November 9, 2020

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

RE: RIN Number 3046-AB19--EEOC Conciliation Process: Notice of Proposed Rulemaking and Request for Comments

Dear Officer Wilson:

The Society for Human Resource Management's (SHRM) mission is to create better workplaces where businesses and workers thrive together. Our 300,000+ HR and business executive members impact the lives of more than 115 million workers and their families.

Our members work with employees and employers daily to create healthy workplace environments that are free of harassment and discrimination. However, complaints do occur and when they do HR professionals should act quickly and diligently to investigate and resolve these matters for the good of the employee and ultimately the well-being of the entire workplace. As such, they understand that transparent, timely, and comprehensive review of facts and issues are important to resolving these matters effectively.

Conciliation is valuable because it provides employees, employers and the U.S. Equal Employment Opportunity Commission (the "EEOC" or the "Commission") the opportunity to more promptly resolve disputes and prevent discrimination in the workplace while avoiding the cost of drawn-out litigation and lengthy delays in satisfactory resolutions of employee concerns. SHRM shares in the EEOC's commitment to more equitable and thriving workplaces and understands that the Proposed Rule is intended to ensure that the conciliation process can more meaningfully and directly resolve complaints and investigations of discrimination for the benefit of employees and employers.

To that end, SHRM supports the Proposed Rule because it creates more transparency in the conciliation process and a more consistent process to negotiate conciliation terms. SHRM submits the following comments in response to the EEOC's notice of proposed rulemaking and request for comments regarding an Update of the Commission's Conciliation Procedures, 85 Fed. Reg. 64079 (October 9, 2020) (the "Proposed Rule").

I. SUMMARY OF MAIN POINTS

Clear, legally compliant guidelines for conciliation will ensure faster, more informed negotiations and more fruitful discussions. Employment disputes are uniquely fact based. Issues arise in the workplace, including performance assessments and other employment decisions, that are very fact-specific, with actions and input by various levels of an employer's operation (including, for example, HR intake professionals first line managers, or supervisors attempting to apply general workplace policies to specific workplace actions).

A sharing of facts and information, as opposed to a party having only their own asymmetrical view of the issues, is critical for informed decision-making with respect to resolving disputes. The Proposed Rule requires the EEOC to reveal the facts and law upon which it relies to support its reasonable cause determination. It also requires that the essence of the charging party's factual allegations and complaint be disclosed to the employer. This vital exchange of information will enable the parties to make an informed decision regarding the merits of the allegations and the risks of litigation, leading to more informed and robust settlement discussions and more successful conciliations, resulting in more resolutions of employee concerns.

As noted below, SHRM also supports slight modifications to the Proposed Rule to ensure meaningful and substantive negotiations, as well as the creation of the proper incentives for conciliation. Conciliation is an important final step of the charge filing and investigation process. By the time conciliation has started, the EEOC has concluded there is reasonable cause to believe a violation of an employment discrimination law has occurred. Having knowledge of the relevant facts and support for the EEOC's reasonable cause determination benefits employer-respondents as well as employees in assessing and resolving their claims and disputes. Having reasonable access to that information at conciliation as opposed to getting it through costly discovery and litigation promotes effective, efficient, and fair resolutions before litigation ensues.

Accordingly, SHRM suggests the Final Rule include the following:

- Conciliation-related disclosures should be made in writing;
- The EEOC should make the first offer of compromise;
- The EEOC should provide a reasonable basis for its suggested relief, including disclosing to the employer-respondent and charging party facts supporting the claim, as well as facts supporting compensatory or punitive damages; and
- Guidance to the EEOC to allow direct or unclaimed funds to be made available for the direct benefit of employees in the workplace generally.

Each of SHRM's suggestions aim to enhance the conciliation process for all parties involved. The EEOC should take this opportunity to address the various aspects of conciliation that have the potential to halt the process and create prolonged and

ultimately unnecessary litigation. SHRM believes these suggestions will produce a Final Rule that benefits all parties including the EEOC as well as employers and employees.

II. COMMENTS

A. The Final Rule Should State That Any Conciliation Disclosures By The EEOC Must Be Made In Writing

In light of the EEOC's invitation to comment regarding whether disclosures should be made in writing, SHRM suggests the Final Rule affirmatively require that all conciliation disclosures be made in writing. This is consistent with the EEOC's reasons for the Proposed Rule. Clear and effective communication in the conciliation process allows for a clearer understanding of the issues, potential damages, and other remedies.

Disclosures in writing are more effective than mere oral exchanges in negotiations. If the parties are required to communicate and exchange information via a written record, it is less likely that the parties will be unclear as to the other parties' positions and information exchanged during the process. Reducing the asymmetry of information will likely lead to efficient and effective resolutions.

Moreover, a robust written record promotes better understanding of the parties' positions. A written record will allow parties to meaningfully engage with one another with full knowledge of the facts and bases for their respective positions. This understanding allows all relevant parties, including the charging party, aggrieved individuals, or other employees, the ability to assess, evaluate, and understand the nature of the dispute and form compromises to address them.

Finally, written exchanges of information will promote more accurate, robust knowledge regarding the relevant issues. A written record will provide clear evidence of the communications between the EEOC and respondent and eliminate confusion regarding any exchange. *See e.g.*, *EEOC v. A & F Fire Prot. Co.*, No. CV174745DRHARL, 2018 WL 7252950, at *4 (E.D.N.Y. Dec. 13, 2018) (finding a lack of information in an affidavit supporting the EEOC's allegations that it conciliated and thereby denying the EEOC's motion to strike the defendant's conciliation defense). Requiring the EEOC to provide written information to respondents will provide a clear record supporting the conciliation process, thereby avoiding unnecessary litigation over the process itself.

