

To: Occupational Safety & Health Review Commission

Re: Advanced Notice of Proposed Rulemaking, 29 CFR Part 2200

These comments are submitted in response to the Occupational Safety and Health Review Commission's (OSHRC) Advanced Notice of Proposed Rulemaking (ANPR) published in the Federal Register on September 7, 2018. They are submitted on behalf of the following organizations:

- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC
- International Union, United Automobile, Aerospace & Agricultural Implement Workers of America
- AFL-CIO
- North America's Building Trades Unions
- Change to Win
- National Council on Occupational Safety & Health
- National Employment Law Project

We applaud OSHRC for taking this initial step to update its procedural rules. Many of the groups submitting these comments also submitted a petition to OSHRC requesting certain changes to its procedural rules in January 2015. These comments reiterate some of the requests made in the earlier petition and respond to several issues raised in the ANPR.

We believe that OSHRC's procedural rules create unnecessary obstacles to employee participation and have the effect of deterring many employees and their representatives from participating more often and more fully in Commission proceedings. We also believe that some of these obstacles arise because OSHRC's procedural rules reflect an outdated concept of employer-employee relations that has limited relevance today. We urge OSHRC to make several changes to its procedural regulations to eliminate these obstacles. Each of our suggested changes would enhance opportunities for employee participation in OSHRC proceedings.

The Occupational Safety & Health Act (OSH Act or the Act) grants employees the right to be active participants in enforcement proceedings under the Act. Sections 8(e) and (f) of the Act, 29 U.S.C. §657(e) and (f), grant employees and a representative of employees the right to file a complaint of hazardous working conditions and the right to accompany OSHA during a work site inspection. Section

10(c), 29 U.S.C. §659(c), directs the Commission to adopt procedural rules that allow employees or a representative of employees to elect party status and participate in Commission proceedings.

Too often, employees do not exercise the rights they have been given under the OSH Act. This is particularly true at OSHRC, where employee participation in Commission proceedings is the exception, rather than the rule. Increased participation by employees in enforcement proceedings would ensure that those most directly affected by conditions alleged to violate the OSH Act have a say in whether and how those violations will be remedied. One reason employees often do not exercise their right to participate in OSHRC proceedings is that the Commission's procedural rules, at least the way they have been applied, create unreasonable obstacles to full employee participation. OSHRC can, and should, eliminate these barriers. We suggest several amendments to OSHRC procedural rules, which together would enable employees to more frequently and effectively participate in enforcement proceedings pending before OSHRC.

1. Amend the Definition of Affected Employee

OSHRC rules permit "affected employees" to elect party status in its proceedings, 29 C.F.R. § 2200.20(a), and define an "affected employee" as "an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations," *id.* §2200.1(e). This definition is too narrow, in two regards.

First, workers may be affected by exposures created or controlled by a cited employer, even if they are not directly employed by the cited employer. For example, under the multi-employer worksite doctrine, affirmed by OSHRC on numerous occasions, OSHA is authorized to cite an employer that creates or controls a hazard even if the only employees exposed work for another employer. This doctrine is usually applied in the construction industry, where multi-employer worksites are common. Employees exposed to a hazard on a construction site have an interest in proceedings to determine whether the hazard will be abated. And with their first-hand knowledge of the cited conditions, they can contribute significantly to the Commission's proceedings. This is true whether the employees are employed by the cited employer or by another employer at the worksite.

Multi-employer worksites are increasingly present in industries other than construction. Over the past several decades, there has been a precipitous rise in the use of temporary or contract workers, employed by leasing or employment agencies, who work on the premises, and often under the control, of a host employer. In cases where temporary or contract employees are working at a site, they often are not employees of the employer cited by OSHA, but are employed by an off-site staffing agency that may claim no responsibility for health and safety conditions at the site. OSHA has recognized that these temporary or contract workers are often at increased risk of injury when faced with health and safety hazards at the worksite of host employers, and the agency asserts the right to cite the host employer for OSHA violations to which temporary or contract workers are exposed. *See generally*, [https://www.osha.gov/temp\\_workers/index.html](https://www.osha.gov/temp_workers/index.html)

Like exposed employees on construction sites, these temporary or contract workers both are directly affected by, and can actively assist in, the Commission's proceedings. Moreover, OSHRC will inevitably be asked to decide whether OSHA has the authority to cite a host employer for exposures of temporary or contract workers under a variety of circumstances. When such cases arise, the employees affected by the citation should be allowed to participate in OSHRC's proceedings. Under the current rules, they would not be permitted to do so.

