August 17, 2020

Janet Dhillon, Chair
U.S. Equal Employment Opportunity Commission
Washington, DC

Via Email

Re: EEOC Conciliation and ADR Pilot Programs

Dear Chair Dhillon,

The National Employment Lawyers Association (NELA) respectfully writes to urge you to discontinue the Conciliation Pilot Project initiated on May 29, 2020 and the Mediation Pilot Project initiated on July 6, 2020 and to abandon the proposed changes to both the Conciliation and the Mediation programs at the EEOC. The changes contained in these pilots have profoundly limiting impact on the rights of working people who seek redress for workplace discrimination.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, wage and hour, and civil rights disputes. NELA empowers workers' rights attorneys through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws; provided comments on relevant Notices of Proposed Rulemaking (NPRMs) for federal agencies whose policies impact working people; and engages in legislative advocacy on behalf of workers throughout the United States. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys, many of whom regularly represent clients in the EEOC's Mediation and Conciliation processes. NELA and the working people our members represent have a strong interest in the EEOC's Pilot Programs related to Conciliation and Mediation.

NELA strongly opposes the Pilot Projects for Mediation and Conciliation first and foremost because each of the two pilot projects will have significant adverse effects on the EEOC's enforcement of important substantive rights of workers who have faced illegal treatment in their workplaces—as well as on the charging parties' ability to successfully pursue their claims in court. It is also of grave concern to us that the pilot projects were instituted without consultation with the Commissioners on this important bipartisan commission, and without rigorous examination of the effects of such a change on *all* stakeholders. The real-life effects of these changes on the workers who face workplace discrimination reach far beyond the Chair's role with respect to administration of EEOC policy. Simply put, the two pilot programs make changes to the conciliation process and the mediation process that will have a deleterious effect on individual employment rights and will undermine the ability of the EEOC to fulfill its mission: enforcement of employee civil rights.

NELA also believes that labeling of the changes to each program, in particular to the Conciliation program, as a "pilot" program is disingenuous. Historically, pilot programs at the EEOC have been implemented in a small number of field offices to determine the viability of the proposed changes. For example, in 1991, the EEOC began the Mediation Program as a pilot in only four field offices. A task force was formed to measure the successes and assess the issues with the Mediation pilot. The EEOC did not roll out Mediation programs to all district offices until 1997, and based the full rollout on the recommendations of the task force's examination of the information gathered through the pilot. While NELA generally encourages the

expansion of EEOC dispute resolution efforts on behalf of Charging Parties, several aspects of these changes will have a deleterious effect on employee civil rights.

Conciliation Pilot

NELA has several concerns regarding the changes created by the Conciliation Pilot. The changes effected by the Conciliation Pilot will benefit Respondents to the detriment of Charging Parties by (1) providing additional information to Respondents in advance of issuing a determination letter, and (2) requiring additional oversight of the monetary relief sought by charging parties.

The Conciliation process occurs after an EEOC investigation has been completed and the EEOC has determined that there is reasonable cause to believe that discrimination has occurred. When a reasonable cause case is anticipated, the individual investigator assigned to the Charge works with management at the EEOC and the Legal Unit before reaching a final conclusion regarding the appropriateness of a Reasonable Cause determination and issuance a Reasonable Cause determination where warranted. Thus, the Conciliation process only occurs in a small number of cases. In fact, the EEOC found Reasonable Cause in only three percent (3%) of cases in FY2019. The cases going to conciliation all involve very egregious employment discrimination and represent a very small population of Respondents. As such, NELA has grave concerns about changes to the conciliation process that result in Respondents being given additional deference *after* the EEOC has already determined that they have violated the law. The EEOC's mission as a law enforcement agency fighting against discrimination is undercut by any policy changes that result in advantages to the Respondent at this stage. Further, the addition of agency oversight of monetary damages will inevitably lead to delays in the conciliation process. Such oversight can also result in a limitation of the potential recovery for Charging Parties in these cases involving the most abhorrent employment practices brought before the EEOC.

Mediation Pilot

NELA's chief concern about the changes included in the Mediation Pilot is that it appears that high priority issues and systemic discrimination claims will not be subject to investigation before referring the case for mediation. As a result, the EEOC will be hampered in its ability to advocate for the public interest through injunctive relief. Employees, particularly those who participate in a mediation *pro se*, do not have all the information at their disposal that a Respondent or the EEOC is likely to have about other similar claims of discrimination or systemic issues. This will increase the information gap that generally exists between a Charging Party and her employer and will often leave the worker with the impression that his or her one charge is an isolated event—when in reality the charge may be consistent with the experiences of many other workers and is the key that will unlock an accurate picture of systemic discrimination on the part of one employer. This approach will enable many serious, egregious, ongoing discrimination issues to remain hidden from detection and will leave many workers who face such discrimination without appropriate intervention from the EEOC. As noted in the EEOC Alternative Dispute Resolution Policy, ADR use should be "fully consistent with EEOC's mission as a law enforcement agency." See, OLC Control #: EEOC-CVG-1995-2. As further noted, "…an effective ADR program must further the EEOC's dual mission of vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes." Id.

For example, an agricultural worker subjected to sexual harassment by her supervisor may be unaware that other women are similarly being sexually harassed and assaulted by other supervisors in other locations. An EEOC investigation is likely to uncover the more widespread sexual harassment at the company because EEOC investigators know that sexual harassment rarely occurs in isolation, but rather is often part of a pattern on the part of the harasser/abuser(s) and/or is a pattern of illegal treatment that is generally tolerated by the management. If there is an EEOC investigation, it is likely to result in a site visit to the workplace and private interviews of employees outside the presence of management. If there is more widespread harassment, the EEOC investigation is likely to uncover it. But if the case is sent to ADR *without* an investigation, a low-wage worker without legal counsel is frequently willing to settle for very little consideration because of financial hardship, fear of reprisal, and the lack of information regarding the fact that her experience of abuse is widespread. Our experience, and we believe that of the EEOC, shows that one very common result of a confidential settlement in a case such as the case described here, is that the

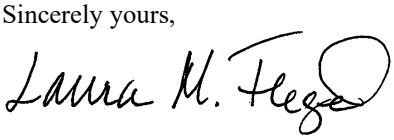
corresponding failure to investigate often results in the illegal treatment continuing unabated (in this instance, ongoing sexual harassment).

Moreover, the plan to dramatically increase the requirement of mediation, without a corresponding plan to dramatically increase the number of mediators at the EEOC, will slow the process for Charging Parties and exacerbate backlogs within the whole system. The failure to allocate additional resources to handle an increased workload for these changes will create an increased caseload for EEOC ADR units; the current staff will have a significantly greater workload resulting in delays of mediations, slowing down the charge processing time for cases that are not successful in mediation, and creating incentives to move cases forward without thorough investigation and consideration.

The EEOC was created to address employment discrimination and enforce the rights of working people. That critically important goal—a goal that is more relevant than ever in the context of the COVID pandemic and our nation's renewed reckoning with its history of race discrimination—is undermined by this plan. The far better course is to refer only appropriate cases for ADR, and conduct investigations on cases that present priority or systemic issues.

NELA urges the EEOC to discontinue the pilot projects immediately and to abandon the proposed changes to both the Conciliation and the ADR programs at the EEOC. We thank the Chair for her consideration. If you have questions or wish to discuss these matters, don't hesitate to reach out to me lflegel@nelahq.org.

Sincerely yours,



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