



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1603

RIN: 3046-AB09

Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination under Section 304 of the Government Employee Rights Act of 1991

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) is proposing to amend its existing regulations by which state and local government employees who were previously exempt from coverage under Title VII of the Civil Rights Act of 1964 may bring claims of employment discrimination pursuant to the Government Employee Rights Act of 1991. The EEOC proposes to amend the regulations to explicitly provide for digital transmission of documents, to update the regulation based upon the text of other regulations or statutes, and to make a number of editorial revisions to improve clarity and correct errors.

DATES: Comments on the notice of proposed rulemaking must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN Number 3046-AB09, by any of the following methods – please use only one method:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.
- Fax: Comments totaling six or fewer pages may be sent by fax machine to (202) 663-4114. 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) 921-2815 (voice), (800) 669-6820 (TTY), or (844) 234-5122 (ASL Video Phone).

- Mail: Comments may be submitted by mail to Raymond Windmiller, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.
- Hand Delivery/Courier: Raymond Windmiller, 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 Regulatory Information Number (RIN) for this rulemaking. 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 <https://www.regulations.gov>. Copies of the received comments also will be available for review at the Commission's library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m., from **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** until the Commission publishes the rule in final form. You must make an appointment with library staff to review the comments in the Commission's library.

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Assistant Legal Counsel, at (202) 921-2665 or kathleen.oram@eeoc.gov, or Erin Norris, Senior Attorney, Office of Legal Counsel, at (980) 296-1286 or erin.norris@eeoc.gov. Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 921-3191 (voice), (800) 669-6820 (TTY), or (844) 234-5122 (ASL Video Phone).

SUPPLEMENTARY INFORMATION: Title III of the Civil Rights Act of 1991, entitled the Government Employee Rights Act of 1991 (GERA), extends protections against employment discrimination based on race, color, religion, sex, national origin, age and disability to previously exempt state and local government employees. 42 U.S.C. 2000e-16c. In addition to providing these protections against discrimination, section 304 of GERA empowered the Equal Employment Opportunity Commission to address complaints filed by GERA-covered employees. GERA afforded previously exempt individuals new equal employment opportunity protections, and it introduced an administrative enforcement mechanism that was different from EEOC's pre-existing charge resolution procedures. Consequently, EEOC created procedures in 29 CFR part 1603 for handling complaints brought by individuals covered by GERA. The interim rule setting out these procedures was published at 62 FR 17542 (April 10, 1997) and the final rule was published at 64 FR 28743 (May 27, 1999). Pursuant to its authority under 42 U.S.C. 2000e-12 to "amend...suitable procedural regulations to carry out the provisions of this subchapter," the EEOC now proposes to revise those regulations as described in this document.

Digital submission of documents

Proposed revisions to §§ 1603.102, 106, 208, 209, and 302 update the regulations to allow for digital submission of documents. Since last revising this regulation, the EEOC has expanded its use of technology in charge and complaint processing. The Commission has implemented a digital system for charges and complaints of discrimination filed with the EEOC. The system enables the EEOC, charging parties and complainants, and respondents against whom charges or complaints are filed to communicate and transmit documents digitally through a secure online portal. It allows potential charging parties and complainants to submit online inquiries to the EEOC and to schedule intake interviews through the online system. In addition, in some cases the

EEOC allows parties to submit information to agency personnel through email. While parties may continue to submit information using other methods, digital submission of documents through the online system is the preferred method.

Other regulations and statutes

The proposed revisions also include a few changes to citations to other regulations or statutes, as well as cross-references to sections within part 1603. In § 1603.108, an incorrect statutory citation was corrected, and in §§ 1603.102, 107, 301, and 303, references to other EEOC regulations and cross-references to sections in part 1603 were added, updated, or corrected.

Further, in § 1603.107 the EEOC proposes to remove two paragraphs that are substantively analogous to paragraphs removed in 2008 from the agency's procedural charge processing regulations in 29 CFR 1601.18. This proposed removal of the language from part 1603 would standardize the EEOC's various procedural regulations. The paragraphs in question state that the Commission may dismiss a GERA complaint if the complainant cannot be located or if the complainant fails to provide information, appear for interviews, or otherwise cooperate with the agency. When similar language was removed from part 1601 in 2008, the agency noted that removing the language would bring part 1601 in line with the agency's procedural regulations governing the Age Discrimination in Employment Act and the Equal Pay Act, which do not contain the dismissal bases of failure to cooperate or failure to locate. Additionally, the agency noted in 2008 that the language had resulted in dismissals of private lawsuits when courts determined that the plaintiffs had not satisfied all prerequisites for filing suit; some courts held that having one's charge dismissed for failure to cooperate with the EEOC's investigation equated to failure to exhaust one's administrative remedies. The Commission did not intend to cause Federal court dismissals or to impose on charging parties any additional prerequisites to suit. For these reasons, the EEOC now proposes to

remove the paragraphs addressing failure to locate a complainant and failure of a complainant to cooperate with the EEOC from § 1603.107. This proposed revision is not intended to limit the Commission's discretion to dismiss complaints on these or other grounds where appropriate.

