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April 7, 2020

Chair Janet Dhillon
U.S. Equal Employment Opportunity Commission
131 M St., N.E.
Washington, D.C. 20002

Re: Ensuring Access to Justice re Right to Sue Notices and Filing Deadlines

Dear Chair Dhillon:

The National Women's Law Center, together with the more than 80 undersigned civil, women's, and workers' rights organizations, writes to urge the Equal Employment Opportunity Commission (EEOC) to take immediate and critical steps to safeguard the rights of employees, including those in the federal sector, during this national crisis.

The COVID-19 global pandemic exposes workers to heightened risks of workplace harassment and other forms of discrimination. As widespread economic dislocation leaves workers more desperate to keep a paycheck at any cost, increasing their vulnerability to abuse, unscrupulous employers may see new opportunities for unlawful exploitation of individuals, as well as for discriminatory discharges and discipline under cover of widespread job loss. Asian-Americans in particular are facing a wave of hostility and increased risks of discrimination in the workplace, something that the EEOC has already noted. Simultaneously, in this time of quarantine, social distancing, and widespread closures, individuals who have experienced unlawful workplace discrimination will face often insurmountable difficulties in seeking to take timely steps to protect and enforce their rights. If they or family members fall ill, these obstacles will be further heightened.

The workers who look to the EEOC to protect their rights are the very workers most affected by the economic upheaval we are experiencing. Black and Latino workers are disproportionately impacted by the furloughs and layoffs that are affecting the economy.¹ Workers with disabilities are also disproportionately impacted by the pandemic. Though people with disabilities constitute about 12 percent of working-age Americans,² they make up half of all those living in long-term

¹ Deborah Barfield Berry, "Coronavirus layoffs disproportionately hurt black and Latino workers: 'It's almost like doomsday is coming,'" USA Today, March 24, 2020, <https://www.usatoday.com/story/news/nation/2020/03/24/coronavirus-unemployment-layoffs-blacks-latinos/2900371001/>.

² Rebecca Cokley, "Coronavirus Proposals Leave the Disability Community Behind," Center for American Progress, March 27, 2020, <https://www.americanprogress.org/issues/disability/news/2020/03/27/482378/coronavirus-proposals-leave-disability-community-behind/>.

poverty.³ People with disabilities are more likely than those without disabilities to work low wage jobs,⁴ which have been the hardest hit by the crisis. The overwhelming majority of older workers are unlikely to be unable to work from home, and, as this group is especially vulnerable to COVID-19, continuing to work can pose a significant risk to their health.⁵ Finally, women are nearly two-thirds of the 22.2 million workers in the 40 lowest-paying jobs in America. Millions of women working in these jobs are now on the front lines of the COVID-19 pandemic – risking their health as personal care and home health aides, child care workers, and grocery store cashiers, among other jobs. Women are also the majority in many low-paid service occupations, like restaurant work, facing devastating lay-offs in the current crisis.⁶ Although they may have been discriminated against, these workers will rightfully be concerned with holding onto their jobs, caring for their families, and filing for unemployment benefits and other ways to ensure their financial stability before trying to reach out to the EEOC.

In this critical moment for our nation’s workers, the EEOC must ensure that procedural hurdles do not compromise access to justice. It should act in three critical respects: 1) issuing a moratorium on right-to-sue notices and tolling of all right-to-sue notices that would require a lawsuit to be filed after February 29, 2020; 2) tolling the time periods for federal workers to start and engage in the EEO process; and 3) tolling the 180/300 day filing period for private sector and state and local government charges.

Moratorium on Issuing Right-To-Sue Notices and Tolling the Time to File Lawsuits

We understand that the EEOC has for the time being ceased issuance of right-to-sue notices unless the charging party requests such a notice. We strongly support this decision and commend you for it. We first learned of this policy on March 23, 2020 through an email from Nick Inzeo, Director of Field Operations to attorneys from the ACLU. We cannot find any indication that the agency has made any public announcement of this decision, and, in fact, it seems at odds with the statements in “The EEOC Continues to Serve the Public During the COVID-19 Crisis,” <https://www.eeoc.gov/eeoc/newsroom/release/eeoc-continues-to-serve.cfm> (last visited 4/3/2020) (“At the end of an investigation the EEOC will issue a Notice of Right to Sue (Notice) to charging parties. Once you receive a Notice, you must file your lawsuit within 90 days. This deadline is set by law and cannot be changed by the EEOC. If you do not file in time you may be prevented from going forward with your lawsuit.”). We strongly recommend that if the agency is not issuing right-to-sue notices, the agency make this policy known on its website. We also request that the agency clarify the date this became its policy and affirm that right-to-sue notices

³ National Council on Disability, “Highlighting Disability / Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities,” October 26, 2017, <https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release>.

