



## **FEDERAL MEDIATION AND CONCILIATION SERVICE**

### **29 CFR Part 1406**

### **RIN 3076-AA26**

### **FMCS Terms of Service**

**AGENCY:** Federal Mediation and Conciliation Service.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Mediation and Conciliation Service (FMCS) is issuing this proposed rule for FMCS clients. This rulemaking sets forth terms for FMCS's provision of services. This rulemaking further expounds upon confidentiality rules associated with FMCS's services.

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

**ADDRESSES:** You may submit comments, in writing, to FMCS on this proposed rule, identified by RIN 3076-AA26, by any of the following methods:

- E-mail: [register@fmcs.gov](mailto:register@fmcs.gov). Include the reference "Proposed Rule FMCS Terms of Service, RIN 3076-AA26" in the subject line of the message.
- Mail: FMCS, One Independence Square, 250 E. Street, SW, Washington, DC, 20427, Attention: Alisa Zimmerman, Deputy General Counsel.

**FOR FURTHER INFORMATION CONTACT:** Alisa Zimmerman, Deputy General Counsel, Office of General Counsel, Federal Mediation and Conciliation Service, 250 E St SW, Washington, DC 20427; Office/Fax/Mobile 202-606-5488; [azimmerman@fmcs.gov](mailto:azimmerman@fmcs.gov).

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

The Federal Mediation and Conciliation Service (FMCS) works to build better, more effective workplace relationships and mitigate the damage from inevitable conflict through preventive dialogue, honest communication, and responsive strategies. Through our mission, FMCS provides professional services to a wide range of Federal, state, and local government agencies to resolve disputes, design conflict management systems, build capacity for constructive conflict management, and strengthen inter-agency and public-private cooperation. In offering these services, FMCS recipients must agree to abide by the proposed rule to preserve the integrity of the provided services.

## **II. Analysis of the Regulations**

### *Section 1406.1 General terms of service*

Paragraphs (a) through (g) set forth general terms of service applicable to all FMCS services. More specifically:

Paragraph (a) explains that when FMCS services are chosen, recipients of the services agree to abide by the terms as well as any other terms of services provided by FMCS and will hold FMCS and any FMCS neutral harmless.

Paragraph (b) notes FMCS will determine the date, time, and manner of services in accordance with applicable statutes and regulations.

Paragraph (d) explains that any person shadowing an FMCS neutral agrees to be bound by the same confidentiality standards as the FMCS neutral, which will be honored by the parties.

Paragraph (e) notes that FMCS recognizes the importance of mediator confidentiality, and as such FMCS will not produce materials related to a mediation, with some exceptions.

Paragraph (f) states that's the section does not negate or modify FMCS's Confidential Commercial Information (CCI) regulation.

Paragraph (g) discusses that FMCS will make the terms publicly available and make a copy available to all parties upon request.

### *Section 1406.2 Terms of service for mediation, facilitation, and other alternative dispute resolution services.*

Paragraphs (a) through (g) sets forth additional terms of service specific to mediation, facilitation, & other alternative dispute resolution services provided by FMCS.

*Section 1406.3 Virtual services – additional terms of service.*

Paragraphs (a) through (c) set forth additional terms of service specific to virtual services provided by FMCS.

*Section 1406.4 Grievance mediation and Federal sector inter-agency agreement mediation – additional terms of service.*

Paragraphs (a) through (e) set forth additional terms of service specific to grievance mediations and Federal sector inter-agency agreement mediations provided by FMCS.

*Section 1406.5 Training and outreach*

This section sets forth additional terms of service specific to training and outreach presentations provided by FMCS.

### **III. Matters of Regulatory Procedure**

*Administrative Procedure Act.*

Under 5 U.S.C. 553(a)(2), rules relating to agency management or personnel are exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). In addition, under 5 U.S.C. 553(b)(3)(A), notice and comment rulemaking requirements do not apply to rules concerning matters of agency organization, procedure, or practice. Given that the rule concerns matters of agency management or personnel, and organization, procedure, or practice, the notice and comment requirements of the APA do not apply here. Nor is a public hearing required under 45 U.S.C. 160a. In issuing a proposed rule on this matter, FMCS, will consider all written comments on this proposed rule that are submitted by the **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** due date.

*Executive Order 12866*

This proposed rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

*Regulatory Flexibility Act.*

FMCS has determined under the Regulatory Flexibility Act, 5 U.S.C. chapter 6, that this proposed rule would not have a significant economic impact on a substantial number of small entities because it would primarily affect FMCS employees.

*Paperwork Reduction Act.*

The Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply to this proposed rule because it does not contain any information collection requirements that would require the approval of the Office of Management and Budget.

*Congressional Review Act*

FMCS has determined that this proposed rule does not meet the definition of a rule, as defined by the Congressional Review Act, 5 U.S.C. chapter 8, and thus does not require review by Congress.

**List of Subjects in 29 CFR Part 1406**

Administrative practice and procedure, Labor management relations.

For the reasons discussed in the preamble, FMCS proposes to amend 29 CFR chapter XII by adding part 1406 to read as follows:

**PART 1406—FMCS TERMS OF SERVICE**

Sec.

