

EMPLOYMENT LAW WORLDVIEW

Biden Administration Nixes Trump-Era EEOC Pre-Suit Conciliation Rule (US)

By [Laura Lawless](#) on July 1, 2021

POSTED IN [AGENCY](#), [CONCILIATION](#), [DISABILITY DISCRIMINATION](#), [DISCRIMINATION](#), [EEOC](#), [EMPLOYMENT LAW](#), [HARASSMENT](#), [LEGISLATION](#), [NATIONAL ORIGIN DISCRIMINATION](#), [NEWS](#), [RACE DISCRIMINATION](#), [REGULATION](#), [RELIGIOUS DISCRIMINATION](#), [SEX DISCRIMINATION](#), [SEXUAL HARASSMENT](#), [SEXUAL ORIENTATION](#), [TITLE VII](#)



Late last year, we [reported](#) that the Equal Employment Opportunity Commission (EEOC) had released a proposed rule modifying the mandatory conciliation process the EEOC must follow before it can file a lawsuit in its own name against an employer.

Under long-standing anti-discrimination statutes, before the EEOC can commence litigation against an employer for employment discrimination or retaliation, it must invite the employer to participate in conciliation, an informal, voluntary, and confidential process by which the EEOC attempts to secure voluntary compliance by the employer with anti-discrimination laws, and which ordinarily requires the employer to provide certain victim-specific relief. Only if this process fails – either because the employer refuses to participate or because the EEOC and employer cannot reach a voluntary resolution – can the EEOC commence suit.

The proposed rule introduced late in the Trump administration required the EEOC to substantially increase the amount of information it provides employers during this pre-suit conciliation process, including mandating a summary of the non-privileged information leading the EEOC to reach its decision to bring a lawsuit (its “reasonable cause” finding), identifying key witnesses, setting forth the criteria the EEOC would use if it planned to add other claimants to the suit, and obligating the EEOC to disclose whether the agency was pursuing a “systemic, class, or pattern or practice” theory of liability. It also required the EEOC to provide a legal analysis of why it believed the facts in the case supported a finding of liability as well as a calculation of damages, and mandated that the EEOC disclose the known non-privileged exculpatory facts that favor the employer. The proposed rule was intended, in theory, to better inform all parties before conciliating so they could make more educated decisions about pre-suit resolution, but it also substantially expanded the disclosure obligations of the EEOC. Some also feared that the pre-suit conciliation disclosure obligation would lead to sideshow skirmishes and increase litigation unrelated to the merits.

Despite these concerns, the EEOC greenlit the Final Rule amending the pre-suit conciliation process in a party-line vote of its commissioners in January 2021, just days before the inauguration, and the proposed rule went into effect a month later. However, after the Biden administration took control, the EEOC’s new Democratic



Visit our [Coronavirus \(COVID-19\) Legal Insights Hub](#)



REGIONS

[UK and Europe](#)

[US](#)

[Asia Pacific](#)

[Global \(All\)](#)

ABOUT THE EMPLOYMENT LAW WORLDVIEW BLOG

The Employment Law Worldview Blog aims to interest and educate, to stimulate discussion, to provoke and sometimes just to amuse HR and other practitioners around the world. Through contributions from our own Labor & Employment lawyers, along with occasional guest writers, it provides a unique global insight into practical and legal HR issues relevant to employers everywhere.

STAY CONNECTED



SUBSCRIBE BY EMAIL

SUBMIT

TOPICS



TWITTER UPDATES



SPB Employment Law
 @SPB_EmpLaw



[#newblogpost!](#) Biden Administration Nixes Trump-Era EEOC Pre-Suit Conciliation Rule (US) bit.ly/3hs3ZmB



leadership, including EEOC Chair Charlotte Burrows, as well as leading Congressional Democrats, criticized the rule as burdening the already spread-thin agency and potentially hamstringing the agency if it failed to disclose a theory, witness, or calculus of damages in pre-suit conciliation.

