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

By Laura Lawless on July 1, 2021

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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

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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.

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