



October 12, 2020

EEOC Proposes Modifying Conciliation Process so as to Reduce Lawsuits

On October 8, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) released a proposed rule amending its procedural rules governing the conciliation process in an effort to enhance the effectiveness of the process by increasing the number of pre-suit settlements and decreasing the number of lawsuits. The proposed rule, which was published in the Federal Register on October 9, 2020, is open for public comment until November 9, 2020.

The EEOC acknowledges that the preferred method for remedying employment discrimination is through cooperation and voluntary compliance, including conciliation. Historically, the EEOC has elected not to adopt detailed regulations for its conciliation efforts in order to retain flexibility over the process. However, the EEOC’s conciliation efforts resolve less than half of the charges in which a reasonable cause finding is made, and an estimated one-third of employers who receive a reasonable cause finding decline to participate.

The EEOC proposes requiring that in any conciliation it must provide to the employer:

- (1) A summary of facts and non-privileged information that the EEOC relied on in its reasonable cause finding, and if it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, the criteria that will be used to identify victims from the pool of potential class members (notably, the EEOC specifically uses the term “victims”);

- (2) (A summary of the EEOC'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 its investigation that raised doubt that employment discrimination had occurred;
- (3) The basis for any relief sought, including the calculations underlying the initial conciliation proposal; and
- (4) Identification of any systemic, class, or pattern or practice allegation.

The EEOC also proposes to specify that the employer participating in the conciliation will have at least 14 calendar days to respond to the initial conciliation proposal from the EEOC.

In addition to enhancing efficiency and better encouraging a negotiated resolution when possible, the EEOC states that the changes will benefit employers by providing them an opportunity to more quickly correct any discriminatory conduct or policies and seek compliance assistance from the EEOC. The EEOC also states that employers would save resources and money by avoiding litigation.

Takeaway for Employers

If adopted, the EEOC regulations should make conciliation more attractive to employers by providing greater transparency as to the basis for the EEOC's probable cause determination and as to the basis for the amount of money demanded in conciliation.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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