U.S. Department of Labor

Occupational Safety & Health Administration

Implementing ADR/Mediation for OSHA's Whistleblower Protection Program

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Introduction

During the summer of 2010, Congress assigned two more whistleblower laws to the Department meaning that investigating complaints filed under those laws belongs to OSHA's Whistleblower Protection Program. This brings the total number of whistleblower laws under OSHA's authority to be 19 - however, this number is not static and-it is expected-to increase.

Also during the summer of 2010, Regional Supervisory Investigators from Regions II, IX and X as well as a Regional Investigator from Region II had several discussions about the implementation of alternate dispute resolution, mediation and early settlement as a way to manage the ever increasing caseload of OSHA's Whistleblower Protection Program (Wpp).[1] Coincidentally, each region had been experimenting with mediation or early settlement. About the same time, the agency created a three-person team to conduct a “top-to-bottom" review of the WPP, and the team asked these regions for input. In addition, a request was made of the WPP's National Office to include mediation/early settlement as a topic for a Regional Supervisory Investigator (RSI) conference call in order to survey the other regions. The result is this written proposal with a list of recommendations prepared in order to formally implement an Alternate Dispute Resolution (ADR)/Mediation and Early Settlement program as part of the agency's WPP. Due to the constantly increasing number of whistleblower laws assigned to OSHA, along with an increased number of complaints filed, it is suggested that such a program be implement as soon as reasonably possible.

Why Use ADR/Mediation?

ADR and mediation are not new concepts. They have been used to resolve employment-related

conflict and complaints for many years; and have been used by Federal enforcement agencies such as the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board.[2] The Department of Labor's Office of Administrative Law Judges (OAU) also uses ADR/Mediation in its ADR/Settlement Judge Program as well as the Department's Administrative Review Board.

In 1997, the Department of Labor published a Notice in the *Federal Register* informing the public that it intended to "expand the voluntary use of ADR in programs administered by the Department."[3] The Notice asked for public comments for a proposed ADR/mediation pilot test for whistleblower complaints filed under Section 11c of the OSH Act and for complaints filed under the 6 environmental whistleblower laws. The Department of Labor justified the use of ADR based on a pilot project used in

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1 For the past several years, OSHA has received constant criticism from the public that it has not effectively managed its whistleblower protection program. There are a variety of reasons for this criticism, and none include the lack of effort or talent on behalf of the whistleblower investigative staff. Rather, the reasons are primarily based on the number of new whistleblower laws assigned to OSHA, increased number of complaints filed versus an inadequate number of whistleblower Investigators, and insufficient overall support of the WPP on a national level.

2 News Release: *NLRB* Establishes Permanent *ADR* Program For Settling Complaints; May 2009

http://www.nlrb.gov/about us/news room/press archives.aspx

3 http://www.oalj.dol.gov/PubliciRulesofPractice/References/FederaIRegister/626690.htm

Region III and noted that the "pilot test in the Philadelphia Region" involved “DOL managers [who] served as Mediators for enforcement cases that were awaiting litigation. The results of the Philadelphia ADR Pilot were encouraging. Of the 27 cases mediated in the pilot, 22 {81 per cent} were settled, and most were resolved in a single mediation session. The DOL participants independently concluded that the settlements were at least comparable to the likely outcome of litigation. Some of the cases were complex and would have cost the Department and the outside parties substantial time and resources to litigate.” The Department of Labor noted that Section 11c cases are rarely filed in Federal District Court, but when they are filed, the cases face “substantial delays" due to busy court schedules.

Resolving a whistleblower complaint thru ADR/mediation/early settlement is one answer to costly, time consuming litigation. For example, in 1997, the Department of Labor gave the following three reasons for implementing ADR:

(1) resolve disputes faster and more cheaply than conventional litigation;

(2) produce resolutions that satisfy the parties and DOL; and

(3) use the enforcement and litigation resources of DOL more effectively.

Approximately 13 years later, these three reasons are still valid, reasonable, and justify OSHA implementing its own ADR/Mediation/Early Settlement program for resolving whistleblower complaints as one tool to effectively manage the WPP.

The Administrative Dispute Resolution Act of 1996

OSHA should implement ADR in order to comply with the *Administrative Dispute Resolution Act of* 1996, (amending Pub. Law 101-552 and Pub. Law 102-354). This law requires that a Federal agency “use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." The ADR Act defines an “administrative program" to include a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or ***investigation,*** as those terms are used in subchapter II of this chapter." Thus, it appears that OSHA's WPP qualifies as an administrative program and is subject to the provisions of the ADR Act.

In addition, the ADR Act requires that each agency train an employee to serve as a “dispute resolution specialist." The training would “encompass the theory and practice of negotiation, mediation, arbitration, or related techniques."

