SOUTHWORTH PC

FEDERAL EMPLOYMENT ATTORNEYS

Shaun Southworth, Esq.
CEO and Founder, Southworth PC
1100 Peachtree Street NE, Suite 200
Atlanta, GA 30309
(404) 585-8095

September 21, 2026

Via Regulations.gov

The Honorable Andrea R. Lucas
Chair
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: Comment in Opposition to the Proposed Federal Sector Equal Employment Opportunity Rule

91 Fed. Reg. 55,690 (Aug. 28, 2026); Docket EEOC-2026-0067; RIN 3046-AB46

Dear Chair Lucas and Members of the Commission:

I write on behalf of Southworth PC in opposition to the Equal Employment Opportunity Commission's proposed rewrite of 29 C.F.R. Part 1614. These rules govern how federal employees challenge discrimination and retaliation by their employing agencies. I urge you and the Commission to withdraw the proposal.

Southworth PC practices federal employment law exclusively. Our firm has represented more than 2,000 federal employees and tried hundreds of cases to decision. As the firm's CEO and Founder, I have devoted more than 20,000 hours to this field. We submit this comment to defend the protections federal employees need to enforce their rights.

The proposal would make independent proceedings harder to obtain and impose new barriers at successive stages of a complaint. It would weaken employees' ability to act together, obtain counsel, and secure relief. The Commission should confront its documented staffing and management failures instead of making employees surrender protections. The following sections explain the changes, their consequences, and the legal reasons for withdrawal.

EXECUTIVE SUMMARY

The Commission should withdraw this rewrite. It would require the employing agency to decide a discrimination complaint before the employee could seek independent judge proceedings. Those proceedings would become discretionary. New filing barriers and weaker enforcement tools would compound that loss. The Commission has not justified this proposed system or shown that it will resolve complaints more fairly or promptly.

Employees would lose an important choice. Today, an employee can request EEOC judge proceedings after the investigation, or after 180 days without waiting for its completion. The judge controls the case and decides it. Under the proposal, the employee would first receive an agency decision and appeal. The Commission would decide whether judge proceedings are necessary or efficient. It could limit the questions, witnesses, or documents examined. The judge ordinarily would make recommendations. Independent appellate review would remain, but the employee would lose the present ability to invoke judge proceedings.[1]

The first filing would become more demanding. The proposal would replace the ordinary 45-day deadline to contact a counselor with 60 days to file a legally sufficient complaint. Those deadlines measure different tasks. The complaint would need facts supporting a reasonable inference of discrimination, a requirement called plausibility. Amendments adding related, existing claims would be limited to 21 days after filing. Later-arising claims would follow separate rules. These changes risk lost claims and fragmented proceedings before an employee receives a fair merits decision.[2]

Employees would lose administrative class enforcement. A class case lets representatives pursue a common discrimination claim for a group, including absent employees. The proposal would replace that process with individual complaints, sometimes processed together. Each identified complainant would remain responsible for meeting filing requirements. Recording class allegations would not assure that a court protects other employees' deadlines or permits a later class action.[3]

Representation and relief would become harder to sustain. Changes to fee recovery and formal settlement offers could place greater financial pressure on employees. Agencies could make consequential offers to unrepresented employees earlier in the process. It would also remove an interim restoration protection. These changes matter to employees trying to obtain counsel or survive a prolonged case.[4]

---

[1] 29 C.F.R. §§ 1614.108(f), (h), .109(a). Proposed § 1614.406(a)-(e), (k)-(l), 91 Fed. Reg. at 55,720-21.

[2] 29 C.F.R. § 1614.105(a)(1). Proposed § 1614.106(b)-(d), 91 Fed. Reg. at 55,712-13.

[3] 29 C.F.R. § 1614.204(a), (e), (g). Proposed §§ 1614.204, .407(d), 91 Fed. Reg. at 55,715-16, 55,721.

[4] 91 Fed. Reg. at 55,714, 55,722–24 (proposed §§ 1614.109, 1614.501; removal of § 1614.505); see Section V below.

Staffing and management failures require a direct response. The EEOC's reports document staff losses and workload pressure. Its budget projects substantially fewer judges facing the same incoming hearing volume. From 2015 to 2024, enacted funding increased more slowly than inflation. The Commission should seek adequate funding, hire and retain qualified personnel, and manage delayed cases. A low number of live hearings does not establish waste: judge proceedings can produce settlements, narrow disputes, and resolve cases without testimony.[5]

Moving disputes to court can increase costs and weaken confidence. Employees may turn to litigation when useful administrative proceedings become harder to obtain. Others may abandon claims they cannot afford to pursue. In *West v. Gibson*, the Supreme Court recognized administrative enforcement's role in avoiding costly litigation. The Commission must assess transferred work and lost enforcement. It must also address its own earlier recognition that perceived unfairness discourages confidence in the process.[6]

Employees with pending cases need protection for steps already taken. General assurances about final decisions do not resolve what happens to ongoing complaints, hearings, classes, fee petitions, and enforcement. The Commission must address those reliance interests and its consultation responsibilities before changing the rules.[7]

Federal employees should retain existing protections while the Commission addresses demonstrated processing failures. The Cummings Act's accountability requirements can operate separately. Southworth PC urges withdrawal of the proposed rewrite.[8]

---

[5] EEOC, FY 2027 Congressional Budget Justification 28–29, tbl. 9 & chart 4 (actual 2025 data and 2026–27 estimates); see Section VI.A below. EEOC, Budget and Staffing History, FY 2015 and FY 2024–25; BLS, CPI-U annual averages, 2015 and 2024; calculation and qualifications in Section VI.A. 91 Fed. Reg. at 55,692, 55,705; see Section VI.B below.
[6] West v. Gibson, 527 U.S. 212, 218–23 (1999). 64 Fed. Reg. 37,644, 37,649–50 (July 12, 1999); see Section VII below.
[7] 91 Fed. Reg. at 55,709–10; see Section VIII below. 42 U.S.C. § 2000e-16(b)(3) (consultation).
[8] 91 Fed. Reg. at 55,693–94 (Cummings Act implementation), 55,709 (express severability); proposed subpart G, id. at 55,725–27.

I. What the EEOC proposes to change.

A. The current ordinary process gives employees a choice.

Part 1614 governs the administrative discrimination complaint process for federal employees and applicants. The employee generally first contacts an agency equal employment opportunity counselor. If the dispute is not resolved, the employee may file a formal complaint with the agency. The agency investigates accepted claims.[9]

After receiving the completed investigation and notice of rights, the employee generally has 30 days to request an EEOC administrative judge or an agency decision. The employee may also request judge proceedings after 180 days from filing without waiting for the investigation to finish. This discussion concerns the ordinary individual process. Different rules apply to certain personnel actions appealable to the Merit Systems Protection Board and to other statutory routes.[10]

When the employee requests judge proceedings, the judge assumes responsibility for deciding the complaint and overseeing development of the record. The parties can seek discovery, which includes obtaining relevant documents, answers, and testimony. The judge controls its scope and timing. Existing rules also allow dismissal and decisions without a live hearing when the applicable standards are met.[11]

After receiving the judge's decision and hearing file, the agency ordinarily has 40 days to say whether it will fully implement that decision. If it will not, it must appeal to the Commission at the same time. Without a timely final order, the judge's decision becomes the agency's final action. An agency decision without judge proceedings is already available when the employee chooses that route or does not timely respond to the notice.[12]

B. The proposal would require an agency decision before an employee could seek judge proceedings.

The proposal would end mandatory counseling and require direct filing with the agency. A complaint generally would be due within 60 days of the challenged matter or a personnel action's effective date. It would have to allege facts sufficient to state a plausible claim. The agency would investigate accepted claims and decide their merits. It could dismiss complaints that fail the applicable requirements.[13]

The employee could appeal that decision to the Commission within 30 days after receipt. The Commission would review the agency's decision anew, without deference to it. On appeal, the Commission could decide the case, obtain additional information, return it to the agency, or refer all or part of it to an administrative judge.[14]

---

[9] 29 C.F.R. §§ 1614.105-.108.
[10] 29 C.F.R. § 1614.108(f), (h). See also §§ 1614.201, .301-.302, .408 (distinct routes).
[11] 29 C.F.R. § 1614.109(a), (b), (d)-(i).
[12] 29 C.F.R. §§ 1614.109(i), .110(a)-(b).
[13] Proposed §§ 1614.106-.108, .110, 91 Fed. Reg. at 55,712-15.
[14] Proposed §§ 1614.402, .405, 91 Fed. Reg. at 55,718-19.

An employee requesting judge proceedings would identify the issues and explain why those proceedings are necessary or efficient. The Commission would decide whether to grant the request. It could limit a referral to particular claims, witnesses, documents, time periods, or factual questions. The judge could not expand that scope unless the Commission modified the referral.[15]

The judge ordinarily would provide a recommended decision, findings, or report. The Commission could adopt, modify, or reject the recommendation. Thus, the proposal retains judge proceedings but changes how employees reach them, what they cover, and who makes the final decision after them.[16]

Statutory court routes would remain available at the applicable stages and deadlines. An employee would not always have to finish a Commission appeal before suing. A federal lawsuit and an administrative complaint nevertheless remain different proceedings, with different practical demands.[17]

II. The proposal would remove independent protections without adequately justifying their replacement.

A. An employee's choice of judge proceedings has practical value.

An employee who claims that an agency discriminated should have a meaningful opportunity to place that claim before an adjudicator outside the employing agency. The existing rules provide that opportunity through the employee's request for EEOC judge proceedings. The proposal would take away that choice before an agency merits decision. The employee would instead receive the agency's decision and then seek independent judge proceedings through a discretionary appeal referral.[18]

An agency's legal obligation to investigate impartially does not eliminate the difference between these routes. Under the existing judge process, the parties can present discovery disputes to an official responsible for adjudicating the complaint. That official can require relevant evidence, manage the proceedings, hear testimony when needed, and decide the case. Under the proposal, the employee first must obtain a referral, and the resulting proceedings remain bounded by the Commission's order.[19]

The Commission emphasizes that appellate review would remain independent and would be de novo, without deference to the agency's findings. It could require more information or refer a matter for a hearing. Those powers do not establish that optional judge proceedings on appeal perform the same work as an employee-requested proceeding. The proposal changes that process's timing, availability, and control.[20]

---

[15] Proposed § 1614.406(b)-(e), 91 Fed. Reg. at 55,720.

[16] Proposed §§ 1614.405(c), .406(k)-(l), 91 Fed. Reg. at 55,719, 55,721.

[17] 29 C.F.R. § 1614.407. Proposed §§ 1614.407, .409, 91 Fed. Reg. at 55,721–22.

[18] 29 C.F.R. §§ 1614.108(f), (h), .109(a). Proposed § 1614.406(a)-(e), (k)-(l), 91 Fed. Reg. at 55,720-21.

[19] 29 C.F.R. §§ 1614.108(b), .109(a), (d)–(i). Proposed § 1614.406, 91 Fed. Reg. at 55,720–21.

[20] Proposed §§ 1614.402, .405, 91 Fed. Reg. at 55,718-19.

Employees need a sufficient opportunity to develop and test the facts before their claims are finally resolved. Reviewing a written account and conducting proceedings that test it provide different protections. The Commission's explanation must address the loss of the latter as an employee-selected route.

B. The EEOC previously strengthened judge authority to address both fairness and delay.

The Commission confronted institutional fairness directly in its 1999 reforms. It concluded that allowing agencies to substitute their own findings and conclusions for a judge's decision created a conflict of interest and a perception of unfairness. It adopted the final-order and simultaneous-appeal approach to prevent agencies from simply replacing an independent decision with their own. The Commission also linked fuller judge control to more efficient processing.[21]

The current proposal is not an exact return to that former system. It would give the Commission, rather than the employing agency, authority to accept or reject a judge's recommendation. But it would require an agency merits decision before optional judge proceedings and would change the judge's role from deciding the complaint to assisting appellate review. The earlier reasons for independent adjudication remain relevant to those changes.[22]

An agency may change policy. Under *FCC v. Fox Television Stations*, it need not prove that its new policy is better than its old policy to a court's satisfaction. It must, however, give a reasoned explanation when disregarding material facts or circumstances underlying the earlier policy. The EEOC must therefore address why the fairness and case-management functions it previously assigned to judges can be performed adequately under the proposed referral system. A historical description of the earlier reforms does not supply that explanation.[23]

C. Selected agency-operated hearings would not replace employee access to Commission judges.

Proposed § 1614.104(c) would allow an agency to seek approval for its own internal hearing process before issuing a decision. Approval would require a showing of impartiality and improved decision quality and accuracy. The Commission intends this route for agencies with reliable existing hearing systems and a compelling need for an earlier hearing. National security interests could supply that need. The stated standards leave unanswered which institutional safeguards an agency must adopt to establish impartiality.[24]

An appeal would remain available. The Commission could return the matter to the agency's hearing process or refer it to a Commission judge. Annual review and possible revocation of agency approval provide oversight. They do not restore the employee's existing choice of Commission judge proceedings. The proposal must justify that loss.

---

[21] 64 Fed. Reg. at 37,649-50 (independence, final orders, judge control, and remands).
[22] Proposed §§ 1614.405(c), .406(k)-(l), 91 Fed. Reg. at 55,719, 55,721.
[23] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009).
[24] Proposed § 1614.104(c)(1)–(4), 91 Fed. Reg. at 55,712. Approval may be revoked after agency notice and a reasonable opportunity to correct deficiencies and demonstrate compliance.

