

Comments Regarding Advance notice of proposed rulemaking, 29 CFR part 2200

In accordance with 29 U.S.C. 661(g), the Occupational Safety and Health Review Commission last implemented a comprehensive revision of its rules of procedure in 2005. To assist in determining what revisions should be made, the agency is soliciting recommendations for amendments to the Commission's rules of procedure. The agency's solicitation indicates while recommended changes to any rule will be considered, the Commission is especially interested in whether:

- Rules on the computation of time should be simplified;
- electronic filing and service should be mandatory and, if so, what exceptions, if any, should be allowed;
- the definition of "affected employee" should be broadened;
- citing to Commission decisions as posted on the agency's website should be allowed;
- the rule on the staying of a final order is not needed and should be eliminated;
- the requirement for agency approval of settlements should be narrowed or eliminated;
- the grounds for obtaining Commission review of interlocutory orders issued by its administrative law judges should be revised;
- protection of sensitive personal information should be broadened; and
- whether the threshold amount for cases referred for mandatory settlement proceedings should be increased.

My comments do not address all of the rules enumerated above.

Whether Rules on the Computation of Time Should be Simplified

Yes.

The Occupational Safety and Health Act of 1970 mandates that unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure (Fed. R. Civ. P.). 29 U.S.C. 661(g). The Commission's current rules on the computing time and extending time, Rules 4 and 5, generally track Federal Rule of Civil Procedure 6 in effect prior to 2009. However, in 2009, Federal Rule 6 was amended to simplify and clarify the provisions that describe how deadlines are computed and extended. According to the Committee Notes on Rules:

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method—two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls 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. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

The Commission should consider applying Federal Rule 6 to Commission proceedings by amending Commission Rule 4 (computation of time) and Rule 5 (to replace the current rule with an Official Record rule indicating the official record of the Commission will be the electronic file maintained by the Commission in the Commission's E-File system) as follows:

§2200.4 Computing and Extending Time; Time for Motion Papers. Computing and extending time and the time for motion papers are covered by Federal Rule of Civil Procedure 6.

§2200.5 Filing. Official record. The Commission shall not maintain a paper file in any case. The official record of the Commission shall be the electronic file maintained by the Commission in the Commission's E-File system.

Whether Electronic Filing and Service Should be Mandatory and, if so, what Exceptions, if any, Should be Allowed

Yes.

Requiring case documents, such as pleadings, motions, and petitions, to be filed electronically with the Commission gives the Commission a way to easily manage these files electronically. Following the general practice in many federal district courts, the Commission should mandate that all representatives of a party must register and electronically file and serve all case documents. The Commission should permit, but not mandate, pro se litigants to register and electronically file and serve all case documents. Therefore, I would recommend amending Commission Rule 7 (service and notice) and Rule 8 (filing) as follows:

§2200.7 Service and notice.

(c) How accomplished. Unless otherwise ordered, service made by a party's representative shall be accomplished by electronic transmission in conformity with §2200.8(g). Service by a party without a representative may be accomplished by electronic transmission in conformity with §2200.8(g), by postage-prepaid first class mail at the address of record, by facsimile transmission, or by personal delivery. Service is deemed effected at the time of mailing (if by mail), at the time of receipt (if by electronic transmission), or at the time of personal delivery (if by personal delivery). Facsimile transmission of documents and documents sent by an overnight delivery service shall be considered personal delivery. Legibility of documents served by electronic transmission or facsimile transmission is the responsibility of the serving party. ~~Documents may be served by electronic transmission only when all parties consent in writing and the certificate of service of the electronic transmission states such consent and the method of transmission. All parties must be electronically served. Electronic service must be accomplished by following the requirements set forth on the Commission's Web site (<http://www.oshrc.gov>).~~

§2200.8 Filing.

(b) Where to file. Prior to assignment of a case to a Judge, all papers filings not accomplished by electronic transmission in conformity with §2200.8(g) shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036-3457. Subsequent to the assignment of the case to a Judge, all papers filings not accomplished by electronic transmission in conformity with §2200.8(g) shall be filed with the Judge at the address given in the notice informing of such assignment. Subsequent to the docketing of the Judge's ~~report decision~~, all papers filings not accomplished by electronic transmission in conformity with §2200.8(g) shall be filed with the Executive Secretary, except as provided in §2200.90(b)(3).

