

EEOC Looks to Increase Early Resolutions With Pilot Conciliation, Mediation Programs

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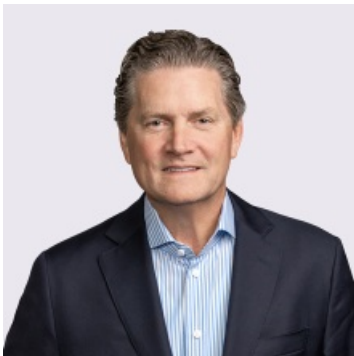
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Employment Litigation

The Equal Employment Opportunity Commission (EEOC) has [announced](#) two six-month pilot programs to expand its mediation program and increase the effectiveness of its conciliation process.

While the EEOC's press release was short on details, it signals that the agency may be placing more emphasis on pre-suit settlements and taking a step back from making splashes through litigation.

Conciliation Pilot

Conciliation: Last Step Before Litigation

The EEOC is required by relevant statutes to attempt to conciliate or settle a matter with a company after the agency has issued a reasonable cause determination. Some who have been through the EEOC conciliation process complain that the EEOC does not share details of evidence supporting the reasonable cause determination. Another complaint is that the EEOC does not adhere to key settlement conference protocols. For example, typically, the EEOC does not permit the charging party, who will be receiving the company's settlement payment, to attend the conciliation and there is no neutral party at a conciliation. In 2015, in *Mach Mining, LLC v. EEOC*, the U.S. Supreme Court approved the EEOC's practice of providing only basic facts in conciliation and declined to require the EEOC to operate in good faith during conciliation.

Despite these shortfalls in the conciliation process, the EEOC has successfully conciliated cause determinations, allowing companies to avoid litigation costs and publicity associated with an EEOC lawsuit.

Pilot Promises Change in Conciliation

In its announcement, the EEOC states that the pilot program "makes a single change to the process to drive accountability." However, the EEOC does not clearly explain what is the "single change." The announcement states that it is adding a requirement that "conciliation offers be approved by the appropriate level of management before they are shared with respondents." If approval "by the appropriate level of management" is the "single change" of the pilot, it is not clear this is a change from how the EEOC operates. EEOC offices have a reputation of being micro-managed by the District Director, giving little discretion to individual investigators. Approval by an "appropriate level of management" would be a meaningful change only if the "appropriate level of management" involved EEOC headquarter officials. While requiring approval of EEOC conciliation demands might increase accountability, such a change in and of itself would not guarantee more productive conciliations.

The EEOC announcement states that the conciliation pilot "builds on a renewed commitment for full communication between the EEOC and the parties." This statement

may signal that the EEOC is willing (1) to discuss facts underlying the EEOC's cause finding and (2) to allow the charging party to participate in the conciliation meeting. If the EEOC's pilot plan makes these changes, conciliation would be moving closer to common alternative dispute resolution or ADR practices.

Mediation Pilot

The EEOC's explanation of changes to its mediation program are almost as cryptic as its explanation of changes to the conciliation process.

Mediation Program Successes Over Last 21 years

While the EEOC gets mixed reviews for its conciliation process, many companies and attorneys have a positive view of EEOC mediation. According to the EEOC, charging parties have obtained close to \$3 billion in relief in EEOC mediations since 1999. Historically, the EEOC has permitted mediation before an EEOC investigation begins, but not in the middle of an EEOC investigation. In addition, the EEOC usually has not allowed mediation for the following types of charges: class and systemic charges, charges filed under the Genetic Information Non-Discrimination Act, or those filed under the Equal Pay Act.

Pilot Promises Fewer Mediation Restrictions

The EEOC's mediation pilot "expands the categories of charges eligible for mediation" Companies will be waiting to see if the EEOC's mediation expansion means the agency will permit all class and systemic charges to go to mediation.

The EEOC's mediation pilot also promises to "allow for mediation throughout the EEOC's investigation." As with other aspects of the pilot, the EEOC has not spelled out this commitment. For example, will the EEOC send any matter in investigation to mediation so long as the charging party and the company agree to do so? That would be a sea change for the EEOC. Pre-pilot, resolutions in investigations are often difficult because EEOC investigations want "one more bit of information."

If you have questions about the EEOC's mediation program or conciliation process, please contact the Jackson Lewis attorney with whom you usually work.

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