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Via Electronic Mail rbailey@oshrc.gov

Mr. Ron Bailey
United States 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:

Ogletree Deakins Nash Smoak & Stewart, P.C. ("Ogletree") appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking for Revisions to Procedural Rules Governing Practice issued by the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission"). Ogletree agrees with OSHRC that an examination and update of the Commission's Rules of Procedures, last updated in 2005, is perhaps overdue.

The Commission requested comment on nine topics, which we will address below. The Commission also solicited suggestions for revisions to any Commission Rule. Ogletree also respectfully submits revisions for various revisions or clarifications to certain Commission Rules for the Commission's consideration.

The Commission's Nine Questions

- **Should rules on the computation of time should be simplified?** Ogletree welcomes a simplification of the Commission rules on the computation of time. The changes made to FEDERAL RULES OF CIVIL PROCEDURE 6 and 12 in 2009 provide a guideline for the Commission. The Federal Rules eliminated the different computation of time for periods of less than 11 days, which "made computing deadline unnecessarily complicated and led to counterintuitive results." FED. R. CIV. P. 6 Advisory Committee Note, ¶ 5 (2009).

  In 2009, the FEDERAL RULES also adjusted the times set for filing of answers, motions to dismiss, and motions from the typical 10 and 20-day periods to periods measured in weeks, specifically 14 and 21 days, respectively. Whole-week periods provide the advantage of time periods in which the final day will always fall "on the same day of the week as the event that triggered the period – the 14th day after a Monday, for example, is a Monday." *Id.*, ¶ 9. Thus, deadlines will always fall on a weekday. The FEDERAL RULES retained the

requirement that if the last day of a time period falls on a Saturday, Sunday, or legal holiday, then the time period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. *See* FED. R. CIV. P. 6(a)(1). The FEDERAL RULES retained time periods for thirty days and longer without change. FED. R. CIV. P. 6 Advisory Committee Note, ¶ 9 (2009).

With this guidance in mind, Ogletree suggests the following revisions to Commission Rules:[1]

§2200.4 Computation of time.

(a) Computation. In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or Federal holiday. ~~When the period of time prescribed or allowed is less than 11 days, the period shall commence on the first day which is not a Saturday, Sunday, or Federal holiday, and intermediate Saturdays, Sundays, and Federal holidays shall likewise be excluded from the computation.~~

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§2200.34 Employer contests.

(a) Complaint.

(1) The Secretary shall file a complaint with the Commission no later than ~~20~~ **21** days after receipt of the notice of contest.

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(b) Answer.

(1) Within ~~20~~ **21** days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

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§2200.38 Employee contests.

[1] The FEDERAL RULES also include computations of time for periods stated in hours, but in the experience of our attorneys, inclusion of these provisions are unnecessary. The Commission and its Administrative Law Judges rarely, if ever, require filing of a pleading, motion, or response in a time period stated in hours.

(a) Secretary's statement of reasons. Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Secretary shall, within ~~10~~ **14** days from his receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by him is not unreasonable.

(b) Response to Secretary's statement. Not later than ~~10~~ **14** days after receipt of the statement referred to in paragraph (a) of this section, the contestant shall file a response.

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§2200.40 Motions and requests.

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(b) When to make. A motion filed in lieu of an answer pursuant to §2200.34(b) shall be filed no later than ~~20~~ **21** days after the service of the complaint. Any other motion shall be made as soon as the grounds therefor are known.

(c) Responses. Any party or intervenor upon whom a motion is served shall have ~~10~~ **14** days from service of the motion to file a response. A procedural motion may be ruled upon prior to the expiration of the time for response; a party adversely affected by the ruling may within ~~5~~ 7 days of service of the ruling seek reconsideration.

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§2200.73 Interlocutory review.

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(b) Petition for interlocutory review. Within ~~5~~ 7 days following the receipt of a Judge's ruling from which review is sought, a party may file a petition for interlocutory review with the Commission. Responses to the petition, if any, shall be filed within ~~5~~ 7 days following service of the petition. A copy of the petition and responses shall be filed with the Judge. The petition is denied unless granted within 30 days of the date of receipt by the Commission's Executive Secretary. A corporate party that files a petition for interlocutory review or a response to such a petition under this section shall file with the Commission a copy of its declaration of corporate parents, subsidiaries, and affiliates previously filed with the Judge under the requirements of §2200.35 or §2200.37(d)(4). In its discretion the Commission may refuse to accept for filing a petition or response that fails to comply with this disclosure requirement. A corporate party filing the declaration required by this paragraph shall have a continuing duty to advise the Executive Secretary of any changes to its declaration until the Commission either denies the petition for interlocutory appeal or issues its decision on the merits of the appeal.