It also appears that the ADR Act would allow OSHA to use “(with or without reimbursement) the services and facilities of other Federal agencies, State, local, and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.”

In short, OSHA may use its own ADR/mediation/early settlement process as well as utilize existing organizations. The Act does not exempt educational institutions from this list.

Regional WPP Experiment with ADR/Mediation/Early Settlement

As previously noted, OSHA Regions 2, 9 and 10 have been experimenting with ADR/mediation/early settlement for about the last 6 months. This is not the same as having the parties of a whistleblower complaint ask OSHA to delay its investigation and defer to the outcome of a mediation. Rather, *our respective OSHA regions have taken the initiative* and asked the parties if they were willing to voluntarily mediate and/or settle the whistleblower complaint.

Although our regional mediation/early settlement processes have similarities, they are not the same. No region's process is better than the other.

Here is a Summary of What Each Region Has Done To Date

Region II Model

(Law Students and Faculty to mediate all types of cases)

NOTE: To date, Region II has successfully mediated one whistleblower complaint filed under Section llc.

Summary: Investigator will refer to all types of whistleblower cases (i.e. not only llc and STAA) to law school students and/or law student faculty at university law school to mediate where mediation appears profitable. An OSHA point person will coordinate setting up the mediation. The parties will choose the Mediator. The parties and the Mediator will sign a mediation agreement setting forth the ground rules. The mediation will be confidential and all documents produced during the mediation will be destroyed. *Any settlement agreement reached during the mediation must be reviewed by OSHA for consistency with OSHA policy.* If no settlement is reached 60 days after the matter is sent to mediation, or if the mediation breaks down before this 60 day period, OSHA will recommence its investigation.

Process:

1) Investigator will go through intake process. If after speaking with both sides the case appears to be one that might profitably be mediated the Investigator will broach the topic with Complainant and Respondent. (See Attachment 1: When is Mediation an Option) The Investigator will have talking points so that she/he can discuss the benefits of mediating or going into an investigation (See Attachment 2: Talking Points).

2) If both parties agree they will be referred to a point person at OSHA who will coordinate the process. The point person will also clarify OSHA's role as facilitator.

3) The parties will be provided with a list of possible no-cost Mediators and they will be informed that they can also choose their own Mediator.

4) Once a Mediator has been chosen the parties and the Mediator will sign a mediation agreement setting forth the ground rules. The agreement can be a standard one supplied by the OSHA point person (See Attachment 3: Agreement to Mediate) or something that the parties decide to do on their own.

5) The Mediator will check in with the OSHA point person to set deadlines as well as to clear up any legal points that might be unclear.

6) OSHA will to extent possible provide meeting space.

7) The Mediator will assume jurisdiction over the complaint for a sixty day period. At any time during that period any of the parties or the Mediator can determine that the mediation process is not working and return the case to the Investigator.

8) The Mediator will report back to the OSHA point person on a regular basis for purpose of communicating where mediation stands.

9) The discussions during the mediation will be afforded complete confidentiality and any and all documents produced for the purposes of the mediation will, at the end of the process be turned over to the Mediator to be destroyed. The end of the process is defined as either once the parties have signed a settlement agreement or when 60 days have passed and no agreement has been reached).

10) Mediation sessions will be closed to any individual other than the parties and their representatives except by consent of the parties and the Mediator.

11) Any settlement agreement reached between the parties will receive the same level of scrutiny as any other whistleblower settlement.

Region IX Model

(Early Settlement)

NOTE: OSHA Investigators in Region IX plan to conduct face-to-face settlements for all types of whistleblower complaints*. Any settlement agreement reached during Region IX's process must be reviewed by OSHA for consistency with OSHA policy.*

Summary: If the parties indicate to the OSHA Investigator a willingness to try early settlement for any whistleblower case, the OSHA Investigator will coordinate with the parties to meet on a specific date at an OSHA area office to try and settle the matter. The Investigator will only conduct settlement discussions if decision makers come to the settlement. The OSHA Investigator will conduct an opening statement laying out the ground rules during the settlement discussions, including requesting that both parties treat each other and the Investigator with respect, and indicating that settlement is voluntary and can be stopped by either party or the Investigator at any time. The parties will then make their opening statements to each other. The OSHA Investigator will then split both parties into different rooms and caucus with each other in

an attempt to reach settlement. If no settlement can be reached, the OSHA Investigator will commence an investigation, including, but not limited to, interviewing the parties who came to the settlement. Region 9 has not yet implemented this process but will do so after all investigators have been trained on conducting early settlement sessions in the manner proscribed below. Region 9 expects that such training will take place in early Fiscal Year 2011. Region 9's RSI and two of its six investigators have currently been trained as FEB shared neutrals' "mediators in training" and will train the Region's remaining four investigators.

