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December 2, 2022

The Honorable Charlotte A. Burrows
Chair of the Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: EEOC-2022-0004-0001, FY 2022-2026 Draft Strategic Plan

Dear Chair Burrows:

Thank you for the opportunity to comment on the Equal Employment Opportunity Commission's ("EEOC") 2022-2026 Strategic Plan ("SP").

A Better Balance is a national nonprofit legal services and advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. We run a free and confidential legal helpline through which we hear from thousands of workers a year, including workers who have experienced discrimination on the basis of pregnancy, lactation, disability, and caregiver status.

I. Strategic Goal 1 (Combat & Prevent Employment Discrimination Through the Strategic Application of EEOC's Law Enforcement Authorities)

Performance Measure 7

We appreciate EEOC's awareness of the need to improve its intake and charge-filing process. We write to draw the agency's attention to several specific problems we believe the agency should address in the SP.

(1) Long wait times to obtain an intake appointment with the agency.

On our free and confidential legal helpline, we hear from thousands of workers a year. Many of these workers complain about the lengthy wait time to schedule an intake with the EEOC. For example, one helpline caller reported requesting an intake in the fall and being told that intake appointments were not available until the following spring. A recent report by the Government Accountability Office ("GAO") bolsters our callers' experiences: The GAO found that some field offices average nearly *four months'* delay in scheduling intakes.¹ These delays have particularly devastating impacts on workers who are currently experiencing unlawful harassment or in need of an accommodation to preserve their health and their employment. They also

¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 18 (2022), <https://www.gao.gov/assets/gao-23-106245.pdf>.

disproportionately impact the most vulnerable workers, who are more likely to experience instability in access to transportation and communication tools such as phones and computers, which are required to confirm, reschedule, and reach intake appointments.

Given the lengthy wait times, it is no surprise that new charges have dropped precipitously in recent years.² Indeed, the GAO found a correlation between field offices with long intake wait times and low charge-filing rates, and observed that some workers decided not to file charges at all because they were unable to obtain a timely intake interview appointment.³ The GAO concluded that the agency’s intake delays “could have a dampening effect on new charge filings”⁴—a reality we have seen reflected by our helpline callers, as well. These lengthy delays frustrate workers’ ability to vindicate their rights and compromise the agency’s mission to reduce unlawful workplace discrimination.

Accordingly, **we urge** the agency to revise the SP to commit to (a) monitoring and publicly reporting the length of the intake wait time at each field office; (b) decreasing the intake processing time by ten (10) percent per fiscal year; (c) assessing *why* some field offices’ intake backlogs are so much more pronounced; and (d) developing specific performance measures to improve these offices’ response times.

(2) Poorly-functioning online charge portal.

Currently, attorneys representing workers in the EEOC process are unable to create their own online portal accounts to communicate with the EEOC on behalf of their clients. As a result, EEOC often sends online communications to the client, instead of the lawyer, burdening clients, fostering miscommunication and exacerbating delays, and frustrating counsel’s ability to effectively represent their clients.

We urge EEOC (a) to create a means for attorneys to register their own online portal accounts and (b) to send all communications directly to counsel rather than solely to represented parties.

Performance Measure 6

Delays in the EEOC’s charge investigation process are especially alarming in the case of workers experiencing discrimination on an ongoing and time-sensitive basis.

For example, pregnant workers whose employers are failing to accommodate their pregnancies (in violation of the Pregnancy Discrimination Act and the Americans with Disabilities Act) need accommodations as soon as possible in order to continue working without risking their health. Resolving their cases many months or years later is of limited utility given that pregnancy itself is time-limited and the need for accommodation is often urgent. The same is true for workers whose employers are failing to accommodate their disabilities (in violation of the Americans with Disabilities Act) and religious practices (in violation of Title VII).

² U.S. EQUAL EMP. OPPORTUNITY COMM’N, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2021, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021>

³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 18–20 (2022), <https://www.gao.gov/assets/gao-23-106245.pdf>.

⁴ *Id.*

Likewise, workers experiencing ongoing harassment on the basis of their pregnancy, lactation, or other protected status require timely attention from EEOC in order to obtain meaningful relief. Resolving such harassment cases many months or years later may allow the worker to recover some monetary compensation for the harms of harassment but utterly fails to provide workers the remedy they often most seek: an end to the harassment and a safe workplace.

Accordingly, **we urge** EEOC to revise the SP to commit to the creation of a system for fast-tracking investigations where workers are experiencing (a) an ongoing need for accommodation or (b) ongoing harassment, to ensure that relief is effective and meaningful, in line with EEOC Strategy I.A.4. and I.A.5. EEOC could look to partner agencies that have implemented such fast-track systems, such as the New York City Commission on Human Rights, for guidance.

