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on Civil and Human Rights

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November 9, 2020

Bernadette B. Wilson
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via regulations.gov

RE: RIN 3046-AB19, Update of Commission's Conciliation Procedures

Dear Ms. Wilson:

On behalf of The Leadership Conference on Civil and Human Rights, we write in response to the Equal Employment Opportunity Commission ("EEOC" or "Commission") Notice of Proposed Rulemaking ("NPRM"), RIN 3046-AB19, Update of Commission's Conciliation Procedures, published in the Federal Register on October 9, 2020.[1] This NPRM would impose burdensome procedural requirements on the EEOC that undermine the mission of the Commission to prevent and remedy employment discrimination and would unnecessarily increase costs to the EEOC and disadvantage working people seeking to enforce their civil rights. For these reasons, The Leadership Conference urges the Commission to withdraw the NPRM.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the rights of all persons in the United States. Central to our work is the understanding that economic justice and civil rights are inextricably bound and that equal opportunity in the workplace is key to promoting dignity and economic security for all. The work of the EEOC is vital to ensuring that those who experience discrimination on the job can enforce their rights, and through enforcement of the law, the EEOC both encourages employer accountability and reassures all working people, especially those living paycheck to paycheck or who lack power or prestige, that they can rely upon the agency to help ensure that they too can have the full protection of our civil rights laws. Given the important role of the Commission, The Leadership Conference is particularly concerned about the potential impact of the NPRM on the EEOC itself and on the working people the agency is meant to protect.

As a preliminary matter, The Leadership Conference notes that despite a request by our organization together with 39 other civil, women's, and workers' rights organizations to

[1] 85 Fed. Reg. 64079 (Oct. 9, 2020).

extend the comment period,[2] the EEOC provided only 30 days for public comment on this NPRM instead of the customary 60 days set out in Executive Order 13563. The executive order clearly articulates a preference for a 60 day comment period, which would "afford the public a meaningful opportunity to comment."[3] The decision to provide a truncated period for public comment, and to issue this NPRM before the Commission's own conciliation pilot concluded, raises serious concerns about the integrity of this rulemaking process.

Workplace Discrimination Continues to be a Significant Problem in the United States

Our nation continues to reckon with persistent discrimination, including in our workplaces. In fiscal year 2019 alone, the EEOC received over 70,000 charges of employment discrimination,[4] and research has long showed that fear of retaliation prevents many working people from ever reporting discrimination.[5] This fear is borne out by the numbers. Claims of retaliation made up over half of all charges filed at the EEOC in fiscal year 2019, with the next largest categories being discrimination based on disability (33.4 percent of charges), race (33.0 percent), sex 32.4 percent), and age (21.4 percent).[6]

The cost of discrimination for people of color, older workers, LGBTQ individuals, people with disabilities, and other marginalized groups is high. Employment discrimination can mean not having access to a job or a promotion, being forced to endure a hostile working environment, or being paid less – all because of who you are. These unlawful practices constrain economic security and opportunity by limiting access to financial resources, healthcare benefits, credit, housing, and, consequently, educational opportunities. Workplace discrimination destabilizes not just the workers who are the immediate victims of this unlawful practice, but it can destabilize entire families. The impact is also not just economic. Workplace discrimination can cause emotional, psychological, and physical harm and contributes to stigma and the further entrenchment of inequality.

Especially in the middle of a global pandemic and related economic crisis, which we are likely to feel the effects of for years to come, the EEOC must be able to conduct its work in the most efficient manner in order to effectively prevent and remedy workplace discrimination. Working people of color in the United States were already more likely to be economically insecure than white workers before the COVID pandemic hit.[7] For example, years of discrimination in almost every aspect of American life has meant

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[2] Letter from The Leadership Conference on Civil and Human Rights et al., to Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission (Oct. 21, 2020), https://civilrights.org/resource/extension-of-comment-period-for-rin-3046-ab19-update-of-commissions-conciliation-procedures/.

[3] Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[4] U.S. Equal Employment Opportunity Commission, Press Release, *EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data* (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data [hereinafter *Enforcement and Litigation Data*].

