



N 6570-01P

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Part 1601 and 1626**

**RIN 3046-AB19**

### **Update of Commission's Conciliation Procedures**

**AGENCY:** Equal Employment Opportunity Commission

**ACTION:** Proposed Rule

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) proposes amending its procedural rules governing the conciliation process. The Commission believes that providing greater clarity to the conciliation process will enhance the effectiveness of the process and ensure that the Commission meets its statutory obligations.

**DATES:** Comments are due on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

**ADDRESSES:** You may submit comments by the following methods:

You may submit comments, identified by RIN Number 3046-AB19 , by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 663-4114. (There is no toll free fax number). Only comments of six or fewer pages will be accepted via fax transmittal, in order to assure access to the equipment.

Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll free numbers).

- Mail: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.
- Hand Delivery / Courier: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

**Instructions:** The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information you provide.

**Docket:** For access to comments received, go to <http://www.regulations.gov>. Although copies of comments received are usually also available for review at the Commission's library, given the EEOC's current 100% telework status due to the COVID-19 pandemic, the Commission's library is closed until further notice. Once the Commission's library is re-opened, copies of comments received in response to the proposed rule will be made available for viewing by appointment only at 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 am and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Andrew Maunz, Legal Counsel, Office of Legal Counsel, (202) 663-4609 or [andrew.maunz@eeoc.gov](mailto:andrew.maunz@eeoc.gov).

**SUPPLEMENTARY INFORMATION:**

Under section 706 of Title VII of the Civil Rights Act of 1964, as amended, Congress instructed that after the Commission finds reasonable cause for any charge, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods

of conference, conciliation, and persuasion.” 42 U.S.C. 2000e-5(b).<sup>1</sup> Congress went on to state that the Commission may only commence a civil action against an employer if “the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission.” *Id.* at § 2000e-5(f).<sup>2</sup> Accordingly, conciliation is not just a good practice for the Commission’s handling of charges, but also attempting to conciliate after a reasonable cause finding is a statutory requirement and a prerequisite to the Commission filing suit.<sup>3</sup>

The Commission first published its regulation governing the procedures for conciliation in 1977. 42 FR 55388, 55392 (1977). Subsequent amendments to this regulation have largely been minor changes to account for organizational changes at the Commission or additions of new laws within the Commission’s jurisdiction, such as the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). 48 FR 19165 (1983); 49 FR 13024 (1984); 49 FR 13874 (1984); 52 FR 26959, (1987); 54 FR 32061 (1989); 56 FR 9624-25 (1991) (adding the ADA); 71 FR 26828 (2006); 74 FR 63982 (2009) (adding GINA). Since 1977, the Commission has not significantly changed the substance of its regulatory procedures governing conciliation.

In 2015, following a series of cases challenging the adequacy of the Commission’s conciliation efforts,<sup>4</sup> the Supreme Court addressed the Commission’s conciliation requirements

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<sup>1</sup> The Commission, or its officers or employees, cannot make public anything said or done during these informal methods “without the written consent of the person concerned.” *Id.*

<sup>2</sup> This includes civil actions brought pursuant to section 707 of Title VII, which states that any action the Commission brings under that section shall be “in accordance with the procedures” of section 706. 42 U.S.C. 2000e-6(e); *see also id.* at § 2000e-6(c) (“The Commission shall carry out such functions in accordance with subsections (d) and (e) of the section).

<sup>3</sup> The only exception to the Commission’s obligation to attempt to conciliate is an action for “temporary or preliminary relief” under section 706(f)(2). 42 U.S.C. 2000e-5(f)(2).