Under the Congressional Review Act, Congress has the ability to overturn executive branch regulations within 60 legislative days of when they were issued and blocks future administrations from enacting substantially similar regulations to the discarded ones unless lawmakers provide explicit authorization to the agency to do so. Under this authority, on May 19, 2021, the Senate voted to rescind the Final Rule, approving Senate Joint Resolution 13 by a vote of 50-48. The House then passed its own version of the resolution – House Joint Resolution 33 – by a vote of 219-210 on June 24, 2021, before it moved to President Biden's desk. On June 30, 2021, President Biden signed the resolution voiding the updated conciliation rule and its rigorous disclosure requirements, leaving in place the existing statutory obligation to conciliate without constraining how the EEOC goes about that process and curtailing efforts by future administrations from issuing similarly onerous requirements of the EEOC. As a practical matter, barring a complete failure by the EEOC to offer the opportunity to conciliation, there is, once again, little practical purpose to challenging the adequacy of pre-suit conciliation. The Rule is now yet another administrative casualty of the change in administrations.



Copyright Squire Patton Boggs.

The opinions expressed in this update are those of the author(s) and do not necessarily reflect the views of the Firm, its clients, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.



1h

SPB Employment Law
Retweeted

APSCo United Kingdom
@APSCo_org

Our chairs from @michaelpage & @CorecomIT will be joined by @SPB_Global & @Ascent_Lead in a panel chaired by APSCo's Tania Bowers to discuss the legal aspects of hybrid/remote working & more: bit.ly/3Ahj2bo#Recruitment #HybridWorking #WFH #WorkingRemotely



8h

SPB Employment Law
@SPB_EmpLaw

Still time to register to join us today 🙋
#DSAR
https://twitter.com/SPB_EmpLaw/status/1410197964497342464

11h

SPB Employment Law
@SPB_EmpLaw

#newblogpost! US Federal Labor Viewpoints – Week of June 21, 2021
bit.ly/3xe4nfu



US Federal Labor Viewpoints – ...
From our Capital Thinking blog, ...
employmentlawworldview.com

Jun 30, 2021

SPB Employment Law
@SPB_EmpLaw

#DSARs are set to rise. #UKEmployers:
Are you mitigating the potential risks to
Tweets by @spb_emplaw

ARCHIVES

Select Month

RECENT UPDATES

[Biden Administration Nixes Trump-Era EEOC Pre-Suit Conciliation Rule \(US\)](#)

[US Federal Labor Viewpoints – Week of June 21, 2021](#)

[Whistleblowing webinar questions, Part 2 – interim relief \(UK\)](#)

[Biden Moves the NLRB Closer to a Pro-Union Majority \(US\)](#)

[US Federal Labor Viewpoints – Week of June 14, 2021](#)

SQUIRE PATTON BOGGS BLOGS

[The Anticorruption Blog](#)

[Capital Thinking](#)

[Conflict Minerals Law](#)

[Down the Wire – Capital Markets Updates](#)

[frESH: Perspectives on Environmental, Safety & Health](#)

[Global IP & Technology Law Blog](#)

[Global Supply Chain Law Blog](#)

[La Revue – Legal Updates from France](#)

[Latin America Legal](#)

[O-I-CEE! Central and Eastern Europe Legal News and Views](#)

[Pensions and Benefits](#)

[The Public Finance Tax Blog](#)

[Restructuring GlobalView](#)

[Security & Privacy // Bytes](#)

[Sixth Circuit Appellate Blog](#)

[Sports Shorts](#)

[The Trade Practitioner](#)

[Triage Health Law](#)

[UK Finance Disputes & Regulatory Investigations Blog](#)

EMPLOYMENT LAW WORLDVIEW



ATTORNEY ADVERTISING



[Privacy](#) | [Disclaimer](#)

ABOUT THE LABOR AND EMPLOYMENT TEAM

The Employment Law Worldview Blog aims to interest and educate, to stimulate discussion, to provoke and sometimes just to amuse HR and other practitioners around the world. Through contributions from our own Labor & Employment lawyers, along with occasional guest writers, it provides a unique global insight into practical and legal HR issues relevant to employers everywhere. [READ MORE](#)