Finally, the EEOC proposes to revise § 1603.215(a) to reflect that transcripts of hearings before administrative law judges are available to the parties. The regulations now incorrectly state that the transcripts are available to the public as well; however, this statement conflicts with section 556 of the Administrative Procedure Act (APA), which states that a transcript shall be made available "to the parties."¹ The revision corrects this error and ensures that GERA complaints are processed in accordance with APA procedures, as GERA requires.

Other clarifying changes

The EEOC proposes to revise § 1603.207(c) to change the time for response to a motion to intervene from 15 days to 10 business days. Other responses to motions filed pursuant to part 1603 must be filed within 10 business days of service of the motion; this change is meant to standardize the deadline within part 1603. The EEOC also proposes to revise § 1603.302 by adding a paragraph requiring service on the opposing party of appeals taken under part 1603. Additionally, a number of minor grammatical, punctuation, and other editorial changes were made throughout this part.

Regulatory Procedures

Executive Order 12866

The Commission has complied with the principles in section 1(b) of Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a "significant regulatory action" under section 3(f) of the order and does not require an assessment of potential costs and benefits under section 6(a)(3) of the order.

¹ 5 USC 556(e).

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden. This proposed rule contains no new information collection requirements for the public, and therefore it will create no new paperwork burdens or modifications to existing burdens that are subject to review by the Office of Management and Budget under the PRA.

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 does not affect any small business entities. The regulation affects only certain employees of state or local governments. 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. To the extent that it affects small governments by allowing for digital transmission of documents, it will save resources of those entities. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This proposed rule is not a “rule” under the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996) because the Congressional Review Act only applies to final rules. Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 29 CFR Part 1603

Administrative practice and procedure, Equal employment opportunity, Intergovernmental relations, Investigations, State and local governments.

Accordingly, for the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR part 1603 as follows:

PART 1603 – PROCEDURES FOR PREVIOUSLY EXEMPT STATE AND LOCAL GOVERNMENT EMPLOYEE COMPLAINTS OF EMPLOYMENT DISCRIMINATION UNDER SECTION 304 OF THE GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991

1. The authority citation for part 1603 is revised to read as follows:

Authority: 42 U.S.C. 2000e-12 and -16c; 42 U.S.C. 2000ff-6(b).

2. Amend § 1603.102:
 - a. By revising paragraphs (a), (b), the introductory text of paragraph (c), (c)(1), (c)(2), (c)(4), and the last sentence of paragraph (d); and
 - b. In paragraph (e), in the first sentence, by removing the commas.

The revisions read as follows:

§ 1603.102 Filing a complaint.

(a) *Who may make a complaint.* Individuals referred to in § 1603.101 who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information, or retaliated against for opposing any practice made unlawful by federal laws protecting equal employment opportunity or for participating in any stage of administrative or judicial proceedings under those federal laws, may file a complaint not later than 180 days after the occurrence of the alleged discrimination or retaliation.

(b) *Where to file a complaint.* A complaint may be filed using the Commission's designated digital systems, in person, by facsimile, or by mail to any Commission office

or with any designated agent or representative of the Commission. The addresses of the Commission's offices may be found at www.eeoc.gov.

(c) *Contents of a complaint.* A complaint shall be in writing and signed and shall be verified as defined in § 1601.3(a). In addition, each complaint should contain the following:

(1) The full name and contact information of the person making the complaint;

(2) The full name and contact information of the person, governmental entity, or political subdivision against whom the complaint is made, if known (hereinafter referred to as the respondent);

* * * * *

(4) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local Fair Employment Practices (FEP) agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(d) * * * A complaint that has been amended after it was referred (see § 1603.103) shall not be again referred to the appropriate State or local FEP agency.

* * * * *

§ 1603.103 [Amended]

3. Amend § 1603.103(b) by removing the comma.

4. Revise § 1603.106 to read as follows:

§ 1603.106 Computation of time generally and for timely receipt by the Commission.

(a)(1) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(2) The first day counted shall be the day after the event from which the time period begins to run, and the last day of the period shall be included unless it falls on a

Saturday, Sunday, or federal holiday, in which case the period shall be extended to include the next business day.

(3) All time limits in this part are subject to waiver, estoppel, and equitable tolling.

(b) Documents submitted to the Commission are deemed timely received as follows:

(1) A document submitted by digital transmission, by facsimile not exceeding 20 pages, or by personal delivery or commercial delivery service shall be deemed timely if it is received before the expiration of the applicable filing period. A document submitted by digital means shall be deemed received on the date the EEOC's designated digital system records the upload.

