



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PROCEDURES AND PRACTICES IN SETTLEMENT PROCEEDINGS
BEFORE JUDGE JOHN B. GATTO

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I. Preamble

Any rule referenced in these procedures is to the Federal Rules of Civil Procedure, unless otherwise indicated.¹ Any reference to a Commission Rule means the Commission's Rules of Procedure, 29 CFR Part 2200, a copy of which is available on the Commission's web page at <https://www.oshrc.gov> under the "Rules – Guides" tab. All motions shall be accompanied by a proposed order that would grant the relief requested in the motion. *See* 29 C.F.R. § 2200.40(e).

As provided in the Commission's Rules, the settlement proceedings are confidential. 29 C.F.R. § 2200.120(d)(3). Confidentiality will permit an open discussion of the issues between the parties and will afford the parties greater privacy in resolving their dispute than is typically available in litigation. The Court will diligently work with the parties to amicably resolve the issues in controversy. All are expected to exert a **good faith effort** to resolve the issues.

Any attorney or other representative who is expected to try the case for each party shall be present at the settlement conference. Each party's representative shall be accompanied by an official of the party having full settlement authority on behalf of the party at the conference. The parties and their representatives or attorneys are expected to be completely candid with the Court so that it may properly guide settlement discussions. The failure to be present at a settlement conference or otherwise to comply with the orders of the Court or the refusal to cooperate fully within the spirit of Commission Rule 120 may result in the imposition of sanctions under Commission Rule 101. 29 C.F.R. § 2200.120(d)(2).

In the Court's experience, the opportunity for a successful settlement conference is enhanced when the parties prepare beforehand, by filing the initial formal pleadings, learning the case facts and relevant law, exchanging documents, and frankly assessing the strengths and weaknesses of their case and of the other party's case. Prior to the conference, the parties should identify and assess their true needs and interests and consider the needs and interests of the opposing party. With this document exchange and pre-conference preparation, the parties will be well prepared to intelligently evaluate settlement options discussed during the settlement conference.

II. Contacting Chambers

The Court's Legal Assistant is listed in Judge Gatto's first order sent to the parties. The

¹ 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. *See* 29 U.S.C. 661(g).

Court's Legal Assistant is your primary point of contact on matters relating to your case and can be reached by e-mail or telephone number indicated in Judge Gatto's first order sent to the parties. Neither the parties nor their counsel are permitted to discuss the merits of the case with any Court staff. **Subpoenas** may be requested *ex parte* through the Court's Legal Assistant by email.

III. **Mandatory Electronic Filing; Email Service**

A. Mandatory Electronic Filing. **ALL** parties must file documents electronically in the Commission's E-File System (unless you filed a written request to be exempt from electronic filing explaining specifically how and why it would be an undue burden to comply with the electronic filing and were granted an exemption from electronic filing by the Judge). **If you have not yet registered, you must immediately do so and notify the Court's Legal Assistant that you have done so.** If you have not registered but included your email address in your notice of contest or notice of appearance, you will receive a **one-time** *courtesy* copy of the Court's Initial Scheduling Order sent to your email address of record. *Unless you have been granted an exemption from electronic filing by the Judge, you will not receive any future Court orders/notices until you register and notify the Court's Legal Assistant that you have done so.*

B. User Registration and Electronic Filing. User registration and electronic filing are accomplished at <https://oshrc.entellitrak.com>. You are responsible for reviewing and complying with the Commission's Instructions for Electronic Filing link located on the Commission's web page at <https://www.oshrc.gov> under the "Featured Resources" tab. Failure to comply with these Instructions may result in the rejection of your submission.

C. Email Service. Documents filed electronically must be served by *email* attachment on all parties and intervenors. The Certificate of Service must not be filed as a separate document. The document submitted for filing to the Commission E-File System case file will be rejected if a Certificate of Service that conforms with the Commission Rules is not included with the document submitted. The Certificate of Service certifying simultaneous email service of the document to the other parties and intervenors in the case must be included as the final page of the document submitted for filing:

Certificate of Service

This is to certify that service of the [Document Name] filed in the Commission's E-File System was also simultaneous served by email attachment to the parties listed below on [Date of Service].

[Name of Individual Served
Address
Email Address]

_____/s/_____
Name Title
Company / Firm Name / Office of the Solicitor
Street Address
City, State, Zip Code Email Address

IV. Pleadings; Corporate Disclosure; Planning for Discovery

A. Complaint. If the Complainant has not filed a complaint, the Complainant shall do so **within 21 days** from the date of the Court's *Initial Scheduling Order*.

B. Answer. If the Respondent has not filed an answer, Respondent shall do so **within 21 days** from the date of the Court's *Initial Scheduling Order*, or service of the complaint, whichever is later.

C. Sample Pleadings Forms. A sample Complaint and a sample Answer are available on the Commission's web page under the "Sample Documents" tab at <https://www.oshrc.gov/sample-documents/>.

D. Corporate Disclosure. Respondent's answer shall not be accepted for filing, or if it has been filed it shall be stricken from the record, unless Respondent complies with Commission Rule 35's corporate disclosure requirements. *Respondent may be held in default pursuant to Commission Rule 35(b) and (d) if it fails to file an adequate disclosure declaration or an amended disclosure.*

E. Joint Preliminary Settlement Report and Discovery Plan. The parties are required to file a *Joint Preliminary Settlement Report and Discovery Plan* **within 14 days** from the date of the Initial Scheduling Order, which shall include the following:

1. The date the Complainant has or shall provide to Respondent a copy of the complete, redacted, OSHA investigative files, including OSHA Forms 1-A and 1-B, documents, photographs, videos, and any exculpatory evidence.