We also suggest that for the sake of uniformity and simplicity, the Commission convert all "working day" periods to calendar day periods. For example, the Commission might change "10 working days" in Commission Rule 37 to "14 days."

- **Should electronic filing and service should be mandatory and, if so, what exceptions, if any, should be allowed?** Attorneys at Ogletree believe electronic filing and service should be mandatory. Federal courts now have mandatory electronic filing requirements. Many state courts and administrative adjudicative agencies are also following this trend of the Digital Era and mandating e-filing procedures.

  Exceptions should be made for materials filed under seal, or privileged materials submitted for *in camera* inspection by an administrative law judge (ALJ). The Commission could also create an opt-out application for *pro se* litigants.

- **Should the definition of ''affected employee'' should be broadened?** Ogletree sees no reason to alter OSHRC's current definition of "affected employee." We agree with the comments filed on this point by the Chamber of Commerce of the United States and the Associated General Contractors of America.

- **Should citation to Commission decisions as posted on the agency's website should be allowed?** So long as all parties and the Commission can easily locate the material cited on the agency's website, Ogletree sees no reason to disallow this practice.

- **Should the rule on the staying of a final order be eliminated?** We presume this refers to Commission Rule 94. Ogletree finds no reason to eliminate this rule, without knowing the considerations that led to the Commission raising this topic as an issue. We do know that such motions are contemplated by the ADMINISTRATIVE PROCEDURES ACT (APA), specifically in the first sentence of 5 U.S.C. § 705. That section 11(a) of the OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (the "OSH ACT") additionally permits a court to issue a stay does not displace the APA provisions. 5 U.S.C. § 559.

- **Should the requirement for agency approval of settlements be narrowed or eliminated?** Considering that the Commission rarely disapproves of a settlement, Ogletree proposes that the Commission revise Commission Rule 100 as follows:

  § 2200.100 Settlement.

  (a) *Policy*. Settlement is permitted and encouraged by the Commission at any stage of the proceedings. The Judge or Commission will not approve settlement agreements but will hear objections to them; if no objection is filed or if any objection is overruled, the Judge or Commission will issue an order terminating the litigation.

  (b) *Requirements*. The Commission does not require that the parties include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item, specify any contested item or issue that remains to be

decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. It is preferred that settlement documents be typewritten in conformance with §2200.30(a). However, a settlement document that is hand-written or printed in ink and is legible shall be acceptable for filing. Unless the settlement agreement states otherwise, the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice.

(c) *Filing; service and notice.* ~~A settlement submitted for approval a~~After the Judge's report has been directed for review, any settlement shall be filed with the Executive Secretary. When a settlement agreement is filed with the Judge or the Executive Secretary, proof of service shall be filed with the settlement agreement, showing service upon all parties and authorized employee representatives in the manner prescribed by §2200.7(c) and the posting of notice to non-party affected employees in the manner prescribed by §2200.7(g). The parties shall also file ~~a final consent order~~ for adoption by the Judge a final consent order terminating the litigation.

(d) Objections; termination of litigation. If the time has not expired under these rules for electing party status, or if party status has been elected, an order terminating the litigation before the Commission because of the settlement shall not be issued until at least 10 days after service or posting to consider any affected employee's or authorized employee representative's objection to the reasonableness of any abatement time. The affected employee or authorized employee representative shall file any such objection within this time. If such objection is filed or stated in the settlement agreement, the Commission or the Judge shall provide an opportunity for the affected employees or authorized employee representative to be heard and present evidence on the objection, which shall be limited to the reasonableness of the abatement time.

~~(d) Form of settlement document. It is preferred that settlement documents be typewritten in conformance with §2200.30(a). However, a settlement document that is hand-written or printed in ink and is legible shall be acceptable for filing.~~

- **Should the grounds for obtaining Commission review of interlocutory orders issued by its administrative law judges be revised?** Ogletree believes the Commission should revise Commission Rule 73(a) as follows:

§2200.73 Interlocutory review.

