



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
the Chair

Agency Plan of Action on Tribal Consultations

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. The EEOC's mission is to stop and remedy unlawful employment discrimination in the workplace through enforcement of these federal laws.

In accordance with President Biden's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (Presidential Memorandum), which directs federal agencies to implement the policies and directives of Executive Order 13175 of November 6, 2000, the EEOC, having consulted with Tribal leaders, hereby submits its plan of action.

I. Governing Principles

The United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian Tribes to self-government and maintains a government-to-government relationship with federally recognized Tribes. Indian Tribes exercise inherent sovereign powers over their members and territory. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes.

In accordance with the government-to-government relationship, the EEOC is committed to working with Indian Tribes in a manner that respects Tribal self-government and sovereignty, honors Tribal treaty and other rights, and meets the Federal Government's Tribal trust responsibilities. Accordingly, the EEOC will consult with federally recognized Tribes before adopting policies that have Tribal implications, including its policy on Tribal consultation. Under Executive Order 13175, the phrase "Policies that have Tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. (*See* Section 1(a) of E.O. 13175). The term "policies" does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations. Nor does it include individual grants or contracts.

While the EEOC generally lacks jurisdiction over Tribes under most of the laws that it enforces, federal anti-discrimination laws protect Tribal members against discrimination when employed in positions covered under EEOC-enforced laws. The EEOC Chair will take steps to ensure that the various agency components notify the designated agency officials for Tribal consultation, listed below, and the Office of Legal Counsel (OLC) whenever they plan to

undertake a new policy that fits within the definition of “Tribal implications.” Once notified, the EEOC Chair’s designated agency officials, in conjunction with OLC, will review the submission to determine if Tribal consultation is necessary or appropriate.

II. Consultations

A. Commitment and Designation of Agency Officials

The EEOC is committed to ensuring agency officials are fully engaged and involved in the Tribal consultations. The EEOC Chair, or other appropriate senior agency officials, will participate in Tribal consultations. The EEOC Chair has designated the EEOC’s Director of State, Local and Tribal Programs and the Chair’s Senior Attorney Advisor with responsibility for Tribal matters to coordinate implementation of this plan of action and prepare progress reports. The designated agency officials will establish a broad internal process to review planned agency actions to determine whether Tribal consultation is necessary or appropriate. If Tribal consultation is deemed necessary or appropriate, the designated agency officials will initiate consultation with Tribal nations consistent with the EEOC’s Tribal Consultation Process.

B. April 14, 2021 Tribal Consultation on EEOC’s Policy Statement and Plan of Action

On April 14, 2021, in partnership with the U.S. Department of Labor, the EEOC hosted a Tribal consultation to obtain feedback from the Tribes regarding this plan of action for its process on Tribal consultation. The EEOC’s Chair and the agency’s designated officials participated in the two-hour conference to affirm the agency’s commitment to Tribal consultation and engaged in dialogue with Tribal leaders. The EEOC requested input from the Tribes regarding the most effective methods for tribal consultation and how the agency can best serve Tribal nations on matters related to employment discrimination. In particular, the EEOC sought input regarding the best practices to provide information regarding the federal anti-discrimination laws enforced by the EEOC to Tribal members during the ongoing pandemic.

Several Tribal leaders provided oral feedback at the consultation. Among other things, Tribal leaders noted that having many agencies hold consultations close in time and per agency presents logistical challenges for the Tribes. They requested that federal agencies engage in joint consultations to the extent possible. Accordingly, the EEOC will continue to partner with other agencies on future consultations whenever possible.

After the Tribal consultation, the EEOC also received written comments from four Tribes. Some of the comments include recommendations such as streamlining the consultation process, providing adequate notice and comment periods, ensuring that the EEOC’s process aligns with Section 3 of Executive Order 13175, providing reports to all Tribal governments regarding the actions taken after the consultations, and conducting regular and local consultations. When drafting its process, the EEOC plans to incorporate, as appropriate, the feedback received from the Tribes.

