



February 10, 2020

Submitted via www.regulations.gov

Janet Dhillon, Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20002

RE: RIN 3046-AB00 Comments in Response to Proposed Rulemaking re Official Time in Federal Sector Cases before the Commission

Dear Chair Dhillon,

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), and the Leadership Conference on Civil and Human Rights ("Leadership Conference") submit these comments to express our grave concerns in response to the Equal Employment Opportunity Commission ("EEOC" or the "Commission") December 10, 2019 Notice of Proposed Rulemaking entitled Official Time in Federal Sector Cases before the Commission ("NPRM," "Proposed Rule"). These organizations have different missions but are committed to furthering the goal of eradicating employment discrimination in the federal government. Moreover, we are united in the view that, for the reasons set forth below, the Proposed Rule is unjustified and would harm the most vulnerable federal workers.

The Lawyers' Committee is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African-Americans and other racial minorities. The Lawyers' Committee has a strong interest in eliminating systemic and structural barriers to employment experienced by people of color in all workplaces, including the federal government. For over fifty years, the Lawyers' Committee has been at the forefront of many significant cases under Title VII of the Civil Rights Act of 1964, as amended.

The NPRM potentially affects the rights of thousands of federal workers to be free from unlawful employment discrimination by limiting their access to competent representation. Specifically, the EEOC seeks to single out union representatives by forcing them to negotiate official time as a term of collective bargaining, a tactic that could result in severe limitations on, or complete elimination of, access to EEO official time. Ensuring that federal employees have adequate representation to pursue EEO matters is essential to fostering a safe and productive federal workforce, and union officials are experienced in navigating complex federal complaint

processes. The signatory organizations oppose this change because it lacks adequate justification and could make it harder for federal workers who have experienced discrimination to access justice.

I. The EEOC's Proposal Would Overturn Decades of Precedent Without Adequate Justification

For more than 40 years, the EEOC has recognized official time for union officials to represent federal workers in discrimination complaint proceedings. Current EEOC regulations explicitly grant this right.”¹ Even though the EEOC assumed responsibility for all federal sector EEO matters in 1978, the Civil Service Commission (“CSC”) first established the framework to process federal sector EEO complaints in 1966.² The EEOC adopted the CSC’s framework in 1979 (codified at 29 CFR 1613), and in 1987 explicitly adopted the CSC’s 1972 EEO official time rule.³

The EEOC’s justification for upending decades of precedent is inadequate. The agency claims that the CSC first developed its federal sector EEO official time rule in 1972 before Congress passed the Federal Service Labor-Management Relations Statute (“FSLMRS”) in 1978, which often requires union officials to receive official time pursuant to an agreement between the agency and union.⁴ According to the EEOC, “[f]ailing to clarify the Commission’s regulation can cause agencies and unions to be unclear on exactly which aspects of official time they need to bargain.”⁵ Yet, the EEOC adopted the CSC’s EEO official time rule in 1987, *nine years* after Congress passed FSLMRS. The EEOC addressed the coverage of union officials in its rule in 1987, and then again in 1992 during the Commission’s revision of federal sector EEO procedures. Yet, the EEOC left the CSC’s EEO official time rule unchanged. Finally, the EEOC’s NPRM is glaringly lacking any evidence - statistical or otherwise - that federal agencies or unions have requested such clarification from the EEOC, or that this change would lead to any positive results.

II. Requiring Union Representatives to Negotiate Over Official Time Will Frustrate Federal Workers' Rights Under Title VII

The EEOC’s grant of official time lets union officials represent their coworkers in federal EEO proceedings without having to rely on their respective unions to negotiate this term with federal agencies. For the past several decades, the EEOC’s rule states that agency employees are entitled to a “reasonable” amount of official time, and employees and agencies are expected to

¹29 CFR § 1614.605(b) states, “If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information.”

² 84 Fed. Reg. 67683

³ *Id.*

⁴ *Id.*

⁵ 84 Fed. Reg. 67683, 67684.

arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of official time.⁶ Many federal agencies have policies in place pursuant to EEOC MD-110 detailing how relevant determinations of official time are made. Collective bargaining negotiations can be time consuming and contentious. Some unions may not reach an agreement with their respective federal agencies, others may have to give up something else in exchange for receiving EEO official time for union representatives.