III. Procedural barriers would prevent claims from reaching a fair merits determination.

The proposal would require more from an employee's first written complaint while sharply limiting opportunities to add related claims. It would also permit related disputes to proceed separately when they should be considered together. Southworth PC opposes these changes because they can prevent employees from obtaining a decision on whether discrimination occurred. The Commission's efficiency rationale does not adequately account for the risk of lost claims, duplicated proceedings, and disputes over these new requirements.

A. Sixty days to file a sufficient complaint is not an extension of the time to seek counseling.

Today, an employee generally must contact an equal employment opportunity counselor within 45 days. The counselor must explain rights and responsibilities and attempt informal resolution. The employee ordinarily has 15 days after receiving the required notice to file a formal complaint. That complaint must identify the employee and agency and generally describe the challenged actions or practices. These are distinct steps, with assistance before formal filing.[25]

The proposal would remove mandatory counseling and generally require the complaint itself within 60 days of the discriminatory matter. For a personnel action, the clock would run from its effective date. That complaint would have to satisfy a new plausibility requirement. The change cannot be evaluated as simply giving employees 15 more days. Within the new period, an employee must identify the appropriate process, obtain any needed help, and submit a sufficiently detailed complaint.[26]

The Commission argues that direct filing removes mandatory delay and disputes over the counseling deadline. Employees could file without waiting through counseling, and voluntary dispute resolution would remain. But removing one step does not establish that the replacement is fair or workable. The Commission must evaluate the more demanding filing task and the assistance employees need to complete it.[27]

The Commission points to pre-complaint technical assistance. Proposed § 1614.102(b)(8) would require agencies to maintain a process for requesting and receiving appropriate and effective assistance. But the regulatory text sets no response deadline. It does not state that requesting assistance preserves the filing date. Nor does it provide a general opportunity to correct a deficient complaint before dismissal. An employee could request help promptly and still face a running deadline while awaiting a response.[28]

The proposal also removes § 1614.105(a)(2), which expressly requires extensions of the counseling deadline in specified circumstances. General waiver, estoppel, and equitable tolling

[25] 29 C.F.R. §§ 1614.105(a)(1), (b)(1), (d), .106(b)-(c).
[26] Proposed § 1614.106(b)-(c) and removal of § 1614.105, 91 Fed. Reg. at 55,712. For a hostile environment or other continuing violation, paragraph (b) uses the most recent contributing act.
[27] 91 Fed. Reg. at 55,695, 55,708-09 (direct filing, counseling, and retained alternative dispute resolution).
[28] Proposed §§ 1614.102(b)(7)-(8), .106-.107, 91 Fed. Reg. at 55,711-13. Specific notices for lost contact and noncooperation remain under § 1614.107(a)(6)-(7); they do not establish a general pleading-cure procedure.

remain under § 1614.604(f). These doctrines can excuse or extend deadlines in qualifying cases, but they require their own legal and factual showing. They do not assure timely assistance or a chance to correct an understandable filing error. The Commission has not explained why predictable intake problems should become disputes over whether a missed deadline can be excused.[29]

For some employees covered by a union grievance procedure, direct filing also advances a consequential choice. When the governing statute applies, an employee must choose between the EEO process and a negotiated grievance for the same matter. That election already exists. Current counseling does not make it; filing the written complaint does. Moving formal filing to the beginning can require the choice before counseling would have helped clarify the dispute. Requests for information, technical assistance, and prefiling dispute resolution would not trigger the proposed election rule. The Commission must still explain how employees will receive usable advice about the consequence before filing.[30]

B. A complaint should identify discrimination without requiring proof that the agency controls.

Proposed § 1614.106(c) requires a plausible claim: enough alleged facts to support a reasonable inference of discrimination. Proposed § 1614.107(a)(1) directs agencies to dismiss complaints that fail the pleading requirements. The Commission says this will conserve resources by screening out labels, speculation, and ordinary workplace disagreements unrelated to discrimination. That rationale leaves a crucial question unanswered: how will the agency distinguish a claim lacking substance from a claim whose supporting information the employee cannot yet obtain?[31]

Consider a hypothetical employee passed over for promotion. The employee can describe the job, relevant qualifications, a supervisor's discriminatory remark, and the selection of another applicant. Those allegations can support a plausible claim even without the agency's explanation of how it compared the candidates. That explanation may be crucial to proving the case. The agency should not demand it from the employee at intake. The proposed rule needs a reliable way to distinguish missing allegations from missing proof.

Swierkiewicz v. Sorema explains that the evidentiary framework for proving discrimination is not itself a pleading requirement. Later decisions, *Twombly* and *Iqbal*, require a plausible claim in federal court and reject the premise that discovery must follow every conclusory allegation. Read together, these cases require a serious distinction between

---

[29] 29 C.F.R. §§ 1614.105(a)(2), .604(f). Amendments 6 and 32, 91 Fed. Reg. at 55,712, 55,724; see also id. at 55,707 (preserved equitable tolling).
[30] 29 C.F.R. § 1614.301(a); proposed § 1614.301(a)–(b), 91 Fed. Reg. at 55,716 (implementing 5 U.S.C. § 7121(d)).
[31] Proposed §§ 1614.106(c), .107(a)(1), 91 Fed. Reg. at 55,712-13; id. at 55,695 (screening rationale).

allegations sufficient to proceed and evidence sufficient to prevail. They do not compel the EEOC to import the Federal Rules' pleading standard into its own complaint-intake process.[32]

The Commission's policy choice must therefore stand on its own explanation. *Artis v. Bernanke* illustrates the information problem in the Federal Reserve's related counseling process. The dispute concerned exhaustion: the steps employees must take administratively before bringing their claims to court. The employees supplied specific allegations and examples of systemic discrimination. The D.C. Circuit held that they supplied sufficient information and rejected demands for statistical detail dependent on employer-controlled data. The proposal does not explain how its new screening rule will protect against that error.[33]

The text says technical legal terminology is unnecessary and factual allegations must be accepted as true. Those protections do not provide a general right to clarify a complaint before it is dismissed. Another discrepancy makes the problem concrete. The preamble describes identifying the requested relief "if known." The proposed regulation omits that qualification. An employee may know what happened without knowing every available remedy. The explanation should not promise flexibility that the operative text fails to provide.[34]

C. The 21-day amendment cutoff reaches beyond the problem the Commission identifies.

Current § 1614.106(d) permits related issues or claims to be added before the investigation ends. After requesting a hearing, the employee may seek permission from the administrative judge to amend. Proposed § 1614.106(d)(1) would instead give an employee 21 days after filing to add related issues or claims that already existed. The agency must decline an untimely amendment. The period runs from the employee's filing, while proposed § 1614.106(e) supplies no fixed deadline for the agency's acknowledgment. The amendment period could expire before the agency identifies what it has accepted.[35]

The preamble criticizes employees who wait until late in an investigation to add claims they knew existed when they filed. The regulation reaches further. It applies to claims that existed at filing, whether or not the employee knew of them. It contains no separate exception for a related claim first discovered after the 21-day period. The general equitable doctrines remain available, but requiring an employee to establish an exception is not equivalent to allowing a timely, justified amendment.[36]

---

[32] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-12 (2002). Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-59, 569-70 (2007). Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 684-87 (2009). See also Seabrook v. Driscoll, No. 20-1961, slip op. at 5-8 (4th Cir. Aug. 4, 2025) (applying plausibility to a federal employee's court complaint).
[33] Artis v. Bernanke, 630 F.3d 1031, 1034-38 (D.C. Cir. 2011) (Federal Reserve counseling under 12 C.F.R. Part 268).
[34] Compare 91 Fed. Reg. at 55,695 (requested relief "if known"), with proposed § 1614.106(c), id. at 55,712; see also proposed § 1614.107(a)(1), id. at 55,713.
[35] 29 C.F.R. § 1614.106(d). Proposed § 1614.106(d)(1), (e), 91 Fed. Reg. at 55,712-13.
[36] Compare 91 Fed. Reg. at 55,695 (claims known at filing), with proposed § 1614.106(d)(1), id. at 55,712 (existing claims). 29 C.F.R. § 1614.604(f).

The consequences also depend on relation back: treating an amendment as filed on the date of the original complaint. The proposal gives that protection to timely related amendments. If the agency rejects an amendment, § 1614.106(d)(6) requires separate processing only when the added claim remains timely and is not otherwise subject to dismissal. A related claim outside both the 21-day amendment period and its separate filing period could therefore be lost unless an applicable exception protects it. The separate-complaint provision does not resolve that risk.[37]

The federal-court comparison exposes a further gap. Federal Rule of Civil Procedure 15 provides certain opportunities to amend without permission. Those periods run from formal delivery of the pleading or specified responses from the other side. The rule also allows amendment with the opposing party's consent or the court's permission, which should be freely given when justice requires. The EEOC proposal contains no comparable ordinary route to obtain permission for a justified late amendment. The Federal Rules do not govern agency intake. But importing a court-style screening standard while withholding ordinary amendment flexibility requires an explanation the proposal does not provide.[38]

Avoiding strategic delay does not explain barring a related claim discovered later or an amendment that would cause no meaningful delay. The Commission's explanation addresses delayed addition of known claims. It does not justify the same cutoff for claims learned later.

D. New claims and new facts must not become an excuse to divide one dispute into multiple cases.

Claims arising after filing follow a different proposed rule. They may be added through supplementation before the final agency decision if they are related and satisfy the applicable 60-day period. They do not relate back to the original filing date. Even an otherwise valid supplement may be declined when proceedings are advanced and accepting it would unduly delay the original decision. If the claim remains timely and otherwise valid, the agency must process it separately.[39]

That separate route preserves some claims, but it can multiply proceedings concerning the same employment dispute. The proposal also weakens the mechanism for bringing them back together. Current § 1614.606 requires an agency to consolidate multiple complaints filed by the same person. Proposed § 1614.606 makes consolidation discretionary. Thus, the proposal can require separate processing while removing the current requirement to consolidate. Separate processing may finish the first complaint sooner while leaving the employee and agency to repeat work in another.[40]

The Commission previously identified that very problem. In its 1999 reforms, it explained that fragmentation multiplies complaints and can make otherwise valid claims appear deficient. It adopted broader amendment rights and mandatory same-employee consolidation as

---

[37] Proposed § 1614.106(b), (d)(1), (d)(6), 91 Fed. Reg. at 55,712-13.
[38] Fed. R. Civ. P. 15(a)(1)-(2) (Dec. 1, 2025 ed., printed p. 24). Compare proposed § 1614.106(d)(1), 91 Fed. Reg. at 55,712.
[39] Proposed § 1614.106(b), (d)(4)-(6), 91 Fed. Reg. at 55,712-13.
[40] 29 C.F.R. § 1614.606. Proposed §§ 1614.106(d)(6), .606, 91 Fed. Reg. at 55,713, 55,724; id. at 55,703 (consolidation discussion).

responses. Consolidation would remain available under the proposal, and separate processing could protect an original complaint from delay. But permission to reunite claims does not ensure that agencies will do so. The proposal does not explain why removing the existing protections will reduce the work needed to resolve the employee's entire dispute. The Commission must confront its earlier reasoning and the costs that separate proceedings can create.[41]

The distinction between a claim and evidence supporting it is equally important. Harassment can involve a series of incidents that together create a hostile work environment. A new incident may support that existing claim without creating a separate claim. *National Railroad Passenger Corp. v. Morgan* distinguishes those incidents from discrete actions, such as a firing or denied promotion. Discrete actions retain their own filing deadlines; one timely incident does not revive every earlier discrete claim. But evaluating each alleged harassment incident in isolation can obscure the claim that the incidents establish together.[42]

The proposal recognizes hostile-environment claims in § 1614.106(b). Its combined pleading, amendment, and supplementation provisions must also distinguish added supporting facts from new claims. Otherwise, an employee risks having new evidence misclassified as an untimely amendment.

E. Delayed correction and procedural waiver would compound the filing barriers.

The proposal permits review of declined amendments, declined supplements, and partial dismissals on appeal from the agency's final decision. Immediate Commission review of partial dismissals is already unavailable under current law. Today, however, an employee who requests judge proceedings can obtain review of those dismissals before the agency's final action. That route would disappear under the proposal. When the Commission removed immediate appeals in 1999, it relied in part on administrative judges to review partial dismissals and develop reinstated claims. The proposal removes that safeguard while increasing the significance of early claim-screening decisions.[43]

Crawford v. Duke shows why careful claim identification matters. The D.C. Circuit treated attachments as part of the administrative complaint and rejected forfeiture based on unclear agency communications about the claims being processed. It nevertheless held that a separate, inadequately identified promotion claim had not been exhausted. The distinction protects claims actually presented without excusing failure to present a different claim. The

[41] 64 Fed. Reg. at 37,648 (fragmentation, amendment, and consolidation). 91 Fed. Reg. at 55,695, 55,703, 55,712-13, 55,724 (amendment, supplementation, and consolidation). See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009) (reasoned explanation of policy changes and treatment of prior factual findings).

[42] National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113-18, 120-22 (2002). Morgan addresses Title VII's statutory charge periods; its distinction between discrete claims and component hostile-environment acts informs the scope issue here. Proposed § 1614.106(b), (d), 91 Fed. Reg. at 55,712-13.

[43] 29 C.F.R. § 1614.107(b). Proposed §§ 1614.106(d)(3), (5), .107(b), 91 Fed. Reg. at 55,712-13; id. at 55,696 (partial-dismissal discussion). 64 Fed. Reg. at 37,647 (judge review after removal of interlocutory appeals).

