

Occupational Safety and Health Review Commission Rule Changes

By Gary Auman

Several changes are occurring for employers regarding contesting Occupational Safety and Health Administration (OSHA) citations. The updated Occupational Safety and Health Review Commission (OSHRC) Rules of Procedure, which go into effect on June 10, 2019, were last revised in 2005. Please remember that these rules impact employers with citations issued under Federal OSHA. Those employers in or with citations issued in state plan states are still controlled by the procedure in their states. Many of the time periods for taking action are being changed. Some of these time periods will encompass calendar days instead of “working days.” E-filing will be preferred; but service by mail will be permitted. All of the changes can be found on the OSHRC website at: <https://tinyurl.com/yxueop66>.

Currently to contest an OSHA citation, employers must file a Notice of Contest (NOC) with the Area Director within 15 working days of receipt of the citation(s) and serve it upon all parties. Currently service on parties other than the Area Director can be accomplished by mail, personal delivery, fax, or posting. So, currently the employer can perfect service on other affected parties (usually the employees of the company) by posting the NOC along with the boilerplate document the employer receives from the Area Director with the citations at the same location the employer has posted the citations. Instructions for posting are included in some of the boilerplate information that accompanies the citations.

Under current procedures the employer receives a certification postcard from the OSHRC several weeks after the NOC has been sent to the Area Director. The employer is required to return this card to the OSHRC within 48 hours certifying that it has notified affected employees and (if they have them) their designated representatives. Sometimes employers don't know they have an affected employee who would like to participate in the contest. This is why there is a requirement to serve notice by posting or by mailing a copy of the NOC to the employees' designated union representative. Employers post a notice informing employees of their right to party status and availability of all pleadings for inspection and copying. A form notice provided in the procedural rules satisfies the requirements. In June, employers will now need

to also post along with this form notice, a copy of the notice of contest or petition for modification of the abatement period. Further, affected employees currently have 10 days to let OSHA know of their intent to participate, but as of June, employees will be given 14 days.

This procedure (filing the NOC) is about to change significantly for represented employers. As of the effective date of the new OSHRC rules, all those parties who are represented by a third party will have to file all documents, including the NOC electronically through the Commission's website. Self-represented parties (an employer who decides to represent itself in the NOC) may still mail the NOC to the Area Director or E-File, fax, or personally deliver their documents. There has been no indication that the procedure for issuing citations to the employer by certified mail are changing. **So, the employer who elects to represent itself should carefully read the instructions that appear in the paperwork, which will accompany the citations, and follow those directions to be sure it correctly files its NOC.**

All those using the E-file system must certify service of filed documents upon all other parties via email and must continue to file all other documents electronically. In other words, an unrepresented party may not choose to E-file one document and then change its mind and switch to U.S. mail. After an employer who chooses to represent itself elects to utilize E-filing, it must utilize E-filing thereafter. All parties must be wary to redact sensitive information (many examples are given in the rules) from their E-filed documents. Those unrepresented parties who choose to physically mail their notice are given the same address in Washington, DC, as before; however, as the language has not changed under the new rules, and unless OSHA changes its procedures, the employer should file its NOC directly with the Area Director.

We still recommend that employers who chose to use a representative to represent

them in the NOC permit their representative to file the NOC so the representative is in the loop for all subsequent pleadings that will occur in the case. Of course, that representative will have to E-file the NOC. Our office will continue to mail a copy of the NOC to the subject Area Director until all of the bugs have been worked out of the system and any questions regarding the new procedures, which require interpretations or litigation, have been resolved. Please remember that, with the modest procedural change noted below, the 15 working day period to file the NOC is still in force and failure to comply will, in most cases, result in affirming the citations issued as is.

As stated, if an employer does not file their notice of contest within the required time frame, the case is over. The employer must pay the fines per the citation and perform any required abatement within the stated abatement period. As of June, the failure of an employer to file their notice of contest within 15 working days will result in a final order with relief permitted only under extraordinary circumstances and with a prompt filing of a request for relief. This is really the first time that the OSHRC has indicated that all may not be lost if the employer misses the 15 working-day time frame for filing the NOC. This may give slightly more leeway to late filings for employers, but what "extraordinary circumstances" are have yet to be determined. The deadlines for filing, service, and procedural activities will also change in some circumstances. Employers will want to be aware of those changes so as not to miss any deadlines.

In many cases, settlement is reached before trial. Currently, "the Commission does not require that the parties include any particular language in a settlement agreement." This will change dramatically. Parties will soon have to notify the Judge in a written joint submission titled "Notification of Settlement," which must contain several statements (such as the items settled and those contested and remaining

to be decided, certification that the agreement has been posted, etc.). The period of voluntary settlement will be increased from 45 days to 75 days. Mandatory settlement mediation currently applies to employers facing \$100,000 or greater in penalties and may not exceed 60 days. This will soon change to those facing \$185,000 in penalties and procedures not to exceed 120 days.

Finally, sometimes simplified proceedings are used for contesting OSHA citations. Currently these proceedings favor oral argument and discourage briefs. However, the new rules result in a 180-degree change with written briefs being favored and oral arguments being more discretionary. Further, judges currently provide their opinions from the bench, unless written briefs are filed, but they no longer must do so. They must only provide their decision within 60 days of the closing of the record.

All employers, especially those who are unrepresented, will want to pay special attention to the changing of the OSHRC Procedural Rules. Another article may follow specifically highlighting some of the new rules that unrepresented parties may wish to pay special attention to and perhaps consider seeking legal counsel for.

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