Process:

1) In OSHA's normal opening letters to the parties, OSHA will indicate that if the parties would like to explore early settlement, they should contact the OSHA Investigator. The benefit of early settlement will be explained in the opening letters.

2) If the parties indicate such a willingness, the OSHA Investigator will coordinate the settlement session to take place on a certain date at an OSHA area office. The parties will have to pay their own way to the session.

3) The OSHA Investigator will conduct an opening statement laying out the ground rules. Confidentiality will not be promised. Rather, the benefits of early settlement will be discussed and the investigator will request that each party listen to the other and treat everyone with respect. The Investigator will explain that this is not a mediation but rather an attempt at early settlement. The Investigator will indicate that settlement is voluntary and can be stopped by either party or the Investigator at any time.

4) Both parties will then make their opening statements to each other and the OSHA Investigator.

5) The OSHA Investigator will then separate each party into a separate room and caucus with each party in an attempt to reach settlement.

6) If a settlement is reached, OSHA must review the settlement under its normal policy. Both "Settled OSHA" and "Settled Other" (ie global settlement) agreements will be accepted, although the Investigator will attempt to get the parties to sign "Settled OSHA."

7) If settlement reaches an impasse, or if either party indicates an intent to end settlement discussions, the Investigator will immediately commence an investigation, including, but not limited to, interviewing the parties who came to the settlement.

Region X *Model*

(Seattle Federal Executive Board ADR Consortium, or the SFEB ADR Consortium)

NOTE: Region X currently refers whistleblower complaints filed locally (within the Seattle/Tacoma/Everett area) to the SFEB ADR Consortium. The SFEB ADR Consortium has an ADR/mediation program with about 2S certified Mediators available to mediate OSHA whistleblower complaints.[4] The SFEB ADR Consortium uses 2 Mediators when mediating

4 The Seattle FEB ADR Consortium's website is located at http://www.seattlefeb.us/adrindex.html. According to the Program Manager, in fiscal year 2009, the SFEB ADR Consortium mediated 229 cases with a success rate of 89%. One Reg. X Whistleblower Investigator is currently enrolled in the SFEB ADR mediation process to become a certified Mediator. Implementing ADR/Mediation for OSHA's WPP

complaints. *Any settlement agreement reached during the mediation must be reviewed by OSHA for consistency with OSHA policy.* Initially only whistleblower complaints filed under Section 11c and the STAA were to be used for mediation. However, Region X is considering referring to the SFEB ADR Consortium all types of whistleblower complaints.

Summary: 11c and STAA regulations allow OSHA to stop an investigation and defer to Alternative Dispute Resolution (ADR). Investigators will usually refer whistleblower complaints to the SFEB ADR Consortium where the employer has an incentive to settle especially if the complainant still works for the employer. In January 2010, Region X Investigators and RSI made a presentation to SFEB ADR Mediators about OSHA's WPP and our settlement process. The Mediators were advised that (1) OSHA is not a party in the mediation, (2) the mediation is confidential, (3) OSHA must review any settlement agreement reached during the mediation, and (4) if no settlement is reached 90 days after the case was referred to mediation, OSHA reserves the right to recommence its investigation.

Process:

1) 11c or STAA complaint is filed with OSHAs.

2) OSHA Investigator consults with RSI about referring whistleblower complaint to SFEB ADR Consortium.

3) OSHA Investigator suggests to the parties that certain 11c or STAA complaints be sent to mediation by touting the benefits of mediation.

4) OSHA Investigator coordinates with SFEB ADR Program Manager, and indicates why the 11c or STAA complaint at issue is good for mediation.

S) If the SFEB ADR Program Manager agrees to take the case for mediation, the OSHA Investigator gives him a copy ofthe complaint.

6) OSHA Investigator sends a letter to the parties, copied to the SFEB ADR confirming that the case is being referred for mediation

7) Referral letter states that the mediation is voluntary, confidential and the parties should not be retaliated against for participating in the mediation

8) SFEB ADR Program Manager conducts an intake, contacts the parties, schedules the mediation with the Mediators. SFEB ADR Program Manager sends the parties a SFEB ADR flyer and the OSHA Fact Sheet, *Your Rights as a Whistleblower.*

9) The mediation begins. OSHA is not present and is not a party to the mediation. The parties sign a confidentiality agreement. During the mediation, the case remains open in IMIS.

10) Any settlement agreement reached during the mediation must follow OSHA policy. The SFEB ADR Mediators have been informed of OSHA's guidelines for approving settlement agreements.

