

# Mediating with the EEOC



**Ernesto Escobedo, Mediator, EEOC San Antonio Field Office**

**Craig Kempf, Mediator, EEOC Dallas District Office**

**Katherine S. Perez, ADR Coordinator, EEOC San Antonio Field Office**

**Ian Shoff, Mediator, EEOC Dallas District Office**



# What is mediation? (1)

- ▶ Form of Alternative Dispute Resolution (ADR) that EEOC offers as an alternative to the traditional investigative or litigation process.
- ▶ Voluntary, informal process where a neutral third party (mediator) assists the opposing parties in reaching a voluntary and negotiated resolution of the charge of discrimination, if possible.



# What is mediation? (2)

- ▶ Opportunity for parties to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement, and, ultimately, incorporate those areas of agreement into solutions.
- ▶ A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution.



# Where does the process begin? (1)

- ▶ For employers, once a charge is filed, EEOC sends an e-mail via the EEOC Public Portal with instructions on how to log into the EEOC Portal to view the charge.
- ▶ If a charge is eligible for mediation, the employer and employee will receive an alert via the Portal.
- ▶ Once the Portal is accessed the mediation option will appear, along with a due date to respond to the mediation option and forms to complete within a 15-calendar day deadline.



# Where does the process begin? (2)

- ▶ If both sides voluntarily agree to mediate, the case is assigned to a mediator for scheduling.
- ▶ The investigative charge process is placed on hold pending the outcome of mediation.



# Choosing the alternative option

- ▶ Parties need to decide within 15 calendar days
- ▶ Mediation vs. Investigation



# Mediation vs. Investigation (1)

## Mediation – **settlement:**

1. Intake
2. Parties opt for mediation
3. Mediation conference
4. Settlement – case closed
5. Outcome within 100 days or less
6. **70% success rate**

## Mediation – **no settlement:**

1. Charge is returned to investigation process
2. Investigations currently average over 10 months



# Mediation vs. Investigation (2)

## Investigation process:

1. Intake
2. Case investigated
  - Review records, interview witnesses, on site visits, fact-finding conferences, and subpoenas issued
3. No cause finding – Notice of Right to Sue issued to Charging Party
4. Cause conciliations (successful) = case closed
5. Cause conciliations (unsuccessful)
  - EEOC sues and the lawsuit is public record
  - Notice of Right to Sue issued to Charging Party
  - Litigation may last for four years or more





# What are the benefits of mediation?

- ▶ Free service
- ▶ Fair, neutral and informal
- ▶ Saves time and money
- ▶ In-person and virtual options, and accommodations are available
- ▶ Confidential
- ▶ Non-admission
- ▶ Avoids litigation
- ▶ Allows parties to address the real issues
- ▶ Issues resolved with general and supplemental releases
- ▶ Parties design their own resolution
- ▶ Everyone wins



# The parties agree – what happens next?

## ▶ Mediator will:

- Contact the parties to schedule date, time and location and platform to be used
- Further explain the mediation process
- Answer any questions regarding the process
- Advise the parties how to best prepare for mediation day
- Perhaps have preliminary discussions regarding resolution



# How to prepare for mediation

1. **Decide who will attend:**
  - Individual with settlement authority
  - Individual with knowledge of the issues
  - Both sides can have representation, but not required
2. **Be prepared to share your point of view.**
3. **Come prepared with realistic options for resolution.**
4. **Be ready to listen, learn new facts, and look for solutions.**
5. **Be flexible and open as brainstorming occurs.**



# What happens the day of mediation?

- ▶ Face-to-face or via video (currently offering both options)
- ▶ Joint session, where points of view are presented
- ▶ Private caucusing, for negotiations
- ▶ On average lasts four to six hours – could be longer



# Getting to closure and resolution

- ▶ If resolved – prepare confidential Agreement and obtain signatures or withdraw.
- ▶ If an impasse occurs – the charge forwarded to Enforcement to begin the investigative charge processing.



# What are possible non-monetary resolutions?

- ▶ Job interview
- ▶ Work accommodation
- ▶ Return to an available position
- ▶ Job placement services
- ▶ Neutral reference or letter
- ▶ One-on-one career development with HR
- ▶ No contest of unemployment benefits
- ▶ Removal of counseling memo or other documentation
- ▶ Training and mentoring
- ▶ Transfer or shift change
- ▶ Conversion of termination to resignation



# EEOC 2021 mediation survey: it works!

- ▶ EEOC 2021 external mediation survey: [The Equal Employment Opportunity Commission Mediation Participants Experience in Online Mediation And Comparison to In-Person Mediation](#)
  - 92% of charging parties and 98% employers would use EEOC online dispute resolution (ODR) again.
  - 86% of charging parties and 94% of employers view the ODR procedures used by EEOC mediators as fair.
  - 82% of charging parties and 91% of employers view the overall ODR mediation as fair.



# EEOC mediation resources

- ▶ [EEOC's Ten Reasons to Mediate](#)
- ▶ [Facts About Mediation](#)
- ▶ [Questions and Answers About Mediation](#)
- ▶ [Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act \(ADA\)](#)





# Pregnant Workers Fairness Act (PWFA) resources

- ▶ Effective June 27, 2023:

[What You Should Know About the Pregnant Workers Fairness Act \(PWFA\)](#)

- ▶ For workers:

[Download Infographic: Tips for Asking for Reasonable Accommodation](#)

- ▶ For employers and healthcare providers:

[Pregnant Workers Fairness Act: What Employers Need to Know Webinar](#)



# Thank You!



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