



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Request for Public Comment on a Review Level Alternative Dispute Resolution Program

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Request for Comment.

SUMMARY: The Occupational Safety and Health Review Commission invites the public to comment on the potential development of an alternative dispute resolution program at the review level.

DATES: Written comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit all written comments, identified by the title “Settlement Part Public Comment,” by mail or hand delivery to John X. Cerveney, Deputy Executive Secretary, Occupational Safety and Health Review Commission, 1120 20th Street, N.W., Washington, DC 20036-3457, by fax to 202-606-5050, or by e-mail to fedreg@oshrc.gov.

FOR FURTHER INFORMATION CONTACT: John X. Cerveney, Deputy Executive Secretary, Occupational Safety and Health Review Commission, 1120 20th Street N.W., Ninth Floor, Washington, DC 20036-3457; Telephone (202) 606-5706; e-mail address: fedreg@oshrc.gov.

SUPPLEMENTARY INFORMATION:

The Occupational Safety and Health Review Commission (“Commission”) adjudicates contested citations issued by the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) at the trial level before an administrative law judge and, if directed for review, before the Commissioners on appeal. The Commission initiated an alternative dispute resolution (“ADR”) program at the trial level, known as the Settlement Part program, in 1999. The Settlement Part program, codified at 29 CFR 2200.120, employs both mandatory and voluntary procedures to promote case settlement. Under the program, an administrative law judge acts as a settlement judge and oversees the ADR process. If a case does not settle, an administrative law judge who did not act as the settlement judge typically hears the case and issues a decision, which may be appealed to the Commissioners at the review level. An ADR program does not currently exist at the Commission’s review level, but the Commission is exploring the feasibility of instituting such a program.

At the Commission’s request, ADR experts at Indiana University School of Public and Environmental Affairs recently completed a study of the Settlement Part program at the judges’ level. Upon studying both empirical data and survey responses from internal and external participants, Indiana University deemed the program “successful” and noted that the Commission “has done an admirable job addressing an increased caseload within constrained resources while at the same time meeting the expectations of its external stakeholders.” In addition to Indiana University’s study of the Settlement Part program at the judges’ level, the Commission held a public meeting on August 30, 2012, to explore ways to enhance efficiency and effectiveness in resolving cases at the review level. During the public meeting, there were expert panelists and

members of the public who spoke in favor of implementing an ADR program at the review level.

In light of the success of the Settlement Part program at the judges' level and the comments received at the public meeting, the Commission is considering creating an ADR program at the review level. At this stage, the Commission seeks public input on whether it should develop such a program and, if so, how the program should operate.

Specifically, the Commission invites public comment on the following list of questions:

1. Should the Commission develop an ADR program at the review level?

a. Why or why not?

b. Do parties have sufficient incentives at the review level to participate in ADR? What are the potential benefits of, and deterrents to, participation in the ADR program at the review level?

c. What types of ADR processes should a potential program incorporate?

2. If an ADR program is developed, should certain types of cases be included or excluded, and how should eligibility for ADR at the review level be determined?

a. Should placement into ADR be decided by a Commission vote?

b. Should participation in an ADR program be mandatory or voluntary?

c. Should the Commission evaluate cases for participation in the ADR program at the review level based on any criteria, such as the total dollar amount of penalties, the number of citation items, the characterization of violations, or any other issues?

d. Regarding cases where the parties participated in the Settlement Part

program at the trial level, should the Commission use different criteria when considering these cases for participation in the ADR program at the review level? If these cases are placed into ADR at the review level, should they be treated differently in any way?

e. Is ADR appropriate for cases with pro se parties? If so, should the Commission offer any assistance or guidance to pro se parties in the ADR process?

3. When should the ADR process begin?

a. Should the process begin before or after the Commission issues a briefing notice?

b. If ADR begins after issuance of a briefing notice when parties know what issues the Commission is most interested in, should briefing be suspended during the ADR process so that the parties may avoid briefing costs?

c. Should an ADR program allow flexibility as to when the process starts in each case?

4. Where should dispute resolution proceedings be held?

5. Should telephone or video conferencing be an option for ADR discussions? If so, should its use be limited to certain circumstances?

6. Who should the Commission select to serve as potential third-party neutrals?

a. In addition to possessing ADR training and skills, would third-party neutrals benefit from having subject matter expertise in OSH law or other related fields such as labor law? If so, should third-party neutrals be required to have such expertise?

b. Should the Commission use its own employees as third-party neutrals if they are excluded from any subsequent involvement in cases they participate in as third-party neutrals?

- c. Are there any reasons not to use former Commissioners, ALJs, or practitioners as third-party neutrals?
- d. Should the Commission seek out third-party neutrals from any other potential source, such as the Federal Mediation and Conciliation Service or regional federal court third-party neutral rosters?
- e. Should the parties be able to select the third-party neutral, or reject one the Commission selects?

7. What responsibilities should a third-party neutral have?

- a. Should a third-party neutral be able to require parties to file pre-conference confidential statements?
 - b. Should a third-party neutral have the power to suspend the ADR process and report any misconduct to the Commission, such as a party's failure to be present at a scheduled ADR conference? Should the Commission consider any reported misconduct consistent with Commission Rule 101, 29 CFR 2200.101 (Failure to obey rules)?
 - c. Should a third-party neutral have the power to require that a representative for each party with full authority to resolve the case be present at an ADR conference?
 - d. Should the third-party neutral require strict confidentiality of all ADR discussions and any other matters subject to a specific confidentiality agreement?
8. Should a specified amount of time be allotted to the ADR process before a case is returned to conventional proceedings?
- a. Should a third-party neutral have the authority to make a request to the

Commission to extend the timeframe for the ADR process?

b. If so, should there be defined criteria for granting an extension and/or a specified limit to any extension?

9. What other considerations should the Commission evaluate in determining whether to develop an ADR program at the review level?

The Review Commission welcomes any other comments or suggestions regarding an ADR program at the Commission's review level.

Dated: August 19, 2013

John X. Cerveny,

Deputy Executive Secretary.

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