EEOC's rules should not allow an agency's narrow characterization to erase allegations the employee already supplied.[44]

On appeal, proposed § 1614.403(a) adds another procedural risk. The Commission may treat judge proceedings as waived if the employee fails to request them or explain why they are necessary or efficient. That is not automatic forfeiture of the discrimination claim. It is a possible loss of the opportunity to obtain the proceedings needed to establish it. The proposal supplies no express opportunity to cure an omitted or inadequately explained referral request before treating that opportunity as waived.[45]

Receipt rules add to these risks. Current § 1614.604(d) already has a five-day receipt rule for specified EEOC decisions. The proposal extends deemed receipt to documents transmitted through the portals, email, or other digital means. A document generally would count as received upon access or five days after upload or transmission, whichever occurs first. For email, this applies if the message is not returned as undeliverable. That broader rule can affect notices that start short response periods. Lack of an undeliverable message does not establish that an employee could open a document or access the relevant system.[46]

In *Asuncion v. Hegseth*, the Ninth Circuit held a lawsuit timely when the agency's passphrase errors prevented effective access to its decision. It also held that equitable tolling applied. The case does not make every unread notice ineffective. It demonstrates why actual access problems matter. Retaining equitable tolling does not answer why the regulation should make employees litigate avoidable notice problems after a deadline has passed.[47]

Taken together, these restrictions risk excluding valid claims and creating additional procedural disputes. Under *State Farm*, the Commission must connect its chosen policy to the facts and consider important aspects of the problem. Timely assistance, meaningful correction, coherent claim processing, and the consequences of lost claims are central here. Its explanation does not justify sacrificing those protections to reduce the work of processing complaints.[48]

IV. Independent questioning and adjudication matter.

A discrimination claim can turn on why a supervisor acted, whose account is accurate, or whether an explanation withstands questioning. Employees need a meaningful opportunity to challenge the agency's account before their claims are finally decided. The proposal would make access to judge proceedings discretionary. After an agency decision, the Commission would choose whether to refer the appeal to a judge and what the judge could examine. The proposal would also remove the current express protection for factual findings made after a hearing.

---

[44] Crawford v. Duke, No. 16-5063, slip op. at 7-11, 13-14 (D.C. Cir. Aug. 11, 2017).
[45] Proposed § 1614.403(a), 91 Fed. Reg. at 55,718; see also id. at 55,700 (request and waiver rationale).
[46] 29 C.F.R. § 1614.604(d). Proposed § 1614.604(d), 91 Fed. Reg. at 55,724; id. at 55,703, 55,708 (digital-filing and service rationale).
[47] Asuncion v. Hegseth, No. 23-4044, slip op. at 16-19 (9th Cir. Sept. 4, 2025).
[48] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, 46-52 (1983).

Southworth PC opposes these changes because they weaken the process for determining what actually happened.[49]

A. Calling a process less adversarial does not resolve the parties' conflicting accounts.

The Commission describes the current hearing process as too formal and adversarial. It argues that discovery and motion practice consume resources that should be directed toward resolving discrimination claims. But an employee and an agency may disagree sharply about the facts. That disagreement remains when the rules restrict the employee's ability to ask questions. The relevant distinction is between wasteful litigation conduct and useful testing of an opposing account.[50]

Under current rules, an employee can request judge proceedings before receiving a final agency merits decision. Section 1614.109(d) gives both parties a right to reasonable development of relevant evidence, subject to the administrative judge's control. Discovery can include written questions, document requests, and depositions—questions answered under oath before a hearing. EEOC guidance also recognizes the parties' opportunity to examine and cross-examine witnesses in appropriate instances.[51]

The employee can identify an inconsistency, ask the witness to explain it, and challenge an inadequate answer before an independent adjudicator. The agency can do the same. These opportunities help distinguish a supported allegation from an unsupported one.

The proposed process would retain some of those tools. A judge could authorize discovery, require evidence, and conduct a hearing within a referral. The Commission could also obtain further information on appeal. Those retained powers do not preserve the employee's present route to judge-supervised proceedings. Access would depend on an appellate referral, and the referral would control what the judge could examine.[52]

B. Follow-up questions can change the evidence on which a case is decided.

Cross-examination means allowing a party to question the other side's witness. Its value lies in the questions and answers, including clarification, admissions, and contradictions. It is not simply an opportunity to watch how a person speaks. A written statement may give a witness's conclusion without revealing the assumptions behind it. Focused questions can test whether the witness had personal knowledge, applied a stated criterion consistently, or omitted a material qualification.

Reeves v. Sanderson Plumbing Products provides a concrete example from a published discrimination case. A management official testified about his involvement in the employee's discipline. After testifying otherwise on direct examination, he acknowledged on cross-

---

[49] Proposed §§ 1614.405(c), .406(a)-(b), (e), (k)-(l), 91 Fed. Reg. at 55,719-21. Compare 29 C.F.R. §§ 1614.109(a), .405(a).

[50] 91 Fed. Reg. at 55,691-93 (stated objections to discovery, motion practice, and the current hearing-request model).

[51] 29 C.F.R. §§ 1614.108(f), (h), .109(a), (d), (f). EEO Management Directive 110, ch. 7, §§ I, IV (Aug. 5, 2015) (hearing participation and discovery).

[52] Proposed §§ 1614.404(a), (c), .405(b), .406(b), (e)-(i), 91 Fed. Reg. at 55,719-21.

examination that he had recommended placing the employee on probation. The Supreme Court discussed that admission among the evidence supporting the employee's verdict. It also explained why evidence undermining an employer's stated reason can support a finding of discrimination.[53]

Reeves arose from a jury trial. Its practical lesson applies here: an answer elicited through questioning can matter to the result. A process that makes such questioning harder to obtain must account for what can be lost.

Discovery can perform similar work before a hearing occurs. A deposition answer may clarify who made a decision. An admission may remove a disputed issue. A response to a focused request may expose an inconsistency that warrants further questions. These uses can narrow a dispute or inform settlement before a hearing. Current rules place a judge in a position to determine which steps are warranted.[54]

The proposal makes information already available in the file a ground for objecting to discovery. That can prevent pointless duplication. But the existence of a witness's statement does not establish that the relevant questions have been answered. The rule permits authorized discovery; it does not expressly prohibit follow-up questioning. Its explanation nevertheless must distinguish repeating an answered question from testing an answer that is incomplete, inconsistent, or disputed.[55]

C. A referral should not prevent a judge from pursuing a material question that emerges during the proceeding.

Proposed § 1614.406(e) permits the Commission to define a referral by specified claims, issues, remedies, witnesses, documents, time periods, or factual questions. A judge must stay within those limits unless the Commission changes the order. Proposed § 1614.406(h) likewise ties discovery to the referred matters. The hearing rules require exclusion of evidence outside the referral's scope. These limits can restrict the subjects a judge may examine, even when the judge considers further inquiry relevant.[56]

The Commission can refer an entire appeal and can later expand a narrower referral. That is its strongest answer to this concern. But the official managing the testimony still lacks independent authority to follow a material issue beyond the order's limits. The proposal provides no specific procedure or decision deadline for obtaining an expansion when that need emerges. It also does not explain how the added request and decision would affect the deadline for the judge's recommendation.[57]

A useful referral cannot always anticipate what questioning will reveal. Consider a hypothetical promotion dispute. A supervisor says the selected employee performed better in an interview. Questioning reveals a possible change to the interview scores after the selection. The

---

[53] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146-49, 151-53 (2000), particularly 152 (cross-examination admission).
[54] 29 C.F.R. § 1614.109(a), (d), (f). EEO MD-110, ch. 7, § IV.A, C (discovery and methods).
[55] Proposed § 1614.406(h)(1)-(4), 91 Fed. Reg. at 55,720.
[56] Proposed § 1614.406(e), (h), (i)(1), (5), 91 Fed. Reg. at 55,720-21.
[57] Proposed § 1614.406(b), (e), 91 Fed. Reg. at 55,720.

next questions concern who revised the scores and when. Answering them may require another witness or different documents.

If a referral covers interview performance but excludes changes to scoring records, the judge would need the Commission to expand it. That additional decision can interrupt the proceeding or leave a material issue unexplored. The Commission has not shown why this arrangement would improve on a judge's existing authority to manage relevant inquiry.

The difference is not whether discovery requires supervision. Current § 1614.109(d) already subjects discovery to the judge's control and permits objections to irrelevant, burdensome, repetitive, or privileged requests. The proposal adds control through an appellate order that can define the permitted witnesses and factual questions before the proceeding begins. It must justify that additional restriction, not merely the familiar need for reasonable limits.[58]

D. Recognizing the need for a hearing is not the same as assuring access to one.

Proposed § 1614.406(d) identifies material factual disputes and credibility questions that cannot fairly be resolved on the written record as grounds for referral. This recognizes an essential limit of paper review. Yet the provision says the Commission may refer such matters, while paragraph (a) disclaims any automatic hearing entitlement. Neither paragraph requires referral when the Commission identifies a material credibility question that the record cannot fairly resolve.[59]

The Commission could order further information or remand a matter to the agency. Those options can resolve some disputes. But the proposal does not explain what ensures a meaningful opportunity to question a witness when another written submission will not resolve the conflict. A promise of independent appellate review answers who reviews the case. It does not, by itself, answer how the parties can test the decisive testimony.[60]

Current rules distinguish an actual factual dispute from a case that can properly be decided without a hearing. Section 1614.109(g) authorizes a decision on paper when the governing conditions are met, with notice and an opportunity to respond. It also allows a hearing to be confined to genuinely disputed issues. This is an existing means of limiting proceedings while preserving adjudication of material conflicts.[61]

Anderson v. Liberty Lobby explains the underlying distinction in federal civil litigation: summary judgment is not the occasion to weigh competing evidence or decide witness credibility. That holding does not dictate every administrative procedure. It explains why

[58] 29 C.F.R. § 1614.109(d). That provision permits written agreement on discovery methods and scope in lieu of obtaining the judge's authorization. Compare proposed § 1614.406(e), (h), 91 Fed. Reg. at 55,720.
[59] Proposed § 1614.406(a), (d)(1)-(2), 91 Fed. Reg. at 55,720; id. at 55,692, 55,701 (referral rationale).
[60] Proposed §§ 1614.404(a), (c), .405(a)-(b), 91 Fed. Reg. at 55,719.
[61] 29 C.F.R. § 1614.109(g)(1)-(3). EEO MD-110, ch. 7, § III.E (decisions without a hearing).

avoiding unnecessary hearings is different from resolving a material credibility conflict without adequate testing.[62]

Administrative procedures may be tailored to the dispute. In *Richardson v. Perales*, the Supreme Court permitted reliance on written medical reports in a disability-benefits proceeding. The reports' reliability and the claimant's available, unused means of obtaining testimony and cross-examination were important to that result. The case supports attention to actual safeguards, not an assumption that written review is sufficient whenever an agency calls it efficient.[63]

Proposed § 1614.404(b) creates a related problem when the Commission requests additional information on appeal. Current rules require the responding party to give the other party a copy. The proposal adds a Commission-ordered exception for classified, privileged, protected, or other information requiring special handling. It does not authorize an agency to withhold material unilaterally. But the text does not explain how confidentiality will be reconciled with a meaningful opportunity to answer material used in deciding the case. The Commission must justify the exception's breadth and explain what safeguards will permit a fair response.[64]

E. The proposal would change the weight given to findings made after a hearing.

Current § 1614.405(a) generally provides fresh review of agency decisions but applies a substantial-evidence standard to specified factual findings by administrative judges. Under the Commission's guidance, that protection applies to findings after a hearing. It asks whether the record adequately supports the findings rather than simply replacing them with the reviewer's preferred view. Legal conclusions and decisions without a hearing remain subject to fresh review.[65]

The guidance gives particular weight to credibility findings based on a witness's demeanor or tone. It also permits rejection when objective evidence contradicts the testimony or the account cannot reasonably be credited. The existing system therefore recognizes the hearing judge's position without making that judge infallible. An employee can challenge unsupported findings. An agency cannot displace supported factual findings merely because another reviewer would have weighed the evidence differently.[66]

Under proposed § 1614.406(k), the judge would ordinarily issue recommended findings, a recommended decision, or a report. Proposed § 1614.405(c) would permit the Commission to adopt, modify, or reject that work. The Commission would retain final decisionmaking authority.

---

[62] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 255-57 (1986). The genuine-dispute requirement concerns facts that could affect the result, not every disagreement.
[63] Richardson v. Perales, 402 U.S. 389, 402-07, 409-10 (1971).
[64] 29 C.F.R. § 1614.404(b); proposed § 1614.404(b), 91 Fed. Reg. at 55,719.
[65] 29 C.F.R. § 1614.405(a). EEO MD-110, ch. 9, § VI.A-B, especially VI.B.1-4 (post-hearing factual findings, legal conclusions, and decisions without a hearing).
[66] EEO MD-110, ch. 9, § VI.B.2, C.1 (credibility findings and the burden on the party challenging supported factual findings).

But the proposal does not carry forward the current express substantial-evidence standard or explain what weight attaches to credibility findings based on testimony heard by the judge.[67]

Even an employee who obtains a referral and presents testimony would face a different framework for review of the resulting findings. The Commission must explain why it is removing this protection and how the replacement accounts for the value of the hearing. A description of the judge's work as a recommendation does not supply that explanation.