<sup>4</sup> *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F. 3d 1256, 1260 (11th Cir. 2003) (EEOC violated its Title VII duty to conciliate, warranting attorney fee award, by failing to identify any theory of liability); *EEOC v. CRST Van Expedited, Inc.*, 679 F. 3d 657, 676 (8th Cir. 2012) (EEOC’s failure to identify class members or investigate claims deprived employer of a meaningful conciliation); *EEOC v. Johnson & Higgins, Inc.*, 91 F. 3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klinger Elec. Corp.* 636 F. 2d 104, 107 (5th Cir. 1981) (application of a three part inquiry to

in the case *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015). In *Mach Mining*, the Court noted that conciliation plays an important role in achieving Congress’s goal of ending employment discrimination. 575 U.S. at 486. The Court observed that Title VII not only required the EEOC to attempt to engage in conciliation but provided “concrete standards pertaining to what that endeavor must entail.” *Id.* at 488. According to the Court, the statute’s specified methods of “conference, conciliation, and persuasion ... necessarily involve communication between parties, including the exchange of information and views.” *Id.* To meet its statutory obligations the Commission must, at a minimum, “tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” *Id.* The Court held that the Commission’s compliance with its statutory conciliation obligations could be subject to judicial review. *Id.* However, the scope of that review will generally be limited to examining whether the Commission afforded “the employer a chance to discuss and rectify a specified discriminatory practice.” *Id.* at 489. According to the Court, such judicial review would likely, at most, consist of a review of affidavits from the parties on whether the EEOC has fulfilled its statutory obligations. *Id.* at 494-95.<sup>5</sup>

The Court noted the EEOC’s “wide latitude” and “expansive discretion” over the conciliation process when it crafted the narrow judicial review it said was appropriate under Title

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EEOC’s duty to conciliate); *EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F. 2d 178, 183 (4th Cir. 1979) (requirement that EEOC’s conciliation efforts reach a minimum of good faith).

<sup>5</sup> After *Mach Mining*, courts have addressed the extent to which a defendant can seek review of the conciliation process. See *EEOC v. Wal-Mart Stores, Texas, LLC*, \_\_\_ F.Supp.3d \_\_\_, \*3-4 (S.D. Tex. 2019) (holding that it would allow only limited discovery related to conciliation, and not on the “substance and detail of conciliation discussions”); *EEOC v. Blinded Veterans Association*, 128 F. Supp.3d 33, 44 (D.D.C. 2015) (stating that courts’ review of conciliation extends only to whether the EEOC attempted to engage the employer in an effort to remedy the alleged discrimination and not to the parties’ positions during conciliation).

VII. *Id.* at 488-89. Such broad discretion in its conciliation processes, and other areas, means the Commission “wields significant power.” *EEOC v. Freeman*, 778 F.3d 463, 472 (4th Cir. 2015) (Agee, J., concurring). Recognizing this power, it is important that the Commission clearly articulate the steps of the conciliation process so that the parties understand what to expect.

The Commission acknowledges that the preferred method for remedying employment discrimination is through “cooperation and voluntary compliance,” including conciliation. *See Mach Mining*, 575 U.S. at 486 (“in pursuing the goal of bringing employment discrimination to an end, Congress chose ‘cooperation and voluntary compliance’ as its preferred means”). Prior to Supreme Court’s decision in *Mach Mining*, the Commission was in the process of developing internal standards for more robust and consistent conciliation efforts in the form of the Quality Enforcement Practices (QEP), which set forth specific action steps to promote sharing of information toward voluntary resolutions.<sup>6</sup> Following the *Mach Mining* decision, the then-Chair and General Counsel issued internal guidance on how to ensure that the EEOC’s conciliation processes conformed to the requirements outlined by the Supreme Court. In the Spring of 2017, the EEOC’s Office of Field Programs implemented agency-wide “Conciliation and Negotiation Training,” a significant portion of which covered what the EEOC must do to satisfy its statutory duty to attempt conciliation. Over 800 EEOC staff participated in this training, including all investigators and their supervisors. Since then, the EEOC has endeavored to train new investigators on the Commission’s conciliation obligations.

