

Senate Votes in Favor of Repealing EEOC's Conciliation Rule

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On May 19, the U.S. Senate voted for repealing the prior administration's Equal Employment Opportunity Commission (EEOC) conciliation rule through a Congressional Review Act resolution. Under the rule, the EEOC was to provide employers with "a written summary of the known facts," among other information, when an employee files a discrimination charge. Conciliation is similar to mediation, except that an EEOC investigator conducts conciliation procedures, rather than an independent third party.

SHRM had previously sent a letter (<https://advocacy.shrm.org/wp-content/uploads/2021/05/SHRM-Letter-HJ-Res-33-SJ-Res-13.pdf>) supporting the conciliation rule and expressing strong concerns with the resolution. We've gathered articles on the news from *SHRM Online* and other trusted media outlets.

Narrow Margin in Favor of Repeal

The Senate voted 50-48 to reverse the EEOC's final conciliation rule, which the EEOC had approved Jan. 7 and required the EEOC to turn more information over to employers during conciliation. The Congressional Review Act allows Congress to annul agency rules finalized by past administrations. The House of Representatives has yet to vote on the resolution.

(Bloomberg (<https://news.bloomberglaw.com/daily-labor-report/senate-votes-to-roll-back-trump-era-eeoc-conciliation-rule>))

Rule Sought More Transparency and Efficiency

The goal of the conciliation rule was to better inform employers on the findings in conciliated cases and encourage them to resolve disputes voluntarily rather than in court. The commission approved the final rule along party lines: 3-2, with current-Chair of the EEOC Charlotte Burrows expressing "strong opposition" to the rule," saying it would "lead to expensive and needless litigation."

But then-EEOC Vice Chair and current-Commissioner Keith Sonderling noted that each year, the agency can litigate only a small number of cases that fail conciliation. "Thanks to the final rule, more victims of discrimination will obtain relief faster," he said. The rule will also benefit employers, he said, by providing the information they need "to decide whether it is in their best interest to settle the matter or litigate."

(SHRM Online (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-approves-final-rule-revising-conciliation-procedures.aspx))

When Conciliation Occurs

Conciliation is voluntary and occurs after the EEOC determines there is reasonable cause to believe discrimination has occurred. Conciliation is similar to mediation, which the EEOC also offers for some charges, though its timing differs. Unlike mediation, conciliation is conducted by an EEOC investigator rather than a neutral party like a mediator.

(SHRM Online (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-eeoc-expands-mediation-program.aspx))

Objections of Rule's Opponents

The final rule's opponents said that it gave some businesses a chance to drag talks out. They also objected to the EEOC providing employers with the name of the worker who accused them of discrimination and any witnesses to the misconduct. Disclosure may dissuade workers and witnesses against coming forward to report discrimination, fearing retaliation, the rule's critics said. They opposed the agency having to share what facts it relied upon to find reasonable cause of discrimination; the criteria it will use to identify more victims; and the basis of requested relief, including a detailed calculation of damages. The rule's opponents also criticized the requirement that the EEOC reveal when it had identified systemic discrimination and explain how it came to that conclusion, saying this gave employers an upper hand in settlement talks and later in court.

(Slate (<https://slate.com/news-and-politics/2021/05/senate-democrats-trump-workplace-discrimination.html>))

Burrows Named as EEOC Head Earlier This Year

President Joe Biden named Burrows as chair of the EEOC earlier this year. Burrows has served as an EEOC commissioner since 2015, having been initially nominated by former President Barack Obama. In 2019, she was re-nominated and unanimously confirmed for a second term ending in 2023. The EEOC has three Republican commissioners—Janet Dhillon, Keith Sonderling and Andrea Lucas—and two Democrat commissioners—Burrows and Jocelyn Samuels. Samuels is the agency's vice chair.

(SHRM Online (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/new-agency-heads-appointed.aspx))

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