F. The Commission has not justified removing protections to address litigation abuse.

The preamble describes agency discovery that pressures unrepresented employees and judges accepting agency motions without independent analysis. It also criticizes employee discovery demands and time consumed by discovery disputes. Those criticisms call for better administration. They do not establish that employees would be better protected by losing their ability to invoke independent proceedings.[68]

Current rules already authorize judges to limit discovery, exclude irrelevant or repetitive evidence, control hearings, and address noncompliance. The proposal retains substantial versions of those powers within referrals, including adverse inferences and exclusion of evidence. The Commission must explain why those tools cannot work while employees retain access to judge proceedings.[69]

The Commission considered retaining employee-requested proceedings with tighter discovery limits, case management, summary judgment, or hearing-selection criteria. It rejected that alternative because many cases enter judge proceedings although, in the Commission's view, very few benefit from a hearing. That answer overlooks focused questioning, narrowed disputes, and informed settlements that can make a hearing unnecessary.[70]

The substitute also requires Commission reviewers to decide whether proceedings are needed, define their scope, and consider later expansions. An agency merits decision may already have been issued before further questioning changes the case. Those steps must be included when comparing the proposed process with better management of existing judge proceedings.[71]

Under *State Farm*, the Commission must connect its reasons to the protections it removes. Its explanation does not justify restricting employee access, limiting the judge's inquiry, or changing review of hearing findings as a response to delay and abusive practice.[72]

---

[67] Proposed §§ 1614.405(c), .406(k)-(l), 91 Fed. Reg. at 55,719, 55,721; id. at 55,700-01 (preamble description). Compare 29 C.F.R. § 1614.405(a).
[68] 91 Fed. Reg. at 55,692 (Commission's account of discovery and summary-judgment practices).
[69] 29 C.F.R. § 1614.109(d)-(g). Proposed § 1614.406(f)(5)-(6), (h)-(i), 91 Fed. Reg. at 55,720-21. The retained nonmonetary measures remain subject to the referral's scope.
[70] 91 Fed. Reg. at 55,708 (alternatives considered), 55,691-93 (hearing-process rationale).
[71] Proposed §§ 1614.110, .405(b)-(d), .406(b)-(e), (k)-(l), 91 Fed. Reg. at 55,714-15, 55,719-21.
[72] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, 46-52 (1983).

V. The proposal weakens the tools employees need to enforce their rights.

The proposed changes reach beyond who decides a discrimination complaint. They affect whether employees can act together, obtain legal representation, and secure meaningful relief. Those protections matter most when an employee cannot afford to fight the government alone. Removing them would make the administrative process less capable of delivering the justice it promises.

A. Employees facing the same discriminatory practice would lose administrative class proceedings.

Discrimination can affect an entire group of employees. A promotion policy, for example, may unlawfully exclude many qualified workers. An administrative class complaint lets a representative challenge that common practice for the affected group. The representative must have a claim typical of the group and be able to represent its interests fairly. The case must involve common factual questions and enough affected people to make consolidating their individual complaints impractical. An administrative judge examines whether those requirements are met.[73]

The proposal would abolish that procedure. The administrative process would no longer provide class certification, class notice, class settlement review, or adjudication for absent class members. Each person seeking individual relief would have to become an identified complainant and independently meet the applicable filing requirements. The agency could process similar complaints together. That would coordinate individual cases; it would not permit anyone to represent the absent employees.[74]

This substitution fails on the terms of the existing rule. Class treatment is available precisely when the group is too numerous for practicable consolidation. The proposal offers joint processing as the answer to that problem. Yet each affected person must satisfy the filing requirements and remain responsible for the person's own claim, even in a joint complaint. Existing regulations already permit joint processing alongside classes. The Commission has not shown why one can now perform the other's distinct function.[75]

The lost protections are practical. Under current rules, affected employees receive notice when a class is accepted. They receive information about the issues, their representative, and the proceeding's binding effect. A proposed class settlement receives notice and independent review for fairness. After a favorable final class order, members have a process for claiming individual relief and resolving disputes over entitlement. Membership alone does not guarantee an award. It provides a route to seek one based on the common finding.[76]

Under the proposal, employees who are not identified complainants lose that representative route. Notice to people already participating in joint processing does not reach the

---

[73] 29 C.F.R. § 1614.204(a)(2), (d).
[74] Proposed § 1614.204(a)-(c), (g)-(h), 91 Fed. Reg. at 55,715-16; proposed § 1614.606, id. at 55,724.
[75] Compare 29 C.F.R. §§ 1614.204(a)(2)(i), .606 with proposed § 1614.204(c)(2), (g), 91 Fed. Reg. at 55,716. Current class and joint-processing provisions.
[76] 29 C.F.R. § 1614.204(e), (g)(4), (j)-(l), particularly (l)(3) (individual relief claims).

same audience as class notice. A common discriminatory practice may remain relevant to an individual's case, and relief preventing future discrimination would remain available. But correcting a policy for the future does not compensate every employee already harmed by it. The proposed rule expressly confines individual relief to identified parties.[77]

The proposal would recognize a timely class allegation as presented in the administrative process. The individual's final decision, or qualifying agency inaction, would encompass that allegation for the specified administrative and statutory purposes. But the proposal expressly leaves courts to decide whether administrative prerequisites were satisfied, deadlines were suspended, and a class can proceed. Recording the allegation would not guarantee that a court accepts the class or protects other employees' deadlines. The proposed administrative mechanism itself supplies no deadline suspension for unidentified people.[78]

That uncertainty encourages employees to file individually to protect their deadlines. Supreme Court decisions concerning court classes recognize that such filings can defeat the efficiency of representative litigation. Those decisions do not automatically protect deadlines under this new administrative arrangement. Nor does extending a deadline for individual claims necessarily permit a later, otherwise untimely class action. Employees would lose a working administrative procedure and face new court disputes about whether their claims can proceed.[79]

The Commission points to prolonged certification disputes, extensive discovery, settlement oversight, and individual remedial proceedings. It considered revising class procedures and creating a specialized class unit. It rejected those approaches because of the demands of large-class litigation and the resources a specialized process would require. But notice, settlement review, and individual relief are also the means by which class enforcement reaches affected workers. Eliminating that work from the Commission's docket does not show that the underlying need disappears.[80]

The relevant comparison includes what replaces the class proceeding: individually sufficient filings, individual determinations, and potential court litigation. Joint processing can share evidence, but it cannot restore absent employees' representation or their claims for individual relief following an administrative class finding. The Commission's explanation does not adequately weigh those losses against its asserted savings. It has not justified abolishing this form of administrative enforcement.[81]

B. A right to representation means little if employees cannot obtain it.

An employee challenging the government may need a lawyer to identify the claims, secure evidence, examine witnesses, and defend a favorable result. The proposal retains the right

[77] Proposed § 1614.204(e)(3), (h)(1)-(4), 91 Fed. Reg. at 55,716.
[78] Proposed §§ 1614.204(b)(6)-(7), .407(d), 91 Fed. Reg. at 55,715-16, 55,721.
[79] American Pipe & Construction Co. v. Utah, 414 U.S. 538, 552-55 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349-54 (1983); China Agritech, Inc. v. Resh, 584 U.S. 732 (2018), slip op. at 1-2, 9-13 (distinguishing individual claims from successive class actions).
[80] 91 Fed. Reg. at 55,693, 55,705, 55,708 (class-processing rationale and rejected alternatives).
[81] 91 Fed. Reg. at 55,708-09 (administrability, alternatives, and reliance); State Farm, 463 U.S. at 43, 46-51 (reasoned consideration of consequences and relevant alternatives).

to a representative. It also adds demands at the start of a case and restricts the route to independent proceedings. Its fee rules must be assessed against that increased need for skilled assistance.[82]

When the law permits and the employee prevails, a fee award can require the agency to pay reasonable legal fees. That can help make representation possible. It does not promise every complainant a lawyer or payment of every bill. Current rules already require reasonable hours and rates. The concern is whether the proposed restrictions would make necessary representation harder to obtain or sustain, especially for employees unable to finance prolonged proceedings themselves.[83]

The proposal singles out fee matrices for disfavored treatment. These schedules organize evidence of hourly rates, usually by attorney experience. The proposed rule would give a matrix no weight unless the applicant supplies specific, reliable evidence connecting it to comparable federal-sector administrative work. The Commission's own decisions have used matrices alongside other evidence to determine reasonable rates. That experience deserves analysis before a broad rule treats the entire category with suspicion.[84]

The legal standard already requires proof of rates for comparable work, beyond counsel's own affidavit. Courts have rejected unsupported matrix claims and rate decisions based on the wrong comparisons. The cases require attention to the actual work and evidence; no particular matrix automatically controls.[85]

The Commission cites variability in awards and generally discounts matrices developed outside the EEO administrative process. Different awards, however, can reflect different work, experience, and markets. Variability alone does not establish unreasonable payment. Nor does a matrix's origin resolve whether evidence makes it useful for comparable work. The Commission has not shown why ordinary proof requirements are insufficient or assessed the added disputes and costs its restriction could produce.[86]

The proposed rule also creates uncertainty about recovering the cost of a dispute over payment of legal fees. Proposed § 1614.501(e)(13) would reduce or deny fees for that work after an agency makes what the rule calls a reasonable tender. It does not define what payment or offer qualifies, require a particular warning, or explain the effect of a later award exceeding that amount. Counsel and the employee must decide whether to challenge an underpayment before those questions are resolved.[87]

---

[82] Proposed §§ 1614.106, .406, .605(a), 91 Fed. Reg. at 55,712, 55,720–21, 55,724.
[83] 29 C.F.R. § 1614.501(e)(1), (2)(ii)(B).
[84] Proposed § 1614.501(e)(8)-(9), 91 Fed. Reg. at 55,723; Latricia P. v. Department of Veterans Affairs, EEOC Appeal No. 2023005251, at 11-13 (Jan. 22, 2025) (matrix, prior awards, and claimed paid-client rates).
[85] Blum v. Stenson, 465 U.S. 886, 895-96 & n.11 (1984); Eley v. District of Columbia, 793 F.3d 97, 104-05 (D.C. Cir. 2015); DL v. District of Columbia, 924 F.3d 585 (D.C. Cir. 2019), slip op. at 9-16.
[86] 91 Fed. Reg. at 55,693, 55,702 (fee-rule explanations), 55,723 (proposed § 1614.501(e)(8)-(9)).
[87] Proposed § 1614.501(e)(13), 91 Fed. Reg. at 55,723.

Reasonableness already permits rejection of unnecessary fee litigation. An additional cutoff tied to an undefined tender risks penalizing necessary work to obtain the fee actually owed. In *Commissioner, INS v. Jean*, the Supreme Court recognized how uncompensated fee litigation can dilute a statutory award. That case addressed a different fee statute, but the practical concern applies here: an entitlement can lose value if enforcing it consumes uncompensated legal work.[88]

Other changes deepen the problem. The proposal retains a 30-day deadline to request payment of legal fees but omits the existing 60-day deadline for deciding that request. It retains the basic restriction to services after a written complaint while making that complaint more legally demanding. Employees may therefore need substantial assistance before the ordinary period for compensable work begins. Removing a decision deadline adds uncertainty at the other end of the representation.[89]

Together, these provisions create foreseeable pressure to reduce representation or shift more costs to the employee. The Commission has not shown that this pressure improves discrimination enforcement. Preserving a formal right to counsel does not answer whether the proposed process makes that right practical.

C. Earlier settlement pressure would fall on employees with less information and less protection.

A formal offer of resolution is more consequential than an ordinary settlement proposal. If an employee rejects a qualifying offer and ultimately obtains no better relief, later attorney fees and costs can become unrecoverable. The current rule already permits that consequence. Before appointment of an administrative judge, however, the employee must have an attorney to receive such an offer. The existing rule also allows an exception in the interests of justice.[90]

The proposal would permit these offers at any administrative stage after the complaint is filed, including to employees without attorneys. It removes the general interests-of-justice exception. This would allow the accused agency to impose a financially consequential choice before independent questioning has tested its explanation. The employee would have to assess both the claim's value and the risk of losing recovery of the legal costs needed to prove it.[91]

The proposal requires a written explanation, at least 30 days to accept, and sufficiently specific relief. It requires comparison of monetary and nonmonetary benefits, and places the burden of establishing the cutoff on the agency. Those safeguards do not provide the employee with legal advice or the evidence needed to evaluate the offer. A warning can explain a financial risk without giving the recipient a fair opportunity to assess it.[92]

---

[88] Commissioner, INS v. Jean, 496 U.S. 154, 161-66 (1990) (Equal Access to Justice Act; reasonable fee-litigation work and reductions for unsuccessful or unnecessary work).
[89] Compare 29 C.F.R. § 1614.501(e)(1)(iv), (2)(i)-(ii)(A) with proposed § 1614.501(e)(17)-(19), 91 Fed. Reg. at 55,723. Current fee-accrual and petition-decision provisions.
[90] 29 C.F.R. § 1614.109(c)(1)-(3).
[91] Proposed § 1614.109(a), (d), (g), 91 Fed. Reg. at 55,714.
[92] Proposed § 1614.109(b), (d)-(e), (g), 91 Fed. Reg. at 55,714.

The Commission says broader use of serious offers will reduce unnecessary fees and costs. But the combined changes can pressure employees to accept less because continuing has become harder to finance. The removal of the justice exception matters when an employee reasonably rejects an early offer without information obtained later. The agency's explanation does not adequately address that circumstance.[93]

Marek v. Chesny recognizes that an authorized offer mechanism can affect later fee recovery. It does not resolve whether this expanded administrative mechanism is justified alongside reduced access to independent proceedings. The objection concerns the proposal's particular choices: earlier reach, unrepresented recipients, and loss of an express fairness safeguard.[94]

D. Eliminating interim restoration would remove pay protection while review continues.

Current § 1614.505 protects an employee when an agency appeals a judge's decision ordering retroactive restoration after removal, separation, or a continuing suspension. The agency must temporarily or conditionally restore the employee, with ongoing pay and benefits during the appeal. If returning the employee to duty would be unduly disruptive, ongoing pay and benefits must still continue. Other monetary relief can await the appeal's outcome. This protection helps an employee who has already won before the judge withstand further delay.[95]

The proposal deletes that provision. Its explanation is structural: agencies would no longer appeal judge decisions because judges would instead make recommendations to the Commission. But changing the decision's label does not eliminate the employee's need for income. A favorable recommendation could await final Commission action without the protection § 1614.505 now supplies. The Commission explains why the old trigger disappears, not why the resulting hardship is acceptable.[96]

Later protection remains under § 1614.502(b) when an agency seeks reconsideration of certain favorable Commission decisions. That does not fill the earlier gap after a judge's favorable recommendation. The distinction is consequential. The employee must first reach a final Commission decision before that later protection can apply.[97]

A system presented as faster should account for the people who bear the cost when review continues. Removing this protection transfers that burden to employees in the very cases where an independent judge would recommend restoration. The proposal offers no adequate account of that loss.

