U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

November 16, 2018

Via email

Ron Bailey
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street NW, Ninth Floor
Washington, DC 20036-3457

Re: Advance Notice of Proposed rulemaking, 29 CFR part 2200

Dear Mr. Bailey:

Enclosed please find the comments of the Occupational Safety and Health Dvision, Office of the Solicitor in response to the Commission's Advanced Notice of Proposed Rulemaking on its procedural rules in 29 CFR part 2200, published at 83 FR 45366 (comment period extended at 83 FR 48578). We appreciate this opportunity to comment.

Please contact me if you have any questions.

Very truly yours,

Edmund C. Baird,
Acting Associate Solicitor of Labor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Room S4004
Washington, DC 20210
(202) 693-5460
baird.edmund@dol.gov

Occupational Safety and Health Division's Comments in Response to the Occupational Safety and Health Review Commission's Advanced Notice of Proposed Rulemaking, 29 CFR part 2200, 83 FR 45366

November 16, 2018

The Occupational Safety and Health Division (OSH), Office of the Solicitor of Labor (SOL) supports the Occupational Safety and Health Review Commission's (OSHRC or Commission) decision to review its rules of procedure in light of technological advances and the evolution of practice before the Commission. We appreciate this opportunity to comment, and as discussed below, we believe there are several areas in which changes to the rules could facilitate improved practice before the Commission. These comments were compiled by OSH from suggestions made by SOL attorneys across the country who practice before the Commission.

E-filing

E-filing should be mandatory when the parties are represented by counsel or lay representatives. However, there should be an exception for pro se litigants. A number of pro-se litigants do not speak English or do not have access to or sufficient knowledge of computers. These parties could receive default judgments for failing to respond or the Secretary will have to expend additional resources explaining how to file electronically as well as having to educate them about OSRHC procedures. If e-filing is mandatory, then service by email also should be assumed to be proper service except, as set forth above, for pro se litigants.

Prehearing Procedures and Discovery

The Commission should provide uniform definitions for terms used in discovery. For example, commonly used terms such as communication, document, identify, and person could be defined in the rules. Common definitions would facilitate Commission practice by minimizing disagreement and misunderstandings arising in discovery proceedings.

The OSHRC should clarify whether Fed. R. Civ. P 26(b)'s proportionality requirement for discovery applies in OSHRC cases. Under Rule 2(b), 29 C.F.R. § 2200.2(b), the Federal Rules of Civil Procedure only apply if there is not a specific provision on point. The OSHRC rule regarding the scope of discovery is encompassed in Rule 52(b), 29 C.F.R. § 2200.52(b), so arguably, Fed. R. Civ. P 26(b), which also addresses the scope of discovery and encompasses the proportionality requirement, is not applicable to OSHRC proceedings. However, many practitioners raise proportionality in discovery, and the administrative law judges have provided differing interpretations. A uniform approach on this issue would be beneficial for all parties.

We urge the OSHRC to consider updating or replacing Rule 54(b), 29 CFR 2200.54(b), governing responding to requests for admissions, with the text from the analogous rule in the Federal Rules of Civil Procedure, Fed. R. Civ. P 36(a)(3)-(5). We believe these additions will make requests for admissions more meaningful and streamline issues for motion practice or trials.

The OSHRC should clarify that nationwide service of OSHRC subpoenas is permissible. Rule 57, 29 CFR 2200.57, is currently silent on geographical limits of subpoenas. The amendment should clarify that Fed. R. Civ. P. 45's 100-mile-service restriction does not apply to Commission subpoenas. This issue arises often, and as some administrative law judges have noted in their rulings, Rule 57 is best read in light of NLRB provisions that allow for nationwide service. An amendment to the rule would provide notice to all parties and would obviate Commission adjudication on the issue.