This Administration has already severely curtailed union workers' use of official time by signing Executive Order 13837 in 2018. E.O. 13837 orders federal agencies to monitor and limit employee use of "official time," requiring authorization prior to use,⁷ barring employees from spending more than 25 percent of their work hours on official time, and preventing them from using official time to lobby Congress or "to appeal when poor performers are fired."⁸ Union representatives use official time pursuant to their respective collective bargaining agreements for a wide range of reasons, including to represent colleagues in grievances, and to attend meetings between labor and management officials. The NPRM would further limit the rights of federal sector union members to official time.

Depending on the terms of each collective bargaining agreement, the Proposed Rule could severely limit or eliminate altogether union officials' access to EEO official time.⁹ In instances where union representatives are not entitled to adequate official time under their collective bargaining agreements, they could be deterred from representing their coworkers in workplace discrimination matters and force workers to rely either on inexperienced co-workers or highly-specialized and expensive private counsel. While the EEOC's federal sector official time rule provides federal employee complainants broad leeway to choose another federal worker from the same agency as his or her representative during EEOC proceedings, not surprisingly, union members typically first turn to their union representatives because they have unique and specific knowledge of federal agency EEO proceedings and grievance procedures. Federal workers rely on union representatives to assist them with the drafting and filing of the complaint, and to represent them in any investigations and subsequent hearings and appeals.

⁶ EEOC Management Directive ("MD") -110 §VII (C)(1).

⁷ "Executive Order Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use," available at <https://www.whitehouse.gov/presidential-actions/executive-order-ensuring-transparency-accountability-efficiency-taxpayer-funded-union-time-use/>

⁸ Michael Nievelet, "The Fine Print of Trump's Executive Order on Official Time," available at <https://www.govexec.com/management/2018/06/fine-print-trumps-order-official-time/148665/>.

⁹ Eric Wagner, "EEOC Plans to Stop Providing Official Time to Union Reps Governmentwide," Government Executive, Nov. 15, 2019, <https://www.govexec.com/management/2019/11/eecoc-plans-cease-providing-official-time-union-reps-government-wide/161340/>; *see also* Michelle Chen, "The Fight Inside the NLRB for Union Rights," The Progressive, Dec. 11, 2019, available at <https://progressive.org/dispatches/trump-efforts-target-board-oversees-unions-chen-191211/vernment-wide/161340/>

Federal employees also have shorter windows than private employees to file discrimination complaints and have to navigate confusing complaint procedures within their agencies. Federal workers only have 45 days from the date of a discriminatory action to initiate an EEO complaint,¹⁰ compared to private sector employees who have 300 days or, in some states, 180 days to bring a discrimination charge.¹¹ In most cases, federal workers are given the choice of participating either in EEO counseling or in an alternative dispute resolution program instead of filing a formal discrimination complaint against an agency.¹² If informal counseling or ADR is not successful, then they only have 15 days from the date they receive a final notice to file a formal complaint.¹³ Furthermore, many federal workers are covered by collective bargaining agreements that permit discrimination complaints to either be raised in a grievance procedure or under the EEOC's procedures pursuant to 29 C.F.R. 1614, but not both (with the exception of U.S. Postal Service employees, who are exempt from this election requirement).¹⁴ Given the federal sector's complex and often confusing complaint processes, many federal employees rely on their union representatives to ensure that critical deadlines for filing complaints are not missed.

Many workers refrain from coming forward with claims of discrimination because they fear retaliation or because they lack information on their rights and workplace policies and procedures. Union representatives play a critical role in assisting coworkers understand their rights and pursue redress when violations occur. The Proposed Rule threatens to undermine federal workers' access to competent union official representation, which in turn will frustrate federal agencies' efforts to root out discrimination in their workplaces.

III. The NPRM Would Harm Vulnerable Federal Workers, Particularly Workers of Color

Almost 55 years after the passage of the Civil Rights Act of 1964, workplace inequality persists, including in federal agencies. American workplaces continue to deal with the lasting effects of discrimination stemming from America's history of slavery, Jim Crow and racial segregation. As one of the first sectors of the economy to desegregate in the 1960s, federal government jobs historically have been a path to the middle class for communities of color. As of January 2019, there are over 1.1 million federal employees represented by unions, including

¹⁰ EEOC Regulation 29 C.F.R. 1614.105(a)(1).