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<sup>6</sup> While the QEPs were in development prior to the Supreme Court issuing *Mach Mining*, they were not published until September 2015, several months after the decision. <https://www.eeoc.gov/quality-practices-effective-investigations-and-conciliations>

Historically, the EEOC has elected to not adopt detailed regulations to govern its conciliation efforts. The Commission took this position in the belief that retaining flexibility over the conciliation process would more effectively accomplish its goal of preventing and remediating employment discrimination. *See Mach Mining*, 575 U.S at 487 (“The Government highlights the broad leeway the statute gives the EEOC to decide how to engage in, and when to give up on, conciliation.”). The Commission still believes that it is important to maintain a flexible approach to conciliation, and that the Commission has broad latitude over what it offers and accepts in conciliation. However, notwithstanding EEOC’s efforts, including the extensive training outlined above, EEOC’s conciliation efforts resolve less than half of the charges where a reasonable cause finding has been made.

Between fiscal years 2016 and 2019, only 41.23% of the EEOC’s conciliations were successful. While this number is a slight improvement over the previous four fiscal years,<sup>7</sup> the Commission is successfully achieving Congress’s “preferred means” of eliminating employment discrimination less than half the time.<sup>8</sup> Furthermore, the Commission estimates that one third of respondents (employers) who receive a reasonable cause finding decline to participate in conciliation. While there are various reasons why a respondent decides not to participate in conciliation, such a widespread rejection of the process suggests a broadly held view that the process does not meet its full potential in providing value to all parties. These results have led the Commission to conclude that a change in approach is necessary. Through this rulemaking,

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<sup>7</sup> For fiscal years 2012 through 2015, the rate was 40%. *See* EEOC Statistics, All Statutes <https://www.eeoc.gov/enforcement/all-statutes-charges-filed-eeoc-fy-1997-fy-2019>

<sup>8</sup> Congress has remained interested in the EEOC’s conciliation efforts well after the initial passing of Title VII. *See e.g.*, Senate Health Education Labor and Pensions Minority Staff Report, November 24, 2014 at p. 4, <https://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf> (“EEOC is not consistently meeting its statutory mandate to attempt to resolve discrimination disputes out of court.”).

the Commission is choosing to exercise its “wide latitude” to fulfill its Congressional mandate of ending employment discrimination through “cooperation and voluntary compliance” by clearly outlining the steps necessary to carry out its statutory conciliation responsibility.

The Commission recognizes that after *Mach Mining*, its conciliation process is subject to judicial review. The purpose of these proposed changes is not to provide an additional avenue for litigation by respondents or charging parties. Indeed, Title VII provides that “nothing said or done during and as part of” conciliation may be publicized by the Commission or “used as evidence in a subsequent proceeding without the written consent of the persons concerned.” 42 U.S.C. 2000e-5(b); *Mach Mining*, 575 U.S. at 492-93 (stating that judicial review of conciliation that delves too deep would violate Title VII’s confidentiality provision). Rather, the purpose of these proposed regulations is to strengthen the Commission’s own practices.<sup>9</sup> The Commission is seeking input through the notice and comment process on the question of whether these proposed amendments will result in additional challenges to the Commission’s conciliation efforts, and whether such challenges would delay or adversely impact litigation brought by the Commission.

Accordingly, the Commission is proposing to amend its procedural conciliation regulations governing Title VII, ADA, and GINA cases to outline steps that the Commission will take in the conciliation process. Articulating these steps meets the obligations highlighted in *Mach Mining*: (1) inform the employer about the claim, including “what practice has harmed

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<sup>9</sup> Any judicial review that does take place is limited. As *Mach Mining* explained, the scope of judicial review will generally be limited to examining whether the Commission afforded “the employer a chance to discuss and rectify a specified discriminatory practice.” *Id.* at 489. As noted above, a sworn affidavit from EEOC stating it had met its obligations “will usually suffice.” *Id.* at 494.

which person or class” and (2) “provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” *Id.* at 488.

The Commission believes these steps will enhance efficiency and better encourage a negotiated resolution when possible. Among the many values of resolving a charge in conciliation is remedying unlawful discrimination more quickly and avoiding the risks inherent in litigation.

The Commission proposes to require that in any conciliation the Commission will provide to the respondent, if it has not already done so: (1) a summary of the facts and non-privileged information that the Commission relied on in its reasonable cause finding, and in the event that 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; (2) a summary of the Commission’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 the course of 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 a systemic, class, or pattern or practice designation. The Commission also proposes to specify that the respondent participating in conciliation will have at least 14 calendar days to respond to the initial conciliation proposal from the Commission. Commission is seeking input through the notice and comment process on all of these requirements, and specifically, the Commission would like input on whether it should specify that its disclosures must only be done in writing or if it should allow for oral disclosures as well.