Summary Judgment

The OSHRC should incorporate Fed. R. Civ. P. 56, Summary Judgment, into its rules. This would encourage the use of summary judgments in appropriate cases. Additionally, a robust summary judgment practice could lead to a reduction of cases on the OSHRC docket or at a minimum or reduce the number of issues that will need to be tried, which in turn would shorten the length of trials and eliminate the need for certain fact and expert witnesses.

Settlement

The OSHRC should consider clarifying the length of time a settlement needs to be posted. Commission Rule 100(c), 29 CFR 2200.100(c) states that settlements must be posted in compliance with Rule 7(g), 29 CFR 2200.7(g). However, Rule 7(g) does not address the duration of time for posting. Rule 7(n), 29 CFR 2200.7(n), states that posting "shall be maintained until the commencement of the hearing or until earlier disposition," which is ambiguous as applied to settlements. This causes confusion among the parties, especially employers who have the responsibility to post settlements.

OSH proposes that the penalty threshold for applicability of mandatory settlement proceedings be increased to account for recent (and future) changes in the statutory maximum for OSHA penalties. The existing penalty threshold of $100,000 is outdated. Specifically, the current penalty threshold of $100,000 should be increased to $185,000 and, that every 3 years thereafter, the threshold be proportionately increased to maintain the same or similar ratio to the maximum penalty for willful or repeat violations (currently $126,749). Based on the Inflation Adjustment Act of 2015, the statutory maximums for OSHA penalties have increased since 2015 and will likely continue to increase incrementally each year. As a result, many more contested cases currently exceed the $100,000 threshold than prior to 2016. We believe it is not in the best interests of the government or the regulated community to automatically assign all cases in excess of $100,000 to mandatory settlement proceedings. The Commission should therefore consider updating the penalty threshold for mandatory settlement proceedings to maintain a consistent ratio between that threshold and the maximum penalty for a willful or repeat violations.

Simplified Proceedings

OSH recommends that Rule 206(b), 29 CFR 2200.206(b), addressing disclosures to the Secretary, should be amended to require employers to disclose affirmative defenses on a set schedule. Under Rule 206(a), 29 CFR 2200.206(a), the Secretary must make certain disclosures

to the employer, however, there is no reciprocal requirement for the employer. This rule change would prevent last minute filings that prejudice the Secretary's preparation of the case and the need for time extensions or continuances. Furthermore, if the Secretary is provided with this information, it would allow the parties to have open and frank discussions about potential settlement early in the proceedings instead of the days or week before the hearing date.

OSH proposes amending Rule 207(a), 29 CFR 2200.207(a) addressing the pre-hearing conference. We recommend that the Rule be revised to require this conference be held at least 30 days before the hearing. Frequently, there are simplified proceedings cases where an employer completely fails to communicate with the Secretary, and it is only during the pre-hearing conference that we learn the employer's defenses for the first time. Situations also arise where pro-se litigants have abandoned their contest, yet we receive no notice until they fail to participate in the pre-hearing call. We believe this rule change would prevent the Secretary and the Administrative Law Judges from unnecessarily expending litigation resources.

Interlocutory Review

Under the Commission's current rules governing interlocutory review, the Commission has a general policy of discouraging interlocutory appeals, granting them only where it determines that the appeal would involve "an important question of law or policy about which there is substantial ground for difference of opinion" or where the ruling below would result in a disclosure of privileged information. 29 C.F.R. 2200.73. This standard closely tracks the applicable federal rule governing appeal of interlocutory decisions. *See* 28 U.S.C. § 1292(b). OSH believes that the Commission's current interlocutory rules appropriately require the parties to wait – unless exceptional circumstances apply - until all claims as to all parties are resolved before any appeal can be brought to challenge any of the decisions made by the ALJ during the pendency of the case. A contrary rule would likely be highly disruptive to the expeditious resolution of trial matters; limiting appeals to final judgments prevents piecemeal litigation and promotes judicial economy. Accordingly, we recommend that the Commission retain its current rule governing interlocutory review.