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
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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.

[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.