⁴ Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics – 2019 (Persons With a Disability: Labor Force Characteristics – 2019), February 26, 2020, <https://www.bls.gov/news.release/pdf/disabl.pdf>.

⁵ Elise Gould, “Older workers can’t work from home and are at a higher risk for COVID-19,” Working Economics Blog, Economic Policy Institute, March 31, 2020, <https://www.epi.org/blog/older-workers-cant-work-from-home-and-at-high-risk-for-covid-19/>.

⁶ Jasmine Tucker and Julie Vogtman, “When Hard Work is Not Enough: Women in Low Paid Jobs,” National Women’s Law Center, April 2, 2020, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.

will not be issued for the duration of the national emergency and any state emergency declarations, unless requested by the charging party.

For the same reasons that the EEOC has wisely stopped issuing right-to-sue notices, it should toll the statute of limitations for those individuals whose right-to-sue notices would require them to file a lawsuit any time after February 29, 2020, the date Washington state became the first state to declare a state of emergency, unless the charging party requests otherwise. One way to do this would be to automatically reconsider and rescind all right-to-sue notices issued to charging parties when the 90-day statutory limitation would require the charging party to file a lawsuit after February 29, 2020, pursuant 29 C.F.R. 1601.21.

Tolling the deadlines in the right-to-sue notices is necessary to preserve the rights of workers who are facing unprecedented obstacles when trying to enforce their equal employment opportunity rights. Since February 29, the President has declared a national state of emergency, and several states have declared states of emergency and/or have issued shelter-in-place requirements. Meanwhile, federal and state courts' operations and filings policies have changed and are inconsistent. Many federal courts are closed, but some still accept electronic filings from lawyers, and/or drop box or U.S. mail filings for pro se litigants.⁷ Similarly, some state courts are closed, and they vary as to whether accept filings and, if so, in what form. Finally, many law offices are closed.

Despite this chaotic situation, the EEOC continued to issue right to sue notices, apparently until very recently. This presents several difficulties. For charging parties who are represented, lawyers may not be in their offices or checking physical mail and so may not know about the right-to-sue notices. Charging parties who do not already have a lawyer and received these notices will face extreme difficulty finding, retaining, or paying for a lawyer, because many lawyers' offices are closed, and many individuals are already facing severe financial impacts from the current crisis. Individuals will not be able to obtain assistance from local courts' *pro se* help desks because the courts have ceased such "non-essential activities." Communications between charging parties and their lawyers or would-be lawyers will be more difficult because many workers may not be able to afford telephone or internet services. Moreover, many charging parties and attorneys may be too ill to undertake any pre-litigation activities such as holding meetings, interviewing witnesses, drafting complaints, or conducting pre-complaint negotiations within the statutory period. Finally, as the EEOC moves to complete telework, we presume that it will be difficult, if not impossible, for the EEOC to process pre-litigation FOIA requests for investigatory files.

If the EEOC agrees to rescind or reconsider the right-to-sue notices that would require a lawsuit to be filed after February 29, 2020, it should do so automatically. Any other system, e.g. requiring the charging party to individually contact the agency to request reconsideration or rescission of a qualifying right-to-sue notice, will be difficult for charging parties – especially those who are unrepresented and may not even be aware of their right to seek such remedies – and could easily overwhelm the agency's resources.

⁷ See, e.g., Robert Loeb, "Federal Courts Begin to Adapt to COVID -19," Lawfare Blog, March 18, 2020, <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>.