(c) ~~How to file. Unless otherwise ordered, filings may be accomplished by postage-prepaid first class mail, personal delivery, or electronic transmission or facsimile transmission.~~

(1) Filings made by a party's representative shall be accomplished by electronic transmission in conformity with §2200.8(g).

(2) Court reporters must file the certified transcript of proceedings by electronic transmission in conformity with §2200.8(g).

(3) Filings by a party without a representative may be accomplished by electronic transmission by electronic transmission in conformity with §2200.8(g), by postage-prepaid first class mail at the address of record, by facsimile transmission, or by personal delivery. Any filings not accomplished by electronic transmission by electronic transmission in conformity with §2200.8(g) will be scanned by the Commission's staff and uploaded to the Commission's E-File system.

(g) Electronic filing.

~~(1) Where all parties consent to electronic service and electronic filing, a document may be filed by electronic transmission with the Commission and its Judges. The certificate of service accompanying the document must state: that the other parties consent to filing by electronic transmission. The electronic transmission shall be in the manner specified by the Commission's Web site (<http://www.oshrc.gov>).~~

(1) Electronic filings shall be accomplished by electronic transmission using the Commission's E-File system at <https://oshrc.entellitrak.com> in the manner specified by the Commission's Web site (<http://www.oshrc.gov>). The certificate of service accompanying the document must state the manner in which service or notice was accomplished on each party so entitled.

~~(5) Information that is sensitive but not privileged shall be filed as follows: [Reserved]~~

~~[As currently written paragraph (5) only applies to electronic submissions. I would propose moving it to a new subsection (h) and applying Federal Rule 5.2]~~

~~(i) If Social Security numbers must be included in a document, only the last four digits of that number shall be used;~~

~~(ii) If names of minor children must be mentioned, only the initials of that child shall be used;~~

~~(iii) If dates of birth must be included, only the year shall be used;~~

~~(iv) If financial account numbers must be filed, only the last four digits of these numbers shall be used;~~

~~(v) If a personal identifying number, such as a driver's license number must be filed, only the last four digits shall be used. Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.~~

(h) Privacy Protection for Filings Made with the Commission. Privacy protection for filings made with the Commission are covered by Federal Rule of Civil Procedure 5.2. Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.

Whether the Grounds for Obtaining Commission Review of Interlocutory Orders Issued by its Administrative Law Judges Should be Revised

Yes.

The Commission should consider adopting the language similar to 28 USC 1292(b)¹ (interlocutory decisions) applicable to courts of appeals:

§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.~~

(a) General. When a Commission judge, in making an order not otherwise appealable, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he or she shall so state in writing in such order. The Commission may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings before the Commission judge unless the Commission judge or the Commission shall so order, except, That the filing of an application concerning an alleged trade secret shall stay the effect of the ruling until the Commission denies the application or rules on the merits.

~~(b) Petition for interlocutory review. Within 5 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 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~~

¹ §1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

~~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.~~

~~(e) Denial without prejudice. The Commission's action in denying a petition for interlocutory review shall not preclude a party from raising an objection to the Judge's interlocutory ruling in a petition for discretionary review.~~

~~(d) Stay.~~

~~(1) Trade secret matters. The filing of a petition for interlocutory review of a Judge's ruling concerning an alleged trade secret shall stay the effect of the ruling until the Commission denies the petition or rules on the merits.~~

~~(2) Other cases. In all other cases, the filing or granting of a petition for interlocutory review shall not stay a proceeding or the effect of a ruling unless otherwise ordered.~~

~~(e) Judge's comments. The Judge may be requested to provide the Commission with his written views on whether the petition is meritorious. The Judge shall serve copies of these comments on all parties when he files them with the Commission.~~

~~(f)(b) Briefs. Should the Commission desire briefs on the issues raised by an interlocutory review, it shall give notice to the parties. See §2200.93--Briefs before the Commission.~~

~~(g)(c) When filing effective. An petition application for interlocutory review is deemed to be filed only when received by the Commission.~~

Whether the protection of sensitive personal information should be broadened

No.

I would propose moving it to a new subsection (h) so that it applies to all filings, and track the language of Federal Rule 5.2 (see proposal above).

Whether the threshold amount for cases referred for mandatory settlement proceedings should be increased

Yes.

The threshold amount for cases referred for mandatory settlement proceedings should be increased in direct proportion to any annual penalty increases established by the Secretary of Labor under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.