In addition, the Commission is also obligated to undertake conciliation efforts pursuant to the Age Discrimination in Employment Act (ADEA). Specifically, the Commission must “seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, or persuasion.” 29 U.S.C 626(d)(2). Accordingly, the Commission is proposing to amend its ADEA regulations to add the same<sup>10</sup> requirements to the ADEA conciliation process.

These steps in cases under Title VII, ADA, GINA, and the ADEA, will support the EEOC’s statutory obligations in the conciliation process, provide a better opportunity to resolve the matter, and remedy unlawful discrimination without litigation.

## **Regulatory Procedures**

### *Executive Order 12866*

This proposed rule has been determined to be significant under EO 12866 by the Office of Management and Budget because it raises novel legal or policy issues arising out of legal mandates or the President’s priorities. The proposed rule will not have an annual effect on the economy of \$100 million or more, nor will it adversely affect the economy in any material way. Thus, it is not economically significant for purposes of EO 12866 review. However, the rule will have many benefits as demonstrated by the following cost-benefit analysis.

The proposed rule imposes no direct costs on any third parties and only imposes requirements on the EEOC itself. These requirements, if implemented, will likely require the EEOC to conduct training of staff and change its processes for investigations and conciliations to ensure that it is complying with the new regulation. While these changes and training would likely be absorbed within the Commission’s normal operating expenses, any additional expenses

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<sup>10</sup> While the requirements are substantively the same, the language in the ADEA section is slightly different due to the language of section 7(d)(2) of the ADEA.

that the agency would incur could be offset by cost savings derived from these changes. For example, charging parties often file Freedom of Information Act (FOIA) requests with the Commission after receiving a “right to sue notice” in order to receive the charge file. If more cases are resolved in conciliation, these cases would not result in right to sue notices and the Commission would receive fewer FOIA requests, resulting in cost savings for the government.

Furthermore, while the parties ultimately determine whether a conciliation agreement is reached, if the Commission is able to conciliate more cases successfully, it will benefit employees, employers, and the economy as a whole. With respect to employees, an increase in successful conciliations will result in more employees receiving remedies for the discrimination they suffered and/or within an accelerated timeframe. Many employees who receive reasonable cause findings are unable to obtain any relief without conciliation because they do not pursue litigation for fiscal, emotional, or other reasons, or even if they do pursue litigation, ultimately do not attain relief. Even employees who ultimately would otherwise be successful in litigation may benefit from a conciliation agreement because they would then receive remedies sooner and avoid the time, cost, stress, and uncertainty of litigation.

Employers will also receive a net benefit from the EEOC conciliating cases more successfully. In some cases, conciliation agreements may provide an opportunity for employers to more quickly correct any discriminatory conduct or policies and seek compliance assistance from the EEOC. Additionally, while employers pay \$45,466<sup>11</sup> on average to settle cases in conciliation, they will save resources and money by avoiding litigation. It is difficult to quantify the average cost of litigating an employment discrimination case for an employer because the

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<sup>11</sup> This was the average for fiscal year 2019.

cost of a case depends on several factors, such as the complexity of the case, length of the litigation, and the jurisdiction in which it is litigated.<sup>12</sup>

The stage at which litigation concludes has a large effect on litigation costs – attorneys’ fees and other litigation expenses are significantly higher for cases that go through trial, as opposed to those that end in summary judgment. For example, in 2013, one experienced defense attorney estimated that the average attorney’s fees for employers for cases that end in summary judgment was between \$75,000 – \$125,000; while cases that go to trial average \$175,000 – \$250,000 in fees.<sup>13</sup> Factoring for inflationary changes in legal fees, the present value of those costs is closer to \$83,000 – \$139,000 for cases ending in summary judgment and \$195,000 – \$279,000 for cases that end after a trial.<sup>14</sup> Taking the middle of each range in present value results in average costs of \$111,000 for cases ending in summary judgment and \$237,000 for cases that end after trial. We recognize that many employers will find these fee estimates to be low, but because there is insufficient, publicly available data for calculating the amount that