---

[93] 91 Fed. Reg. at 55,696-97 (offer-of-resolution rationale); proposed § 1614.109, id. at 55,714.
[94] Marek v. Chesny, 473 U.S. 1, 9-11 (1985) (Federal Rule of Civil Procedure 68 and fees defined as costs by the governing statute).
[95] 29 C.F.R. § 1614.505(a)-(b).
[96] 91 Fed. Reg. at 55,702-03 (reason for removal), 55,724 (instruction 29); proposed § 1614.406(k)-(l), id. at 55,721.
[97] 29 C.F.R. § 1614.502(b), unchanged by the proposal.

E. Effective enforcement requires usable procedures as well as written promises.

The proposal would codify a bar on monetary sanctions against agencies unless Congress has specifically authorized that remedy against the government. That position was already announced in the Commission's May 2025 policy. Monetary sanctions address violations of procedural rules or orders; they differ from compensation and other relief for proven discrimination. The proposal expressly preserves remedies authorized by statute. *Plaskett v. Wormuth* supplies substantial authority limiting administrative monetary sanctions under the federal-sector age-discrimination statute.[98]

The remaining lawful enforcement tools therefore matter. The Commission would retain measures such as drawing an unfavorable conclusion when a party unjustifiably withholds evidence, or excluding evidence for noncompliance. Judges would retain specified measures within the scope of a referral. But employees' access to those judge proceedings would become discretionary, and the Commission would control their scope. Retaining a tool does not answer whether an employee can obtain its timely use when an agency fails to cooperate.[99]

Commission orders would remain binding, and enforcement petitions would remain available. Settlement enforcement also would continue. The objection is that the proposal makes independent proceedings harder to obtain while removing other protections that sustain employees through a case. Its cumulative effect cannot be justified merely by listing the remedies and powers that survive.[100]

These changes would make employees more dependent on individual resources and less able to pursue relief together. They would increase the risk that financial pressure determines which claims continue and on what terms. The Commission has not justified imposing those losses on the people its administrative process exists to protect.

VI. The EEOC has not justified removing protections to address its delays.

Federal employees should not wait years for justice. The Commission reports an average of 442 days in its hearing process during fiscal years 2021–2025. For successful complainants, it reports an average of 962 days, with one in ten waiting at least 1,661 days. These figures describe serious failures. They do not establish that taking away employees' procedural protections will correct those failures.[101]

The Commission must confront the capacity and management problems documented in its own records. A system cannot provide timely adjudication without enough qualified people to do the work. Employees should not lose access to independent proceedings because the government has failed to fund, staff, and manage those proceedings adequately.

---

[98] Proposed § 1614.501(f), 91 Fed. Reg. at 55,724; EEOC, Ending Unauthorized Monetary Sanctions Against Federal Agencies (May 15, 2025); Plaskett v. Wormuth, 18 F.4th 1072 (9th Cir. 2021), slip op. at 23-29.
[99] Proposed §§ 1614.404(c), .406(a)-(b), (e), (f)(6), 91 Fed. Reg. at 55,719-20.
[100] 29 C.F.R. §§ 1614.502-.503; proposed § 1614.504(c), 91 Fed. Reg. at 55,724.
[101] 91 Fed. Reg. at 55,691 & n.1. The 442-day measure runs from docketing of a hearing request to the judge's decision; the notice separately reports longer times for successful complainants.

A. The Commission must address staffing, funding, and management failures.

The EEOC's Inspector General identified shrinking staffing and management turnover as major challenges for fiscal year 2026. The assessment described departures through the Deferred Resignation Program, retirements, and a prolonged hiring freeze. It warned that staff losses and turnover would likely reduce the agency's output. It specifically identified federal-sector hearing and appeal inventories as vulnerable while fewer judges and attorneys were available to work on them.[102]

The Commission's later performance report confirms substantial actual losses across the agency. It reports beginning fiscal year 2026 with 1,809 employees, down from 2,170 a year earlier. Federal-sector operations were among the offices most affected. The report acknowledges workforce shortfalls and plans targeted hiring. Those agencywide counts are distinct from the number of judges available to hear federal employees' cases.[103]

Recent workload figures show the pressure on judges. From fiscal year 2023 to 2025, incoming hearing requests rose from 6,641 to 7,175, about 8 percent. Available judges fell from 97 to 89 over those years. Hearing requests fluctuate; the 2025 total was below the 7,752 received in 2015. The problem is not an uninterrupted increase in requests. It is the Commission's responsibility to provide enough qualified people for the work it actually faces.[104]

The Commission's fiscal year 2027 budget projects a further reduction to only 58 available administrative judges in each of 2026 and 2027. That is about one-third below the 2025 level. Yet it assumes 7,175 incoming hearing requests in each of those years. Under that forecast, substantially fewer judges would face the same incoming volume. Its projected growth in pending hearings describes pressure under the staffing plan, not a tested result of the later proposed rewrite.[105]

The funding request also deserves scrutiny. While seeking about $20 million more agencywide for fiscal year 2027 compared with fiscal year 2026, the Commission budgets no increase for federal-sector enforcement. Its funding profile holds that program at about $64.5 million, below the $72.7 million reported for fiscal year 2025. Within that flat total, hearing funding rises modestly while appeal funding falls. These are the budget's program allocations,

---

[102] EEOC, Fiscal Year 2025 Agency Financial Report 60–61 (Inspector General's Management Challenges for Fiscal Year 2026). The assessment disclosed limits on obtaining and verifying updated year-end information.

[103] EEOC, Fiscal Year 2027 Agency Performance Plan and Fiscal Year 2025 Agency Performance Report 54 (beginning-of-year employee headcounts, including full- and part-time employees).

[104] EEOC, FY 2027 Congressional Budget Justification 28–29, tbl. 9 & chart 4 (actual hearing receipts and available judges, 2023–2025); EEOC, FY 2019 Congressional Budget Justification, tbl. 7 (actual 2015 hearing receipts). These counts measure requests, not live hearings, case complexity or hours of work.

[105] EEOC, Fiscal Year 2027 Congressional Budget Justification 28–29, tbl. 9 & chart 4. Fiscal year 2025 is actual; 2026 and 2027 are estimates. The available-judge forecast was updated March 11, 2026, before the proposed rule.

not separate statutory appropriations. The Commission must explain why its request does not restore the hearing capacity its own budget projects losing.[106]

The longer funding history also matters. The EEOC's enacted funding rose from $364.5 million in fiscal year 2015 to $455 million in 2024, an increase of about 25 percent. National consumer prices rose about 32 percent across the corresponding calendar years. On that broad inflation measure, the appropriation lost roughly 6 percent of its purchasing power. Funding remained $455 million in fiscal year 2025. These agencywide figures do not measure the hearing program's exact costs. They show why a larger dollar amount can still leave an agency with less capacity to buy the resources it needs.[107]

The notice itself points to management problems. It describes decision-ready cases sitting for months while judges prioritize easier closures. If cases are ready for decision, their continued delay cannot be explained simply by a need to eliminate discovery or hearings. It calls for attention to assignments, supervision, performance expectations, and available staff. The Commission has not shown why removing employee choice addresses those causes better than correcting them.[108]

The workload problem has a documented history. In 1999, Congress's audit agency (GAO) found that hearing and appeal inventories grew as workloads outpaced gains in judges' and attorneys' productivity. People were completing more cases, but incoming work grew faster. The report also recognized that then-planned staffing increases might remain insufficient for the incoming volume. The lesson is to match capacity to the work, rather than assume any hiring increase will suffice.[109]

In 2009, GAO reported practitioners' accounts that staffing and funding shortages impeded timely EEO processing. One judge described copying and filing documents and arranging travel because support staff were lacking. That historical account does not measure

[106] EEOC, Fiscal Year 2027 Congressional Budget Justification at 7–8, tbls. 1–2. The federal-sector funding profile is $72.746 million for 2025 and $64.524 million for both 2026 and 2027. Within that total, the hearing line rises from $34.762 million in 2026 to $35.377 million in 2027; the appeal line falls from $21.082 million to $20.062 million.
[107] EEOC, Budget and Staffing History 1980 to Present, Enacted column, 2015, 2024 and 2025 rows; BLS, Summary of Annual and Semi-annual Indexes, CPI-U, U.S. city average, annual averages: 237.017 (2015) and 313.689 (2024). Adjusting the funding amounts for these price indexes yields a 5.68% purchasing-power decline. This comparison pairs fiscal-year funding with calendar-year prices; CPI-U is a broad benchmark, not an EEOC operating-cost index. The price comparison ends in 2024 to use complete twelve-month annual averages.
[108] 91 Fed. Reg. at 55,691.
[109] GAO, Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear, GAO/GGD-99-128, at 13–14 (1999). The report also discussed other contributors, including fragmented complaints; it did not attribute every delay to staffing.

today's offices. It illustrates why a judge's time cannot be assessed without asking what other work the agency requires the judge to perform.[110]

The Commission's own results also show that performance can change within the existing system. Its pending hearing inventory fell from 14,885 in fiscal year 2017 to 6,009 in 2024, then rose to 6,986 in 2025. Its later budget reports a 2025 appellate reorganization and increased appeal resolutions. It projects a declining appeal inventory despite fewer assigned appeals attorneys. Those mixed results require attention to management, staffing, and case mix; they do not establish that either more staff alone or fewer procedural rights will solve every delay.[111]

Southworth PC's position is that the Commission should seek the funding needed to hire and retain qualified judges, attorneys, and support staff. It should protect time for adjudication, train personnel, and manage aging cases. Substantially greater investment in that capacity deserves serious consideration before protections are taken away. Congress controls appropriations; the Commission must identify its needs and account for how it deploys the resources available to it. Resource scarcity does not itself establish that the rights of federal employees are the wrong place to spend those resources.[112]

The present record supplies substantial support for a staffing and management explanation of delay. It does not isolate how much each cause contributes. The Commission has not shown why removing protections better addresses those documented bottlenecks than funding, staffing, and management changes.

B. A low rate of live hearings does not show that judge proceedings lack value.

The Commission emphasizes that relatively few hearing requests end in live hearings or findings of discrimination. It reports annual averages of 7,514 requests, 304 hearings, and 128 liability findings for fiscal years 2017–2025. It then asserts that the process directs nearly all the parties' and judges' time, resources, and expertise into cases without merit. Those figures do not establish that conclusion. Requesting judge proceedings and needing a full evidentiary hearing are different things. Judges also resolve motions, supervise development of the case, identify disputed issues, and help cases reach resolution without a trial.[113]

A system in which most cases end before live testimony is not necessarily wasting its resources. Some cases settle because the parties have obtained evidence or tested their positions. Independent decisions can resolve claims without live testimony. Some disputes narrow enough

---

[110] GAO, Equal Employment Opportunity: Pilot Projects Could Help Test Solutions to Long-standing Concerns with the EEO Complaint Process, GAO-09-712, at 13–14 (2009). These passages report stakeholder accounts, including the judge's support-staff example at page 13.
[111] EEOC, Fiscal Year 2024 Annual Performance Report 48 (2017 and 2024 hearing inventory). FY 2027 Congressional Budget Justification 28–30, tbls. 9–10 (2025 hearing inventory, appellate reorganization and forecasts). The appellate workload includes multiple categories of appeals.
[112] See FY 2027 Congressional Budget Justification 1, 7–8 (funding request and program allocations); FY 2027 Agency Performance Plan and FY 2025 Agency Performance Report 54 (workforce shortfalls and targeted hiring).
[113] 91 Fed. Reg. at 55,692, 55,705. For judges' current discovery and adjudication responsibilities, see 29 C.F.R. § 1614.109(d), (g)–(i). Current § 1614.109.

to avoid a hearing. The relevant question is what the proceedings accomplish compared with their cost and with the process that would replace them. Counting live hearings alone does not answer it.

The Commission also reports an average of 2,283 settlements a year during the same period. Those resolutions are another reason that the process cannot be evaluated by counting live hearings and liability findings alone.[114]

A separate limitation affects comparisons between incoming requests and later outcomes. A case received in one year may settle or reach a decision in another. Annual averages do not follow the same employees from filing to final relief. Those aggregate figures alone cannot establish an employee's probability of obtaining a hearing or proving discrimination. Nor can the absence of a liability finding classify a settled or withdrawn case as meritless.[115]

The hearing program's other reported results show why a narrow outcome count is inadequate. In fiscal year 2024, the EEOC reported resolving 6,679 hearing requests and obtaining more than $181.4 million in benefits. That amount included more than $90 million from significant class settlements. Its latest report records 6,178 resolutions and almost $78.1 million in benefits for fiscal year 2025. These figures do not prove discrimination in every settled case or establish what a typical year will produce. They do show substantial relief that a count of adjudicated liability findings does not capture.[116]

The notice also asserts that judge decisions do not appear materially more accurate than decisions agency EEO offices could produce. Yet the cited discussion supplies no comparative study establishing that equivalence. The EEOC's own evaluations reported hearing cases generally meeting its quality criteria for legal analysis, accuracy, and clarity. Those internal measures do not establish superiority over agency decisions. Neither do they justify assuming that the two processes produce interchangeable results.[117]

The Commission may reduce unnecessary work. It must first distinguish unnecessary work from work that produces a settlement, a reliable adverse decision, or a better-defined dispute. The proposal's central inference skips that distinction.