1) Timing and Notice for Finalizing the EEOC's Tribal Consultation Process

Within 30 days of submission of this plan of action, the EEOC will draft its Tribal Consultation Process and share it with the Tribal nations for final input. The EEOC's draft process will incorporate the Tribal feedback received to date. The EEOC draft process will include a commitment to provide timely and adequate notice to Tribal nations regarding upcoming consultations. Specifically, the EEOC will seek to provide Tribal leaders and/or their designated proxies at least 30 days' notice in advance of a scheduled consultation. If exceptional circumstances, such as legislative deadlines or other factors beyond the EEOC's control warrant a shorter period of advance notice, the EEOC will provide an explanation for the abbreviated notification in its letter inviting Tribes to participate in consultation. The notice will include a description of the topic(s) to be discussed and any supporting materials related to the topic(s). Such notice will be provided to the designated point of contact for each Tribe through various methods, including email address, first-class mail, and/or posting on the agency website.¹ Besides Nation-to-Nation consultations, where appropriate, the EEOC will also consult with the Council for Tribal Employment Rights (CTER) and the Tribal Employment Rights Offices (TEROs).

After receipt of final input from the Tribes on the EEOC's draft Tribal Consultation Process, the EEOC will incorporate the feedback and finalize its process. The EEOC will seek to finalize the process within 90 days of receiving feedback from Tribes, or as soon as practicable. Once finalized, the Tribal Consultation Process will be posted on the EEOC's website within 30 days from final approval.

C. Additional Principles to be Incorporated in Tribal Consultation Process

1) Accessibility for Tribal Leaders to Participate in Tribal Consultations

The EEOC's draft process will include a commitment to utilize various communication options to ensure Tribal consultations are accessible and convenient to Tribal participants. During the DOL/EEOC joint consultation, some Tribes indicated that one web-based platform presented access challenges for Tribal members. The EEOC will consider this feedback when planning future consultations. Tribal consultations may be conducted in person, via video conferencing (i.e., web-based platform), conference calls, or other similar means. Written comments will be accepted via the following designated email address: tribalfeedback@eeoc.gov. Tribes will be provided a minimum of 14 days to submit written comments. In addition, to ensure accessibility and active participation in Tribal consultations, the EEOC may consider scheduling regional or local consultations at different times and dates.

¹ To the extent necessary and possible, the EEOC will update its database of contact information for Tribal nations and identify points of contact for consultation purposes.

2) Interagency Consultation

As noted in Section II (B) above, when appropriate, the EEOC will initiate interagency Tribal consultations where overarching topics that merit policy discussions involve other Federal agencies. Examples of such topics might include employment policies regarding hiring and promotional opportunities, and training/education about the anti-discrimination laws relating to employment. Relevant Federal agencies may be invited, along with representatives from interested Tribes, and Tribal leaders will be notified that their proxies may participate and represent the interests of the Tribe as they deem appropriate.

3) Regulatory Policies or Legislation with Tribal Implications and Certifications

a) Policies

Some EEOC enforced laws exclude Tribes from the definition of covered employers, but in the event that the EEOC is considering regulatory policies that may have Tribal implications, the agency will engage in consultation with Tribal nations before such policies are presented to the full Commission for a final vote. The EEOC will follow its Tribal Consultation Process and ensure Tribal nations are given timely notice and an opportunity to comment. In addition, the EEOC will consult with Tribal partners, such as CTER and TEROs. As part of its action plan, the agency is exploring the possibility of establishing an EEOC/TERO Joint Committee to assist the EEOC when specific questions arise pertaining to TEROs as well as broader questions related to Tribes. (*See* Section 6 below for further details on the EEOC/TERO Joint Committee). This joint committee may also be consulted regarding policy matters that may have Tribal implications.

