

The EEOC's Transformational New Conciliation Regulations

By **Eric Dreiband** (March 17, 2021, 2:07 PM EDT)

New regulations enacted by the U.S. Equal Employment Opportunity Commission took effect on Feb. 16.

These regulations will transform the EEOC's presuit conciliation process and may impact litigation brought by the agency.[1] They require agency staff, during presuit conciliation, to provide comprehensive information to employers about alleged violations of Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act and the Age Discrimination in Employment Act.

This article explains the requirements of the new regulations, the changes they mandate to the presuit conciliation process and why they are likely to remain unchanged, at least in the near term, given the EEOC's political makeup.

It then discusses the regulations' potential impact on EEOC litigation, concluding that the EEOC must comply with its new regulations or face the possibility of dismissal of all or part of any EEOC-filed lawsuit.

In this respect, the regulations supersede the U.S. Supreme Court's 2015 determination in *Mach Mining v. EEOC* that the appropriate remedy for the EEOC's violation of its conciliation duties is for a district court "to order the EEOC to undertake the mandated effort to obtain voluntary compliance." [2]

Background

Title VII requires the EEOC to act on a charge of discrimination in accordance with a multistep enforcement scheme.[3]

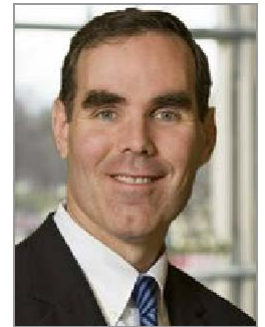
The EEOC must first provide notice of a filed charge to the party named in the charge — the respondent — and then the agency "shall" investigate the charge.[4]

Following its investigation, the EEOC must notify the parties of its findings. The EEOC will either dismiss the charge or determine that there is reasonable cause to believe the charge is true.

If the EEOC dismisses the charge, it typically issues a letter that authorizes the person who filed the charge to file a lawsuit. If, however, the EEOC has reasonable cause to believe the facts gathered during the investigation establish an unlawful employment practice, the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." [5]

The EEOC may sue the respondent — usually an employer — if the agency is unable to secure a conciliation agreement that the agency finds acceptable.

The ADA and GINA incorporate Title VII's enforcement scheme, including the conciliation requirement.



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The ADEA's requirements are a bit different, however. The EEOC can investigate and file suit under the ADEA even without a charge being filed, but before filing suit the agency must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." [6]

Title VII, the ADA, GINA and the ADEA all authorize the EEOC to enact regulations delineating the EEOC's enforcement procedures, including its conciliation process.[7]

On Oct. 9, 2020, the EEOC published a notice of proposed rulemaking about its conciliation process. It then published final rules on Jan. 14 and the new regulations became effective on Feb. 16.

The EEOC's conciliation regulations are not retroactive and apply to conciliations related to reasonable cause determinations issued by the agency on or after Feb. 16.

The agency has asserted that the primary objective of the new regulations is to "make conciliation a more powerful mechanism to halt and remedy unlawful discriminatory employment practices in a greater percentage of charges without litigation."

The regulations seek to achieve this objective "by implementing requirements regarding the information that [the agency] must provide in preparation for and during conciliation, particularly with respect to its findings and demands."

In all cases, the regulations now require the EEOC to provide "the essential facts and the law supporting the claim, findings, and demands" in order to enable employers to evaluate properly "their potential liability and the Commission's settlement offer."

As a result, when an employer agrees to participate with the EEOC in its conciliation process, the agency must provide the employer with a written summary of the facts and nonprivileged information that it relied upon in its reasonable cause determination.

The EEOC also will identify "known aggrieved individuals or known groups of aggrieved individuals for whom relief is being sought, unless the individual(s) has requested anonymity."

In class cases, the EEOC may propose to use a claims process and will "identify for respondent the criteria that will be used to identify victims from the pool of potential class members."

The EEOC also will provide information about the identities of alleged harassers or supervisors, if known, or a description of the testimony or facts gathered during the investigation. Further, the EEOC will disclose the current class size and, if the class size is expected to grow, an estimate of potential additional class members to the extent known.

Pursuant to the new regulations, the EEOC also will provide respondents with:

- A written summary of the commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts;
- The basis for monetary or other relief, including the calculations underlying the initial conciliation proposal, and an explanation in writing about the initial proposal; any designation of the case "as systemic, class, or pattern or practice as well as the basis for the designation"; and
- At least 14 calendar days to respond to the agency's initial conciliation proposal.

The EEOC Is Unlikely to Rescind or Modify the Regulations Title VII established the EEOC and requires that no more than three of five commissioners may be of the same political party. The commissioners serve staggered five-year terms upon nomination by the president and confirmation by the U.S. Senate.

The terms of the EEOC's two Democratic commissioners — EEOC Chair Charlotte Burrows and Vice Chair Jocelyn Samuels — end on July 1, 2023, and July 1, 2021, respectively.

The terms of the three Republican commissioners — Janet Dhillon, Keith Sonderling and Andrea Lucas — end on July 1 of 2022, 2024 and 2025, respectively.

