

Congress of the United States
Washington, D.C. 20515

July 28, 2020

The Honorable Janet Dhillon
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: Comment on Notice of Proposed Rulemaking: Official Time in Federal Sector
Cases Before the Commission, RIN NO. 3046-AB00

Dear Chair Dhillon:

We write to express our strong opposition to the Equal Employment Opportunity Commission's (EEOC's or Commission's) proposed change to longstanding federal rules that ensure federal employees the right to a representative of their choice when they bring complaints of unlawful workplace discrimination. As Chairs of the Committee on Education and Labor and the Committee on Oversight and Reform, which share jurisdiction over the EEOC and protection of public employees, we are concerned about the adverse impact of this proposed rule on equal employment opportunity (EEO) laws and policies affecting federal employees, the enforcement of anti-discrimination laws, and fairness in the federal workplace.

For over 40 years, the EEOC has required that federal agencies allow employees to pursue formal complaints of discrimination during paid work hours.¹ Agencies are required to provide an employee a "reasonable amount of official time" to "prepare the complaint and respond to agency and EEOC requests for information."² Additionally, the EEOC requires that federal employees have the right to be "accompanied, represented, and advised by a representative of complainant's choice."³

The EEOC's current rule also ensures that employee representatives chosen by complainants are allowed to represent them throughout the complaint process during paid work hours. The current EEOC rule reads, in part:

The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.⁴

On December 11, 2019, the EEOC published a Notice of Proposed Rulemaking (NPRM) that would change 40 years of practice by attacking the right of all federal employees to choose a

¹ *Official Time in Federal Sector Cases Before the Commission*, 84 Fed. Reg. 67683 (proposed June 1, 2020) (to be codified at 29 C.F.R. § 1614).

² 29 C.F.R. § 1614.605(b).

³ 29 C.F.R. § 1614.605(a).

⁴ *Id.*

representative of their choice in EEO matters.⁵ The proposed rule would amend the current EEOC rule that requires official time to be provided to a complainant's representative to exclude any representative who is "an officer, steward or otherwise in an official capacity" with a union. This means that EEO complainants could only receive union representation if the representatives performed their representation work during their annual leave, which is subject to their management's discretion, or uncompensated personal time. Non-union equivalent representatives would continue to be able to perform their representation work under paid official time.

After the proposed rule was published, we wrote to you on January 23, 2020, to request documents and information so we could better understand the proposed rule and the justification for it.⁶ To date, most of the documents and information we have received have been non-substantive. The EEOC withheld an unknown volume of responsive documents but failed to specify why they were withheld or assert any privilege regarding specific documents in a privilege log, as our letter requested. As a result, most of our requests are still outstanding, including our requests for communications, studies, analyses, memoranda, and opinions concerning the potential effects of the proposed rule on other laws, on complainants, and on the EEOC's workload.⁷

Of particular concern is the role played by Andrew Maunz, who was Special Assistant to the Chair and identified in the NPRM as the agency's point of contact for the proposed rule. After our Committees requested documents and communications regarding the justification for this proposed rule, Mr. Maunz was promoted to lead the EEOC's Office of Legal Counsel. In that capacity, he headed the office that was designated to make the final determination about which documents the agency would produce in response to our request, as well as any privilege the agency was going to assert. Our Committees communicated our concerns that Mr. Maunz was operating under a conflict of interest, since he would have the ability to withhold from Congress his own communications about the justification for the proposed rule. Despite our concerns, the EEOC did not acknowledge Mr. Maunz's conflict of interest and has failed to respond to our request for how the EEOC plans to mitigate his conflict of interest.

Six months since we first wrote for information, our Committees continue to lack information as to why this rule change was proposed, the entities that sought this change, and whether the EEOC has considered or is even aware of the impact of this change. This proposed rule is especially questionable because the EEOC lacks any data on how much official time is being used by union representatives in federal employee case representation before the Commission.

The proposed rule not only denies complainants the right to choose their representative; it also denies them the expertise and experience of union representatives in the equal opportunity

⁵ *Official Time in Federal Sector Cases Before the Commission*, 84 Fed. Reg. 67683 (proposed December 11, 2019) (to be codified at 29 C.F.R. § 1614).

⁶ See attached Addendum A, Letter from Chairwoman Carolyn B. Maloney and Chairman Robert C. "Bobby" Scott to Chair Janet Dhillon, Equal Employment Opportunity Commission (Jan. 23, 2020).

⁷ See attached Addendum B, which lists the items still outstanding from the Committees' request of January 23, 2020.

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process. In this way, the proposed rule would also have a negative impact on the EEOC by making the complaint process less efficient and effective.

In light of the many unresolved questions that arise from this proposed rule, the lack of adequate justification for the proposed change, and the unequal and unlawful restriction of a complainant's right to representation in EEOC complaints, we respectfully request that the EEOC reject this proposed rule. Federal employees should continue to have representatives of their choice in equal opportunity claims and those representatives should be treated on an equal footing as non-union employees.