[5] *See generally* Deborah L. Brake, *Retaliation*, 90 Minn. Law Rev. 18, 36-42 (2005), *available at* https://www.minnesotalawreview.org/wp-content/uploads/2011/12/Brake_Final.pdf (last visited Nov. 9, 2020).

[6] *Enforcement and Litigation Data*, supra note 4.

[7] *See e.g.*, Elise Gould and Valerie Wilson, Economic Policy Institute, Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality (Jun. 1, 2020), https://www.epi.org/publication/black-workers-covid/; Jens Manuel Krogstad and Mark Hugo Lopez, Pew Research

that Black workers have historically higher levels of unemployment, are unemployed longer, are paid lower wages, and have much less savings and higher poverty rates than white workers.[8] Women, and in particular women of color, are also economically vulnerable. Women make up nearly two-thirds of the 22.2 million workers in the 40 lowest-paying jobs in the United States, with Latinas being the most over-represented.[9] Women in low-paying jobs are also more likely than men to be living in poverty.[10] LGBTQ people and people with disabilities also suffer from high rates of poverty and continue to be vulnerable to workplace discrimination.[11] Overall, workers who identify in multiple protected classes are at increased risk of economic insecurity. Under these circumstances, it is critical that the EEOC not hamper itself with burdensome and costly requirements but instead continue to operate with the flexibility it needs to ensure that working people of color, women, LGBTQ workers, workers with disabilities, and other marginalized groups – already economically vulnerable – have equal employment opportunities.

The NPRM Imposes Burdensome Procedural Requirements on the EEOC

If after conducting an investigation of a charge of discrimination, the EEOC finds reasonable cause that discrimination has occurred, Title VII of the Civil Rights Act requires the EEOC to attempt to settle the charge through conciliation before a claim against an employer can be litigated. Although this process is mandatory, Title VII provides that the process is "informal,"[12] and the Supreme Court in *Mach Mining v. EEOC* affirmed that the Commission has broad flexibility in how it conducts conciliation.[13] The NPRM, however, would impose onerous procedural requirements on the EEOC that go well beyond the scope of what is required under *Mach Mining* and Title VII itself. These requirements would saddle the Commission with burdensome costs that would ultimately disadvantage working people seeking assistance from the EEOC and make it more difficult for the Commission to fulfill its mission to prevent and remedy employment discrimination.

Under the proposed rule, after the Commission makes a reasonable cause finding, it would be required to provide employers with a summary of the facts and non-privileged information relied upon for the finding; a summary of the legal basis for the finding, including any information obtained that raised doubt the employment discrimination occurred; the basis for the relief sought; and a determination of whether the Commission has designated the case as a systemic, class, or pattern or practice case as well as the basis for that designation.

Center, Coronavirus Economic Downturn Has Hit Latinos Especially Hard (Aug. 4, 2020), https://www.pewresearch.org/hispanic/2020/08/04/coronavirus-economic-downturn-has-hit-latinos-especially-hard/.

[8] Gould and Wilson, *supra* note 5.

[9] Jasmine Tucker and Julie Vogtman, National Women's Law Center, When Hard Work Isn't Enough (Apr. 2020), *available at* https://nwlc.org/press-releases/low-paid-women-workers-on-the-front-lines-of-covid-19-are-at-high-risk-of-living-in-poverty-even-when-working-full-time/.

[10] *Id.*

[11] *See e.g.*, Kiese Hanson, CLASP, LGBTQ+ Discrimination: It's a Poverty Issue (May 20, 2019), https://www.clasp.org/blog/lgbtq-discrimination-its-poverty-issue; Rebecca Vallas, Shawn Fremstad, and Lisa Ekman, Center for American Progress, A Fair Shot for Workers With Disabilities (Jan. 28, 2015), https://www.americanprogress.org/issues/poverty/reports/2015/01/28/105520/a-fair-shot-for-workers-with-disabilities/.

[12] 42 U.S.C. § 2000e-5(b).

[13] 575 U.S. 480 (2015).