¹¹ See "Time Limits for Filing a Charge," Equal Employment Opportunity Commission <https://www.eeoc.gov/employees/timeliness.cfm>

¹² See Overview of Federal Sector EEO Complaint Process, available at https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm

¹³ 29 C.F.R. Section 1614.105(b)(1).

¹⁴ Supra footnote 11.

974,000 union members, comprising over 25% of federal sector employees.¹⁵ According to the Bureau of Labor Statistics, Blacks are more likely to be union members than whites, representing 11.2 percent and 10.3 percent, respectively.¹⁶

Today, while African Americans are 11.8 percent of the civilian labor force, they represent 18.6 percent of federal employees.¹⁷ Yet, the federal government workplace is still struggling with harassment, occupational segregation and power imbalances. Hispanic employees make up only 8.9 percent of federal employees, and Asian employees represent only 5.9 percent of the federal workforce. The federal workplace remains majority white at 63% and majority male at 57%.¹⁸ According to recent figures from the Office of Personnel Management, nearly 80% of senior executive positions in the federal government were occupied by white workers in 2016, while Black and Hispanic employees comprised a mere 10.4% and 4.6% respectively of senior executive positions.¹⁹ According to a 2016 Merit Systems Protection Board (“MSPB”) survey, approximately 1 in 7 federal employees - 14% of the entire federal workforce – had experienced sexual harassment in the preceding two years.²⁰ Federal workers of color are more likely to file claims of harassment and discrimination than white federal workers, and women file about twice as many complaints as men.²¹

Federal workers who are women and people of color, in particular women of color, will be disproportionately harmed by this NPRM because these communities are especially vulnerable to workplace discrimination and harassment. Workplace harassment and discrimination have significant and harmful consequences to impacted individuals. Negative effects on mental and physical health, reduced career development, and forced job change or unemployment are just a

¹⁵ “Union representation” includes both members of the union and employees who report no union affiliation but whose jobs are covered by a union contract. *See also* Table 3. Union affiliation of employed wage and salary workers by occupation and industry <https://www.bls.gov/news.release/union2.t03.htm> (last modified January 18, 2019).

¹⁶ “Union Members Summary” <https://www.bls.gov/news.release/union2.nr0.htm>.

¹⁷ Office of Personnel Management, “Federal Equal Opportunity Recruitment Program (FEORP) Report to Congress, Fiscal Year 2017,” available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/feorp-2017.pdf>.

¹⁸ Office of Personnel Management “Profile of Federal Civil Non-Postal Employees,” Sept. 30, 2017, available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/>.

¹⁹ FEORP Report at 1, *supra* fn. 17.

²⁰ Update on Sexual Harassment in the Federal Workplace, U.S. Merit Systems Protection Board (Mar. 2018).

²¹ Annual Report on the Federal Work Force Fiscal Year 2018, Table B-8. Available at <https://www.eeoc.gov/federal/reports/tables.cfm>.

few of the disruptive and sometimes life-altering effects of workplace harassment.²² Workplace discrimination is also very costly for employers because it leads to increased employee turnover and absences, and reduced productivity.²³

IV. Conclusion

If implemented, the Proposed Rule would undermine efforts to identify and remedy workplace discrimination and impose particularized harm to vulnerable federal workers including people of color. This NPRM contravenes the EEOC's critical mission of eradicating discrimination in the federal workplace, without justification. For the reasons detailed above, the Lawyers' Committee and the Leadership Conference oppose the Proposed Rule and urge the EEOC to withdraw it. If you have any questions, please contact Phylicia H. Hill, Counsel at phill@lawyerscommittee.org.

Sincerely,

/s/

Dariely Rodriguez

Director, Economic Justice Project

Lawyers' Committee for Civil Rights Under Law

²² Elyse Shaw et al., "Sexual Harassment and Assault at Work: Understand the Costs." (Oct. 15, 2018), available at https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf.

²³ *Id.* at 5-6.