If you have any questions, please contact Carolyn Ronis with the Committee on Education and Labor at Carolyn.Ronis@mail.house.gov or Jaron Bourke with the Committee on Oversight and Reform at Jaron.Bourke@mail.house.gov.

Sincerely,



Robert C. "Bobby" Scott

Chairman

Committee on Education and Labor



Carolyn B. Maloney

Chairwoman

Committee on Oversight and Reform

Congress of the United States House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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January 23, 2020

The Honorable Janet Dhillon
Chair
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20507

Dear Chair Dhillon:

We are writing to request documents and information about the change proposed by the Equal Employment Opportunity Commission (EEOC) to longstanding federal rules ensuring that federal employees who bring complaints for illegal employment discrimination may be accompanied by the representative of their choice.

For 40 years, EEOC has required that federal agencies allow employees to use work hours to bring formal complaints of employment discrimination against their agencies. Agencies are required to provide a “reasonable amount of official time” to complainants to “prepare the complaint and respond to agency and EEOC requests for information.”¹

The rule also ensures that representatives chosen by complainants, if they are employees of the agency, “shall be on official time” when they advise, accompany, and represent complainants.²

On December 11, 2019, EEOC published a Notice of Proposed Rulemaking that would amend that agency requirement and allow agencies to deny official time for any representative who is “an officer, steward or otherwise in an official capacity” with a union. The proposed rule would exclude only union representatives from the government-wide Equal Employment Opportunity (EEO) official time requirement.³

As the Chairwoman of the Committee on Oversight and Reform, which has jurisdiction over Title 5 of the U.S. Code, the Federal Service Labor Management Relations Statute (FSLMRS), and the Civil Service Reform Act, and the Chairman of the Committee on Education and Labor, which has jurisdiction over EEOC, we are extremely concerned about the potential effects of this proposed rule on the enforcement of employment anti-discrimination laws and policies affecting

¹ 29 C.F.R. § 1614.605(b).

² *Id.*

³ 84 Fed. Reg. 67683 (Dec. 11, 2019) (online at www.federalregister.gov/d/2019-26545).

federal employees and the fairness of the federal workplace.

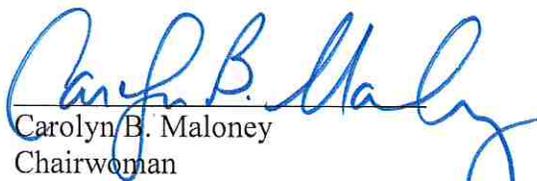
To assist the Committees' oversight, we request the following information and documents by February 6, 2020:

1. All communications, studies, analyses, memoranda, and opinions concerning the following potential effects of the proposed rule:
 - a. How the proposed rule would affect the EEO regulatory requirement in 29 C.F.R. § 1614.605(a) that complainants have the right to "a representative of the complainant's choice" during interactions with an EEO counselor and when formally filing a complaint and appealing the agency decision to EEOC;
 - b. How the proposed rule would affect the EEO regulatory requirement in 29 C.F.R. § 1614.102(a)(12) to "enlist" the cooperation of labor organizations in maintaining an affirmative program to promote equal opportunity;
 - c. How the proposed rule would affect the financial cost to complainants, including the average financial cost to complainants, if the rule led complainants to retain attorneys to represent them in matters for which they would otherwise have enlisted a union representative on official time;
 - d. How the proposed rule is expected to affect the number of *pro se* complainants;
 - e. How the proposed rule might affect the backlog of EEO cases awaiting adjudication, the average length of adjudications, and the workload on administrative judges;
 - f. How a decrease in the number of union-represented complainants would affect the effectiveness and efficiency of EEO proceedings;
 - g. Whether the proposed rule is intended to exclude any federal employee who serves "as an officer, steward or otherwise in an official capacity" with a union from receiving any official time under Section 1614.605(b), even if he or she is not eligible for official time under a collective bargaining agreement;
 - h. The basis for the Commission's statement in its notice of proposed rulemaking that it "believes that the relevant labor relations statute articulates the best policy for determining if someone receives official time when they act for a labor organization" when the FSLMRS does not explicitly mention EEO;
 - i. How the purposes of EEO are advanced by prohibiting official time for union representatives while requiring official time for non-union representatives; and
 - j. Any cost benefit analyses undertaken and all analyses substantiating EEOC's claim that this proposed rule is not a "significant regulatory action" under Executive Orders 12866 or 13563, which would require that an agency propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