The imposition of these procedural requirements threatens to turn *Mach Mining* on its head. In that case, the Supreme Court determined that Title VII demands only that the EEOC "inform the employer about the specific allegation" by "describ[ing] both what the employer has done and which employees (or what class of employees) have suffered as a result" and "try to engage the employer in some form of discussion."[14] *Mach Mining* affirms that the intent of Title VII is to provide the EEOC with broad latitude to conduct conciliation as an informal process in order to resolve a charge. The layering on of procedural requirements, however, denies the Commission this flexibility, which hampers its ability to conciliate in the way that is most appropriate for each case.

The NPRM does not adequately justify this diversion of resources or abandonment of the flexibility envisioned by Title VII and *Mach Mining*. The proposed rule would require enforcement staff at the EEOC to expend precious resources to prepare extensive disclosures, diverting those resources away from other critical duties, including reviewing and investigating incoming charges and pursuing systemic enforcement. The preparation of these disclosures will take time and create an additional burden for the agency, even as workers already are waiting months or years for resolution of their charges. Right now, on average, it takes 10 months for the EEOC to investigate a charge,[15] even before conciliation begins,[16] meaning that a worker may have to wait over a year for relief even without the addition of the procedural requirements in the NPRM. The EEOC assumes in the NPRM that any costs would be "absorbed within the Commission's normal operating expenses," ignoring the cost to working people of a prolonged process and failing to acknowledge the EEOC's already limited resources.

The NPRM also states that "any additional expenses that the agency would incur could be offset by cost savings derived from the changes" because more cases would be resolved through conciliation.[17] Yet, there is no actual evidence that the proposed changes would lead to more resolutions through conciliation or any cost savings. The lack of evidence may be attributable to the fact that the EEOC issued this NPRM before concluding its six-month conciliation pilot program. The decision to rush this rulemaking deprives both the public and the agency the opportunity to closely analyze data from the pilot and determine the most effective and appropriate changes to the conciliation process – changes that may contradict those contained in the NPRM.

The EEOC assumes through this NPRM, without evidence, that conciliation would be more successful if the agency were required to disclose more information. Importantly, however, employers already control most of the information related to a charge and many employers will have conducted their own internal investigations of a report of discrimination. It is unlikely then that conciliation fails solely because employers lack information. Requiring the EEOC to prepare disclosures – in every case – therefore seems

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[14] *Id*. at 491.
[15] U.S. Equal Employment Opportunity Commission, What You Can Expect After You File a Charge, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Nov. 7, 2020).
[16] A 2017 report from Seyfarth Shaw LLP found that the EEOC spent on average over two months in conciliation. Laura Maechtlen, New Study of EEOC Enforcement: Demystifying EEOC Determination, Conciliation & Litigation Timeline (May 23, 2017), https://www.workplaceclassaction.com/2017/05/new-study-of-eeoc-enforcement-demystifying-eeoc-determination-conciliation-litigation-timeline/.
[17] 85 Fed. Reg. at 64081.

like a waste of the agency's resources, or worse, an attempt to shift the burden of accountability for discrimination away from the employer to the taxpayer.

The EEOC also claims that the proposed changes are necessary to address "a widespread rejection" of conciliation by employers.[18] Yet, the EEOC explains on its website that it has consistently improved its rate of successful conciliations in recent years. The EEOC notes, that it "improved its rate of successful conciliations from 27 percent in fiscal year 2010 to 38 percent in fiscal year 2014" and that the "successful conciliation rate for systemic cases in fiscal year 2014 is even better – with 47 percent of systemic investigations being resolved."[19] These figures, the EEOC explains, show that "more and more employers are coming to the table after an investigation and resolving more complaints with conciliation agreements."[20] The NPRM also notes that the 41.23 percent of conciliations were successful between fiscal years 2016 and 2019.[21] In other words, these numbers do not show "widespread rejection" of conciliation. To the contrary, they show that the rate of successful conciliations has only grown over the past decade – without any of the burdensome requirements proposed in the NPRM.

The Leadership Conference is also concerned that the NPRM would expose the EEOC to ancillary litigation in cases where a conciliation agreement cannot be reached, leading to prolonged harm to workers and yet another waste of agency resources. In its own brief to the U.S. Court of Appeals for the Seventh Circuit in *Mach Mining*, the EEOC noted that employers were turning the conciliation process "into a form of quasi-litigation where many respondents focus more on setting up a 'failure to conciliate' defense rather than attempting to correct the employment practices EEOC found unlawful in its reasonable cause determination."[22] By imposing requirements on the conciliation process, the EEOC may inadvertently be encouraging ancillary litigation, and giving employers a roadmap for increasing delay, a tactic that is costly to both the EEOC and the workers it seeks to protect.