11) If an agreement is reached during mediation, the Investigator and/or RSI will review it before it is signed by the parties. If it is a "Settled *OSHA"* case, both parties and OSHA sign the settlement.

5 Due to an increase in the number offiled complaints besides 11c or STAA, Region 10 has stopped limiting mediated cases to these two whistleblower laws only.

12) If the case has not settled 60 days after the date the SFEB ADR receives the complaint, the SFEB ADR will notify OSHA.

13) If the case has not settled within 90 days from the date it was filed, OSHA reserves the right to recall the complaint and recommence its investigation.

Recommendations

Listed below are our recommendations to implement a formal ADR/Mediation/Early Settlement Program for OSHA's WPP:

1. It is recommended that OSHA propose a rule informing the public about its intent to implement an ADR/Mediation/Early Settlement program for whistleblower complaints filed with the agency. The purpose of this rule-making would be formalize the use of ADR as a way to resolve whistleblower complaints through mediation, improve the use of government resources, provide a "win-win" solution for the parties, and save taxpayer dollars.

DOL OALJ made a similar rule making proposal in 1993 as follows:

The purpose of this proposal is to *permit the appointment of settlement judges in proceedings before the Office of Administrative Law Judges. The procedure would use informal conferences* to *encourage claim settlement without adjudication. This is a voluntary procedure intended* to *reduce the costs* to *parties of filing and defending complaints and* to *expedite the resolution of complaints pursuant to Executive Order No. 12778 (Oct. 23, 1991) and the Department of Labor's Alternative Dispute Resolution Interim Policy/57 FR 7292* (1992).

The OALJ's rule for mediating complaints, including whistleblower complaints, became final in 1993. It was implemented as part of compliance with the Administrative Dispute Resolution Act of 1990. See 29 CFR Part 18.

2. Proposal of the *OSHA Whistleblower Complaint ADR/Mediation Rule* should begin no later than October 31, 2010. The purpose of making such a rule formalizes the process and ensures that the agency is compliant with the ADR Act.

3. It is also recommended that OSHA fashions its ADR/Mediation/Early Settlement program similar to the program utilized by the OAU. Since both agencies are part of the Department of Labor, the OALJ preside over many of the same whistleblower complaints already investigated by OSHA, and since the OALJ has had an existing program, it is reasonable to adopt parts of their program, where appropriate and practical, to OSHA's WPP. Complaints filed under any of the whistleblower laws administered by OSHA shall be considered for mediation.

4. OSHA should continue to use and increase the use of the Federal Executive Board's ADR/Mediation Program. Currently there are FEB ADR/Shared Neutral Programs in 8 of OSHA's regions; however, not every FEB ADR regional program is available to mediate whistleblower complaints. If a FEB Mediator must travel in order to mediate a whistleblower complaint, OSHA should pay for the cost of transportation, hotel and per diem for a location that requires the least amount of travel or expense.

5. OSHA should include a training program to allow whistleblower Investigators to become certified Mediators or "shared neutrals."

6. OSHA should hire full-time whistleblower Mediators similar to what the EEOC has on staff. Ideally, there should be 1 Mediator for each region. At the very least, there should be 5 full-time Mediators who can be shared between 2 regions each.

a. Attached is a draft Whistleblower Mediator/Investigator position description.

7. Or, OSHA should hire a cadre of OSHA investigators in the country that solely perform mediation for our program. One or several investigators would either be assigned to the each Region to solely conduct mediation, depending on the number of new complaints each Region receives. Once a whistleblower complaint is filed, if the parties are interested in mediation, it would go straight to these individuals (this is the EEOC model) and not be assigned as an OSHA investigations. Confidentiality agreements are signed. Such investigators would need mediation training like the type the FEB/EEOC puts on.

8. It for some reason, it is not possible to hire full-time Mediators, then OSHA should refer any case which is a good candidate for settlement to a body outside of OSHA, preferably to a federal agency like the FEB (Region X model) but if that is not available, to a non-federal agency like law schools or a state body (Region II model).

9. If the case is not a good candidate for settlement, or if the body outside of OSHA (ie FEB, law school, state program, etc.) does not agree or does not have the resources to mediate, OSHA should use an *in-house settlement program* (Region IX model). In order for this to work, the investigator would need training on conducting settlements in the fashion Region IX is proposing. Supervisors would direct investigators to conduct such in-person settlements.

10. OSHA Whistleblower Investigators and their Supervisors should be informed about implementing an ADR/Mediation/Early Settlement program as soon as reasonably possible.

11. OSHA Whistleblower Investigators should be *given* the opportunity to be trained as certified Mediators. Such training and certification can be done with either the EEOC, a regional FEB ADR Program (if available) and/or another accredited mediation training program.

Respectfully Submitted,

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