(a) General. Interlocutory review of a Judge's ruling is discretionary with the Commission. A petition for interlocutory review may be granted only where the petition asserts and the Commission finds: (1) that the review involves an important question of law or policy about which there is substantial ground for difference of opinion ~~and that immediate review of the ruling may materially expedite the final disposition of the proceedings~~; or (2) that the ruling

will result in a disclosure, before the Commission may review the Judge's report, of information that is alleged to be privileged.

The line "immediate review of the ruling may materially expedite the final disposition of the proceedings" leaves the Commission gazing into a crystal ball, attempting to surmise the effect of interlocutory review on future litigation in the proceedings.

Although the current Commission rule resembles that in 28 U.S.C. § 1292(b), there is a crucial difference between the Commission and the courts of appeals, one reflected in the statutes defining their authority. Appeals to the courts of appeals are of right, not discretion. The courts of appeals must review all questions brought to them; they have no authority to decline to review questions they consider unimportant. Their role is correction of error, not the resolution of important questions of law and not oversight of adjudication under a particular statute. See 28 U.S.C. § 1291(a). By contrast, there is no right to Commission review. By statute, it is discretionary and thus can be and is properly limited to important questions, including those requiring national oversight and uniformity. See OSH ACT § 12(j); Commission Rules 91(a) ("Review by the Commission is not a right" but "a matter of discretion") and 92(b) ("novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions"). There is, therefore, strong reason why the Commission's interlocutory review rule should reflect its different role and permit the Commission to review interlocutory rulings if they implicate important questions of law. Whether interlocutory review would also materially advance the litigation should be a factor in the exercise of its discretion, not a legal restriction on the exercise of that discretion.

Particularly if litigation is not stayed, it appears that the Commission should be able to review interlocutory rulings that present questions of importance under the Act without necessarily being required to find that its review may materially advance the case's final disposition.

- **Should protection of sensitive personal information be broadened?** Commission Rule 8(g)(5) covers the same information protected by FED. R. CIV. P. 5(a). Ogletree is not aware of any additional categories of sensitive personal information that merit protection in Commission filings, but suggests that the Commission might mention any particular concerns it may have.

- **Should the threshold amount for cases referred for mandatory settlement proceedings be increased?** Mandatory settlement proceedings have been a success for the Commission in managing its docket and helping OSHA and employers reach mutually agreeable resolutions in difficult cases. We see no reason to increase the threshold amount, which would make fewer cases eligible for this program.

Suggestions for Revisions to Other Commission Rules

Commission Rule 34(b)(4).

Ogletree urges the Commission to amend Rule 34(b)(4), which states: "The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable." The "unless" clause of the above sentence should be deleted because the "as soon as practicable" criterion imposes a one-sided restriction on the amendment of pleadings. It imposes a burden on the amendment of answers, which are filed by employers, that is not imposed on the amendment of complaints, which are filed by the Secretary.

For the Secretary to amend a complaint, he must satisfy only the criteria in FED. R. CIV. P. 15(a) or (b) – *i.e.*, "if justice so requires" (paragraph (a)) or implied consent (paragraph (b)). But for an employer to amend an answer by, say, the addition of an affirmative defense, the ALJ must find not merely that the amendment is proper under FED. R. CIV. P. 15(a) or (b), but also that the amendment was sought "as soon as practicable." *E.g., Field & Associates, Inc.*, 19 BNA OSHC 1379, 1382 (No. 97-1585, 2001). The lack of any requirement that the Secretary seek an amendment "as soon as practicable" provides a tactical advantage to the Secretary, for it permits the Secretary to delay seeking an amendment far longer than an employer is permitted to delay seeking an amendment. Not only is this unfair to employers but it infringes on the equal-treatment guarantee of the Administrative Procedure Act, 5 U.S.C. § 559, which states: "Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons."

