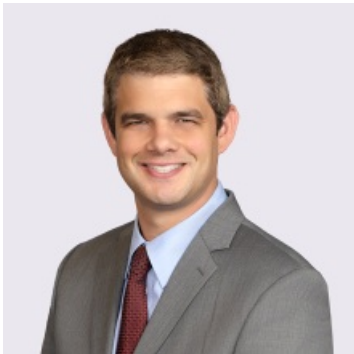


EEOC Chair Praises Congress' Move to Overturn New Conciliation Rule

By Andrew F. Maunz &

June 25, 2021

Meet the Authors



Andrew F. Maunz

Of Counsel

412-338-5144

Andrew.Maunz@jacksonlewis.com

Related Services

Employment Litigation

The House of Representatives has joined the Senate in using the Congressional Review Act to overturn an Equal Employment Opportunity Commission (EEOC) conciliation rule that became effective February 16, 2021. The votes in both the House and the Senate were along party lines.

The rule required the EEOC to provide some baseline information to the respondent and charging party during the conciliation process. Although the conciliation rule is still in place until President Joe Biden signs off on their repeal, he is expected to do so and EEOC Chair Charlotte Burrows took the opportunity to trumpet the House's actions in a [press release](#).

Background

The EEOC is required by relevant statutes to attempt to conciliate or settle a matter with a company after the agency has determined reasonable cause exists to believe that discrimination or retaliation has occurred. If conciliation fails, then the EEOC can file a lawsuit.

In 2020 and early-2021, the EEOC went through the rulemaking process and finalized regulations with the stated goal of conciliating more cases by providing respondents and charging parties the factual and legal bases of the EEOC's reasonable cause findings. The Commission vote on finalizing the final rule fell along party lines with the three Republican Commissioners voting in favor and the two Democratic Commissioners, including now-Chair Burrows, voting against the new rule.

Some at the EEOC [were critical of the new rule](#), viewing it as burdensome and putting the EEOC at a litigation disadvantage.

Jackson Lewis attorneys noticed a spike in cause findings in the few weeks prior to the new rule becoming effective, possibly because the EEOC wanted to avoid the standards set forth in the new rule.

On May 18, 2021, the Office of Management and Budget issued a statement indicating Biden Administration support for efforts in the Senate to overturn the new rule. On May 19, 2021, the Senate voted to overturn the rule.

EEOC's Press Release

The EEOC's June 24, 2021, press release, "Congress Acts to Restore Flexibility to EEOC's Conciliation Process," was issued despite the fact that, at the time it was issued, the new conciliation rule was still in place. Additionally, EEOC officials typically promote bipartisanship. The EEOC's press release refers to the conciliation rule as a "Trump Administration Rule," even though all of the Commissioners who voted to approve the rule continue to serve on the EEOC.

Going Forward

If, as expected, President Biden signs off on Congress' action, under the Congressional Review Act, the conciliation rule is legally treated as if it never existed. *See* 5 U.S.C. § 801(f).

In the EEOC's press release, Chair Burrows speaks favorably of the EEOC's ability, without the rule, "to tailor the conciliation process to the facts and circumstances of each case." One possible interpretation of the Chair's statement is that the EEOC will be willing to devote significant time and effort to conciliating complex and systemic cases. The press release also states that the EEOC remains committed to the conciliation process, noting that the percentage of successful conciliations has risen from 27% in fiscal year 2010 to nearly 44% in fiscal year 2020.

While some had welcomed the conciliation rule as providing some additional logic to the conciliation process, it appears conciliation will go forward as it had for nearly 50 years prior to the new rule. Conciliation has always been more of an art than a science. For that reason, if you are facing an EEOC cause finding and conciliation, please contact your Jackson Lewis attorney.

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.