

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN _____

Official Time in Federal Sector Cases before the Commission

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Rule

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) proposes amending its rule covering official time for representatives who are employees of the federal government. The Commission seeks to clarify that its rule concerning official time does not apply to representatives who serve in an official capacity in a labor organization that is the exclusive representative of employees in an appropriate unit. The Commission is doing this because 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 and the Commission does not want its regulations to undermine this approach.

DATES: Comments are due on or before _____, 2019.

ADDRESSES: You may submit comments by the following methods:

You may submit comments, identified by RIN Number [INSERT] , by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 663-4114. (There is no toll free fax number). Only comments of six or fewer pages will be accepted via fax transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may

request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll free numbers).

- Mail: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.
- Hand Delivery / Courier: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

INSTRUCTIONS: The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information you provide.

DOCKET: For access to comments received, go to <http://www.regulations.gov>. Copies of the received comments also will be available for review at the Commission's library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5:00 p.m., from [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER] until the Commission publishes the rule in final form but you must make an appointment to do so with library staff.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:

Under section 717 of Title VII of the Civil Rights Act of 1964, as amended, the Commission is responsible for the enforcement of equal employment opportunity (EEO) in the federal employment. As such, the Commission is authorized to issue rules, regulations, orders, and

instructions as necessary and appropriate to carry out its EEO responsibilities. Section 717(b) of Title VII provides that “[e]xcept as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies.... and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.” Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e -16.

In 1978, the President consolidated numerous EEO responsibilities at the EEOC and, among other things, transferred responsibility for all federal sector EEO from the Civil Service Commission to the EEOC.¹ When the Commission took on responsibility for federal sector EEO, however, the Commission did not create a new process. As the Commission stated in 2015, when it contemplated a review of longstanding federal sector EEO procedures of which this proposed rule is a small part,

[T]he Federal sector EEO complaint processing procedures did not originate with EEOC in 1979 Rather, formal, regulatory procedures first were promulgated by the Civil Service Commission (“CSC”) in 1966, codified at 5 CFR part 713, and the basic framework contained in those procedures was adopted by EEOC in 1979 [and codified at 29 CFR part 1613]. Although EEOC has revised the procedures a number of times, the original structure inherited from the CSC—counseling, complaint, investigation, hearing, final agency action, and appeal—remains.

See Advance notice of proposed rulemaking, 80 Fed. Reg. 6669 (Feb. 6, 2015) (ANPRM). The EEOC thus positioned itself to make changes to the federal sector EEO complaint process.

¹ On February 23, 1978, the President submitted to Congress Reorganization Plan No. 1 of 1978, which consolidated Federal Equal Employment Opportunity Activities. The text of the President's message and the terms of the plan are at 124 Congressional Record H 1457 (H.Doc.No.95-295).

Although the EEOC's original 1979 federal sector regulation at 29 CFR part 1613 was silent about "official time" for representatives of complaining parties, in 1987 the Commission turned back to the CSC's EEO rule for model language about "official time". *Id.* at 6670. The Commission then adopted the "official time" rule that remains today, and which was unchanged during the Commission's 1992 revision of federal sector EEO procedures, in which the Commission rescinded 29 CFR part 1613 and created 29 CFR part 1614. *See generally* 57 Fed. Reg. 12634 (April 10, 1992) (effective Oct. 1, 1992). Specifically, section 1614.605, under the heading "Representation and Official Time," describes a complainant's right to be represented in federal sector actions covered by the Commission's regulations. Paragraph (b) of section 1614.605 discusses the right of both the complainant and representative, if they are employees of the agency at issue, to reasonable official time during their involvement in the complaint process. It is notable that the first two sentences of paragraph (b), which is the language that gives the right to reasonable official time to complainants and representatives, borrows heavily from the wording used for the comparable provision in the original CSC rule. *See* U.S. Civil Service Commission, Part 713 – Equal Opportunity; Filing and Presentation of complaint, §713.214(b), 37 Fed. Reg. 22717, 22719 (Oct. 21, 1972).

When the Civil Service Commission first crafted this approach in 1972, Congress had not yet passed the Federal Service Labor-Management Relations Statute (FSLMRS), which it did in 1978. The FSLMRS established the ability for someone acting on behalf of a labor organization to receive official time, in some instances as a right, but in many instances pursuant to an agreement between the agency and the union. 5 U.S.C. 7131. Specifically, 5 U.S.C. 7131(d)(1)

states that “any employee representing an exclusive representative ... shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.”

Since union official time did not exist in statute until 1978, there was no reason for the CSC’s original EEO procedures to address union official time when it first published the regulation in 1972. However, in its subsequent modifications of the EEO procedures, the Commission has not expressly addressed the availability of “reasonable” official time to union officials or how the Commission’s official time regulation for EEO proceedings interacts with the FSLMRS.

The Commission now proposes to amend section 1614.605(b) to exclude union representatives from its grant of reasonable official time for EEO proceedings. Failing to clarify the Commission’s regulation can cause agencies and unions to be unclear on exactly which aspects of official time they need to bargain. Furthermore, the FSLMRS was specifically designed to address the unique relationship between labor organizations and federal agencies. *See* 5 U.S.C. 7101(b) (“It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government.”). Considering this design, the Commission believes that the best policy approach is to leave the determination of whether a union official receives official time to the provisions of the FSLMRS.

Therefore, the Commission proposes to amend its regulation to clearly state that its official time provision does not apply if the representative serves in an official capacity in a labor organization that is an exclusive representative of employees at the agency.

Regulatory Procedures

Executive Order 12866

The Commission has complied with the principles in section 1(b) of Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a “significant regulatory action” under section 3(f) of the Order, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order.

Executive Order 13771

This proposed rule is not subject to Executive Order 13771, Reducing Regulation and Controlling Regulatory Cost. Pursuant to guidance issued by the Office of Management and Budget’s Office of Information and Regulatory Affairs (April 5, 2017), an “EO 13771 regulatory action” is defined as “[a] significant regulatory action as defined in Section 3(f) of EO 12866” As noted above, this proposed rule is not a significant regulatory action under section 3(f) of EO 12866. Thus, this proposed rule does not require the EEOC to issue two EO 13771 deregulatory actions.

Paperwork Reduction Act

This proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it applies exclusively to employees and agencies of the federal government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

While the Commission believes the proposed rule does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), it will still follow the reporting requirement of 5 U.S.C. 801.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Equal Employment Opportunity

For the Commission.

Dated: _____, 2019

Janet Dhillon

Chair

For the reasons set forth in the preamble, the Commission proposes to amend part 1614 as follows:

PART 1614 – FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY [AMENDED]

1. The authority citation for Part 1614 continues to read as follows:
2. **Authority:** 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16 and 2000ff-6(e); E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR 1954-1958 Comp., p.306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No 1 of 1978, 3 CFR, 1978 Comp., p. 321. Section 1614.605(b) is amended by adding:

§ 1614.605 Representation and official time

* * * * *

(b) * * * This paragraph does not apply to a representative if he or she serves as an officer, steward, or otherwise in an official capacity in a labor organization that is the exclusive representative of employees in an appropriate unit at the agency under the relevant provisions of the Federal Service Labor-Management Relations Statute (FSLMRS). The Commission will leave whether such a representative can receive official time to the FSLMRS and the bargaining agreements between the agency and relevant labor organization.