The NPRM Disadvantages Workers Who Experience Employment Discrimination

Working people seeking to assert their right to be free from employment discrimination would be disadvantaged not only by the diversion of agency time and resources that this NPRM would require, but also by the content of the proposed rule itself.

The proposed requirements of the NPRM create an unfair advantage to employers in the conciliation process and, if conciliation should fail, in any potential subsequent litigation. The proposed mandatory disclosures, for example, are one-way only, to the employer. Disclosures could be made to the charging party only upon request. In other words, the EEOC would be required to automatically turn over its case

[18] *Id.* at 64080.
[19] U.S. Equal Employment Opportunity Commission, What You Should Know: The EEOC, Conciliation, and Litigation (Jan. 21, 2015), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation (last visited Nov. 6, 2020).
[20] *Id.*
[21] 85 Fed. Reg. at 64080.
[22] Brief of the Equal Employment Opportunity Comm'n as Plaintiff-Appellant, 738 F.3d 171 (7th Cir. 2013) (No. 13-2456), *available at* https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/litigation/briefs/machmining2.html.

files to employers whom the agency believes to have acted unlawfully, but not to the working people who are seeking a remedy for the discrimination they have faced. This practice would exacerbate resource and information inequities between the parties to the benefit of employers only. Although the proposed rule would allow disclosures to the charging party upon request, many working people who file charges are unrepresented by counsel and will not know to make such a request. The EEOC, whose mission is to prevent and remedy discrimination, should not, in its own procedural rules, disadvantage the very party seeking to remedy discrimination.

The content of the disclosures may also disadvantage workers by increasing the likelihood of retaliation. Information supporting a reasonable cause determination, for example, could include witness identity, which would only be kept confidential if the witness makes a specific request for anonymity. The proposed rule would inexplicably put the burden on workers to protect themselves from retaliation, even though the EEOC, as the agency charged with protecting workers from discrimination, is in a better position to proactively prevent this unlawful practice. Charges of retaliation made up the largest source of charges filed at the EEOC in fiscal year 2019: 53.8 percent of all charges filed.[23] Notably, fear of retaliation prevents many workers from coming forward to report discrimination or harassment. This proposed rule could further chill potential claimants and witnesses from reporting discrimination – an outcome at odds with the EEOC's mission.

Finally, the proposed rule could undermine the goals of conciliation, hurting workers in the process. Conciliation only works if the parties enter it in good faith. The proposed mandatory disclosures, however, rewards employers who do not enter conciliation in good faith but instead see conciliation as a way to obtain pre-litigation discovery. The NPRM does not consider the cost of this type of gamesmanship of the process on either the EEOC or on the workers they seek to protect. Indeed, the proposed disclosures contain no requirement that an employer provide the EEOC or a charging party with the facts and legal basis for the employer's defense. By making the conciliation process more rigid, the proposed rule does not allow the EEOC to conciliate each case in the way that is most appropriate given the circumstances. This lack of flexibility disadvantages workers, many of whom will not be represented by counsel and who cannot afford to bear the costs associated with bad-faith conciliation and litigation.

Conclusion

The EEOC plays a critical role in preventing discrimination and ensuring that those who experience discrimination on the job can obtain meaningful relief. This NPRM, however, would undermine the ability of the EEOC to fulfill its mission by imposing burdensome procedural requirements on the agency that would unnecessarily increase costs to the EEOC and disadvantage working people seeking to enforce their rights. The Leadership Conference urges the EEOC to withdraw the NPRM and not to consider changes to the conciliation process until its conciliation pilot is complete and the results properly analyzed to determine what changes, if any, are appropriate for the EEOC to achieve its aim to prevent and remedy employment discrimination. Please contact Gaylynn Burroughs, senior policy counsel, at burroughs@civilright.org with any questions.

[23] *Enforcement and Litigation Data*, supra note 4.

The Leadership Conference on Civil and Human Rights

Sincerely,

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