Second, using the existing definition of "affected employees," the Commission has only permitted workers exposed to the specific cited condition to elect party status. However, workers who are exposed to hazards substantially similar to the cited hazard should also be permitted to vindicate their rights by electing party status. For example, an employer may be cited for failing to have a machine guard or to follow lockout/tagout procedures on "Machine A." However, there may be dozens of machines in other parts of the facility, similar or identical to Machine A, with the same machine guarding and lockout/tagout hazards. If a worker who works on Machine A declines to elect party status, then no workers in the facility may be heard, even though they may have relevant information that would be very helpful to the Commission's proceedings. *See Sec. of Labor v. Nissan North America, Inc.*, OSHRC No. 17-0556. Accordingly, workers who are exposed to the same or substantially similar hazard in another part of the facility or on another piece of equipment should not be excluded from seeking party status simply because they do not have precisely the same exposures to hazards or violations as the employees listed in the citation.

Accordingly, OSHRC should amend the definition of “affected employee” in 29 C.F.R. § 2200.1(e) to eliminate the requirement that only employees of the cited employer who are exposed to the precise condition or machine cited may be “affected employees.” OSHRC should define an “affected employee” as “an employee who performs work at the site and who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations, or to the same or a substantially similar hazard arising out of circumstances, conditions, practices or operations that are the same or substantially similar to those listed in the citation.” The proposed definition is consistent with the definition of “employee” in §3(6) of the OSH Act, which does not tie “employee” to a particular employer. 29 U.S.C. § 652(6) (“[E]mployee” means an employee of an employer who is employed in a business of his employer which affects commerce.”)

## **2. Clarify That Employees May Select Any Person or Entity as Their Representative**

OSHRC rules provide that “affected employees” who elect party status may designate a representative to appear in Commission proceedings on their behalf. 29 C.F.R. § 2200.22(a). In a union workplace, the employee’s collective bargaining representative may not only act as the employees’ representative, but may elect party status in its own name. *Id.* § 2200.22(b). However, where no union has been certified, in some cases OSHRC ALJs will recognize an entity as the representative of employees and in other cases OSHRC ALJs refuse to do so. This lack of a standard practice among OSHRC ALJs encourages employers to routinely challenge workers’ designation of organizational representatives despite the absence of any such restriction in Commission rules. Such objections create unnecessary delays in the proceedings, impose an undue burden on employees seeking to participate in OSHRC proceedings, and potentially deprive employees of their rights to participate in settlement negotiations in the interim. OSHRC should clarify that, if designated by an affected employee, an organization, including a labor union, may serve as that employee’s representative during Commission proceedings.

Nothing in OSHRC’s rules prohibit an employee or group of employees from selecting an organization, rather than an individual, to represent their interests. OSHRC Rule 22(a) provides that “[a]ny party . . . may appear in person, through an attorney, or *through another representative* who is not

an attorney.” (Emphasis added.) Employees have a constitutional right to designate the representative of their choosing. *In re: Perry*, 859 F.2d 1043, 1045 (1<sup>st</sup> Cir. 1988).

The failure of OSHRC’s rules to explicitly allow an organization to represent the interests of several nonunion workers stands in contrast to the practice at OSHA, MSHA, and FMSHRC. OSHA recognizes that a wide range of organizations can represent workers for the purposes of filing a complaint seeking an inspection. See [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-148.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf) at 9-3. OSHA accepts formal complaints from an entity representing nonunion employees. See <https://www.osha.gov/as/opa/worker/handling.html>

In a related context, the Mine Safety & Health Administration defines a “miner’s representative” to include “any person or organization which represents two or more miners for the purposes of the Act.” 30 C.F.R. §40(b)(1). And, the Federal Mine Safety & Health Review Commission recognizes that any “affected miners or their representatives,” 29 C.F.R. §2700.4(b)(1), shall be permitted to intervene in Commission proceedings.

We urge OSHRC to make clear that any party may appear through a representative, including an organization.

### 3. Narrow the Scope of Confidentiality During Settlement Proceedings

Under Commission Rule 2200.120(d)(3), “all statements made and information presented” during settlement proceedings are treated as confidential. Confidentiality applies both to statements of fact and to offers of compromise made during settlement discussions. Confidentiality applies even if one of the parties had an independent basis for knowing the information. The Commission’s rule is too broad, particularly as applied to employees and their representatives.

