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EEOC's Proposed New Procedures May Enhance Value of Conciliation

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A proposed rule published by the Equal Employment Opportunity Commission ("EEOC") on October 9, 2020 (the "Proposed Rule") offers the possibility of expanded information-sharing with respondents/employers in connection with the agency's conciliation efforts. The proposed expanded disclosures may enhance the value of conciliation to those parties.

When the EEOC makes a finding that there is reasonable cause to believe discrimination occurred based on a charge filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* ("Title VII"), it must offer the employer an opportunity to resolve the dispute through the "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). The agency may not commence a civil action against an employer unless it is unable to secure satisfactory remedies through the conciliation process. 42 U.S.C. § 2000e-5(f). According to the Proposed Rule, approximately one-third of employers who receive a reasonable cause finding decline to participate in conciliation, and only 41.2% of conciliations between fiscal years 2016 and 2019 were successful. The Proposed Rule characterizes this as a "widespread rejection" of the conciliation process.

These statistics may reflect employer perceptions that the EEOC's efforts at conciliation can be one-sided and lacking in transparency. *See, EEOC v. Agro Distribution, LLC,* 555 F.3d 452, 468 (5th Cir. 2009) (EEOC did not attempt conciliation in good faith with "take-it-or-leave-it demand for $150,000); *EEOC v. CRST Van Expedited, Inc.,* 679 F.3d 657, 676-77 (8th Cir. 2012) (upholding dismissal of class action when EEOC failed to identify all potential class members during its investigation, thus depriving employer of ability to assess size and scope of potential class during conciliation). Now that the United States Supreme Court has made clear that federal courts have only limited ability to review the adequacy of the EEOC's conciliation efforts, *see Mach Mining, LLC v. EEOC*, 535 U.S. 480 (2015), it is not hard to understand why EEOC conciliation may hold little attraction for employers.

The EEOC thus proposes to amend the procedural conciliation regulations governing Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act to articulate the steps the agency will take in the conciliation process. It views the Proposed Rules as a "change in approach," designed to provide employers

with more information to allow them to meaningfully assess risks of potential litigation. The agency would provide respondents with the following information as part of the conciliation process, if it has not already done so:

1. A summary of facts and non-privileged information relied upon in the “reasonable cause” finding, including identifying known aggrieved individuals (or groups of individuals) for whom relief is being sought, unless those individuals have requested anonymity.

2. In the event the EEOC anticipates using a claims process to identify aggrieved individuals, the criteria that will be used to identify victims from the pool of potential class members. If information about the claims process does not provide an accurate assessment of the size of the class, the EEOC may, but is not required to, provide more detail, such as the identities of the harassers or supervisors, and a description of the testimony or facts gathered from identified class members during the investigation. The EEOC also may disclose the current class size and an estimate of potential additional class members.

3. A summary of the Commission’s legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts, as well as non-privileged information it obtained during the course of its investigation “that raised doubt that employment discrimination had occurred”; the Commission would “explain how it was able to determine there was reasonable cause despite this information.”

4. The basis for any relief sought, including the calculations underlying the initial conciliation proposal and an explanation thereof.

5. Information as to whether the Commission has designated the case as systemic, class, or pattern-or-practice, and the reasons why.

Employers would then have at least 14 calendar days to respond to the EEOC’s initial conciliation proposal. The agency would furnish the same information to the charging party or “other aggrieved individuals” upon request.

Although EEOC written “reasonable cause” findings normally can be expected to include some of the information in categories 1 and 3, above, often they do not include the names of aggrieved individuals other than the charging party, nor is there necessarily analysis of exculpatory information and how it factored into the Commission’s determination. That information, together with more fulsome information about the basis for the relief sought by the agency, would better enable employers to gather facts, and assess the scope and potential exposure of litigation during conciliation proceedings. Of course, should the Proposed Rule be adopted, the way in which it will be interpreted and applied by agency staff remains an open question.

Comments on the Proposed Rule may be submitted through November 9, 2020 on the federal eRulemaking portal, as well as by fax, U.S. mail, or hand delivery.

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