CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

November 9, 2020

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

By electronic submission: www.regulations.gov

RE: Proposed Update of Commission's Conciliation Procedures; RIN: 3046-AB19; 85 Fed. Reg. 64079 (October 9, 2020)

Dear Ms. Wilson:

The U.S. Chamber of Commerce appreciates the Equal Employment Opportunity Commission's (EEOC) proposed rules updating and clarifying the rules governing the conciliation process for resolving allegations of unlawful employment practices (85 Fed. Reg. 64079). The Chamber has always believed that conciliation is the best method for seeking resolution and therefore strongly supports the EEOC's proposed rulemaking.

The EEOC's proposal flows from the Congressional direction in Title VII of the Civil Rights Act of 1964 that after the EEOC has found reasonable cause for a charge of unlawful employment practice "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). And further that using these methods is a precondition to the EEOC commencing a civil action.

Unfortunately, over the years, what constitutes EEOC making an effort at conciliation has varied and been diluted to the point that any perfunctory attempt to hold a conference is now considered enough to satisfy the precondition required before the EEOC files a legal action in court. The proposed regulation would rectify this problem by formally setting out how conciliation is to proceed and what all parties should expect. EEOC's regulation will apply not only to cases arising under Title VII, but to cases under the other laws within EEOC's jurisdiction: the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Age Discrimination in Employment Act.

The nature of the disputes that arise under the laws overseen by EEOC is uniquely fact based. Issues arise in the workplace, including the hiring and firing of employees, which are

often based on various levels of employer operations such as HR intake personnel, first line managers, or supervisors attempting to apply general personnel policies to specific workplace actions. Generally, these disputes are not the result of an employer's specific policy.

When an individual believes that he or she is aggrieved by employer action based upon any of the statutorily protected characteristics, there is an absolute right to file a complaint in order to protect their rights. The EEOC, as the federal agency responsible for processing these complaints has a statutory, and legal, duty to investigate these complaints and initiate a process to resolve the issues raised. While its role is not entirely passive, it must be neutral. Its duty is to structure the informal process, i.e. conciliation, so that the parties are fully cognizant of the actual facts underlying the complaint, and, with the EEOC explaining how the law has developed so that the facts may be applied against that legal context.

Accordingly, conciliation is only possible if the parties are provided all of the facts. The conciliation process is designed to be confidential to allow each party to set forth their case supported by facts so that the other party may fairly determine its response. While the charging party (the employee or applicant) understands what has occurred and how he or she was detrimentally affected, the employer is often not informed fully as to what has occurred. Although the employer should generally be able to rely on the representations of its managers or employees, it deserves to be fully informed of what the other party believes occurred. "Employer" is not a unitary construct but rather consists of different layers of personnel. Therefore, the "employer's" response must be based on a full knowledge of the facts as understood by all parties.

The EEOC proposal makes simple, but impactful, amendments to the conciliation process to make it viable and meaningful. In proposed section 1601.24 (d)(1) et. seq., it establishes a protocol so that the EEOC must offer its own understanding of the facts and apply them to the law as it understands it, to justify the Commission's reasonable cause determination. It also requires that the essence of the charging party's factual basis and complaint be disclosed to the employer. This would enable the employer, in a relatively expeditious but reasonable amount of time, to investigate the facts to its own satisfaction and formulate a response.

Requiring these disclosures does not prejudice the charging party or the Commission. By requiring the EEOC to justify its determinations up front, the slight added burden would surely reduce litigations or investigations. Both parties would benefit from learning the agency's view of how the law and the facts of a complaint should be considered within the legal framework.

The law and Commission rules make it absolutely clear that the disclosures and interchanges in the conciliation process cannot be used in any subsequent proceeding such as litigation. Disclosures during conciliation are to be kept strictly confidential. Indeed, the most significant development in the various laws administered or enforced by the EEOC is the emergence of the concept of retaliation which, if proved, is considered by definition intentional and can result in significant penalties. This offers concrete protection to charging parties, or their supporters, that any disclosure in the conciliation process cannot be used in any manner to harm the individual.

For conciliation to work, and for it to achieve its intended purpose of fairly and expeditiously resolving employment matters, all parties must believe that the process is fair and neutral. The proposed regulation to strengthen the conciliation process will clearly help achieve that desired result. Although the notion that everybody has their right to a day in court is one of our bedrock principles, the reality of the legal process is that a day in court may not be the best method for resolving a dispute as it is likely a very long, risky, and expensive process that may not yield a satisfying result. Well conducted conciliation allows a complaint to be presented fairly when a satisfying result can still be achieved quickly and inexpensively. Furthermore, conciliation does not preclude further legal action if the two parties are unable to find a resolution. The EEOC's proposed regulation enhances the likelihood that conciliation will produce results, thus ensuring that the purposes of the discrimination laws, and the intent of Congress, can be met.

Sincerely,

Marc Freedman
Vice President, Workplace Policy
Employment Policy Division

Outside Counsel
Lawrence Z. Lorber
Seyfarth Shaw LLP
975 F Street, N.W.
Washington, DC 20004