Performance Measure 4

Protecting workers from unlawful discriminatory practices requires effective monitoring of conciliation agreements to ensure that employers have in fact accorded the agreed-upon individual and equitable relief, including policy changes. And workers' willingness to participate in the EEOC investigation and conciliation process requires confidence that the agency will in fact monitor and enforce agreement terms.

We recommend the agency revise the SP to adopt *quantitative* measures to improve EEOC's compliance program. Performance Sub-Measure 4a, which directs EEOC merely to issue annual reports on the agency's enhancement of its compliance monitoring program for conciliation agreements, is insufficient and should be refined. For example, EEOC should revise the SP to commit to tracking and publicly reporting the percentage of conciliation agreement terms with which employers actually complied per fiscal year. Specifically, in FY 2023, the SP should direct the agency to assess how many terms employers met; in each fiscal year thereafter, the agency should commit to increasing by five (5) percent the percentage of terms with which employers complied.

Performance Measure 3

We applaud the agency's implementation of its Systemic Program, which is vital to root out widespread discrimination across companies and industries. EEOC is uniquely situated to identify alarming company- or industry-wide trends, conduct investigations beyond the scope of individual charges, obtain and analyze company- or industry-wide data, and obtain comprehensive relief.

Accordingly, **we support** the agency's ongoing efforts to expand its Systemic Program, including those reflected in its Performance Measure 3.

II. Strategic Goal 2 (Prevent Employment Discrimination & Advance Equal Employment Opportunities Through Education & Outreach)

Performance Measure 10

We support the agency's commitment to creating and/or updating its resources and guidance documents each fiscal year. In our experience, such documents are essential to our helpline callers and clients understanding their legal rights at work and to employers understanding their legal obligations.

We urge EEOC to prioritize updating the following existing guidance documents: (1) the 2007 caregiver discrimination guidance and (2) guidance on the use of artificial intelligence (“AI”) in hiring and performance monitoring. Additional information on the need for such updates, and what they should include, is available in our October 7, 2022 comment on the agency’s upcoming Strategic Enforcement Plan.⁵

In addition, **we recommend** EEOC issue an FAQ for employers on workers’ lactation rights under the Pregnancy Discrimination Act and the Fair Labor Standards Act Section 7(r), explaining what employers need to know about effectively accommodating lactating workers, including the health, financial, and legal reasons for doing so. The agency should consider partnering with the Departments of Labor and Health and Human Services on this FAQ and should look to the New York City Commission on Human Right’s excellent document, “Lactation Accommodations: What NYC Employers Need to Know,” as a guide.⁶

III. Strategic Goal 3 (Strive for Organizational Excellence Through Our People, Practices & Technology)

Performance Measure 12

Ongoing training for agency staff is essential to ensure that frontline staff who most interact with workers during the intake, charge-filing, investigation, and mediation processes, understand the law and do not inappropriately exclude workers with meritorious claims from the EEOC process. The application of the antidiscrimination laws to workers alleging failure to accommodate pregnancy/lactation and/or caregiver discrimination, can be complicated—particularly for non-attorneys—and requires comprehensive, ongoing training to ensure appropriate resolution of such claims.

Accordingly, **we recommend** EEOC revise the SP to commit to increasing training for its field office staff, including its investigators, mediators, and attorneys, on protections related to pregnancy accommodations, lactation accommodations, and caregiver discrimination. We recommend that training materials focus on real-life scenarios experienced by low-wage pregnant and lactating workers in physically demanding industries—such as warehouses, construction, and agriculture—where accommodations are most necessary and, in our experience, least provided.

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⁵ A Better Balance, Comments Submitted to U.S. Equal Employment Opportunity Commission Highlighting Need to Prioritize Women & Caregivers (Oct. 7, 2022), <https://www.abetterbalance.org/resources/comments-submitted-to-the-u-s-equal-employment-opportunity-commission-eeoc-highlighting-need-to-prioritize-women-and-caregivers/>.

⁶ N.Y.C. COMM’N ON HUMAN RIGHTS, LACTATION ACCOMMODATIONS: WHAT EMPLOYERS NEED TO KNOW (2019), https://www.nyc.gov/assets/cchr/downloads/pdf/Lactation%20Accommodation_WhatNYCEmployersNeedToKnow%20FINAL.pdf.

We thank you for the opportunity to comment on EEOC's important work and priorities.

Sincerely,

Dana Bolger
Staff Attorney

Katherine Greenberg
Director of Strategic Litigation

Sarah Brafman
National Policy Director