2. The date the Respondent has or shall notify the Complainant if Respondent is claiming a financial inability to pay the proposed penalty. If so, the date the Complainant shall notify Respondent regarding the financial documents that the Complainant will need to receive

and review prior to the settlement proceedings, regarding the claim of financial distress.

3. The date the Respondent has or shall provide to the Complainant:

a. Documents supporting Respondent's defenses and affirmative defenses, including photographs and videos;

b. Any proof of abatement documentation regarding the citations issued in these cases;

and

c. If Respondent is claiming a financial inability to pay the proposed penalties, the date Respondent will provide to the Complainant the requested financial documents regarding Respondent's claimed financial distress.

4. The date prior to the settlement conference that any additional discovery will be completed, if needed, to intelligently evaluate settlement options.²

5. The date the parties propose the settlement conference shall take place,² which shall be no later than **75 days** from the date of assignment of the case to **voluntary** settlement proceedings or **120 days** from the date of assignment of the case to **mandatory** settlement proceedings. *See* Commission Rules 120(a)(2) and 120(b)(3)(iv). **All settlement conferences shall be conducted remotely via Zoom video conference.**

V. [Ex Parte Confidential Memorandum](#)

All statements made and information presented during the settlement proceedings are **confidential** and shall not be divulged to the opposing party or outside of the settlement proceedings except with the advance permission of the parties. Commission Rule 120(c)(d)(e). The parties' *ex parte* confidential memorandum shall **NOT** be electronically filed or served. Within **14 days** before the conference, each party shall prepare and submit to the Court's Legal Assistant an *ex parte* Confidential Memorandum, which shall be marked "CONFIDENTIAL" and sent to the Court's Legal Assistant by e-mail attachment with the following in the subject line: Docket No. [Docket#] Complainant or Respondent's *Ex parte* Confidential Memorandum. The *ex parte* confidential memoranda shall include:

1. Describe the circumstances that gave rise to the litigation, including an analysis of the factual and legal issues, a discussion of the factual predicate for the party's position on each

² The Settlement Judge only schedules one day for settlement conferences but will be available for one additional consecutive day if necessary.

issue, and any other information the party believes will be helpful to an understanding of its position;

2. Describe any matters pending in any related litigation;
3. Describe any recent developments that may affect the resolution of the case;
4. Describe the important factors (factual, legal, and practical) you believe affect the terms and conditions upon which the case may be settled;
5. Describe any efforts to settle the issues, including offers or demands before and since the citation(s) were issued;
6. Provide a candid assessment of the strengths and weaknesses of the major points of error of each party's case;
7. Describe the necessary terms in any settlement (i.e., confidentiality, date by which settlement must close, scope of release, disposition of related litigation, etc.);
8. Describe any additional information your client or the other party needs to settle the case and whether it is needed before the settlement conference;
9. State whether you and your parties will participate in the settlement conference in good faith with the intention of using your best efforts to settle the case and explain if "no" as to any party;
10. State whether you and your parties will maintain confidentiality with respect to settlement communications made and received during and after the settlement conference and explain if "no" as to any party;
11. If the settlement proceedings are not successful, describe the realistic range of outcomes upon further trial or disposition, including monetary remedies; and
12. A copy of all settlement offers and counteroffers made by each party prior to the scheduled conference.

VI. Settlement Offers

The Respondent is required to make at least one **reasonable** settlement offer **prior** to the settlement conference related to the citation(s) at issue (a reasonable offer **is not** the vacation of all citation items and proposed penalties or the reclassification of all citation items). The Complainant is required to make at least one **reasonable** counter settlement offer **prior** to the settlement conference related to Respondent's offer (a reasonable counteroffer **is not** the affirmance of all citation items, classifications, and proposed penalties). Each party shall include

a copy of their offer/counteroffer with the *ex parte* Confidential Memorandum. *If either party fails to make a reasonable offer, the Settlement Judge will deem further negotiations to be fruitless and the settlement proceedings will be terminated.*

VII. Remote Instructions for Settlement Conference Form

Within **14 days before** the conference, the parties must jointly complete and file with the Court the [Remote Instructions for Settlement Conference form](https://www.oshrc.gov/about/administrative-law-judge-practices), which is available under Judge Gatto's area of the Administrative Law Judge Practices tab on the Commission's web page at <https://www.oshrc.gov/about/administrative-law-judge-practices>. _

VIII. Status Report

The parties shall file a joint status report of their intent to proceed to conference, settle, or withdraw the citation(s) or notice of contest no later than **14 days before** the conference.

IX. Citation Settlement Offers Chart

The *ex parte* Confidential Memorandum shall include as an attachment a completed Citation Settlement Offers Chart as set forth in the [attachment](#) to this procedure.

SO ORDERED.


/s/ _____
JOHN B. GATTO, Judge

Dated: August 21, 2023
Atlanta, GA

CITATION SETTLEMENT OFFERS CHART

Citation Number, Item	Characterization	Amount	Respondent's Offer	Complainant's Offer
Citation 1, Item 1				