C. Requiring more agency decisions does not establish that agencies can issue them promptly.

The proposed process depends on agencies completing investigations and issuing their own final merits decisions before ordinary Commission review. The Commission expects that

---

[114] 91 Fed. Reg. at 55,705 (average annual settlements, fiscal years 2017–2025).
[115] 91 Fed. Reg. at 55,692, 55,705 (annual averages, not a disclosed group of cases followed from request to outcome). The notice does not establish that all reported liability findings followed the reported live hearings.
[116] FY 2024 Annual Performance Report 48; FY 2027 Agency Performance Plan and FY 2025 Agency Performance Report 44. Monetary benefits are relief obtained, not a measure of net administrative cost savings.
[117] 91 Fed. Reg. at 55,691; FY 2024 Annual Performance Report 22–23 (quality criteria and hearing-case results). The agency's quality measures are not a comparative merits-accuracy study of judge decisions and agency decisions.

responsibility to improve agency performance. Its existing evaluations identify obstacles that a new obligation alone will not remove.[118]

The EEOC's 2023 evaluation reported that only 47 percent of agencies' merit decisions were timely in fiscal year 2021. The comparable reported figure for 2018 was 61 percent. The study identified problems involving staffing, funding, recruitment, and review delays. These are historical findings, not a measurement of every agency today. They are concrete reasons to examine capacity before relying on agency decisions as the new system's foundation.[119]

The evaluation also identified practices intended to improve performance, including accountability, training, tracking, and timely review. Those qualitative findings drew on voluntary responses from 61 agencies and selected follow-up work. The Commission's 2024 evaluation of decision-writing contractors likewise reported uneven experiences and insufficient staffing for review of draft decisions. Hiring a contractor still leaves an agency responsible for supervising and evaluating the work.[120]

The proposal would shorten the ordinary investigation period to 135 days, with a transitional 180-day period for specified earlier filings. It then allows 15 days for additional evidence and requires a final agency decision within 30 days after the record closes. It also requires notice when an agency misses its deadline. These provisions establish obligations and notices. They do not establish that agencies have enough qualified personnel to meet the new demands.[121]

Processing-time comparisons must also use the same starting and ending points. The notice's 442-day figure begins when the hearing request is docketed. It excludes earlier agency processing and later implementation or appeal. Agency-decision data use different clocks and include different types of dispositions. A shorter figure for one stage cannot establish that an employee will obtain final relief sooner under the entire replacement process.[122]

The Commission therefore needs current evidence of decision-writing and review capacity, and a supported assessment of performance under the projected workload. Requiring an agency to decide more cases does not itself supply the people or time needed to decide them well.

---

[118] Proposed §§ 1614.108(g), .110, .401, 91 Fed. Reg. at 55,714–15, 55,718; id. at 55,708 (expected improvement in agency incentives).
[119] EEOC, Timeliness of Merit Final Agency Decisions in the Federal Sector 2–3, 19 (2023), especially tbl. 1 (governmentwide Form 462 data for fiscal years 2018–2021).
[120] Id. at 3, 19–20 (survey methods, reported obstacles and practices); EEOC, Use of Contractors and Agency Agreements for Drafting Merit Final Agency Decisions 4–6, 8–9 (2024).
[121] Proposed §§ 1614.108(e)–(h), .110, 91 Fed. Reg. at 55,713–14. The transitional 180-day investigation period applies to complaints filed after the effective date but before January 1, 2028. Section 1614.108(e) also provides specified extensions. The 15-day evidence period runs from receipt of the investigative file.
[122] 91 Fed. Reg. at 55,691 n.1; EEOC, Timeliness of Merit Final Agency Decisions in the Federal Sector 1–3 (2023).

D. The cost model rests on assumptions that do not establish an efficient replacement.

The notice estimates approximately $16.1 million in one-time costs and $9.2 million in recurring annual costs. The estimates depend on inadequately explained assumptions and an incomplete comparison of costs and benefits. The Commission leaves its expected savings unquantified.[123]

Its largest recurring estimate assigns six additional staff hours to preparing an agency decision in each matter that otherwise would enter the judge process. Applied to 7,514 matters, that produces about $5.35 million annually. These are additional hours, not a claim that the agency spends only six hours on the entire case. The Commission argues that agencies already spend substantial time on litigation, discovery, settlement, and final orders under current procedures.[124]

That is a reason to compare the work under both systems. It does not establish that six additional hours is a sound average. The evaluation of decision-writing contractors documents the need for review and correction but supplies no validation of that estimate. The notice needs a basis for the assumed hours, the mix of staff, and the treatment of complex cases. It also must identify what existing work would actually be avoided.

The appellate estimates present similar questions. The notice uses 4,343 annual appeals, adds half an hour of review per appeal for possible referral, and assumes approximately 10 percent will be referred. The cost model assumes these figures; the rule does not impose them. A referral itself may involve only a limited issue or further development rather than live testimony.[125]

The Commission has not demonstrated how those assumptions reflect the new stream of mandatory agency decisions and requests for judge proceedings. Some appeals after current judge decisions could disappear; other appeals could arise from the new agency decisions. The analysis must account for both and avoid counting the same case twice. It must also show that its referral allowances capture the work those decisions require, and account for the resulting proceedings. Carrying forward historical appeal volume does not establish the replacement system's workload.[126]

---

[123] 91 Fed. Reg. at 55,705–07. Published totals are $16,063,600 in one-time costs and $9,201,839 in recurring annual costs, before unquantified savings. The listed calculations reproduce using the underlying, unrounded wage rates. These totals cover the full proposal, including Cummings Act implementation, and are not estimates of net costs.

[124] 91 Fed. Reg. at 55,705–06 (four additional GS-14 hours and two additional GS-13 hours per decision; 7,514 decisions; $5,348,525 annually).

[125] 91 Fed. Reg. at 55,706–07 (4,343 appeals; half an additional GS-14 hour of referral review per appeal; 434 assumed referrals). Compare proposed §§ 1614.404–.406, id. at 55,719–21: these estimates do not impose a review-time cap or a referral quota.

[126] 91 Fed. Reg. at 55,706–07. The model separately includes four GS-14 hours for each of 434 referral orders and time for agency referral requests. The objection concerns the support and adequacy of these allowances, not omission of every referral-related cost.

E. Moving work to employees, agencies, and courts is not the same as eliminating it.

An employee who needs independent proceedings would face a new sequence: an agency decision, an appeal, a referral determination, any authorized judge proceedings, and a final Commission decision. The Commission could instead seek further information or return the matter to the agency. These options may resolve some cases efficiently. They also create additional decisions and opportunities for repeated processing when the initial path does not resolve the dispute.[127]

The proposed appellate timetable uses best efforts to decide an appeal within 180 days after receiving it. It also calls for action within 90 days after receiving the completed judge recommendation and record. Those standards do not guarantee the elapsed time through every stage. The Commission has not supplied a supported comparison of the complete pathways, including repeated returns to agencies, expanded referrals, and implementation of relief.[128]

The proposed reporting rules would not fully show what happens to employees seeking independent proceedings. They require counts and timing for matters actually referred to judges. They do not expressly require counts of denied or waived requests, reasons for denial, or time spent deciding whether to refer. Overall appeal time would still be reported, but those separate effects would remain difficult to identify.[129]

The proposal also changes the reporting definition of an investigation. That period can extend through the agency's merits decision, although the processing rule separates completion of the investigative file from the later decision. The Commission must explain how old and new results will remain comparable. Claims of greater efficiency cannot be tested reliably without distinguishing the work and delay at each stage.[130]

For employees and representatives, the cost model chiefly measures becoming familiar with the new rules. It assumes one hour in the first year and half an hour in later years. That is not an estimate of the work needed to prepare an appeal, explain why judge proceedings are necessary, respond to additional submissions, or pursue relief through repeated proceedings. Some existing discovery and briefing costs could fall. The notice does not measure those reductions against the new burdens.[131]

---

[127] Proposed §§ 1614.404–.406, id. at 55,719–21 (supplementation, agency remand, referral, judge proceedings and Commission action).
[128] Proposed § 1614.405(d), id. at 55,719. The 90-day period begins when the Office of Federal Sector receives the judge's recommendation, findings or report, together with any hearing record.
[129] Proposed § 1614.707(a)–(b), 91 Fed. Reg. at 55,727; see also proposed § 1614.702(g)–(h), id. at 55,725.
[130] Proposed § 1614.702(d), 91 Fed. Reg. at 55,725; compare proposed § 1614.108(e)–(h), id. at 55,713–14, and proposed § 1614.705, id. at 55,726. The reporting definition also recognizes dismissal, other final action, and termination upon a civil action. Compare current 29 C.F.R. § 1614.702(c).
[131] 91 Fed. Reg. at 55,705–07 (employee and representative familiarization assumptions). These estimates do not purport to price all case-specific participation under the proposed process.

Federal-court substitution is part of the Commission's own account of the proposal's benefits. If employees turn to court for useful evidence development and adjudication, agency counsel, Justice Department attorneys, and federal judges must perform that work. Employees also face the expense and demands of federal litigation. The published estimate does not quantify those changes. A cost does not disappear because it moves off the EEOC's docket.[132]

Some employees may instead abandon claims they cannot afford to pursue. Fewer pending cases would then reflect lost enforcement rather than more effective justice. The available record does not support a numerical forecast of that loss. The consequence still belongs in the agency's analysis of whether its new process will fairly serve federal employees.

F. The Commission's explanation does not justify the loss of these protections.

The Commission rejected stronger case management while retaining employee-requested judge proceedings. It reasoned that too many cases would still enter that process, even though it considers few to benefit from hearings. That reasoning does not account for the value of discovery, motion decisions, and settlements explained above. Its expectation that mandatory agency decisions will improve incentives likewise does not resolve documented staffing and review bottlenecks.[133,134]

Under *State Farm*, the Commission must examine relevant facts, consider important consequences, and connect its reasons to its choice. *Fox* does not require proof that a new policy is better than the old one. It still requires a reasoned explanation. Here, the Commission has not adequately separated capacity failures from procedural burdens or supported its replacement's workload assumptions.[135]

Employees should not surrender independent protections to accommodate failures to fund, staff, and manage timely adjudication. The proposed rewrite should be withdrawn.

VII. The proposal risks more litigation and diminished confidence in the EEOC.

The proposal treats federal court as the more appropriate forum for complaints requiring extensive discovery or lengthy proceedings. That position would change what federal employees can expect from the administrative process. Employees who need substantial evidence development would face greater pressure to leave that process and litigate.[136]

---

[132] 91 Fed. Reg. at 55,693, 55,705–08 (court access rationale and regulatory cost-benefit discussion). The predicted direction and extent of substitution require evidence; no numerical litigation increase is asserted here.
[133] 91 Fed. Reg. at 55,708. The Commission considered discovery limits, case-management standards, summary-judgment procedures and hearing-selection criteria while retaining employee-requested judge proceedings. It separately rejected eliminating all judge proceedings.
[134] 91 Fed. Reg. at 55,708 (agency incentives); proposed §§ 1614.404–.406, id. at 55,719–21 (referral structure).
[135] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 46–52 (1983); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).
[136] 91 Fed. Reg. at 55,693 (court as the proposed avenue for lengthy formal proceedings or extensive discovery).

Southworth PC opposes that shift. The government should provide a credible opportunity to resolve discrimination complaints before a lawsuit becomes necessary. Employees need a process capable of testing their claims, correcting discrimination, and explaining adverse decisions fairly. Restricting independent proceedings threatens that function. Preserving the legal right to sue does not answer the practical consequences.

A. Congress provided administrative enforcement to resolve disputes before court becomes necessary.

Section 717 of Title VII assigns the Commission an affirmative enforcement role. It authorizes appropriate remedies and rulemaking to carry out the federal government's nondiscrimination obligations. The statute also provides a civil action. Congress created an administrative remedy and a judicial remedy that can serve complementary purposes.[137]

In *West v. Gibson*, the Supreme Court upheld the EEOC's authority to award compensatory damages in administrative proceedings. The Court explained that effective administrative relief encourages quicker and less expensive resolution outside court. Denying that relief would force into litigation matters the Commission could otherwise resolve. Employees and the government would bear additional time and expense.[138]

West concerned the Commission's remedial authority. Its reasoning identifies a problem with the proposal's reliance on lawsuits: removing useful administrative protections can make court necessary in cases that could have been resolved earlier. Even a case requiring substantial evidence development may be resolved through useful administrative proceedings. The Commission must justify why the proposed restrictions improve enforcement in those cases.

Chandler v. Roudebush confirms that federal employees may obtain a fresh determination of their Title VII claims in court. The court decides the discrimination claim itself, rather than merely reviewing the EEOC's decision for error. But *Chandler* also recognizes that administrative findings may become evidence in court and that earlier proceedings may narrow the issues. Administrative work can therefore remain valuable even when it does not end the dispute.[139]

The EEOC argues that its process should provide a speedy, informal alternative to litigation. It need not copy every feature of a federal lawsuit. That distinction still leaves the Commission responsible for explaining what its alternative can accomplish. A process that postpones necessary independent examination until court may add a preliminary stage without providing the administrative resolution Congress sought.[140]

---

[137] 42 U.S.C. § 2000e-16(b)–(d).

[138] West v. Gibson, 527 U.S. 212, 218–23 (1999), particularly 219 (administrative resolution and burdens of forced court proceedings). Its holding concerns administrative compensatory damages; it does not require every feature of the present hearing process.