(2) A document submitted by mail shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period or, in the absence of a legible postmark, if it is received within 5 days of the expiration of the applicable filing period.

(c) For the purposes of this part, the terms *file*, *serve*, *receive*, *issue*, *transmit*, *send*, and any other word forms of these terms, such as *filing* or *servicing*, when used to describe transmission of documents, shall include all forms of digital transmission.

5. Amend § 1603.107:

- a. By revising paragraph (a);
- b. By removing paragraphs (b) and (c); and
- c. By redesignating paragraphs (d) and (e) as paragraphs (b) and (c) and revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 1603.107 Dismissals of complaints.

(a) Where a complaint is not timely filed or, except as described in §1603.102(e), fails to state a claim under this part, the Commission shall dismiss the complaint.

(b) Written notice of dismissal pursuant to paragraph (a) of this section shall be issued to the complainant and the respondent. The Commission hereby delegates authority to dismiss complaints to the Director, Office of Field Programs or the Director's designees, and to District Directors or their designees.

(c) A complainant who is dissatisfied with a dismissal issued pursuant to this section may appeal to the Commission in accordance with the procedures in subpart C of this part.

§ 1603.108 [Amended]

6. Amend § 1603.108:

- a. In paragraph (c), by adding a comma after the words “employees of the Commission”; and
- b. In paragraph (d), by removing the number “584” and adding in its place the number “574”.

§ 1603.109 [Amended]

7. Amend § 1603.109:

- a. In paragraph (a), by adding the word “an” before the word “investigation” and by adding a comma after the word “visits”; and
- b. In paragraph (b), in the first sentence, by adding a comma after the words “the production of evidence”.

§ 1603.201 [Amended]

8. Amend § 1603.201:

- a. In paragraph (a), by adding a comma after the words “of this section or”;
- b. In paragraph (c), by removing the words “representatives or witnesses” and adding in their place the words “representatives, and their witnesses”.

9. Amend § 1603.202:

- a. In paragraph (a), by adding a comma after the word “place”; and
- b. By revising paragraph (b) to read as follows:

§ 1603.202 Administrative law judge.

* * * * *

(b) Enter a default decision against a party failing to appear at a hearing unless the party shows good cause by contacting the administrative law judge either prior to the hearing or within 2 days after the scheduled hearing and presenting arguments as to why the party or the party’s representative could not appear; and

* * * * *

10. Amend § 1603.203:

- a. By revising paragraphs (a) and (b); and
- b. By removing paragraph (c).

The revisions read as follows:

§ 1603.203 Unavailability or withdrawal of administrative law judges.

(a) In the event the administrative law judge designated to conduct the hearing becomes unavailable or withdraws from the adjudication, another administrative law judge may be designated for the purpose of further hearing or issuing a decision on the record as made, or both. At any time administrative law judges deem themselves disqualified, they may withdraw from an adjudication.

(b) Prior to issuance of a decision on the complaint, any party may move that the administrative law judge withdraw on the grounds of personal bias or other disqualification by filing with the administrative law judge an affidavit setting forth in detail the matters alleged to constitute grounds for withdrawal promptly upon discovery of the alleged facts. The administrative law judge shall rule upon the motion for withdrawal. If the administrative law judge concludes that the motion was filed promptly

and has merit, the administrative law judge shall immediately withdraw from the adjudication. If the administrative law judge does not withdraw, the adjudication shall proceed.

11. Amend § 1603.204:

- a. By revising the last sentence of paragraph (a); and
- b. By revising paragraphs (b) and (d).

The revisions read as follows:

§ 1603.204 Ex parte communications.

(a) * * * Communications between the administrative law judge or Commission personnel and one party concerning the status of the case, the date of a hearing, the method of transmitting evidence to the Commission, and other purely procedural questions are permitted.

(b) “Decision-making personnel of the Commission” includes members of the Commission and their staffs as well as personnel in the Office of Federal Operations but does not include investigators and intake staff.

* * * * *

(d) Where it appears that a party has engaged in prohibited ex parte communications, that party may be required to show cause why, in the interest of justice, the party’s claim or defense should not be dismissed, denied, or otherwise adversely affected.

§ 1603.205 [Amended]

12. Amend § 1603.205(b) by removing the comma after the words “in the adjudication”.

§ 1603.206 [Amended]

13. Amend § 1603.206:

- a. In paragraph (a), in the first sentence, by removing the words “his or her” and adding in their place the words “the administrative law judge’s”, by removing the comma after the words “common parties”, and by adding the word “common” before the word “factual”; and
- b. In paragraph (b), by removing the words “his or her” and adding in their place the words “the administrative law judge’s” and by adding a comma after the word “claims”.

