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The EEOC's Proposed Rule on Conciliation: Will it Withstand a Change in Administration?

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On August 18, 2020, the Equal Employment Opportunity Commission (EEOC) held a public meeting to consider a Notice of Proposed Rulemaking (NPRM) intended "to enhance the effectiveness and create accountability and transparency in the conciliation process."

Thereafter, the NPRM was submitted to the Office of Management and Budget (OMB) for consideration before being published for comment and review on October 9, 2020. During the August 18, 2020 meeting the EEOC Commissioners voted to limit the comment period on this NPRM to only 30 days rather than the standard 60-day comment period. Thus, the comment period closed on November 9, 2020. The EEOC is next expected to evaluate the comments submitted and issue a final rule. Title VII requires the EEOC to conciliate before filing litigation when it finds reasonable cause to believe that the employer engaged in unlawful employment practices. The purpose of conciliation is to "endeavor to eliminate such unlawful practice through informal methods" without the need for litigation. The EEOC in its NPRM acknowledged that the existing conciliation process is successful less than half the time and is subject to outright rejection by many employers in the wake of a reasonable cause finding.

To address these apparent issues, the NPRM, if issued as a final rule, would require the EEOC to commit to provide the following to employers in any conciliation:

1. A written summary of the known facts and non-privileged information that the EEOC relied on in making its reasonable cause finding, which will include identifying the known aggrieved individuals or groups of aggrieved individuals for whom relief is being sought, unless those individuals have requested anonymity, and the criteria it will use to determine additional aggrieved individuals;

2. A summary of the EEOC's legal basis for finding reasonable cause, which will include an explanation of how the law was applied to the facts of a specific case and an explanation of whether any material information that the EEOC obtained during the investigation caused the EEOC to doubt whether reasonable cause existed and how the EEOC was still able to determine reasonable cause despite that information;

3. The basis for monetary and other relief the EEOC seeks in conciliation, including the calculations underlying the initial conciliation proposal;

4. Notice of whether the case has been designated as a pattern or practice, systemic or class claim and the basis for the designation; and

5. At least 14 days to respond to an initial conciliation proposal.

Comments from opponents of the NPRM suggest that it will "undermine the mission of the EEOC to swiftly prevent and remedy workplace discrimination" and "further stack the deck against working people seeking justice in the face of employment discrimination." Most opponents call for the withdrawal of the NPRM for

numerous reasons including that is rushed and premature as the EEOC's conciliation pilot program is not yet complete.

Prior to the publication of the NPRM, the EEOC implemented a six-month conciliation pilot program in order to assess and evaluate the existing conciliation process. During the August 18, 2020 public meeting on the NPRM, Commissioner Lipnic indicated that the data from the pilot program was being gathered and evaluated on an ongoing basis and that she believed that the convergence of the program results, along with the public comments, should provide a full picture for the EEOC to consider in issuing a final rule.

Proponents of the NPRM have commented that "there needs to be a meaningful exchange of information" during the conciliation process and that proposed changes are welcome. Proponents have also offered substantive suggestions. For example, one comment touts the EEOC's mediation program and suggests utilizing EEOC mediators to facilitate the conciliation process in order to provide a more neutral process.

The fate of the NPRM is yet unknown, but the EEOC will review the comments and may amend it prior to issuing a final rule; however, the impending change in administration could slow or halt the approval of a final rule if the NPRM is viewed as too employer-friendly. If no final rule is issued in the coming weeks, it is possible that the NPRM will fail and conciliation will continue without the required exchange of the details described above.

If you have any questions on this or any other employment topic, please contact the author or any member of Baker Donelson's Labor & Employment Group.