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<sup>12</sup> This analysis focuses only on an employer’s litigation costs because most plaintiff-side attorneys use contingency-fee arrangements for pursuing claims, in which the attorney receives a portion of the recovery and charges little or nothing if no recovery is obtained. See Martindale-Nolo Research, *Wrongful Termination Claims: How Much Does a Lawyer Cost?* (Nov. 14, 2019), available at <https://www.lawyers.com/legal-info/labor-employment-law/wrongful-termination/wrongful-termination-claims-how-much-does-a-lawyer-cost.html> (noting that 75% of plaintiffs lawyers in employment litigation use contingency fee arrangements and another 15% use a combination of a contingency fee and hourly rate). Thus, more frequent conciliation will save litigation costs for those few plaintiffs who pay their attorneys an hourly rate.

<sup>13</sup> John Hyman, *How Much Does it Cost to Defend an Employment Lawsuit*, in WORKFORCE, (May 14, 2013), available at <https://www.workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit>.

<sup>14</sup> These calculations were made using the Department of Labor Bureau of Labor Statistics’s (BLS) Consumer Price Index calculator, available at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). These increases are likely conservative, as they are similar to increases in legal service costs over a shorter time frame. Historical data for the BLS Producer Price Index for Legal Services in the Mid-Atlantic region, available at [https://www.bls.gov/regions/mid-atlantic/data/producerpriceindexlegal\\_us\\_table.htm](https://www.bls.gov/regions/mid-atlantic/data/producerpriceindexlegal_us_table.htm), reveals that average costs for employment and labor legal services increased from 100 in December 2014 (the earliest data available) to 109.9 in April 2020 (the most recent non-“preliminary” data), an increase of approximately 10%. Similarly, the US Department of Justice’s USAO Attorney’s Fees Matrix, which only measures the change in fees between 2015-2020 across the legal field, reveals a roughly 12% change in hourly rate for the most experienced attorneys in the District of Columbia. See <https://www.justice.gov/usao-dc/page/file/1305941/download>.

employers have expended in defending against a charge through conciliation<sup>15</sup> and which otherwise would be subtracted for purposes of this analysis, we believe such a conservative estimate is appropriate.

To determine the average amount spent on attorney's fees, the Commission also must consider the number of cases that were the subject of conciliation that are either resolved in summary judgment or proceed to trial. The majority of cases of employment discrimination are not tried.<sup>16</sup> Some studies suggest that two-thirds or more of employment discrimination lawsuits that are filed in court end in summary judgment.<sup>17</sup> Those statistics, however, include cases filed in court after the EEOC dismissed the charge without a reasonable cause determination. In conciliation cases, by contrast, the EEOC has conducted an investigation and found reasonable cause to conclude that discrimination may have occurred. We believe it is reasonable to assume that more of these latter cases will survive summary judgment. With this assumption, the average litigation cost to employers is \$174,000.<sup>18</sup>

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<sup>15</sup> "There do not appear to be any reliable statistics on the percentage of employers who retained outside counsel to defend charges filed with the EEOC." Philip J. Moss, *The Cost of Employment Discrimination Claims*, 28 Maine Bar J. 24, 25 (Winter 2013). Supposing "conservatively" that 50% of employers relied on outside counsel at an hourly rate averaging \$250 (in 2013) and invested 20 hours in cases during the EEO process, *Id.*, employers would average \$2,500 in legal costs during the EEO process ( $\$250 \times 20 \text{ hours} \times 0.5$ ), which in present value would average \$2,792. The costs for employers who use in-house counsel or human resource professionals to handle their EEOC charges are more difficult to quantify.

<sup>16</sup> Paul D. Seyfarth, *Efficiently and Effectively Defending Employment Discrimination Cases*, 63 AmJur Trials 127, § 81 (Supp. 2020) ("It is an undeniable fact that most employment discrimination cases do not get tried; they are either settled or disposed of via summary judgment.").

