

## EEO Rulings to Get Tougher, Quicker

The Equal Employment Opportunity Commission last week proposed allowing agencies to experiment with newer, quicker ways of processing equal employment opportunity complaints.

“Often agencies are in a good position to tell us what works best for them,” said Equal Employment Opportunity Commissioner Stuart Ishimaru.

The commission would have to approve all pilot programs under a newly approved proposed rule, which has not yet been published in the Federal Register.

Carlton Hadden, director of EEOC’s Office of Federal Operations, pointed to earlier pilot programs at the Defense Department as an example of how agencies could try new approaches.

The Air Force, for example, ran a three-year pilot program that ended in September 2007 that emphasized alternative dispute resolution and combined the investigation and hearing processes.

Under that system, claims of bias were heard in fact-finding conferences instead of in hearings before administrative judges. Fact finders issued decisions at the end of the conference, but did not have authorities typically available to judges, such as the power to sanction uncooperative parties.

A February report from the Government Accountability Office found the Air Force’s system processed cases in an average 108 days, well below the 127-day goal it had set. Congress authorized Defense to set up its own pilot programs in the fiscal 2001 Defense Authorization Act.

EEO experts and attorneys who handle federal discrimination cases largely commended the proposed pilot programs, but some had concerns.

“They’re shooting themselves in the foot by largely limiting it to 12 months,” said San Francisco attorney William Wiley. “Sometimes it takes years to process cases. To think you can test out significant changes in only 12 months is an unwarranted limitation.”

Jorge Ponce, co-chairman of the Council of Federal EEO and Civil Rights Executives, said pilot programs could result in a patchwork of EEO processes across the government.

“There won’t be any centralized process to make sure everyone is abiding by the same regulations, so it could be very difficult to bring consistency to the decisions,” Ponce said.

But experts agree something must be done to speed up the EEO process. In fiscal 2006, cases took an average of 186 days to complete, which exceeds the 180-day deadline required by law.

“It’s definitely a step in the right direction,” said Greg Rinckey, a partner at Tully, Rinckey and Associates in Albany, N.Y., and a columnist for Federal Times. “The process at agencies now is not good. It’s slow and it’s very disorganized.”

EEO offices in federal agencies are the right places to develop new processes, Wiley said.

“The problem is [the EEOC] tends to set regulations from on high, what they think is best,” Wiley said.

“Sometimes, that’s not the case.”

And Joseph Kaplan, a partner at Passman and Kaplan in Washington, said that requiring EEOC approval and review of the programs — as the draft regulation does — will help ensure employees’ rights.

“As long as you get that public hearing, where parties can express dissatisfaction, that safety valve will keep agencies from adopting pilots that can disadvantage employees,” Kaplan said. EEO officials at several agencies said they were still reviewing the proposed regulation and declined to comment.

#### Class-action cases

The draft regulation would also add more weight to EEOC rulings on class-action complaints.

Agencies now are allowed to accept, reject or modify the findings of EEOC administrative judges in classaction complaints.

The draft regulation would require agencies to follow the EEOC judges’ conclusions.

EEOC judges heard only two class-action cases over the last year. But Rinckey expects the proposed change would encourage more people to file class-action complaints.

“We’ve avoided class actions [and instead filed individual cases] because agencies can always disregard some of the findings,” Rinckey said. “A lot of attorneys avoid it for that reason. But I think you’ll see a lot of cases that would have been filed individually be filed as class actions” after this rule is implemented. The proposed rule changes would also require agencies to notify complainants when their investigations have not been finished in the 180-day time limit and of their right to request a hearing or file a lawsuit.