On Jan. 7, the EEOC voted along party lines, 3-2, to adopt the conciliation regulations. Absent an unexpected departure, the three Republican commissioners who voted to enact the conciliation regulations will control a majority of the EEOC until at least 2022, and perhaps longer.

And because any change to the regulations would require a majority vote of the commissioners, it is likely that the conciliation regulations will remain in effect, unchanged, at least for the near future.

The Conciliation Regulations' Potential Impact on EEOC Litigation

The new regulations may impact lawsuits filed by the EEOC if the agency does not strictly comply with the regulations' requirements. Title VII authorizes district courts "upon request" to stay litigation for "not more than sixty days pending ... further efforts of the commission to obtain voluntary compliance." [8]

In *Mach Mining*, the U.S. Supreme Court determined that courts should "order the EEOC to undertake the mandated effort to obtain voluntary compliance" when a court agrees with an employer's claim that the EEOC did not satisfy its conciliation obligations.

Since *Mach Mining*, the EEOC has routinely argued that dismissal is never an appropriate remedy for its failure to satisfy its conciliation obligations, and some courts have agreed. [9]

The Supreme Court in *Mach Mining* considered only the statutory conciliation requirements that Congress imposed on the EEOC. It did not consider additional regulatory obligations imposed upon the agency because, at the time the case was decided, there were none. In enacting the regulations, the EEOC recognized that they impose procedures on the agency that are unmentioned by any statute or *Mach Mining*.

In the preamble to the new regulations, the EEOC explained that "[w]hile the requirements set out in the rule are not spelled out in either the Court's opinion [*Mach Mining*] or the statute, the final rule—or any regulation—need not be required by the Supreme Court or a statute to be appropriate."

With its new regulations now in effect, the EEOC must comply with both its statutory and regulatory obligations.

Fundamental administrative law principles include two points that are relevant here.

First, as recognized by the U.S. Supreme Court in *Vitarelli v. Seaton* [10] in 1959, executive branch agencies must comply with regulations that they impose upon themselves, even when no statute requires the regulatory procedures.

Second, several courts have relied upon *Vitarelli* to dismiss EEOC lawsuits when the agency failed to comply with then-existing conciliation regulations, including when the EEOC violated its regulations in fairly minor ways.

EEOC v. Western Electric Company provides a good example. There, the U.S. District Court for the District of Maryland in 1974 observed that "[w]here a regulation promulgated by an administrative agency is intended to confer important procedural rights, that regulation must be strictly observed." [11]

In that case, the EEOC failed to send a notice that "suit would be filed unless defendant requested

that conciliation be resumed." And, because a then-existing regulation required the EEOC to send such a notice, and the EEOC did not do so, the court dismissed the case. The regulation created "an important procedural right, and the EEOC's blatant violation of the plain language of its own regulations dictate[d] a dismissal of the ... action." [12]

Several other courts have reasoned likewise. [13] And at least one court, the U.S. Court of Appeals for the Ninth Circuit, has determined that a violation of EEOC's procedural regulations can justify both dismissal and sanctions. [14]

Of course, the EEOC can avoid any viable challenge to its conciliation process by complying strictly with its new regulations. Whether the EEOC will do so, and what courts will do about any violation by the EEOC, remains to be seen.

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[1] The EEOC's conciliation regulations are available at <https://www.federalregister.gov/documents/2021/01/14/2021-00701/update-of-commissions-conciliation-procedures> (last visited March 4, 2021). Additional information about the regulations is available on the EEOC's website at <https://www.eeoc.gov/newsroom/eeoc-publishes-final-conciliation-rule>.

[2] 575 U.S. 480, 495 (2015).

[3] 42 U.S.C. §§2000e-5 & 2000e-6(e).

[4] *Id.*

[5] 42 U.S.C. §2000e-5(b).

[6] 29 U.S.C. §626(b).

[7] 42 U.S.C. § 2000e-12(a); 29 U.S.C. § 628.






[8] 42 U.S.C. §2000e-5.


[9] See, e.g., *Arizona ex rel. Horne v. Geo Grp., Inc.* , 816 F.3d 1189, 1199 (9th Cir. 2016).

[10] 359 U.S. 535 (1959).

[11] 382 F. Supp. 787, 796-97 (D. Md. 1974).

[12] *Id.* at 797.

[13] See, e.g., *EEOC v. CVS Pharmacy, Inc.* , 809 F.3d 335, 342 (7th Cir. 2015); *EEOC v. U.S. Pipe & Foundry Co.* , 375 F. Supp. 237, 246-48 (N.D. Ala. 1974);  *EEOC v. Westvaco Corp.* , 372 F. Supp. 985, 992-94 (D. Md. 1974); *EEOC v. Firestone Tire & Rubber Co.* , 366 F. Supp. 273, 275-78 (D. Md. 1973).

[14] *EEOC v. Pierce Packing* , 669 F.2d 605, 609 (9th Cir. 1982). The Ninth Circuit in *Pierce Packing* determined that EEOC's "obvious disregard" for its own "promulgated regulations is the apex of unreasonableness." *Id.*