<sup>17</sup> Charlotte S. Alexander, Nathan Dahlberg, Anne M. Tucker, *The Shadow Judiciary*, 39 Rev. of Lit. 303 (2020) (Table 3) (finding that among summary judgment motions in employment cases handled by magistrate judges in the Northern District of Georgia, 78% are granted in part or in full); Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y. L. Sch. L. Rev. 815, 817 (2012/2013) (finding that approximately two-thirds of all equal pay act cases end at the summary judgment stage).

<sup>18</sup> Average summary judgment fees (\$111,000) + average trial fees (\$237,000)/2 = \$174,000. This figure is within the range of other estimates for average attorney fee costs. See AmTrust Financial, *Employment Practices Liability (EPLI) Claims Trends, Stats & Examples*, available at <https://amtrustfinancial.com/blog/insurance-products/top-trends-employment-practices-liability-claims> (asserting that attorney fee costs in 2018 averaged \$160,000, which in present value would amount to \$167,000); Moss, *supra* note 7 (citing Blasi and Doherty, *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at \$0*, UCLA-RAND Center for

Resolving more cases through conciliation will be beneficial to the economy as a whole because the litigation costs that the parties save can be put towards more productive uses, such as expanding businesses and hiring more employees. It is difficult to quantify how many cases in which the Commission finds reasonable cause end up being litigated in court because, if the EEOC decides to not litigate the case, the Commission does not track lawsuits filed by private plaintiffs. Cases in which the EEOC found reasonable cause are the most likely to be litigated by a private plaintiff because the EEOC has already determined that there is reasonable cause to believe that the case has merit. While not all cases in which reasonable cause is found and conciliation is unsuccessful are litigated, there is reason to believe that a significant portion are. The Commission itself files lawsuits in roughly 10% of the cases in which reasonable cause is found and conciliation is not successful.<sup>19</sup> It is reasonable to believe that private plaintiffs file lawsuits in at least an additional 40% of cases, so that overall half the cases in which reasonable cause is found, but conciliation is unsuccessful, end up being litigated in court.<sup>20</sup>

Using the numbers above, if the Commission successfully conciliated only 100 more cases each year, that would save the economy over \$4 million in litigation costs.<sup>21</sup>

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Law and Public Policy (2010)) (estimating costs to employers in state-level employment discrimination cases in California in 2010 at \$150,000, which taken to present value would average approximately \$180,000).

<sup>19</sup> For fiscal year 2019, the Commission filed 157 lawsuits. EEOC Litigation Statistics, <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019>. Overall, in fiscal year 2019, there were 1,427 cases in which the Commission found reasonable cause but conciliation was unsuccessful. <https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2019>.

<sup>20</sup> To give some sense of the scope of cases, federal courts reported that 42,053 “Civil Rights” cases were filed in federal court during the most recent year.

[https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf). While not all these civil rights cases involve employment discrimination, and this number would include cases where a private plaintiff filed suit after the EEOC did not find reasonable cause, it illustrates that the assumption – that half of the roughly 1,400 cases in which conciliation is unsuccessful end up in court – is likely a low estimate.

<sup>21</sup> 100 successful conciliations x \$45,466 (average conciliation for fiscal year 19) = \$4,546,600. However, this number is offset by the litigation costs saved in 50 cases (assuming half the cases would have ended in litigation): 50 x \$174,000 = \$8,700,000. \$8,700,000 - \$4,546,600 = \$4,153,400 in savings for every 100 cases that are conciliated.

Therefore, the Commission's proposed rule, which establishes basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful, will result in significant economic benefits if it becomes a final rule and is successfully implemented.

#### *Executive Order 13771*

This proposed rule is not expected to be an EO 13771 regulatory action because it will not impose total costs greater than \$0. As described above, the Commission's rule will result in more successful conciliations and therefore, overall cost reduction, so this is considered a deregulatory action. Details on the expected impacts of the proposed rule can be found in the agency's analysis above.

