

On The Hill

NELA's Washington Report



May 2012

NELA Participates In White House Summit On Judicial Nominations

On May 7, 2012, NELA was one of over two dozen advocacy groups invited by the White House to participate in a briefing and strategy session on the nation's judicial vacancy crisis. (Read NELA's press statement [here](#).) The summit took place on the final day of the brokered Senate agreement that allowed the confirmation of 14 of President Obama's picks to the federal bench, including three judges that afternoon. NELA served as a member of the Planning Committee for the Coalition for Constitutional Values, the broad-based coalition that sponsored the event. NELA members William H. Ewing (PA) and M. Megan O'Malley (IL), who serve on NELA's Judicial Nominations Committee, joined the 150 invited guests engaging White House officials on how to move pending nominees through the confirmation process and fill the unprecedented number of judicial vacancies plaguing our nation's courts.

U.S. Attorney General Eric Holder led off the plenary session by noting that President Obama's nominees have waited over 100 days to be confirmed—nearly five times longer than President George W. Bush's nominees did at the same point in his Administration. "Republican obstructionism has left half of all Americans—over 160 million people—without enough judges to handle the federal judiciary's caseload," Holder added, and resulted in some 35 federal courts across the country being labeled as judicial emergencies. Echoing the points made in NELA's Report entitled "Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench," Bill Ewing asked Holder directly about the need for professional experiential diversity on the bench and let him know there were too many big firm lawyers and former prosecutors who have been nominated by the Administration. Bill's question was met with rousing applause from attendees and made a difference in the presentations that followed, with later speakers specifically referencing experiential diversity among the other traditional diversity measures that matter to the White House. NELA was recognized throughout the day as the organization leading the charge in ensuring that workers receive equal justice under the law and enhancing the quality of decision making for litigants in employment cases.

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Kathryn Ruemmler, Assistant to the President and White House Counsel, discussed how tough negotiations with Senators over home state nominees have led to prolonged delays in the nominations process and that a single Senator's refusal to support a nominee by returning what is known as a "blue slip" can effectively kill a nomination with little or no retribution. She stated that the White House's goal is to confirm at least 35 of President Obama's judicial nominations between now and the November Presidential election.

After the plenary session, Christopher Kang, Special Assistant to the President and Senior Counsel, moderated a panel of White House Counsel staff who shared their insight into the judicial nominations process as part of the team whose full-time job is devoted to this issue. Kang noted the need for the White House to have specific examples of problems created by vacant seats. Megan O'Malley was able to speak directly with Kang about her client who waited over 10 years to have his employment discrimination case heard due to the lack of judges in Illinois, which provided one of the most concrete (and well articulated) examples of the deleterious effects of the judicial vacancy crisis.

Following the breakout sessions, the participants headed to the Hill for constituent meetings with Senate offices. The day ended with a wrap-up session facilitated by Serena Hoy, Senate Majority Leader Harry Reid's (D-NV) Senior Counsel, and Jeremy Paris, Chief Counsel for Nominations and Oversight for Chairman Patrick Leahy (D-VT).

The day's events were covered by national and local media organizations throughout the country, including The Rachel Maddow Show, which featured Alliance For Justice President Nan Aron that evening.

Galvanized by the success of the event, the Coalition for Constitutional Values is working on follow-up meetings with participants' Senate offices and coordinating the next round of judicial nominations set for a Senate vote.

EEOC Issues Enforcement Guidance on Arrest And Convictions Records; House Votes For Appropriations Amendment To Forbid Use of Commission's Funds To Implement

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964", as amended, 42 U.S.C. § 2000e.

The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII, applicants and employees, and for EEOC enforcement staff.

The Commission began to re-evaluate its policy statements on this issue after the Third Circuit Court of Appeals noted in *El v. Southeastern Pennsylvania Transportation Authority* (479 F.3d 232, 3d Cir. 2007) that the EEOC should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to assess further the impact of using criminal records in employment decisions that resulted in the latest guidance.

On May 10, 2012, the House passed by voice vote an appropriations amendment that will forbid the EEOC from using any of its funds "to implement, administer, or enforce" this guidance. The amendment was sponsored by Ben Quayle (R-AZ), Steve Scalise (R-LA), Cliff Stearns (R-FL), and Rob Woodall (R-GA).

The Senate Appropriations Committee approved its own bill funding the EEOC last month. Once the full Senate passes a final appropriations bill, it will need to be reconciled with the House version.

Consumer Financial Protection Bureau To Look At Forced Arbitration Clauses

The Consumer Financial Protection Bureau (CFPB) is seeking comment on the use of clauses that require consumers to resolve disputes with companies through arbitration rather than through the court system. The central mission of the CFPB is to make markets for consumer financial products and services work for Americans—whether applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products.

As a precursor to its study of consumer arbitration mandated by Section 1028 of the Dodd-Frank Act, the CFPB issued a "Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements." The request, published in the Federal Register, seeks public comment by June 23, 2012 on a series of topics dealing with the scope, methodology, and data sources of the study. Forced arbitration clauses are used for products including credit cards, checking accounts and payday loans, as well as in employment contracts. NELA and several of our Fair Arbitration Now (FAN) Coalition colleagues plan to submit comments.