1406.1 General terms of service.

1406.2 Terms of service for mediation, facilitation, and other alternative dispute resolution services.

1406.3 Virtual services—additional terms of service.

1406.4 Grievance mediation and Federal sector inter-agency agreement mediation—additional terms of service.

1406.5 Training and outreach presentations.

**Authority:** 29 U.S.C. 172; 29 U.S.C. 173 *et seq.*; and 5 U.S.C. 574.

**§ 1406.1 General terms of service.**

When Federal Mediation and Conciliation Service (FMCS) services are chosen, the recipients of the services have agreed to abide by FMCS's general terms of service as well as any other terms of service provided by FMCS.

(a) The recipients of a service shall hold FMCS and any FMCS neutrals harmless of any claim arising from the delivery of that FMCS service.

(b) FMCS will determine the date, time, place, and manner (virtual, in-person, or hybrid) of services provided in accordance with any applicable statutes, regulations, and agreements.

(c) FMCS may convene the parties for a threatened or actual work stoppage whenever in its judgment such dispute threatens to cause a substantial interruption of commerce.

(d) Any person shadowing an FMCS neutral agrees to be bound by the same confidentiality standards as the FMCS neutral and such confidentiality standards will be honored by the parties.

(e) FMCS recognizes the importance of mediator confidentiality to further its mission. Therefore, FMCS will not produce any materials related to a mediation other than the date, parties, location, and mediator, unless required by law. FMCS will not produce materials related to a mediation, materials exchanged in a mediation or facilitation, information related to non-plenary sessions of a facilitation, mediator or facilitator notes, and any internal communications with the mediator or facilitator, unless required by law.

(f) Nothing in this section shall be construed so as to negate or modify the FMCS's Confidential Commercial Information (CCI) regulation (29 CFR 1401.26).

(g) FMCS will make a copy of these terms available to all parties upon request.

**§ 1406.2 Mediation, facilitation, and other alternative dispute resolution services – additional terms of service.**

The following Terms of Service additionally apply when the FMCS service is a mediation, facilitation, training, and other alternative dispute resolution service.

(a) These services are voluntary processes that may be terminated at any time unless otherwise provided by statute or by agreement.

(b) The neutral has no authority to compel resolution.

(c) These services are confidential to the extent allowed by law. The obligations imposed by these terms and conditions are in addition to and do not supersede any obligations imposed by applicable state or Federal laws regarding mediation confidentiality.

(d) The parties agree that they will not record, transcribe, save, or otherwise capture any audio, video, files, documents, chat texts, or any other data that they would not have access to but for the service being provided, unless agreed to by all parties and with prior written approval of FMCS, or as otherwise required by law. They further agree to notify the neutral immediately if recordings, saves or other captures of data occur, to ensure that no further distribution or transfer occurs, and to immediately and permanently delete them.

(e) Non-parties may attend only with the agreement of the parties and the neutral unless otherwise required by law and are bound by these terms of service.

(f) If a party inadvertently gains access to any confidential discussions involving another party, the party with inadvertent access shall immediately disclose their presence and exit from the confidential discussions. Any confidential information inadvertently disclosed may not be used by the party with inadvertent access, even within the confines of the alternative dispute resolution session.

(g) The parties agree not to subpoena or compel the neutral to testify or produce any documents provided by a party in any administrative or judicial proceeding. The neutral will not voluntarily testify or produce documents on behalf of a party in any administrative or judicial proceeding unless otherwise required by law.

**§ 1406.3 Grievance mediation and Federal sector inter-agency agreement mediation —additional terms of service.**

The following Terms of Service additionally apply when the FMCS service is a grievance mediation or Federal sector inter-agency agreement mediation.

(a) The grievant or complainant is entitled to be present at the mediation.

(b) The parties agree not to disclose to any non-party oral or written communications made during the mediation process, including settlement terms, proposals, offers, or other statements, whether made privately to the neutral or when all parties are present.

(c) Evidence that is otherwise admissible or discoverable will not be rendered inadmissible or non-discoverable as a result of its use in the mediation proceedings.

(d) The neutral has no authority to compel agreement or other resolution of the dispute and will issue no written recommendations or conclusions. At the request of the parties, or on the initiative of the neutral, the neutral may provide an oral recommendation or opinion to resolve the dispute. In that circumstance, the parties may jointly decide to implement that recommendation or opinion but neither party is obligated to do so.

(e) (For Federal sector inter-agency agreement mediation, if applicable) Any communications between the Agency or Organizational Program/or Alternative Dispute Resolution Coordinator and the neutral(s) and/or the parties are considered dispute resolution communications with a neutral and will be kept confidential.

**§ 1406.4 Training and outreach presentations.**

The following Terms of Service additionally apply when the FMCS service is a training or outreach presentation.

(a) The parties agree that they will not record any FMCS training or outreach presentation (whether delivered in-person or virtually) without the knowledge and consent of the parties and prior written approval of FMCS.

(b) [Reserved]

**§ 1406.5 Virtual services—additional Terms of Service.**

The following Terms of Service additionally apply when the FMCS service is provided virtually.

(a) Parties may not provide meeting access information to non-parties without permission from the neutral unless the session is open to the public.

(b) The neutral and all parties must be provided notice of all attendees before or at the time of attendance unless the session is open to the public.

(c) Parties must ensure the integrity of technology used in virtual meetings. If an attendee is aware of any security breach, that attendee will inform the neutral immediately.

Dated: August 29, 2023.

**Anna Davis,**

*General Counsel.*

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