B. The Final Rule Should State That The EEOC Must Make The Initial Offer Of Compromise

The Proposed Rule does not clarify whether the EEOC should make the initial proposal in conciliation. Because the EEOC comes to conciliation with the most knowledge regarding the claims at issue, it is typically in a superior position to start the negotiation. Having the EEOC initiate the offer, together with the basis for its position, will provide the most reasonable starting place for the negotiation and will encourage the parties to seriously engage in the process.

Conciliation is a critical juncture in an EEOC investigation; therefore, the process needs to be structured to produce the desired result: Prompt and thorough resolution of alleged discrimination and its effects. At the time of a conciliation, the EEOC, based on its statutory authority, has had the opportunity to investigate the charging party's allegations, including compelling the production of evidence from the employer as well as other sources, requiring the submission of written position statements, and even conducting on-site visits and witness interviews. This creates an asymmetry of information, which if left unchecked, inhibits effective and efficient dispute resolution.

Once conciliation is initiated, employer-respondents should not be pushed away, but invited into the process. Yet, the EEOC, even recently, will sometimes ask an employer to make the first conciliation proposal. In other words, "we invite you to conciliation, and you should make the first move." Employers should not be put in the position of bargaining against themselves, without having information to assess the EEOC's position with respect to compliance issues. If employer-respondents can be told to make the first offer of compromise when there is an imbalance of information, that will only serve to dampen negotiations and create unnecessary antagonism in the process. Accordingly, the Final Rule should clarify that the EEOC must make the first offer of compromise as this creates the conditions for more meaningful and genuine negotiations.

C. The Final Rule Should State That The EEOC Must Provide Reasonable Support for Damages Requested And The Bases for Its Reasonable Cause Determination; The Relevant Information Should Be Exchanged With Employer-Respondents As Well As The Charging Party

SHRM believes the Proposed Rule should clarify the amount of detail the EEOC is required to provide in conciliation disclosures. The Proposed Rule only requires the EEOC to provide a calculation of the underlying proposal and "an explanation."

By the time conciliation is initiated, the EEOC has investigated the matter and devoted substantial resources to that investigation and made a reasonable cause determination. At this point, the EEOC should provide reasonable support for its determination and any damages figure requested so that conciliation discussions can be informed, specific, and efficient.

Indeed, ultimately reducing the information asymmetry inherent in the investigative process will increase the likelihood of effective and efficient outcomes as well as higher levels of satisfaction with the negotiation. Furthermore, providing parties with relevant information and an opportunity to be heard can enhance relationships between the employer-respondent and the EEOC overall.

Thus, the Final Rule should clearly articulate what is required for "an explanation." To that end, SHRM suggests the following be included in the Final Rule for guidance on what a proper "explanation" consists of:

- To allow for consistency in the conciliation process, such an explanation should entail reasonable support for the EEOC's claimed damages;

- If there is a claim for compensatory or punitive damages, the EEOC must provide information to reasonably support the type of relief sought as well as the amount of damages; and

- The Final Rule should state that merely reciting the statutory maximums for compensatory or punitive damages does not satisfy this obligation.

SHRM believes these additions will put the parties on the proper footing for an open and informed negotiation. Again, conciliation should be seen as an opportunity for all the parties involved to reconcile claims of discrimination and find ways to improve the workplace, not as a precursor for litigation. Finally, SHRM suggests the Final Rule should remove "upon request" from the proposed § 1601.24(f) so that it reads: "Any information the Commission provides pursuant to paragraph (d) of this section to the Respondent will also be provided to the charging party and other aggrieved individuals." In order to promote transparency in the conciliation process, the charging party should receive relevant information from the Commission as well.

D. The Final Rule Should Encourage the EEOC and Employer-Respondents to Designate Funds to Programs and Causes that will Directly Benefit Workers

Though the issue of how payments are allocated is not discussed in the Proposed Rule, SHRM believes the conciliation process would benefit from guidance on potential alternative avenues for allocating unclaimed funds. Accordingly, SHRM requests that the Final Rule include language encouraging the EEOC to allow an employer-respondent to designate unclaimed amounts for funds that directly benefit current company employees through various supporting funds, training programs, and other ways. Such programs should be encouraged not just as means of legal compliance but for their ability to promote more equitable workplaces.

In addition, mutually agreed upon charities may also pose appropriate avenues to contribute positively to the workplace for the benefit of all employees. Bolstering such institutions can ultimately serve to promote the very mission of the EEOC without commanding additional EEOC resources. As such, SHRM asks that the Final Rule also include language encouraging the EEOC and employer-respondents to explore agreements where funds are allocated to charities that provide workplace trainings or enhancements that serve the goals of the Commission.

III. CONCLUSION

SHRM urges the Commission to adopt the Proposed Rule subject to the suggested changes provided above. The Proposed Rule is necessary to provide structure and guidance to the EEOC and employer-respondents once conciliation is initiated. Ultimately, conciliation is an opportunity for all parties—employers, employees, and the Commission—to come together to reconcile and rectify discrimination in the workplace.

SHRM believes the Proposed Rule, subject to the suggested revisions and additions above, will create the conditions necessary for meaningful and efficient

resolution of discrimination claims without the need for slow, costly, and contentious litigation. This will not just benefit the direct parties to potential litigation, but other workers as well. By resolving conflict through conciliation, employers can work quicker to create a better workplace for all employees. SHRM appreciates the opportunity to provide comments on the proposed rule.

Sincerely,

Emily M. Dickens
Chief of Staff, Head of Government Affairs & Corporate Secretary