Although we urge the Commission to delete the "unless" clause of the current rule, we appreciate that the clause was likely included in the rules to serve the salutary purpose of warning employers, many of whom are *pro se*, of the need to seek amendments to answers and that it is better to do so early, lest a defense be waived. This purpose can be better served by no longer phrasing the text in the form of a rule, and recasting it as a party-neutral informational note, such as is used in Rule 96 ("Note: 28 U.S.C. 2112(a) contains certain applicable requirements."), or as a cross-reference, as in Rule 91(f) ("*See Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976))." The note might read as follows: "Note: The Judge may bar the assertion of claims or defenses not mentioned in the complaint or answer or in a timely amendment. *See* Federal Rule of Civil Procedure 15."

Commission Rule 40(a)

The Commission should exempt dispositive motions from the Rule's conference requirements. A conference is unnecessary for dispositive motions because the non-movant will naturally oppose the dispositive relief. In our collective experience, Ogletree attorneys have never encountered an "unopposed motion for summary judgment," for example. Such an exemption is common in federal court local rules. *See, e.g.*, C.D. CAL. LOC. CIV. R. 7-3; D. COLO. LOC. CIV. R.

7.1(b); D.D.C. LOC. CIV. R. 7(m); M.D. FLA. LOC. R. 3.1(g); S.D. FLA. LOC. R. 7.1(a)(3); N.D. TEX. LOC. R. 7.1(a).

Commission Rule 52(a)(1)(iii)

The last sentence of the rule reads, "In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to Commission proceedings."

In our experience this sentence has generated considerable confusion. FED. R. CIV. P. 26(a) requires parties to make initial disclosures, disclose experts and provide written expert reports, and make pretrial disclosures. ALJs differ on whether this sentence prohibits the exchange of initial disclosures (most hold that it does), prohibits the exchange of written expert reports (most hold that it does not), or prohibits the exchange of pretrial disclosures (most hold that it does not).

The Commission excluded FED. R. CIV. P. 26(a) from its proceedings for two primary reasons: (1) it is unworkable with *pro se* employers; and (2) it "results in needless additional expense to employers represented by counsel." *Preamble to Proposed Rule for Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission*, 70 FED. REG. 10,574, 10,575 (March 4, 2005). Little comment was provided on what exactly was unworkable (disclosures, expert reports, pretrial disclosures, or all three) or what results in needless additional expense to employers.

The Commission should clarify the meaning of this sentence and if necessary, amend the rule to reflect the Commission's meaning. For the Commission's consideration, employers almost universally perceive expert reports as an item that substantially increases costs in Commission proceedings. If the Commission intends to keep the requirement of an expert report, it should limit the practice to expert witnesses retained or specially employed to provide expert testimony in the case, or one whose duties as the party's representative regularly involves giving expert testimony, as provided in FED. R. CIV. P. 26(a)(2)(B).

A better, more efficient idea would be to adopt the requirement to disclose the expert witness, the subject matter on which the witness is expected to present evidence under FED. R. EVID. 702, 703, or 705, and a summary of the facts and opinions to which the witness is expected to testify. See FED. R. CIV. P. 26(a)(2)(C).

Commission Rule 54

The Commission should eliminate the requirement to respond to requests for admissions "under oath or affirmation and signed by the party or his representative" in Commission Rule 54(b). A response to a request for admission states an admission or denial, not a positive factual averment, and is therefore much like an answer to an allegation in a complaint, which need not be made under oath or affirmation. The analogous FED. R. CIV. P. 36(a) imposes no like requirement.

Commission Rule 56(a)

The Commission should amend Commission Rule 56(a) to allow parties to take a reasonable number of depositions without leave. In any case, the employer will wish to depose the inspector or inspectors who conducted the inspection; and any party will wish to depose any expert witness designated by their adversary.

The Commission should also clarify that the Secretary can conduct discovery only through the devices set forth in the Commission Rules Subpart D. At times the Secretary's representatives attempt to conduct *ex parte* interviews or depositions of witnesses, even employees and supervisory employees still employed with the employer. For attorneys, this would run afoul of ethical concerns. More fundamentally, it is inconsistent with the Commission's discovery rules and the structure of the OSH ACT.