Extending Time Periods for Federal Workers

The EEOC may also take steps to help federal workers. For example, the deadline for federal workers to contact their EEO office regarding discrimination (45 days) is created by regulation, is within the agency's power to revise, and is, in the best of circumstances, too short. In the current situation, given the challenges set out above, where some brave workers have been declared essential and must go to work despite the danger of infection, other workers are balancing teleworking and caregiving responsibilities, and still other workers are ill with the virus, the deadline poses extreme difficulties and the EEOC should extend it to at least 180 days to align with those imposed on non-federal employees. Consistent with our suggestion below for non-federal employees, the EEOC and federal agencies should also be willing to accept a shorter form of the complaint or charge as sufficient for timeliness purposes. Additionally, for the same reasons that private sector workers need relief from the 90-day filing deadline, federal workers' deadlines within the administrative process and to file in court should be extended as well. While hearings may continue, the EEOC and its administrative law judges (AJs) should realize that litigation outside of the office setting necessarily requires more time and effort because of a lack of proper technology, equipment and other resources such as commercial printers and scanners. Counsel and complainants may be working from the confines of home and balancing homeschooling and caregiving responsibilities while trying to prepare for depositions or hearings. Affording AJs the flexibility to extend case processing timelines to accommodate the real-world challenges that counsel and complainants face in this difficult time will help ensure that the EEOC process leads to just outcomes.

Tolling the 180/300 Day Filing Period for Private Sector and State/Local Government Charges

Third, we urge the EEOC to find a method to address the fact that sickness, loss of telephone or internet service because of inability to pay bills, the loss of access to public internet locations such as libraries, the states of emergency, the stay at home orders, and caregiving responsibilities mean that many workers will miss the 180/300 day requirement to file a charge of discrimination with the agency. We recognize that this is a statutory deadline that the EEOC may not be able to change on its own. We urge the EEOC to advocate with law makers to toll this deadline for all workers, especially given the U.S. Supreme Court's decision in *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843 (2019), which found charge filing to not be a jurisdictional requirement for a Title VII lawsuit. Meanwhile, on its own, the EEOC should, at a minimum, create a dedicated telephone number where workers and attorneys facing this deadline can call and leave a message; that contact should count as meeting the required deadline and the charge can be perfected at a later date. Similarly, the EEOC should create and distribute widely a shorter version of the charge form (requiring name, contact information, the date, and the name of the employer) and allow that to be submitted to meet the required deadline with a completed charge to follow.

* * *

This is not the time for “business as usual.” The EEOC has already recognized this on its own with its sound and just decision to stop issuing right-to-sue notices. Accordingly, we strongly urge the EEOC to rescind and later reissue any right-to-sue notices that would require an individual to file a lawsuit after February 29, 2020, to toll the deadlines for federal workers, and to create a process for tolling the 180/300 day filing requirement.

We appreciate your consideration of this request. Please feel free to contact Emily Martin, Vice President for Education and Workplace Justice, National Women’s Law Center, at emartin@nwlc.org with any questions.

Sincerely,

National Women’s Law Center
9to5
A Better Balance
Advocates for Worker Rights LLP
AFGE
Alianza Nacional de Campesinas
American Association of University Women (AAUW)
Americans United for Separation of Church and State
AnitaB.org
Asian American Legal Defense and Education Fund (AALDEF)
Asian Pacific American Labor Alliance, AFL-CIO
Bay Area Employment Law Office
Bazon Center for Mental Health Law
Bet Tzedek Legal Services
California Employment Lawyers Association
California Women's Law Center
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Center for American Progress
Center for Workers' Rights
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Diefer Law Group, P.C.
Equal Justice Center
Equal Pay Today
Equal Rights Advocates
Feminist Majority Foundation
Futures Without Violence
Gender Equality Law Center
Gender Justice
Human Rights Campaign
Jewish Women International
Justice for Migrant Women
Justice in Motion

KWH Law Center for Social Justice and Change
Labor Council for Latin American Advancement
Lambda Legal
LatinoJustice PRLDEF
Law Offices of Richard N. Koss
Lawless and Lawless
Lawyers' Committee for Civil Rights Under Law
Legal Aid at Work
Legal Aid Society of Metropolitan Family Services
Legal Momentum, The Women's Legal Defense and Education Fund
MANA, A National Latina Organization
Mehri & Skalet, PLLC
Muslim Advocates
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Organization for Women
National Partnership for Women & Families
NC National Organization for Women (NC NOW)
North Carolina Justice Center
Oxfam America
Restaurant Opportunities Centers (ROC) United
Safe Harbor Law, LLC
Service Employees International Union
Shriver Center on Poverty Law
Sikh Coalition
Southwest Women's Law Center
Spencer Johnson McCammon LLP
Sugar Law Center for Economic and Social Justice
Tash
The Leadership Conference on Civil and Human Rights
The Sturdevant Law Firm, APC
TIME'S UP Now
Union for Reform Judaism
United State of Women
William E. Morris Institute for Justice (Arizona)
Women Employed
Women's Law Project

Workers' Rights Clinic, James E. Rogers College of Law
Worksafe
YWCA USA