



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Request for Public Comment on Settlement Part Program

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Request for Comment.

SUMMARY: The Occupational Safety and Health Review Commission (Review Commission) invites the public to comment on the Review Commission's Settlement Part program.

DATES: Written comments must be submitted on or before [INSERT DATE 45 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. Cerveny, 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. Cerveny, 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:

I. Background

The Review Commission's Settlement Part program, codified at 29 CFR 2200.120, is designed to encourage settlements on contested citations issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) and to reduce litigation costs. The Settlement Part program is a form of alternative dispute resolution (ADR) under which larger contested OSHA citations (those with an aggregate penalty amount of \$100,000 or greater) docketed at the Review Commission are required to undergo a "settlement procedure" prior to the initiation of conventional hearing procedures before a Review Commission administrative law judge (ALJ). Under the mandatory Settlement Part, such a case is first assigned to a "Settlement Judge" who will issue a discovery order and supervise all discovery proceedings. Discovery may be limited or suspended entirely in advance of any conference before the settlement judge. After any discovery proceedings, the Settlement Judge conducts settlement proceedings which include conferences with the parties in order to identify or narrow factual and legal issues and/or to settle the case(s). All statements made and all information presented during the course of settlement proceedings are regarded as confidential and are not to be divulged outside of the settlement proceedings except with the consent of the parties. If Settlement Part proceedings do not result in a settlement, the case is assigned to a hearing judge (normally a judge other than the Settlement Judge) who will handle the matter under conventional hearing procedures.

The Review Commission's Mandatory Settlement Part was first instituted as a pilot program by the Review Commission in 1999 and was limited to contests of \$200,000 or more. See 64 FR 8243 (Feb. 19, 1999). During the pilot period, the Settlement Part program was the subject of a study performed by the Indiana Conflict

Resolution Institute at the School of Public and Environmental Affairs of Indiana University (IU). That study, which was completed in August 2000, attempted to examine several aspects of the pilot Settlement Part program in order to make recommendations concerning continuation of the program and any changes that might improve the Settlement Part process. In general, IU concluded that Settlement Part resulted in a high settlement rate and that both internal and external stakeholders were satisfied with program requirements and the Review Commission's role.

II. Current Status of Settlement Part Program Review

The Review Commission's Settlement Part program has changed in three important ways since it was initiated in 1999. First, it was made a permanent program in 2000. See 65 FR 58350 (Sept. 29, 2000). Second, it was expanded to encompass contests of \$100,000 or more in 2005. See 70 FR 22785 (May 3, 2005). Last, the 2005 revisions also provided for discovery to take place prior to initiation of settlement conferences. However, the basic premise and foundation of Settlement Part has not been reviewed on an in-depth basis since completion of the IU study in 2000.

After the passage of twelve years and the substantial experience gained in Settlement Part use since that time, the Review Commission is considering what additional steps, if any, may be taken to improve, expand upon, or otherwise modify existing Settlement Part procedures. The Review Commission has again contracted with IU and data is being collected in order to examine the efficiency and effectiveness of its Settlement Part program in achieving its goals. IU will review case processing data obtained from the Review Commission's case tracking system and has interviewed Review Commission personnel. IU plans on distributing a survey to U.S. Department of

Labor attorneys, employer counsel or representatives, counsel for employee representatives and employee representatives, and decision makers who personally participated in settlement cases from February 15, 2011 through February 14, 2012 that completed the settlement part process. IU plans an additional survey of a control group of participants with similar roles, in regular conventional proceedings between February 15, 2011 through June 30, 2012 where between \$50,000 and \$99,999 is at issue. Both surveys include questions that address the settlement process and do not include questions that ask about the substance or confidences of any particular case. These two surveys are voluntary and individual responses will be confidential. The Review Commission will obtain all appropriate clearances, including Office of Management and Budget survey collection approvals, before any surveys of participants involved in Review Commission settlement and conventional proceedings are distributed by IU.

III. Issues for Public Comment

In addition to the data collected from our case tracking systems and participant surveys, we invite comments on the efficiency and effectiveness of the Settlement Part program from the general public. Comments on specific aspects of the program are most helpful. Below are several questions that may be considered in commenting on the Settlement Part program.

1. How should the Review Commission define “success” for its Settlement Part program? Should issues of time and cost savings be principal considerations, or should other issues (e.g., transparency, avoidance of litigation, fairness to parties) infuse the process?

2. Has use of Settlement Part improved cooperation among the parties in

encouraging settlements? For example, is there more cooperation among the parties regarding abatement? Does the Settlement Part promote future compliance?

3. What is the appropriate role of employees and/or their representatives in the Settlement Part process? How might the Review Commission's Settlement Part rules address these roles?

4. One concern that has been voiced by some is that the confidentiality provisions of Settlement Part are too broad and comprehensive, and while perhaps appropriate for private arbitration agreements, may be inappropriate in the current context. Conversely, a concern expressed by some with substantial ADR experience, is that it is not feasible to expect settlement of a matter if a substantial degree of confidentiality is not maintained. Do existing Settlement Part rules adequately address the concerns of parties regarding confidentiality? How might the Review Commission's Settlement Part rules balance the competing interests of transparency and confidentiality, as well as creating an environment that will either foster or promote the resolution of contests?

5. Are the Review Commission's existing Settlement Part discovery rules appropriate for use in an ADR setting?

6. Should mandatory Settlement Part rules be amended to provide an option for the Chief ALJ to assign a case to Settlement Part where the issues are particularly complex even if specific dollar thresholds are not met? Should the Chief ALJ be able to adjust the dollar thresholds for cases eligible for mandatory settlement part processes based upon the Review Commission's case load?

7. Should cases be permitted to remain in mandatory settlement part proceedings for more than 18 months without the approval of the Chief ALJ?

8. Should the parties be allowed to elect to not participate in a mandatory settlement part proceeding and, instead, request that the case proceed directly to a hearing on the merits?

The Review Commission welcomes any other comments or suggestions regarding Settlement Part.

Dated: May 1, 2012

Debra Hall,
Acting Executive Director

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