#### *Paperwork Reduction Act*

This proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it applies exclusively to employees and agencies of the federal government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

#### *Unfunded Mandates Reform Act of 1995*

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year,

and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Congressional Review Act*

While the Commission believes the proposed rule is a rule of agency procedure that does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), it will still follow the reporting requirement of 5 U.S.C. 801.

**List of Subjects in 29 CFR Parts 1601 and 1626**

Administrative practice and procedure, Equal Employment Opportunity  
For the Commission.

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Janet Dhillon,  
Chair

For the reasons set forth in the preamble, the Commission proposes to amend 29 CFR parts 1601 and 1626 as follows:

**PART 1601 – PROCEDURAL REGULATION**

1. The authority citation is revised to read as follows:

Authority: 42 U.S.C. 2000e to 2000e-17; 42 U.S.C. 12111 to 12117; 42 U.S.C. 2000ff to 2000ff-11.

2. Amend **§1601.24** by adding paragraphs (d) through (f) to read as follows:

## **§ 1601.24 Conciliation: Procedure and authority**

\* \* \* \* \*

(d) In any conciliation process pursuant to this section, after the respondent has agreed to engage in conciliation, the Commission will:

(1) To the extent it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that the Commission relied on in its reasonable cause finding, including identifying known aggrieved individuals or known groups of aggrieved individuals for whom relief is being sought, unless the individual(s) have requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, to the extent it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members; In cases in which that information does not provide an accurate assessment of the size of the class, for example, in harassment or reasonable accommodation cases, the Commission may, but is not required to provide more detail to respondent, such as the identities of the harassers or supervisors, or a description of the testimony or facts we have gathered from identified class members during the investigation. The Commission may also use its discretion to determine whether to disclose current class size and, if class size is expected to grow, an estimate of potential additional class members;

(2) To the extent it has not already done so, provide the respondent with a summary of the Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts. If there is material information that the Commission obtained during its investigation that caused the Commission to doubt that there was reasonable cause to believe discrimination occurred, if it has not already done so, the Commission will explain how it was



able to determine there was reasonable cause despite this information. In addition, the Commission may, but is not required to, provide a response to the defenses raised by respondent;

(3) Provide the respondent with the basis for monetary or other relief, including the calculations underlying the initial conciliation proposal, and an explanation thereof;

(4) If it has not already done so, and if there is a designation at the time of the conciliation, advise the respondent that the Commission has designated the case as systemic, class, or pattern or practice as well as the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(e) The Commission shall not disclose any information pursuant to subsection (d) where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(f) 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 upon request.

## **PART 1626 – PROCEDURES – AGE DISCRIMINATION IN EMPLOYMENT ACT**

3. The authority citation continues to read as follows:

**Authority:** Sec. 9, 81 Stat.605, 29 U.S.C. 628; sec. 2, Reorg Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

4. Amend **§1626.12** by redesignating as paragraph (a) and adding paragraphs (b) through (d) to read as follows:

**§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.**

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(b) In any conciliation process pursuant to this section the Commission will:

(1) If it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that form the basis of the allegation(s), including identifying known aggrieved individuals or known groups of aggrieved individuals, for whom relief is being sought, but not if the individual(s) have requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, if it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members

(2) If it has not already done so, provide the respondent with a summary of the legal basis for the allegation(s). In addition, the Commission may, but is not required to provide a response to the defenses raised by respondent;

(3) Provide the basis for any monetary or other relief, including the calculations underlying the initial conciliation proposal, and an explanation thereof;

(4) If it has not already done so, advise the respondent that the Commission has designated the case as systemic, class, or pattern or practice, if the designation has been made at the time of the conciliation, and the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(c) The Commission shall not disclose any information pursuant to subsection (b) where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(d) Any information the Commission provides pursuant to subsection (b) to the respondent will also be provided to the charging party or other aggrieved individuals upon request.

5. Amend §1626.15 paragraph (d) by adding the following sentence at the end to read as follows:

**§1626.15 Commission enforcement**

\* \* \* \* \*

(d) \* \* \* Any conciliation process under this paragraph shall follow the procedures as described in section 1626.12.

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