Reps. Nadler, Maloney, Speier, And Davis Announce Legislation Protecting Pregnant Workers From Discrimination

On May 8, 2012, Representatives Jerrold Nadler (D-NY), Carolyn Maloney (D-NY), Jackie Speier (D-CA), and Susan Davis (D-CA) introduced the Pregnant Workers Fairness Act, to ensure that pregnant women are not forced out of jobs unnecessarily or denied reasonable job modifications that would allow them to continue working. The legislation will close legal loopholes and ensure that pregnant women are treated fairly on the job. At press time, the bill had 63 original cosponsors.

The legislation would prevent employers from using a worker's pregnancy to deny her opportunities on the job, force her to take an accommodation that she does not want or need, or force her onto leave when another reasonable accommodation could help keep her on the job—all rules outlined in the Americans With Disabilities Act (ADA).

Currently, pregnant women are protected by the federal Pregnancy Discrimination Act, but protection against discrimination does not require accommodation. Sometimes equal treatment is not enough to allow a woman to stay on the job. NELA signed on to a support letter for the legislation authored by the National Partnership for Women and Families.

House Education and Workforce Committee Holds Hearing on OFCCP Regulatory And Enforcement Actions

On Wednesday, April 18, 2012, the Subcommittee on Health, Employment, Labor, and Pensions, chaired by Rep. Phil Roe (R-TN), held a hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' (OFCCP) Regulatory and Enforcement Actions."

According to the Subcommittee's media advisory, "the agency is currently developing five regulatory proposals that may lead to even greater administrative burdens on employers. For example, two such proposals would require employers to provide a "statement of reasons" that explains why certain workers were not extended an employment opportunity. Additionally, OFCCP has sought to expand its jurisdiction to certain health care providers, challenging their ability to deliver affordable health care to seniors and veterans."

Although NELA did not testify at the hearing, Democratic members of the Subcommittee contacted us for our input. Patricia A. Shiu, OFCCP Director, is a former NELA Executive Board member.

To learn more about this hearing, visit www.edworkforce.house.gov/hearings.

EEOC Rules Transgender Employees Protected By Title VII

In a landmark ruling, the U.S. Equal Employment Opportunity Commission (EEOC) announced that Title VII of the Civil Rights Act of 1964 as amended protects employees who are discriminated against because they are transgender. In its unprecedented decision, the EEOC concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on... sex' and such discrimination... violates Title VII."

The ruling came as a result of a discrimination complaint filed by the Transgender Law Center on behalf of Mia Macy, a transgender woman who was denied a job as a ballistics technician at the Walnut Creek, California laboratory of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

To read the EEOC ruling, go to <http://transgenderlawcenter.org/cms/blogs/552-24#ruling>.

Senator Patty Murray Introduces Legislation To Protect Veterans, Servicemembers From Unemployment and Foreclosure

On April 18, 2012, Senator Patty Murray (D-WA) introduced a bill entitled the Servicemembers Rights Enforcement Improvement Act (SREIA/S. 2299), which would strengthen the employment rights of veterans and members of the military. The bill is intended to improve the enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits employers from penalizing or denying jobs to servicemembers based on their military status. Senator Murray is the Chairman of the Senate Veterans' Affairs Committee.

SREIA would enable the Department of Justice (DOJ) to investigate and bring lawsuits against employers with a history or pattern of USERRA violations. The proposed legislation would also allow the Office of Special Counsel to subpoena relevant testimony and documents from federal employees and agencies. In addition, the legislation would protect service members from being improperly overcharged or foreclosed upon by banks.

Senator Mary Landrieu, Representative Gregory Meeks Co-Sponsor Paycheck Fairness Act

On April 17, 2012, Senator Mary Landrieu (D-LA), became a co-sponsor of the Senate version of the Paycheck Fairness Act (PFA/S.797) that would amend the Fair Labor Standards Act (FLSA) of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex. The bill, introduced by Senator Barbara Mikulski (D-MD), currently has 35 sponsors. Similarly, in the House, Representative Gregory Meeks (D-NY) became the 179th sponsor of H.R. 1519, introduced by Representative Rosa DeLauro (D-CT).

Senate Majority Leader Harry Reid (D-NV) agreed to push the full Senate vote on the PFA back to the upcoming work period from Memorial Day to early June. NELA is an active member of the national coalition that vigorously supports passage of the PFA.

NELA Attends EEOC Meeting On ADAAA Regulations Implementation

By request of EEOC Commissioner Chai Feldblum, NELA representatives attended a meeting on May 14, 2012 to discuss the Commission's implementation of the ADA Amendments Act of 2008 (ADAAA) regulations.

The ADAAA was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of "disability." It also directed the EEOC to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011.

Senate HELP Committee Holds Hearing On Helping Middle Class Balance Work and Family—Low-Wage Worker Measures Highlighted

Senator Tom Harkin (D-IA), Chair of the Senate Committee on Health, Education, Labor and Pensions (HELP) convened a hearing on May 10, 2012 to examine ways to help Americans balance the demands of their jobs and their families.

The hearing underscored Senator Harkin's bill, the Rebuild America Act (S. 2252), that includes a litany of measures aimed at boosting income for low-wage workers, most notably raising the minimum wage significantly and pegging it to inflation. It also would require employers to offer their workers paid sick days, make more white-collar workers eligible for overtime pay that they're currently exempted from, and give more workers the right to join a union.

To read the bill, go to: <http://www.gpo.gov/fdsys/pkg/BILLS-112s2252is/pdf/BILLS-112s2252is.pdf>.

Sincerely,



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