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EEOC LOOKING TO INCREASE VOLUNTARY RESOLUTIONS

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The Equal Employment Opportunity Commission (EEOC) announced earlier this month that it had implemented two six-month pilot programs expanding opportunities for parties to resolve charges through mediation and increasing the effectiveness of its conciliation process. These pilots will apply to charges filed during the six-month periods beginning July 6, 2020 for mediation and May 29, 2020 for conciliation. The mediation program has been quite popular and successful in most districts for over 20 years. Participation is voluntary and almost always has occurred prior to investigation. Conciliation, required by statute after the investigation reveals cause to believe that a violation of law occurred, has not enjoyed the same popularity or success.

According to its July 7, 2020 press release, the Mediation Pilot "expands the categories of charges eligible for mediation and, generally, allows for mediation throughout an investigation … [and] expand the use of technology to hold virtual mediations." In other Pilot guidance, EEOC states that all charges are eligible for mediation, "with narrow exception." The cited exceptions are charges EEOC determines to be without merit, Commissioner and Directed charges, when EEOC determines a party's interest would not be well served by mediation, and any charge exempted by EEOC management. Historically, class and systemic charges, charges targeted for litigation and those filed under the Equal Pay Act (EPA) and Genetic Information Non-Discrimination Act (GINA) also have not been allowed mediation. However, agency representatives advise me that they are not automatically exempted during the Pilot.

Granting mediation requests after investigation is underway has been uncommon in most districts. Consistently allowing for mediation at whatever stage the parties agree it is appropriate will be a welcome change and will surely lead to more merit closures. Negotiated settlements have always been allowed by working with the investigator, but many respondent representatives will only negotiate through a mediator because of the guaranteed confidentiality. Of course, charging parties sometimes simply withdraw their charges during investigation after negotiating a settlement directly with the respondent. This change keeps everyone involved – the parties and divisions within the EEOC – in the loop and all working toward a known goal.

Especially during these times of work and travel restrictions, the expanded use of virtual mediations will be crucial to the program. While some offices have had the ability to hold video conferences for years, some have not. It only makes sense to provide mediators with the means to hold virtual mediations, pandemic or not, to enhance the process with face-to-face meetings when otherwise not available. EEOC's investment in this technology hopefully will extend beyond the Pilot.

These Pilots do not change my advice regarding requests for mediation: Any party interested in trying to resolve any charge at any stage through EEOC's mediation program should send a written request to the assigned investigator **and** the ADR Coordinator for that office. An official confirmed that, at least during the Pilot period, whenever the parties request a charge go to mediation, an agency rejection of that request must be approved beyond the District level.

The Conciliation Pilot "makes a single change to the process to drive accountability." It "builds on a renewed commitment for full communication between the EEOC and the parties … and adds a requirement that conciliation offers be approved by the appropriate level of management before they are shared with respondents." It is very rare that local EEOC management is not in control of settlement offers made during conciliation and it has not been made clear how this changes present protocol. Since greater accountability is the stated goal of this change, I hope "appropriate level of management" will be defined clearly on a national level as different levels of management do sometimes have different opinions regarding conciliation of certain charges.

The renewed commitment for full communication between the EEOC and the parties could result in a meaningful change. The agency normally does not allow charging parties to attend conciliation conferences nor will it discuss evidence supporting its cause determinations with respondents. If "full communication" will allow all parties involved to openly discuss settlement options and the evidence upon which the cause determinations are founded, I certainly expect that conciliation will gain popularity and success.

The EEOC rarely allows a mediator or other neutral party to participate in a conciliation, a concern expressed by many respondents. While the default process continues to include only the investigator and respondent, the Pilot program allows for specific requests for mediation to be considered. When a request is approved, the process will include an EEOC mediator, the respondent, the charging party, and an EEOC representative. This change has the potential to move conciliation closer to common alternative dispute resolution practices.

These Pilot programs seem to show an effort on EEOC's part to allow charging parties more involvement in the administrative process and respondents opportunities to make better informed decisions regarding these charges and resolve more employee disputes.

There appears to be a general belief within the agency that most, if not all, of the provisions of these Pilots will become permanent.

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.