[139] Chandler v. Roudebush, 425 U.S. 840, 863–64 & n.39 (1976). This describes a Title VII merits action for de novo adjudication, not a suit confined to enforcing an existing award. Admissibility of administrative findings remains subject to applicable evidence rules.

[140] 91 Fed. Reg. at 55,693; West, 527 U.S. at 218–19.

B. A right to sue does not give every employee a practical substitute for judge proceedings.

The proposal preserves the principal statutory routes to court. An employee does not have to complete every Commission appeal or referred judge proceeding before a lawsuit becomes available. For an ordinary Title VII complaint, court access depends on final action and the applicable filing or waiting period. Other statutes and mixed cases have distinct rules. These differences matter when evaluating whether court actually provides a usable alternative.[141]

Preserving those routes does not mean an employee can move to court at any time without consequence. An employee who files a lawsuit on the same complaint ordinarily ends the administrative proceeding. Choosing court can therefore mean giving up further administrative review, including a pending referral. The employee must assess that choice while facing different procedures, deadlines, and litigation demands.[142]

Federal litigation requires a legally sufficient complaint and compliance with court rules. Discovery is subject to judicial control and proportionality. Motions may resolve a case before trial. A civil action can provide powerful means to obtain evidence and test a claim, but neither discovery nor a trial follows automatically from filing it. The proposal cannot treat court as a guaranteed answer to every limitation it creates administratively.[143]

The employee must also secure the time, assistance, and resources to pursue the case. Title VII permits attorney-fee awards and authorizes courts to appoint counsel in appropriate circumstances. Courts may also allow a case to begin without payment of fees, costs, or security. Those provisions do not guarantee a funded lawyer at the outset of every case. An employee may have a legally available lawsuit but be unable to obtain representation on workable terms.[144]

The problem can be especially acute after a loss of income or during continuing workplace retaliation. The employee must decide whether the relief sought justifies the cost and demands of litigation. These are foreseeable access barriers, not reasons to discount the underlying discrimination claim. The Commission's analysis must address employees who need independent proceedings but cannot realistically pursue the court substitute it recommends.

---

[141] 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(a)–(g). Ordinary routes include suit within 90 days of receipt of agency final action, subject to paragraph (e)'s appeal-withdrawal rules; after 180 days from complaint filing without final action; within 90 days of receipt of the Commission's final appeal decision; or after 180 days from appeal filing without a final decision. See also §§ 1614.201(a), .302(d), .310, .408 for distinct age-discrimination, mixed-case and Equal Pay Act rules. Proposed § 1614.407(a)–(e), 91 Fed. Reg. at 55,721–22, retains the principal routes and addresses appeal/reconsideration withdrawal and referrals.

[142] 29 C.F.R. §§ 1614.107(a)(3), .409 (current agency dismissal and Commission appeal-processing rules); proposed §§ 1614.406(m), .407(e), .409, 91 Fed. Reg. at 55,721–22 (filing a civil action terminates processing of the same complaint, including judge proceedings).

[143] Fed. R. Civ. P. 8(a)(2), 12(b)(6), 26(b)(1), 56(a).

[144] 42 U.S.C. § 2000e-16(d), incorporating § 2000e-5(f)–(k) as applicable. Section 2000e-5(f)(1) addresses discretionary appointment and commencement without fees, costs or security; § 2000e-5(k) addresses prevailing-party attorney and expert fees.

C. Restricting judge access can send unresolved disputes to court instead of resolving them.

Under the ordinary proposed route, the employing agency would issue the first merits decision on a complaint accepted for processing. The employee could appeal and request judge proceedings, but the Commission would decide whether those proceedings are necessary or efficient. The proposal identifies material credibility disputes as a possible ground for referral. It also permits the Commission to confine a referral to particular issues or evidence. That structure would make the availability and scope of judge proceedings less certain than the employee's present ability to invoke them.[145]

Suppose an employee's case turns on conflicting accounts of a supervisor's decision. The employee believes questioning witnesses is necessary to test the explanation. Under the proposal, the employee must assess whether an appeal will produce a useful referral and whether its scope will permit the necessary examination. When court becomes available, that uncertainty may favor filing suit rather than continuing administratively.

The resulting lawsuit may require lawyers and a federal judge to address issues that useful administrative proceedings could have resolved or narrowed. The employee's choice can thus be understandable while the government's overall process becomes less efficient. As Section VI explains, counting fewer administrative proceedings does not establish that the underlying work disappears.

The effect could reach settlement as well. Parties can assess a claim more realistically when important evidence has been obtained and conflicting explanations have been tested. If those steps are deferred until court, a dispute that could have settled administratively may remain unresolved longer. Those opportunities can help resolve disputes before the parties must incur the costs of a lawsuit.

The direction and size of any litigation increase require evidence. Some employees will still obtain effective administrative relief; some disputes may conclude sooner. Others may leave for court or abandon claims they cannot afford to pursue. The Commission has not supplied a reasoned account of those different responses. Its assertion that a lawsuit remains available cannot substitute for examining how the proposal changes the need to bring one.[146]

D. Confidence depends on meaningful independence and a fair opportunity to be heard.

Employees are being asked to bring discrimination complaints against the agencies that employ them. The process must give them reason to believe those complaints can receive an independent and serious examination. That confidence matters before a complaint is filed, during efforts to resolve it, and when an employee decides whether to accept an adverse result.

The Supreme Court discussed this problem in *Brown v. General Services Administration*. Recounting the history behind the 1972 amendments, the Court described Congress's concern

---

[145] Compare 29 C.F.R. §§ 1614.108(f), .109(a), with proposed §§ 1614.110, .401, .406(a)–(i), 91 Fed. Reg. at 55,714–15, 55,718, 55,720–21. Current access to judge proceedings does not guarantee a live hearing in every case.

[146] 91 Fed. Reg. at 55,693, 55,705–08 (court-access rationale and published cost-benefit discussion). The possibilities discussed here are consequences requiring assessment, not measured changes in filing behavior.

about employees' skepticism toward administrative remedies. That skepticism discouraged complaints because employees feared antagonizing supervisors without obtaining a just resolution. This was a historical account of the earlier system. It nevertheless identifies a concrete enforcement concern: employees may stop using a process they do not trust.[147]

The EEOC recognized related concerns in its 1999 reforms, discussed in Section II. It strengthened judges' authority to address a conflict of interest and perceived unfairness. Those concerns remain relevant when deciding whether employees can obtain independent examination of their complaints.[148]

The present proposal would retain final Commission review. It would not restore the employing agency's former authority to reverse an existing judge decision. But it would require agency merits decisions first and restrict how employees obtain independent judge proceedings afterward. The Commission must explain how that allocation of authority addresses the confidence concerns it previously identified. A promise of later review does not establish that employees can obtain the examination their disputes require.[149]

The proposal also recognizes the need to protect agency EEO programs from control by agency counsel and human resources offices. Those safeguards operate within the employing agency. They do not make an agency's first decision equivalent to proceedings before a judge outside that agency. The Commission must evaluate both protections according to what they actually accomplish.[150]

This objection concerns the structure of the process, not an accusation that every agency official acts in bad faith. In *Withrow v. Larkin*, the Supreme Court rejected the proposition that combining investigative and adjudicative functions necessarily violates due process. It also explained how a later adversarial hearing could give the decisionmaker a more complete view of the evidence. Those proceedings allow the parties to contest the case presented against them. The Commission must explain why its restrictions adequately preserve that opportunity when a fair decision requires it.[151]

The proposal would also expressly authorize summary affirmance of certain agency decisions, dispensing with the Commission's usual written reasons. Current § 1614.405(a)

---

[147] Brown v. General Services Administration, 425 U.S. 820, 825–26 & nn.5–6 (1976) (recounting congressional findings about the pre-1972 process). Brown's holding concerns § 717's exclusive remedial scheme; the history is not a contemporary survey or a holding that every current procedure is mandatory.
[148] 64 Fed. Reg. 37,644, 37,649–50 (July 12, 1999).
[149] 91 Fed. Reg. at 55,690; proposed §§ 1614.404–.406, id. at 55,719–21. Section 1614.405(a) retains de novo Commission review on the administrative record. The objection concerns access to independent proceedings, not elimination of independent final Commission authority.
[150] 91 Fed. Reg. at 55,693–94; proposed § 1614.102(b)(4), id. at 55,711 (agency EEO-program safeguards and direct reporting).
[151] Withrow v. Larkin, 421 U.S. 35, 46–48, 57–58 (1975). The Court upheld the combined functions on the record before it and recognized a presumption of adjudicator honesty and integrity. Its discussion of a later adversarial hearing does not establish a universal constitutional right to current EEOC procedures.

requires a written decision explaining the result. The proposed exception applies only when there is no material factual dispute, no arguable legal error, and no issue warranting written discussion. Those limits matter. The agency's underlying reasons would also remain available. But they do not tell an employee why the independent reviewer rejected the employee's objections. The Commission must justify that loss of explanation, especially when appellate review is the employee's principal administrative safeguard against the agency's decision.[152]

An employee can receive an unfavorable decision after a fair process. Independent questioning and a reasoned explanation can help show why the evidence does not establish discrimination. A system that restricts those opportunities risks leaving employees with a different impression: their employer's explanation prevailed without a meaningful chance to test it. That foreseeable loss of confidence deserves analysis even when an appeal or lawsuit remains legally available.

E. The Commission must address the consequences for participation and enforcement.

If fewer employees pursue viable complaints, agencies lose opportunities to correct discrimination and the EEOC loses opportunities to resolve disputes. Those consequences belong in the Commission's analysis. Under *State Farm* and *Fox*, the Commission must address important aspects of its choice and relevant earlier findings. Its emphasis on speed does not explain how restricting independent protections will preserve participation, improve resolution, or maintain confidence.[153]

Federal employees should have a meaningful administrative remedy, backed by access to court. They should not be pushed toward a lawsuit because the government has made its own discrimination process less capable of resolving their claims.

VIII. The Commission must address its statutory responsibilities and existing cases.

The Commission is responsible for enforcing federal employees' rights. That responsibility includes overseeing agency programs, seeking informed recommendations, and accounting for employees who have already invoked the existing process. A rewrite of this scope must address all three.

The proposal leaves consequential questions unresolved. Its accountability provisions do not justify restricting independent proceedings. Its published explanation does not identify how the Commission fulfilled its statutory consultation duty. And its general assurances about reliance do not tell employees what will happen to cases already underway.

A. Congress made agency capacity part of the Commission's responsibility.

Title VII gives the Commission authority to provide appropriate remedies and issue rules necessary to carry out its responsibilities. Congress also assigned specific oversight duties. The Commission must review agency equal employment opportunity plans and evaluate agency

---

[152] 29 C.F.R. § 1614.405(a); proposed § 1614.405(a), 91 Fed. Reg. at 55,719 (summary affirmance where there is no material factual dispute, no colorable legal error, and no issue warranting written discussion).
[153] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 46–52 (1983); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).

programs. Those plans must describe responsible officials' relevant training and experience, along with the proposed allocation of personnel and resources.[154]

These requirements bear directly on the capacity problems discussed in Section VI. The statutory framework calls for scrutiny of whether agencies have qualified personnel and adequate resources to perform their duties. A prediction that agencies will assume more decisionmaking work does not establish that they can perform it promptly and fairly.

The statute does not prescribe a particular budget or freeze every administrative procedure. It does make effective enforcement the purpose of the Commission's authority. The proposed transfer of work requires a supported assessment of agency capacity. Removing employees' access to existing protections does not supply missing personnel or improve their qualifications.

B. The Cummings Act's accountability requirements do not justify the broader rewrite.

The Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 strengthens accountability for discrimination within federal agencies. It requires public reporting, complaint tracking, and specified disciplinary information. It also requires fair and impartial complaint processing and protects agency EEO programs from structural or practical control by human resources and general counsel offices. The EEO program's head must report directly to the agency head.[155]

Those requirements address concrete institutional risks. The office responsible for enforcing employees' rights must be able to exercise its own judgment. Direct reporting helps protect that function. The separate prohibition against practical control matters as well: an organization chart alone cannot establish who actually controls a program's work.

Proposed § 1614.102(b)(4) expressly requires direct reporting and bars intermediary reporting relationships. Proposed § 1614.607 preserves that relationship when authority is delegated and recognizes legal limits on delegation. The Commission should also address how its revised framework will enforce the Act's separate protection against structural and practical control. That statutory protection remains binding even where the proposed regulatory language does not restate it.[156]

The Act also preserves advice or counsel provided by agencies, agency components, and the Department of Justice to agency employees resolving complaints. That permission is compatible with an EEO program exercising independent judgment. It does not erase Congress's

---

[154] 42 U.S.C. § 2000e-16(b), including the Commission's duties in paragraphs (1)–(2) and the agency-plan requirements following paragraph (3).

[155] Pub. L. No. 116-283, div. A, tit. XI, subtit. B, §§ 1133–1137, 134 Stat. 3900–04 (2021), particularly § 1137(b), adding No FEAR Act §§ 401–403, 134 Stat. 3903–04 (codified at 5 U.S.C. § 2301 note). The Act's short title uses 2020; enactment occurred January 1, 2021.