Employees are present in the workplace. They learn about everyday working conditions, hazards employees face, and violations during their daily work activities. They, and their representatives, have a right to demand improvements in working conditions and to bargain with employers to gain safer workplaces. They also have a right to communicate with the public in their efforts to improve their working conditions.

Employees should not be impeded from acting to improve their working conditions because they or their representatives participate in Commission settlement discussions. Unfortunately, this is what sometimes happens under Commission Rule 120. Where hazardous working conditions and options for abatement are discussed in settlement, the Commission treats the factual information disclosed as confidential. This is true even if the employees or their representatives have an independent basis for learning of or knowing about such information.

The Commission's rule on confidentiality is broader than Rule 408 of the Federal Rules of Evidence. The Federal Rules recognize that statements of fact made during the course of settlement negotiations are not rendered inadmissible if the facts could have been obtained from an independent source, including through discovery. *See* Committee Notes on Rule 408 – 2006 Amendments. The Commission should narrow the scope of its rule so that it parallels the intent of the Federal Rules of Evidence. A revised OSHRC rule should make confidential only offers of compromise and factual information that a party could not learn of through discovery or other means. This clarification will permit employees and their representatives to continue to work towards improving health and safety in their workplaces, even during Commission proceedings.

#### 4. Increase the Transparency Surrounding Settlement Agreements

OSHRC should continue to require that, once its jurisdiction has been invoked, any settlement agreement between the Secretary and the cited employer must be approved by the Commission. Employees are entitled to a meaningful opportunity to participate in settlement discussions. *General Electric Co.*, 14 OSH Cases 1763 (Rev. Comm'n 1990). OSHRC enforces this right by requiring that the employer post any pending settlement agreement at the worksite for 10 days before OSHRC will approve the agreement. 29 C.F.R. 2200.100(c). OSHRC should continue this practice. Although OSHRC cannot insist that the substantive terms of the agreement are adequate, *Cuyahoga Valley Railway v. United Transportation Union*, 474 U.S. 3 (1985), it can insist that certain procedural rules are followed before it approves any settlement. OSHRC should not narrow or eliminate these minimal requirements for obtaining approval of settlement agreements.

In addition to requiring that any pending settlement agreement be posted at the worksite, OSHRC should also insist that the Secretary comply with section 6(e) of the Act before it approves any settlement agreement. Section 6(e) requires that whenever the Secretary “compromises, mitigates, or settles any penalty assessed under [the Act], he shall include a statement of the reasons for such action, which shall be published in the Federal Register.” 29 U.S.C. § 655(e). OSHA never complies with this requirement. OSHRC routinely overlooks this failing. As a result of OSHA’s failure to comply with section 6(e) and OSHRC’s failure to insist that it do so, the settlement process for citations is opaque when Congress intended that it be transparent. The lack of transparency means workers and their representatives have little ability to learn of past settlements and ground their advocacy in these precedents. OSHRC can correct this failure by either requiring OSHA to certify that it has complied with Section 6(e) or otherwise making public settlements that compromise penalty assessments.

#### 5. Citation to OSHRC Posted Decisions

We strongly agree with the suggestion in the ANPR that parties to OSHRC proceedings be permitted to cite directly to OSHRC decisions posted on the web, rather than requiring citation to a private reporter. Subscriptions to private reporting services are expensive and out of the reach of virtually all employees and employee representatives (and even some of their lawyers).

#### 6. Electronic Filing and Service

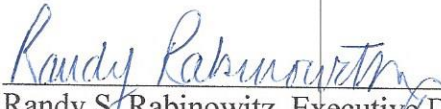
We encourage OSHRC to upgrade its electronic filing system, and to make its use mandatory, but with exceptions for parties who lack the capacity to easily access the system. The electronic systems adopted by federal and some local courts and by various federal agencies have provided professional practitioners with extremely efficient and cost-effective ways to file documents and receive immediate confirmation that the documents have been received in a timely fashion and served on other parties. However, although members of the public have increasing access to the internet, workers and their representatives do not necessarily have access to the equipment necessary to electronically generate, convert and file documents. We would therefore welcome OSHRC adopting an efficient electronic

filing and service system, and making its use mandatory for most Commission participants, but with exceptions for parties for whom electronic filing is infeasible.

We appreciate your thoughtful consideration of the issues raised in this petition. We look forward to working with the Commission on ways in which it can ensure that employees may effectively exercise their right to participate in Commission proceedings.

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Respectfully submitted,

  
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