2. All communications of Victoria Lipnic, former Acting Chair, Janet Dhillon, Chair, and Andrew Maunz, Special Assistant to the Chair, concerning the development of this draft rule, from January 2019 to the present;
3. All communications between EEOC and other federal agencies, including the Office of Personnel Management, relating to the union status of representatives chosen by EEO complainants, including comments from federal agencies about the draft proposed rule, from January 2019 to the present; and
4. For each of the past five years, the following information and analyses as reported by each agency that submitted information under the No FEAR Act:⁴
 - a. The total number of EEO cases;
 - b. The number of cases in which complainants chose to have representatives at any stage of the proceedings;
 - c. The number of cases in which the complainants self-represented;
 - d. The status type of the representatives chosen by complainants (private attorney, union representative, non-union co-worker); and
 - e. Analyses concerning the union status of representatives chosen by EEO complainants or concerning the costs borne by EEO complainants.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X. The Committee on Education and Labor has oversight responsibilities regarding laws under its purview under House Rule X. An attachment to this letter provides additional instructions for responding to this request. If you have any questions, please contact Jaron Bourke (Committee on Oversight and Reform) at Jaron.Bourke@mail.house.gov or Cathy Yu (Committee on Education and Labor) at Cathy.Yu@mail.house.gov. Please direct all official correspondence to both Committees’ Chief Clerks at Elisa.LaNier@mail.house.gov (Committee on Oversight and Reform) and Tylease.Fitzgerald@mail.house.gov (Committee on Education and Labor). Thank you for your attention to this matter, and we look forward to your response.

Sincerely,


Carolyn B. Maloney
Chairwoman
Committee on Oversight and Reform


Robert C. “Bobby” Scott
Chairman
Committee on Education and Labor

cc: The Honorable Jim Jordan, Ranking Member, Committee on Oversight and Reform
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor

⁴ Pub. L. No. 107-174 (2002).

Responding to Oversight Committee Document Requests

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.
4. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and TIF file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.

7. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2105 of the Rayburn House Office Building.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic

message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term "including" shall be construed broadly to mean "including, but not limited to."
5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.
7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
9. The term "individual" means all natural persons and all persons or entities acting on their behalf.

Addendum B - Outstanding Congressional Requests

On January 23, 2020, Chairman Robert C. “Bobby” Scott of the House Committee on Education and Labor and Chairwoman Carolyn B. Maloney of the House Committee on Oversight and Reform wrote a letter (attached as Addendum A) to EEOC Chair Janet Dhillon requesting information and documents, and to date the following are still outstanding:

1. All communications, studies, analyses, memoranda, and opinions concerning the following potential effects of the proposed rule:
 - a. How the proposed rule would affect the EEO regulatory requirement in 29 C.F.R. § 1614.605(a) that complainants have the right to “a representative of the complainant’s choice” during interactions with an EEO counselor and when formally filing a complaint and appealing the agency decision to the EEOC;
 - b. How the proposed rule would affect the EEO regulatory requirement in 29 C.F.R. § 1614.102(a)(12) to “enlist” the cooperation of labor organizations in maintaining an affirmative program to promote equal opportunity;
 - c. How the proposed rule would affect the financial cost to complainants, including the average financial cost to complainants, if the rule led complainants to retain attorneys to represent them in matters for which they would otherwise have enlisted a union representative on official time;
 - d. How the proposed rule is expected to affect the number of pro se complainants;
 - e. How the proposed rule might affect the backlog of EEO cases awaiting adjudication, the average length of adjudications, and the workload on administrative judges;
 - f. How a decrease in the number of union-represented complainants would affect the effectiveness and efficiency of EEO proceedings;
 - g. Whether the proposed rule is intended to exclude any federal employee who serves “as an officer, steward or otherwise in an official capacity” with a union from receiving any official time under Section 1614.605(b), even if he or she is not eligible for official time under a collective bargaining agreement;
 - h. The basis for the Commission’s statement in its notice of proposed rulemaking that it “believes that the relevant labor relations statute articulates the best policy for determining if someone receives official time when they act for a labor organization” when the FSLMRS does not explicitly mention EEO;
 - i. How the purposes of EEO are advanced by prohibiting official time for union representatives while requiring official time for non-union representatives; and
 - j. Any cost benefit analyses undertaken and all analyses substantiating the EEOC’s claim that this proposed rule is not a “significant regulatory action” under Executive Orders 12866 or 13563, which would require that an agency propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

2. All communications of Victoria Lipnic, former Acting Chair, Janet Dhillon, Chair, and Andrew Maunz, Special Assistant to the Chair, concerning the development of this draft rule, from January 2019 to the present.

3. All communications between the EEOC and other federal agencies, including the Office of Personnel Management, relating to the union status of representatives chosen by EEO complainants.
4. A privilege log of any documents or communications for which the EEOC has asserted privilege.

Following the letter, staff of the House Committee on Education and Labor and the House Committee on Oversight and Reform also requested additional information about Andrew Maunz's conflict of interest from the EEOC via email on April 24, 2020, to date, the following is still outstanding:

1. The EEOC's plan for mitigating Mr. Maunz's conflict of interest.
 - a. Specifically, what is Mr. Maunz's role in identifying and reviewing documents for production to the Committees?
 - b. Did Mr. Maunz recuse himself from a role in determining whether or not the agency asserts privilege?