

from the full Commission, additional EEOC staff, and dozens of stakeholders representing employers and employees, and many other interested members of the public. In addition, we consulted with other agencies concerning development and implementation of their Strategic Plans and measurements.

Assumptions. Several assumptions underlying the recommendations reflect a misunderstanding of EEOC's enforcement. For example, the report recommends that we measure discrimination by looking at the "Percent of citizens¹ reporting discrimination." A measure on reported discrimination fails to acknowledge the underreporting of discrimination, the lack of awareness of legal protections, and the difficulties complying with procedural requirements that reduce reporting. Without controlling for these factors, we could not draw any credible conclusions about whether discrimination has increased or decreased. Moreover, conducting a survey of our stakeholders – in our case, most of the nation's workforce – would have significant budgetary, legal, and staff implications.

The report also suggests as a performance measure the "number of charges that led to a resolution that discrimination had occurred or for which mediation led to some form of relief being provided." (Page 19) This suggested measure fails to recognize that many charges are dismissed without any finding or resolution.² Many of these charges may be meritorious but are closed at the request of charging parties represented by counsel who wish to litigate their claims.

It also relies on the mistaken premise that if EEOC does not find reasonable cause or settle through mediation, there was no discrimination.³ Few, if any, believe that the Commission's cause or no cause rate can reliably measure whether discrimination actually occurred or whether an individual may prevail in a settlement or court litigation after the EEOC process

Further, we are also concerned with the report's recommendation to alter Performance Measure 4 regarding systemic litigation.(p.5) The report states that systemic cases are "not a product of EEOC's work," but rather depend "primarily on the characteristics of the cases [that] come to EEOC." This assumption is incorrect. The EEOC carefully develops systemic cases from charges filed by individuals and Commissioner Charges and Directed Investigations, where EEOC becomes aware of a particular systemic practice yet no charge has been filed.

¹ We note that the laws enforced by EEOC protect individuals without regard to their citizenship status.

² See Laura Beth Nielsen, Robert L. Nelson, and Ryan Lancaster, "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States," 7 *Journal of Empirical Legal Studies* 175, 191 (June 2010). "In 80 percent of the lawsuits in our sample, the EEOC made no finding and provided the plaintiff with a right-to-sue letter. In the 20 percent of cases in which there was an EEOC finding, the EEOC supported the plaintiff's charge 21 percent of the time and did not support on the merits 79 percent of the time. These EEOC administrative decisions also have relatively little effect on litigation outcomes."

³ *Id.*

have an efficiency measure in its last Strategic Plan. Clearly, EEOC has considered such measures, but decided that such a measure in the current plan was not appropriate.

- Definitions would be useful for some terms that are used in proposed measures #1 and #2 under Strategic Objective 2. Measure #1 refers to “employable” citizens and it is unclear if this is attempting to capture individuals in the labor market, those seeking employment or some other government measure on employment in the U.S. Both measures refer to responders being “reasonably clear” about rights relating to employment discrimination, but there should be greater explanation provided about how to test a measurement of knowledge that would meet a ‘reasonably clear’ standard.

If you have any questions about our comments, please contact me or Sharon Shoemaker or Sue Murphy of my staff.

cc: Claudia Withers, COO

P. David Lopez, General Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

March 1, 2013

To: Milton A. Mayo
Inspector General

From: P. David Lopez
General Counsel

Re: Comments on draft report "Evaluation of EEOC's Outcome Measure," prepared by the Urban Institute

This is in response to your request for comments on the Urban Institute's draft report. We appreciate the time taken by the Urban Institute to learn about the work of our agency. We believe that many of the approaches suggested in the report should be seriously considered by the EEOC. However, the EEOC's resources are extremely limited and we do not think the agency can bear the burden of additional measures that might require the creation of new tracking systems, significant time by a shrinking staff and/or contracts with outside experts. The following are specific comments focused on those recommendations in the report that address the litigation program:

First, with respect to Performance Measure 4, "the percent of cases that are systemic cases," the draft report suggests that the EEOC measure the number (not percentage) of systemic cases received. However, the EEOC's systemic litigation docket does not come about simply from systemic charge filings. While a charge alleging systemic discrimination might be the basis for a systemic lawsuit, there are other sources of such suits. For example, systemic litigation may be the result of a Commissioner's charge or an individual charge that did not necessarily allege systemic discrimination. Thus, counting the number of systemic charges received provides limited information about systemic litigation case filings.

We do agree with the draft report's recommendation that it is important to track the number and percent of systemic cases that are resolved satisfactorily. In our experience, this is information that our stakeholders are always interested in obtaining and OGC tracks this information for our own program assessment purposes. Of course, the systemic cases are only a part of the litigation docket and, as discussed below, we track the successful resolution of non-systemic cases, as well. Indeed, it is important to have measures that we have at least some ability to control and tracking successfully resolutions, while not perfect, is such a measure.

Second, we agree that Performance Measure 6, percent of EEOC's administrative and legal resolutions that contain targeted, equitable relief, is an important measure of success. There was some initial confusion in OGC about the definition of the term "equitable" because this term has a very specific meaning in our Title VII cases and that definition includes monetary

relief, such as backpay. Therefore, we do believe it would have been more desirable – and less confusing to litigating lawyers – to have used the term “targeted non-monetary relief” for this measure. However, at this point in implementation, computer programs have already been modified and trainings have been conducted and we believe staff will input the correct information.

As important as “targeted equitable relief” is in our cases, we also believe it is equally important to measure our success at obtaining monetary relief for victims of discrimination. The laws we enforce provide for such monetary relief and, it is indeed “targeted” as it is provided to specific individuals. Tracking monetary relief, along with equitable relief, completes the picture. Indeed, OGC has and will continue to track this information, and external stakeholders continue to ask for this information.

Third, the draft report recommends the measure “percent of litigated cases that ended favorably to the EEOC position. “ We agree that this is an important measure and as the draft report indicates, OGC currently tracks this information and will continue to do so for both internal and external purposes.

Fourth, we are concerned about the draft report’s recommendation that the EEOC expand the Strategic Enforcement Plan (SEP) quarterly meetings and use the type of quarterly data-driven reviews that OMB requires for the large federal agencies. Given our dwindling human resources, we believe that our staff needs to be able to concentrate on doing the jobs they were hired to do, and that reporting and process-oriented meetings that require substantial staff input and time, be kept to a minimum. Indeed, we have just completed the first quarterly SEP meeting and the preparation required significant staff time and it is not at all clear that the result of this meeting or the future meetings will lead to programmatic improvements to advance the mission. Further, pursuant to our statutes, the General Counsel, who is Presidentially appointed, has independent authority over the conduct of litigation and any meetings must ensure that the lines of authority and responsibilities within the agency are not blurred. This issue has been of paramount concern to this office throughout the development of the SEP. Thus, we would not endorse the recommendation for expanded meetings.

Finally, as a housekeeping matter, the following are the additional names of individuals from OGC who participated in the interview with the Urban Institute:

James Lee, Deputy General Counsel
Gwendolyn Reams, Associate General Counsel
Jennifer Goldstein, Senior Attorney Advisor

Please feel free to contact me at 202-663-4702 or Leslie Annexstein at 202-663-4610 if you have any questions.