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 C*ERTAINTY 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 P*RESERVING 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,

[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

[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

[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.