[156] Proposed §§ 1614.102(b)(4), .607, 91 Fed. Reg. at 55,711, 55,724; see also id. at 55,693–94 (Cummings Act explanation).

separate restrictions on control. As agencies assume greater responsibility for initial merits decisions, the Commission must explain how these requirements will operate together.[157]

Nothing in these accountability provisions directs the Commission to abolish administrative classes or restrict employees' access to judge proceedings. The Commission itself states that the Cummings Act provisions can operate independently of the judge-referral provisions. Congress's accountability requirements therefore supply no reason to adopt the contested restructuring as a package.[158]

C. The rulemaking record must show meaningful consultation and an informed basis for change.

Congress expressly directed the Commission to consult with interested individuals, groups, and organizations and solicit their recommendations about equal employment opportunity. Employees and practitioners can explain how proposed rules will operate in actual disputes. Their participation bears directly on whether the Commission's assumptions are sound.[159]

Southworth PC asks the Commission to explain how it is fulfilling that duty in considering this rewrite. That account should identify the participants, subjects addressed, recommendations received, and the Commission's response. The notice invites comments. It does not explain how that process and any related outreach satisfy the statutory responsibility. The available record does not establish that no consultation occurred. The Commission should supply the missing account before adopting the rewrite.

The Commission also must confront the substantive gaps in its published justification. Section VI identifies assumptions about staffing, agency decision-writing, appeals, and referral work that remain inadequately supported. Section V identifies consequences of replacing administrative class proceedings with individual processing. The Commission should disclose material supporting analyses and allow a meaningful opportunity to address them before a final decision. If the estimates rest on judgment rather than additional studies, it should say so and explain that judgment. A materially new factual or analytical basis requires an opportunity for meaningful comment where notice-and-comment requirements apply. Updates that confirm previously disclosed analysis present a different question.[160]

Employees and practitioners need a meaningful opportunity to test workload assumptions and identify practical consequences. The Commission retains discretion over the form of

[157] No FEAR Act § 402, as added by Pub. L. No. 116-283, § 1137(b), 134 Stat. 3903; compare §§ 401, 403, id. at 3903–04.
[158] 91 Fed. Reg. at 55,709 (severability explanation expressly addressing Cummings Act implementation and judge referrals).
[159] 42 U.S.C. § 2000e-16(b)(3). The statute prescribes consultation and solicitation; it does not specify a public hearing or a fixed consultation format.
[160] Chamber of Commerce of the United States of America v. EPA, No. 24-1193, slip op. at 29–33 (D.C. Cir. Aug. 18, 2026) (distinguishing critical new information from confirmatory supplementation and rejecting the challenge on the latter ground).

consultation. It must still address the specific objections in this comment and give a reasoned explanation for the choices it ultimately makes.[161]

D. The proposal leaves employees with pending cases facing unresolved changes.

The Commission acknowledges that employees, representatives, agencies, and judges have organized their work around the current rules. It says the final rule is not intended to reopen previously final decisions, agency actions, settlements, or judgments. It asks whether additional transition provisions are needed for pending complaints, hearings, appeals, classes, compliance matters, and fee petitions.[162]

That assurance about completed matters does not resolve what happens to an unfinished case. The proposed regulatory amendments supply no comprehensive transition provision. A separate statement says the rule would lack retroactive effect except as expressly provided in a final rule or required by law. It does not identify which pending proceedings would change or when. Employees should not have to litigate those questions after complying with the government's existing instructions.[163]

The following examples arise from the current rules. They illustrate the unresolved choices; they are not findings that the proposal already orders every pending case transferred or dismissed.

An employee may already be participating in counseling or alternative dispute resolution under the existing timetable. Current rules permit that process to extend beyond the proposed 60-day complaint-filing period. Another employee may have properly filed a complaint under today's requirements and later seek to add related claims. The final rule must address those steps expressly. A newly imposed filing or amendment requirement should not convert timely conduct under the current rules into a forfeiture.[164]

An employee may already have requested judge proceedings, exchanged discovery, or received a hearing date. The employee needs to know whether the judge will finish the case under the existing authority. A return to the employing agency could require further decisions and another request for independent proceedings. The proposal must account for completed work, existing orders, and the delay such a transfer could create. Preserving the possibility of a later referral does not answer whether an existing proceeding will continue.[165]

---

[161] 42 U.S.C. § 2000e-16(b)(3). Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543–49 (1978). Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[162] 91 Fed. Reg. at 55,709 (reliance discussion and request for comment on pending matters).

[163] 91 Fed. Reg. at 55,710 (retroactivity statement); see proposed amendments, id. at 55,711–27. The objection concerns unresolved applicability, not a claim that an unlawful retroactive application has already been adopted.

[164] 29 C.F.R. §§ 1614.105(a)(1), (d)–(f), .106(b)–(d); proposed §§ 1614.106(b)–(d), .107(a)(1)–(2), 91 Fed. Reg. at 55,712–13. Existing complaint requirements, later amendments, and supplements alleging subsequent events present distinct transition questions.

[165] 29 C.F.R. §§ 1614.108(f), (h), .109(a), (d), (i), .110(a); proposed §§ 1614.110, .406(a)–(l), 91 Fed. Reg. at 55,714–15, 55,720–21.

An appeal may already challenge a judge's decision or an agency's refusal to implement it. Those appeals arise from the current rules governing agency final orders and Commission review. Applying the new structure could raise questions about the status of the judge's findings and the record already submitted. The final rule must preserve the legal effect of completed steps and respect statutory court-filing periods.[166]

A pending class case presents additional consequences. Employees may already have received class notice or relied on a representative pursuing a shared claim. Some cases may have reached certification, settlement review, or individual relief proceedings. Proposed § 1614.204 would bar maintaining, appealing, and enforcing administrative class complaints, as well as issuing class notices. The final rule would need to reconcile those prohibitions with the assurance that final decisions and settlements will remain intact.[167]

Permission to assert allegations on behalf of a proposed class does not explain what becomes of those existing proceedings. Nor does it determine how a court will treat exhaustion, tolling, or a later request for class certification. The Commission must address each pending stage and protect employees from losing claims because the administrative route changes around them.

Completed legal work also requires separate treatment. Employees may already have received legal services under the existing fee rules while an award remains undecided. New limits could affect compensation for that work, ongoing representation, or the consequences of an earlier settlement offer. Fees for completed services and fees for future services are different questions. A general promise to preserve statutory fee awards does not resolve them.[168]

Finally, a discrimination finding or settlement may be final while payment, reinstatement, compliance review, or another implementation step remains pending. An agency appeal may also leave interim relief at issue. Preserving the underlying decision is essential, but employees still need an effective way to enforce it. The removal of § 1614.505 and the changes to compliance procedures require an express account of their effect on existing orders and unresolved implementation.[169]

---

[166] 29 C.F.R. §§ 1614.110(a), .401(b), .405(a); proposed §§ 1614.401, .405, .407, 91 Fed. Reg. at 55,718–19, 55,721–22; 42 U.S.C. § 2000e-16(c).
[167] 29 C.F.R. § 1614.204(d)–(g), (j)–(l), particularly (l)(3) (individual relief after a class finding); proposed § 1614.204(a)(1)–(3), (b), (h), 91 Fed. Reg. at 55,715–16. Compare id. at 55,709 (finality assurance) and proposed § 1614.407(d), id. at 55,721 (judicial class questions).
[168] 29 C.F.R. §§ 1614.501(e), .109(c); proposed §§ 1614.109, .501(e), 91 Fed. Reg. at 55,714, 55,722–24. Existing fee recovery is already conditioned on statutory authorization, entitlement, reasonable services, and proof; no particular rate or award is guaranteed.
[169] 29 C.F.R. §§ 1614.502, .504, .505; proposed § 1614.504(c) and removal of § 1614.505, 91 Fed. Reg. at 55,724. The proposal retains settlement implementation or complaint reinstatement remedies; its .204 class restrictions require coordination with those provisions. Section .502 and other lawful relief must be considered separately from .505's removal.

E. The Commission must evaluate reliance before displacing existing protections.

Reliance means more than preferring familiar rules. It includes choices made and work performed because the government offered a particular process. The Commission's own discussion recognizes that reliance. Its answer largely lists surviving mechanisms and concludes that administrative burdens outweigh reliance on administrative classes. That response does not resolve the concrete stages described above.[170]

FCC v. Fox Television Stations and *Department of Homeland Security v. Regents* require an agency to evaluate serious reliance interests when changing policy. The agency may ultimately give competing interests greater weight. It must first assess the reliance and explain its decision. Here, the Commission needs to address the consequences of displacing proceedings already invoked, including whether existing cases can finish under the rules on which participants relied.[171]

The legal treatment of pending cases depends on the particular change. *Landgraf* recognizes that new procedural rules often apply to existing suits. It also explains that a new complaint-filing rule would not govern a complaint already properly filed. *Martin v. Hadix* distinguishes fees for work completed before a statutory change from fees for later work in the same pending litigation. These decisions require attention to what changes and when the affected conduct occurred. Labeling the entire rewrite procedural does not answer that inquiry.[172]

Nor can an agency create retroactive rulemaking authority simply by declaring its intention in a final rule. *Bowen v. Georgetown University Hospital* requires congressional authorization for that power. The Commission must identify any such authority and distinguish genuinely retroactive consequences from permissible changes to future procedure.[173]

These unresolved issues reinforce the need for withdrawal. Congress's accountability requirements can be addressed separately. Federal employees should retain the existing protections while the Commission confronts capacity failures, obtains informed recommendations, and develops a justified account of any proposed change. It should not make employees bear the uncertainty and expense of discovering, case by case, what happens to proceedings the government already invited them to use.

---

[170] 91 Fed. Reg. at 55,709. The Commission recognizes and preliminarily weighs reliance; the objection is to the adequacy of that response for the identified stages.
[171] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); Department of Homeland Security v. Regents of the University of California, 591 U.S. 1, 30–33 (2020). Regents requires assessment and weighing, not adoption of every possible accommodation.
[172] Landgraf v. USI Film Products, 511 U.S. 244, 275 & n.29, 280–81 (1994); Martin v. Hadix, 527 U.S. 343, 357–62 (1999). Martin involved already-prevailing parties and established rates for postjudgment monitoring. It allowed the new cap for future services; it does not preserve all anticipated fees in every pending EEO matter.
[173] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208–09 (1988) (legislative rulemaking authority and retroactive Medicare cost-limit rules).

IX. The proposed rewrite should be withdrawn.

Southworth PC urges the Commission to withdraw this proposal. It would remove important protections from federal employees without adequately showing that the resulting process will resolve discrimination complaints more fairly or promptly. Its restrictions would operate together, at successive stages of the same case. The Commission must account for what that complete process would require of an employee seeking justice.

An employee would have to file a more developed complaint sooner in the process, without the existing mandatory counseling procedure. Restrictions on amendments could separate related claims or prevent their consideration together. For accepted claims, the employing agency would then decide the merits before the employee could seek judge proceedings on appeal. Access to those proceedings would depend on a discretionary referral, which could restrict the issues and evidence the judge may consider. The abolition of administrative classes and changes affecting counsel, settlement, and relief would add further burdens.[174]

The continued availability of Commission review, limited judge referrals, and court proceedings does not answer these objections. Those mechanisms do different work and impose different demands. Preserving a legal route does not establish that an employee can use it effectively. The Commission's explanation must address the protections each change removes and the consequences of their combined loss.

The staffing record makes that inquiry especially urgent. The Commission's own reports identify substantial staff losses, workload pressure, and management problems. Its budget projects fewer available judges while assuming the same incoming hearing volume. Between 2015 and 2024, enacted funding grew more slowly than inflation. These findings require a serious response to capacity failures. They do not establish that independent adjudication is the wrong place to invest public resources.

The Commission should seek the funding needed to hire and retain qualified judges, attorneys, and support staff. It should protect their time for adjudication and address delayed decisions through effective supervision and case management. Congress controls appropriations; the Commission is responsible for identifying its needs and explaining its allocation choices. Employees should not surrender protections to accommodate failures to provide the people and management needed to make those protections work.

The proposal also relies too heavily on what proceedings do not produce. A case can settle, narrow, or reach a sound decision without a live hearing. Those outcomes do not show that the judge's work lacked value. Moving unresolved disputes to agency decisionmakers, Commission reviewers, and federal courts may duplicate work or transfer its costs. Employees unable to bear those costs may abandon claims. Fewer cases on one docket would not establish better enforcement.

In *West v. Gibson*, the Supreme Court recognized the administrative process's role in resolving discrimination disputes without forcing employees into costly litigation. A system that

[174] See proposed §§ 1614.106, .109–.110, .204, .406, .501, 91 Fed. Reg. at 55,712–16, 55,720–24. Sections II–V of this comment address these changes and their retained safeguards in detail.

makes useful administrative proceedings harder to obtain risks frustrating that purpose. It also risks weakening employees' confidence that the government will seriously examine discrimination within its own agencies.[175]

The governing legal principles require a reasoned response to these consequences. *State Farm* requires consideration of important aspects of the problem and a supported connection between the facts and the agency's choice. *Fox* and *Regents* require attention to relevant earlier findings and serious reliance interests. The Commission has discretion to change policy. That discretion does not answer the specific defects identified throughout this comment.[176]

Employees with pending cases need more than general assurances that final decisions will remain intact. They need protection for timely steps already taken, proceedings already invoked, and relief still awaiting implementation. The Commission must resolve those consequences before changing the rules governing their cases.

The Cummings Act does not require this restructuring. Its accountability measures can operate separately, as the Commission itself acknowledges. The government can enforce those requirements while retaining existing protections and addressing demonstrated processing failures.[177]

Federal employees deserve an administrative process capable of enforcing the rights Congress gave them. On behalf of Southworth PC, I urge you and the Commission to withdraw the proposed rewrite.

Respectfully submitted,

Shaun Southworth
CEO and Founder
Southworth PC

[175] West v. Gibson, 527 U.S. 212, 218–19 (1999).
[176] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 46–51 (1983); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); Department of Homeland Security v. Regents of the University of California, 591 U.S. 1, 30–33 (2020).
[177] 91 Fed. Reg. at 55,709 (Cummings Act provisions can operate independently of judge-referral provisions).