ADA's 25th anniversary this year, NCD urges Congress to allow the EEOC the opportunity to provide clarification in the form of regulations or guidance prior to acting legislatively in a manner that runs contrary to the balanced compromises reached among stakeholders in negotiations that produced the bipartisan successes the ADA has enjoyed. It is sobering to think that, in the process of seeking to clarify the responsibilities of employers, the proposed legislation could have the unintended consequence of rolling back the protections of a law that Congress passed in a bipartisan fashion in 1990 as well as amended in a bipartisan fashion in 2008.We stand ready to be a resource to the Committee on this or related topics. Please do not hesitate

to contact our Director of Legislative Affairs, Anne Sommers, at asommers@ncd.gov, with any questions you may have.

Respectfully,



Jeff Rosen
Chairperson

[1] Presidential Statement on the Signing of the ADA of 1990, 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990)

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

April 13, 2015

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

Dear Chairman Walberg:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Text of H.R. 548

A. Findings (Section 2)

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

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

42 U.S.C. § 2000e-12.

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

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

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

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

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

B. Amendment to Title VII (Section 3)

The Amendment would provide:

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

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

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

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

II. Flawed Basis for This Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Sincerely,

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