b) Legislation

While the EEOC typically does not present legislative proposals to Congress, in the event the Commission is considering a legislative proposal on matters that may have Tribal implications, the EEOC will consult with Tribal nations prior to formally presenting such a legislative proposal consistent with the Commission's Tribal Consultation Process. We note however, that the Commission is sometimes asked by members of Congress to comment on proposed legislation on very short deadlines that do not allow time for the agency to engage in Tribal consultation. In such instances, the agency will suggest to the legislators who contacted the EEOC to also consult with Tribal nations.

c) Certification

Any draft final regulation or legislation with Tribal implications will be accompanied by a certification, signed by an agency official, attesting that the agency has completed consultation with Tribal nations on the draft final regulation or legislation. The EEOC's Chair will identify

and designate an agency official responsible for signing the certification. The EEOC's Chair or designee along with the Director of State, Local and Tribal Programs will consult with the EEOC's Office of Legal Counsel (OLC) and request that OLC include a certification document to be attached to any draft final regulation or legislation with Tribal implications.

4) Requests for Regulatory Waivers

Tribal nations may request regulatory waivers to any policy or legislation with Tribal implications proposed by the EEOC. The EEOC Tribal Consultation Process will include a section describing the process by which a Tribal nation may seek a waiver. The EEOC will fully consider such waiver requests within 120 days of receipt. Although Tribes are not covered by most of the laws that the EEOC enforces, the EEOC lacks authority to grant waivers from any of the substantive prohibitions in the laws that it enforces, with the exception of the Age Discrimination in Employment Act (ADEA), for which the EEOC may grant "exemptions to and from any or all provisions ... as it may find necessary and proper in the public interest." 29 U.S.C. § 628. Such exemptions must be recorded in regulations, reviewed by the Office of Management and Budget, voted by the Commission, and published by the Federal Register, and therefore would not be accomplished within 120 days.

5) Tribal Nations' Administrative Discretion

The EEOC is committed to working with Indian Tribes in a manner that respects Tribal self-government and sovereignty. As part of that commitment, the EEOC will ensure that it maximizes Tribal nations' administrative discretion when collaborating and consulting with Indian Tribes. Since 1980, the EEOC has worked closely with several federally recognized Tribes. Some of those Tribes have established TEROs, to maximize employment opportunities and to protect the Title VII and special preference rights of Tribal members. The EEOC annually provides the TEROs with programmatic funding via contracts administered by eight District Offices with direct working relationships with the TEROs within their jurisdictions. Funds provided by the EEOC to these TEROs support the objectives of the TERO program to identify, remedy and eliminate employment discrimination occurring on or near the reservation. The EEOC will continue to support the TEROs in this manner. It will also explore other opportunities to engage Tribal members.

6) Development of Policies or Standards for Tribal Nations

Since the establishment of the agency's Tribal Program, the EEOC has been committed to working closely with Indian Tribes to ensure Tribal members are informed about the anti-discrimination laws and their rights in the workplace. The EEOC has met with Tribal leaders, including members of CTER, to encourage them to develop their own policies and standards regarding employment discrimination. As part of its plan of action, the EEOC intends to continue

those discussions with CTER and will jointly explore how to encourage Tribal leaders to enact ordinances that prohibit employment discrimination in Tribal nations.

In addition, the EEOC will explore the possibility of establishing an EEOC/TERO Joint Committee to serve as a resource and provide feedback to the agency on Tribal matters. The EEOC/TERO Joint Committee may be comprised of four to six TERO Directors, two to three EEOC District Directors, a representative from OLC, and both the Directors of the Office of Field Programs and State, Local and Tribal Programs. The joint committee would meet regularly and assist the EEOC when specific questions arise pertaining to TEROs as well as broader questions related to priorities and issues that matter most to Tribes. For example, this joint committee may assist in developing an outreach and training plan specific to Tribal members. It may assist in defining a “communications” or “messaging” strategy that will resonate with Tribal members. Finally, the joint committee will provide a forum for TERO Directors to exchange ideas and best practices that may be helpful to their own respective TERO programs and to the development of legal policies or standards for their respective Tribes.