April 19, 2012

The Honorable Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Avenue NW, Room 262
Washington, DC 20503

Re: Forthcoming Significant Guidance from EEOC on Reasonable Accommodation Under the Americans with Disabilities Act

Dear Administrator Sunstein:

We are writing on behalf of the U.S. Chamber of Commerce, the HR Policy Association, and the Society for Human Resource Management to bring to your attention serious issues related to forthcoming guidance that is being developed by the Equal Employment Opportunity Commission (EEOC) amending or replacing its existing enforcement guidance on reasonable accommodation and undue hardship under the Americans with Disabilities Act (ADA).

The U.S. Chamber of Commerce (Chamber) is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The HR Policy Association (HR Policy) is a public policy advocacy organization representing the chief human resource officers of more than 330 of the largest corporations doing business in the United States and globally. The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, SHRM has long advocated for improving employment opportunities for individuals with disabilities.

The Chamber, HR Policy, and SHRM each have a long history with respect to the ADA and in seeking legislative and regulatory solutions to implement this important law that can be adopted on a bipartisan, consensus basis. Each of our organizations was active in negotiating a compromise with the disability community on which the ADA Amendments Act of 2008 was based. We also worked with the EEOC from the time the bill was enacted until final regulations were finalized in 2011 to try to ensure that the regulations accurately reflected the law and the compromise that underlies it.

It has come to our attention that the EEOC is now considering replacing its longstanding enforcement guidance on reasonable accommodation and undue hardship.¹ We are especially concerned that this guidance might be voted on as soon as April 25, 2012, without any meaningful

¹ No. 915.002 (Oct. 17, 2002).
opportunity for stakeholder participation in development of the guidance and without review by OMB. Although the EEOC held a public meeting on the issue of “leave” as a reasonable accommodation,\(^2\) this meeting explored only one limited issue and did not provide a draft agency position for stakeholders to comment upon. It is also our understanding that the revised guidance will address other significant reasonable accommodation policy issues that were not discussed at the meeting.

As you have recently heard with respect to pending EEOC guidance on employer use of background checks, strong policy favors pre-adoption notice and comment on guidance documents. As OMB stated in its bulletin to federal agencies regarding issuing guidance:

> Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.\(^3\)

The new ADA guidance documents under consideration by the EEOC satisfy the above criteria. Reasonable accommodation and undue hardship are complex areas of the law and we are concerned that the guidance will be extremely controversial. Moreover, pre-adoption notice and comment has a good chance at helping the agency arrive at guidance that better reflects the law while limiting controversial elements of the proposal.

As you know, the EEOC has an unfortunate track record in developing and maintaining guidance that is inconsistent with law in its\(^4\) 1997 Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment. This document opines 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).” The Commission did not enter into pre-adoption notice and comment at the time.

Courts have now uniformly rejected this guidance and its inconsistency with federal law is no longer subject to legitimate debate.\(^5\) Yet, the Policy Statement remains the position of the Commission and is still displayed on its website without any notation that courts have uniformly rejected it. How


\(^4\) Available at: [http://www.eeoc.gov/policy/docs/mandarb.html](http://www.eeoc.gov/policy/docs/mandarb.html).

\(^5\) See, e.g., EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748 (“All of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements.”).
many employers changed behaviors based on the unlawful guidance? How many instead choose to settle allegations that they had violated the law? How many chose to litigate the matter? How much did it cost them?

We have significant concerns that the guidance under consideration by the EEOC will not interpret the ADA in the balanced manner which Congress directed. Intervention at this stage can help ensure that any guidance the EEOC adopts in these areas will not follow in the unfortunate footsteps of its binding arbitration guidance.

Of course, we also have serious substantive concerns about the guidance under consideration. While we may only speculate as to the precise contents of the guidance under consideration, some stakeholders, for example, argued at the Commission’s public meeting on “leave” issues that attendance can never be an essential function of a job\(^6\) despite the fact that “since the passage of the ADA, a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions.”\(^7\) Likewise, the Commission heard witnesses argue for policies that would make it vastly more difficult for employers to address issues related to requests for extended leaves and leaves of indefinite duration,\(^8\) although the vast majority of courts have ruled that employers do not need to provide indefinite leave as a reasonable accommodation.\(^9\) Among the many concerns raised by these and other issues is whether the EEOC seeks to effectively use the ADA as a mechanism to expand the Family and Medical Leave Act both to cover smaller employers and provide for longer periods of leave. We respectfully suggest that such decisions are the province of Congress and not the agency.

While EEOC guidance does not have the force and effect of law and is not entitled to great deference by courts, the agency can be expected to enforce the ADA according to the terms of the guidance. Moreover, employers will be led to believe that this guidance is an accurate statement of the law. There can be no doubt that the EEOC expects any such guidance to significantly alter employer practices. Indeed, because of this, some stakeholders expressed concern during the Commission’s meeting on “leave” as a reasonable accommodation that the EEOC will interfere with employers’ ability to rely on reliable, predictable employee attendance.

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\(^6\) See Testimony of Brian East, EEOC Meeting on Use of Leave as a Reasonable Accommodation (Jun. 8, 2011), available at: [http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm](http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm).

\(^7\) Samper v. Providence St. Vincent Medical Center, No. 10-35811 (9th Cir., April 11, 2012).

\(^8\) Id.

\(^9\) See, e.g., Valdez v. Brent McGill and Mueller Supply Co., Inc., 2012 U.S. App. LEXIS 2783 (10th Cir. 2012)(unpublished) (holding that “when the employee seeks leave, but it is uncertain if or when he will be able to return to work, a leave of absence is not a reasonable accommodation.”); Peyton v. Fred’s Stores of Arkansas, 561 F.3d 900 (8th Cir. 2009) (holding that “indefinite” leave is not a reasonable accommodation and the employer did not need to hold open the employee’s job where she “had no idea when, if ever, she would be able to return”); Fiumara v. Harvard College, 2009 U.S. App. LEXIS 9558 (1st Cir. 2009)(unpublished) (holding that “indefinite leave is not a reasonable accommodation under the ADA.”).
For these reasons, we strongly urge you to ensure that the EEOC not finalize any new guidance on reasonable accommodation and undue hardship under the ADA until such time as the draft guidance has been properly reviewed by OMB and been made available for public notice and comment.

Thank you very much for your consideration of this request. Please do not hesitate to contact us if we may be of further assistance.

Sincerely,

Randel K. Johnson  
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Labor, Immigration, & Employee Benefits  
U.S. Chamber of Commerce

Michael P. Aitken  
Vice President, Government Affairs  
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cc: Hon. Jacqueline A. Berrien, Chair  
Equal Employment Opportunity Commission