§ 1603.207 [Amended]

14. Amend § 1603.207:

- a. In paragraph (b), by adding the word “relevant” before the words “facts or reasons”; and
- b. In paragraph (c), by removing the words “15 days after the filing” and adding in their place the words “10 business days after service”.

§ 1603.208 [Amended]

15. Amend § 1603.208:

- a. In paragraph (b), in the first sentence, by removing the words “ten (10)” and adding in their place the number “10”, and in the last sentence, by removing the words “judge, in his or her discretion, orders” and adding in their place the words “judge exercises discretion to order”;
- b. In paragraph (c), in the third sentence, by adding the words “or other digital means” after the word “telephone”, and in the last sentence, by removing the words “five (5)” and adding in their place the number “5”, and by adding a comma after the word “vacate”; and
- c. In paragraph (d), by removing the words “dilatory, repetitive or frivolous motions” and adding in their place the words “motions that are repetitive, frivolous, or intended to delay the proceedings”.

16. Revise § 1603.209 to read as follows:

§ 1603.209 Filing and service.

(a) Unless otherwise ordered by the administrative law judge, a signed original of each motion, brief, or other document shall be filed with the administrative law judge, with a certificate of service indicating that a copy has been sent to all other parties and stating the date and manner of service. Digitally submitted documents may be electronically signed. All documents presented in hard copy shall be on standard size (8 1/2 × 11) paper. Each document filed shall be clear and legible.

(b) Filing and service shall be made by first class mail or other more expeditious means of delivery, including, at the discretion of the administrative law judge, by facsimile, digital transmission, or other means. The administrative law judge may exercise discretion to limit the number of pages that may be filed or served by facsimile. Service shall be made on a party's representative, or, if not represented, on the party.

(c) Every document shall contain a caption including the parties' names, the complaint number or docket number assigned to the matter, a designation of the type of filing (e.g., motion, brief, etc.), and the filing person's signature and contact information.

§ 1603.210 [Amended]

17. Amend § 1603.210(b) by adding a comma after the word "admission".

§ 1603.211 [Amended]

18. Amend § 1603.211:

- a. In paragraph (a), in the last sentence, by adding the word "state" before the words "the date and time"; and
- b. In paragraph (b), in the second sentence, by adding the word "also" before the words "be served upon".

§ 1603.213 [Amended]

19. Amend § 1603.213:

- a. In paragraph (a) introductory text, by adding the words “either independently or” before the words “upon motion of a party”, and by removing the words “or upon his or her own motion”;
- b. In paragraph (a)(2), by removing the word “ruling” and adding in its place the word “appeal”, and by removing the word “or” and adding in its place the word “and”;
- c. In paragraph (a)(3), by removing the word “ruling” and adding in its place the word “appeal”;
- d. In paragraph (b) introductory text, by removing the words “ten (10)” and adding in their place the number “10”; and
- e. In paragraph (c), in the last sentence, by removing the comma after the word “judge” and by removing the words “within his or her discretion.”.

§ 1603.214 [Amended]

20. Amend § 1603.214 by adding the word “that” before the words “the rules on hearsay”.

§ 1603.215 [Amended]

21. Amend § 1603.215:

- a. In paragraph (a), in the first sentence, by removing the words “mechanically or stenographically reported” and adding in their place the words “audio or video recorded, stenographically reported, or both” and in the last sentence, by removing the words “and the public”; and
- b. In paragraph (b), by removing a comma after the words “upon motion” and by removing the words “ten (10)” and adding in their place the number “10”.

§ 1603.217 [Amended]

22. Amend § 1603.217(b), in the last sentence, by adding a semicolon after the word “discovery”.

§ 1603.301 [Amended]

23. Amend § 1603.301 by removing the citation “§ 1613.213” and adding in its place the citation “§ 1603.213”.

24. Amend § 1603.302:

- a. By revising paragraph (b); and
- b. By adding a new paragraph (c).

The revisions read as follows:

§ 1603.302 Filing an appeal.

* * * * *

(b) An appeal shall be filed with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, by mail to P.O. Box 77960, Washington, DC 20013, by personal delivery or commercial delivery service, by digital transmission, or by facsimile to 202-663-7022.

(c) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.

§ 1603.303 [Amended]

25. Amend § 1603.303:

- a. In paragraph (c), introductory text, by adding a comma after the word “order”;
- b. In paragraph (c)(2), by adding a comma after the word “regulation”; and
- c. In paragraph (e), by removing the words “the appeal and” and by removing the citation “§ 1603.209” and adding in its place the citation “§ 1603.302(b) and (c)”.

§ 1603.306 [Amended]

26. Amend § 1603.306 by removing a comma after the word “resides”.

Dated: May 12, 2023.

For the Commission,

Charlotte A. Burrows,

Chair.

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