The Secretary defends the deployment of this gambit under the guise of his authority to "question privately" employers, owners, operators, agents, or employees under Section 8(a)(2) of the Occupational Safety and Health Act of 1970. But this authority applies only to inspections. The Secretary's inspection is over by the time the matter reaches the Review Commission. The Secretary has *completed* his inspection, and issued a citation to the employer *after* the inspection. The Secretary's approach raises due process concerns, something the Commission should not countenance. Allowing the Secretary to circumvent rules of discovery under Commission Rules would eviscerate the very objective of Commission proceedings – to provide a fair and even-handed forum for the Secretary and employers to resolve their disputes.

Commission Rule 71

Ogletree requests no changes to Commission Rule 71, but most respectfully urges the Commission to invite public comment on whether the deliberative process privilege should be limited in Commission proceedings. Specifically, the Commission should invite public comment on whether the following should be added to Rule 71:

§2200.71 Rules of evidence.

(a) The Federal Rules of Evidence are applicable.

(b) The deliberative process privilege applies in these proceedings only to governmental secrets relating to the national defense or the international relations of the United States. Nothing in this section implies that the Secretary may not obtain a protective order when otherwise appropriate under § 2200.52.

Like all privileges, the deliberative process privilege is "in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). It thus creates a danger that cases will be wrongly decided, and that persons will be deprived of life, liberty or property on the basis of untruth. Hence, to justify a privilege, the case for it must be substantial and clear.

A number of commentators have sharply questioned the grounds for the existence of the deliberative process privilege. See 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680, at 131 (1992) (privilege rests on a "puny" rationale); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 INDIANA L.J. 845 (1990) (advocating restriction of privilege to military and state secrets, and permitting agencies to seek protective orders); Arthur Piacenti, Note, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice?* 12 REV. LITIG. 275, 283-92 (1992) (privilege thwarts justice rather than facilitates candid communication; privilege should not protect documents when agency brings prosecution); Edward J. Imwinkelreid, *The Government's Increasing Reliance Upon – and Abuse of – the Deliberative Process Evidentiary Privilege: "The Last Will Be First,"* 83 MISS. L.J. 509 (2014). These commentators, particularly Professor Wetlaufer, assert that, except for military and foreign policy secrets, the privilege lacks a sound basis. They show that any governmental interest in secrecy is so minor and so occasional that any particularized need can be adequately protected by permitting the agency to apply for a protective order like any other litigant.

The privilege has shown itself in OSHA litigation to be highly susceptible to misuse and abuse. The Solicitor's Office has invoked it to hide highly relevant impeachment evidence – a written memorandum by a compliance officer that he did not understand the technical issues involved in a certain citation item that he had already recommended and that he "need[s] help." The privilege is often, in our experience, invoked incorrectly to hide facts, which the privilege does not protect but which employer must then ferret out at great expense by filing a motion to compel.

Several of our attorneys have, after much struggle, obtained internal OSHA documents that had been initially withheld on deliberative process privilege. In one instance OSHA invoked the privilege to withhold so-called "egregious memorandums," *i.e.*, memorandums in which OSHA regional and area offices lay out the case for and against invoking the so-called "egregious" policy. The result was nearly always the same – that the material in the document contained no remarks that an OSHA official would be discouraged from making if he or she knew that the document would eventually be made public, but which contained much useful evidence supporting the employer's position. Other attorneys have had discovery fights over redactions in the case file diary or even worse, the inspector's notes.

In sum, the principal effects of the privilege in OSHA litigation are to keep highly probative evidence from employers and the Commission, and to confer a tactical advantage on OSHA's attorneys. It substantially, prejudicially and one-sidedly harms the search for truth and the rendering of justice. It does nothing for employee safety or health.

As the cited commentators note, there will on rare occasions be documents or remarks that would, if publicly disclosed, reveal highly embarrassing comments that perhaps would discourage candid advice by exposing the commenter to ridicule. Even if such remarks should be kept from the public, that does not justify their wholesale exclusion from the parties and the Commission required by the deliberative process privilege.

In these rare cases, the FEDERAL RULES and the COMMISSION RULES afford a simple mode of relief – the protective order. For example, a condition of revealing a candid document or remark might be that it would be disclosed to the attorneys and the Judge in confidence, just as is now done with trade secret material. We urge the Commission to propose the suggested rule.

We thank the Commission for offering us the opportunity to submit these views.

Sincerely yours,

Ogletree Deakins Nash Smoak & Stewart, P.C.

JFM:vab

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