

Proposed Rules

Federal Register

Vol. 64, No. 228

Monday, November 29, 1999

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2430

Amendment of Equal Access to Justice Act Attorney Fees Regulations

AGENCY: Federal Labor Relations Authority.

ACTION: Proposed rule.

SUMMARY: The Federal Labor Relations Authority (FLRA) proposes to amend its regulations implementing the Equal Access to Justice Act (EAJA) by adopting a cost of living adjustment to the maximum rate for the calculation of attorney fees permitted under the EAJA. Specifically, the FLRA proposes to use the Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, U.S. City Average, All Items to create an inflation-based adjustment to the statutory cap on attorney fees. The FLRA also proposes modifying the rules to allow an applicant to request an increase to the maximum fees rate based on special factors.

DATES: Comments must be received on or before January 13, 2000.

ADDRESSES: Mail or deliver written comments to the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW, Room 415, Washington, DC 20424-0001.

FOR FURTHER INFORMATION CONTACT: Peter Constantine, Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW, Washington, DC 20424-0001, or by telephone at (202) 482-6540.

SUPPLEMENTARY INFORMATION: The EAJA, 5 U.S.C. 504(b)(1)(A) (1994 & Supp. III 1997), provides that an agency may not award attorney fees in excess of \$125 per hour (or \$75 for proceedings commenced prior to March 29, 1996), unless the agency determines by regulation that a higher fee is justified by (1) an increase in the cost of living or (2) some special factor. In a recent decision, 55 FLRA (No. 72) 444 (Apr. 30, 1999), responding to petitions requesting an adjustment to the EAJA fees cap, the FLRA announced its intention to engage in the instant rulemaking to consider appropriate criteria for increasing the maximum rate based on cost of living and other special factors. The FLRA also announced in that decision its intention to amend its regulations implementing the EAJA to permit recovery, in conjunction with adversary adjudications commenced on

or after March 29, 1996, of attorney fees not to exceed \$125.00 per hour. This was accomplished through the promulgation of the final rule published at 64 FR 30861 (Jun. 9, 1999).

Cost of Living

The FLRA proposes to allow for an increase in the maximum EAJA attorney fees rate based on cost of living increases. For guidance in this regard, the FLRA has looked to the National Transportation Safety Board's EAJA regulations, 49 CFR part 826, and its statement in its proposed rulemaking regarding the cost of living adjustment to the statutory cap (57 FR 60785) (Dec. 22, 1992). The FLRA proposes an inflation-based adjustment to the statutory cap based on the Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, U.S. City Average, All Items (CPI-U). This CPI-U is the generally understood "cost of living" index that is widely used as a price inflator in labor and contract matters.

To determine the appropriate attorney fees rate, adjusted for cost of living, the statutory cap (\$125 or \$75) is multiplied by an inflation factor. The inflation factor is the CPI-U for the year that legal services were rendered divided by the CPI-U for the base year. Phrased as a formula, the calculation is:

$$\frac{\text{CPI-U-Year of Service}}{\text{CPI-U-Base Year}} \times \$125 \text{ (or } \$75) / \text{hr} = \text{Adjusted Rate}$$

The base year for calculations premised on the \$75 statutory cap is 1981. The base year for calculations

premised on the \$125 statutory cap is 1995.

To illustrate how the calculation works, two examples are provided.

Example 1: The maximum rate for attorney fees for services provided in 1993 is \$119/hr, based on the following calculation:

$$\text{Adjusted Rate} = \frac{144.5 \text{ (CPI-U-1993)}}{90.9 \text{ (CPI-U-1981)}} \times \$75 / \text{hr}$$

Example 2: The maximum rate for attorney fees for services provided in

1997 is \$132, based on the following calculation:

$$\text{Adjusted Rate} = \frac{160.5 \text{ (CPI-U-1997)}}{152.4 \text{ (CPI-U-1995)}} \times \$125 / \text{hr}$$

The FLRA seeks comments and suggestions concerning its proposed method of adjusting the statutory fee cap.

Other Specific Factors

The FLRA is seeking comment on whether to also amend its EAJA regulations to allow for an adjustment to the statutory fees cap based on "special factors." We note that the Federal Mine Safety and Health Review Commission has recently amended its regulations to allow fee increases based on special factors, 61 FR 66961 (Nov. 12, 1998).

The EAJA, 5 U.S.C. 504(b)(1)(A), lists as a special factor the "limited availability of attorneys qualified to handle certain types of proceedings." This phrase refers to a narrow category of attorneys who have "some distinctive knowledge or specialized skill" such as those who practice patent law. *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Without specifying what other special factors may exist, the Supreme Court noted that they "must be such as are not of broad and general application." *Id.* at 573.

The FLRA reiterates that it is unclear whether expertise in administrative practice before the FLRA qualifies as a "special factor." See 55 FLRA at 448 n.4 (citing *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 598-99 (D.C. Cir. 1994); *Waterman Steamship Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1124 (D.C. Cir. 1990)).

The FLRA proposes revising § 2430.5 to provide that requests for special factor increases in fees are submitted to the administrative law judge assigned to the matter, and thereafter subject to Authority review. The FLRA asks

commentators to address two questions. First, is it appropriate to establish a regulation allowing for increases due to special factors? Second, assuming that such a regulation is established, what, if any, specific criteria should the regulation set out to be considered in analyzing a request for such an increase? As currently proposed, the regulation does not list any specific criteria.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant economic impact on a substantial number of small entities, because this rule applies to Federal employees, Federal agencies, and labor organizations representing Federal employees.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the

economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulation contains no additional information collection or record keeping requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Part 2430

Administrative practice and procedure, Equal access to justice, Government employees, Labor-management relations.

For the reasons stated in the preamble, the FLRA amends 5 CFR part 2430 as follows:

PART 2430—AWARDS OF ATTORNEY FEES AND OTHER EXPENSES

1. The authority citation for part 2430 is revised to read as follows:

Authority: 5 U.S.C. 504.

2. Revise § 2430.4(a) to read as follows:

§ 2430.4 Allowable fees and expenses.

(a)(1)(i) No award for the fee of an attorney or agent under these rules may exceed \$125.00 per hour, or for adversary adjudications commenced prior to March 29, 1996, \$75.00 per hour, indexed to reflect cost of living increases as follows:

$$\frac{\text{CPI-U-Year of Service}}{\text{CPI-U-Base Year}} \times \$125 \text{ (or } \$75) / \text{hr} = \text{Adjusted Rate}$$

(ii) The cost of living index to be used is the Consumer Price Index, All Urban Consumers, U.S. City Average, All Items (CPI-U). If legal services are provided during more than one year, each year shall be calculated separately. If an annual average CPI-U for a particular year is not yet available, the prior year's annual average CPI-U shall be used.

(2) No award to compensate an expert witness may exceed the highest rate that the Authority pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily

charges clients separately for such expenses.

* * * * *

3. Revise § 2430.5 to read as follows:

§ 2430.5 Rulemaking on maximum rates for attorney fees.

If warranted by special factors, attorney fees may be awarded at a rate higher than that established in § 2430.4. Any such increase in the rate for attorney fees shall be made only upon a petition submitted by the applicant, pursuant to § 2430.6. Determinations regarding fee adjustments are subject to Authority review as specified in § 2430.13.

Dated: November 23, 1999.

Solly Thomas,

Executive Director.

[FR Doc. 99-30897 Filed 11-26-99; 8:45 am]

BILLING CODE 6727-01-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Ch. I

[Docket No. OST-1996-1880]

Nondiscrimination on the Basis of Handicap in Air Travel

AGENCY: Office of the Secretary, DOT.