

Two comments were received in response to the NPRM. Both expressed support for the proposed revisions. They noted that conforming the regulations to existing practice would provide helpful clarification and avoid unnecessary confusion.

In addition to this over-all support for the proposed changes, one of the two commenters encouraged the Commission to exercise thoughtful restraint in enforcing the ADEA where a timely charge has not been filed or after a Notice of Dismissal or Termination has been issued. This comment did not request any change in the regulation. The Commission does, however, want to reassure the commenter that it intends to exercise its enforcement discretion responsibly. The other commenter suggested further clarification of §§ 1626.17(a), 1626.17(a)(3), and 1626.18.

In § 1626.17(a), we proposed that Notices of Dismissal or Termination be issued in the case of a charge involving more than one aggrieved person only when EEOC terminates its processing as to all aggrieved persons. The commenter suggests that it would better serve judicial economy to issue Notices of Dismissal or Termination to the aggrieved persons seriatim during the process as we make determinations rather than to all at the end. We disagree and think the suggested alternative would be inefficient and not serve judicial economy. Seriatim issuance would likely lead to consecutive court filings by individuals as they receive the Notices and either premature termination of EEOC's processing of the remainder of the charge or early EEOC intervention in the lawsuit(s). The Commission believes that its proposal better serves efficiency and judicial economy by allowing orderly completion of the administrative process, appropriate pre-suit conciliation efforts by EEOC and contemporaneous filing of individual lawsuits.

In § 1626.17(a)(3), we proposed that the issuance of a Notice of Dismissal or Termination would not preclude the Commission from offering the recipient of the notice such assistance as it deems necessary or appropriate or from continuing to investigate. The commenter argues that this is vague, could mislead the aggrieved person into thinking that EEOC will intervene in his or her lawsuit and overstates EEOC's authority. The proposed language on rendering assistance was borrowed from our Title VII and ADA procedural regulations. See 29 CFR 1601.28(a)(4) ("The issuance of a notice of right to sue does not preclude the

Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate."). That language has appeared in 29 CFR 1601.28 for over 25 years. We are not aware of any evidence that this language has been found to be confusing or that individuals have been misled by it. Furthermore, the statement that the Commission could continue to investigate or litigate after a Notice is issued is simply a recognition that the Commission's jurisdiction under the ADEA is not dependent on the filing of a charge.

In § 1626.18(b), we state that an aggrieved person who files a charge may file a lawsuit without waiting for a Notice of Dismissal or Termination as long as 60 days have passed since the filing of the charge. The commenter argues that § 1626.18 does not present a clear picture of the aggrieved person's right to file a private lawsuit because, among other things, it does not mention that the right to file an individual lawsuit terminates if the Commission files suit on the charge. We agree that the individual's right to file a lawsuit is terminated when the Commission files a lawsuit and have added some language to § 1626.18(c) to make that clear. The commenter also argues that subsection (b) either makes an unwarranted assumption not based on clear statutory language or places undue emphasis on the 60-day provision of the ADEA. We believe subsection (b) is based on clear statutory authority allowing a private ADEA lawsuit to be filed anytime after 60 days from filing of the charge up to 90 days after issuance of the Notice of Dismissal or Termination or the filing of a Commission lawsuit. We do not believe that § 1626.18 gives improper emphasis to the right to file a lawsuit before the Notice is issued.

In § 1626.18(d), we stated that the Commission "may" dismiss a charge if a private lawsuit has been filed. The commenter states that the word "may" in subsection (d) should be "shall" because "may" implies that the Commission has unfettered discretion. Proposed subsection (d) provided that the EEOC "may" dismiss a charge if a private lawsuit is filed on the charge unless an EEOC official determines that further processing would effectuate the purposes of the Act. The effect and intent of the proposed provision, as indicated in the preamble to the NPRM, was that EEOC would terminate further proceedings unless an appropriate official made an affirmative determination that further processing would effectuate the purposes of the Act. While we do not think that the use

of "shall" instead of "may" changes the result, we agree with the commenter that "shall" makes more sense in light of the "unless" clause and have made that change.

Finally, we made three minor editorial changes. We changed "Associate General Counsel" to "General Counsel" in §§ 1626.17(b) and 1626.18(d). We modified § 1626.17(c)(2) slightly to mirror the similar, but better stated, language in § 1626.17(a)(1). We also added a cross reference to § 1626.12 in § 1626.18(b).

Regulatory Procedures

Executive Order 12866

Pursuant to Executive Order 12866, EEOC has coordinated this final rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities, because it does not affect any small entities. The regulation affects what the Commission does and what aggrieved parties can do. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

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