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Wage and Hour Division

Occupational Safety and Health Administration

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29 CFR Parts 24, et al.

Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

Wage and Hour Division

Occupational Safety and Health Administration

Office of Federal Contract Compliance Programs

29 CFR Parts 24, 825, and 1977

29 CFR Chapter V

41 CFR Chapter 60

Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor

AGENCY: Office of the Secretary, Wage and Hour Division, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice; request for comments.

SUMMARY: This notice amends the Department of Labor's interim policy on the use of alternative dispute resolution (ADR), originally published on February 28, 1992 (57 FR 7292), and revised on June 26, 1992 (57 FR 28701). The Department of Labor (DOL) is interested in expanding the voluntary use of ADR in programs administered by the Department. Accordingly, the Department seeks public comment on a proposed pilot test of voluntary mediation and/or arbitration in six categories of cases: Discrimination cases arising under Section 11(c) of the Occupational Safety and Health Act; environmental ''whistleblower'' cases arising under the employee-protection provisions of the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Energy Reorganization Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act; cases arising under the Family and Medical Leave Act; cases arising under the Fair Labor Standards Act; compliance review cases arising under Executive Order 11246; and complaint investigation cases under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. 4212).

DATES: Comments are due by April 14, 1997.

ADDRESSES: Submit written comments to Roland G. Droitsch, Deputy Assistant Secretary for Policy, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue, N.W., Washington, DC 20210.

The Department is using this notice to experiment with the electronic filing of comments. Submit comments in electronic format through the World Wide Web of the Internet at the following Website: http://www.dol.gov/dol/public/regs/comments/main.htm.

Commenters who file electronically do not need to confirm their comments by submitting written confirmation copies. Interested parties will also be able to review comments filed (whether submitted in written or electronic format) at the same Website.

Questions about or problems with filing electronically should be submitted to: webmaster@dol.gov.

All of the comments received can be viewed at the Office of the Assistant Secretary for Policy, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue, N.W., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Jim Jones, Office of the Assistant Secretary for Policy, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone (202) 219–6026. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: After discussing the legal authority for the Department's use of ADR, this Notice describes: a prior pilot test of ADR (the Philadelphia ADR Pilot), the use of ADR by public agencies, the DOL programs involved in the current pilot test, and the details of the test. The Department is interested in receiving comments on ADR and the pilot test generally, as well as on a number of specific issues identified in the Notice. For example, the Department invites comments on the use of mediation and arbitration in the pilot test, as well as on the relationship between these two ADR techniques, including the issue of whether arbitration (in addition to mediation) should be offered as an option in all categories of cases included in the pilot test.

Legal Authority

On February 28, 1992, under the original Administrative Dispute Resolution Act, Public Law 101–552, which expired on September 30, 1995, the Department published in the Federal Register (57 FR 7292) an interim policy on the use of ADR in the programs administered by DOL.

On October 19, 1996, President Clinton signed the Administrative Dispute Resolution Act of 1996 (ADR Act), Public Law 104–320, which reauthorized alternative means of dispute resolution in the Federal administrative process.

As did its predecessor statute (codified at 5 USC 575–580), the ADR Act of 1996 authorizes and encourages federal agencies to use arbitration, mediation, negotiated rulemaking, and other consensual methods of dispute resolution. With respect to arbitration, the ADR Act, in conjunction with the Federal Arbitration Act (9 USC 1–16): Provides for federal judicial enforcement of arbitration agreements; provides for judicial review and enforcement of arbitration awards; specifies the authority of the arbitrator; and establishes rules for arbitration proceedings, as well as rules governing the effect of arbitration awards.

The pilot test includes, among other methods of ADR, voluntary arbitration to which the Department would be a party. The Department believes that the arbitration procedure described in this Notice would be consistent with the Constitution, as currently interpreted by the Department of Justice.[1] In compliance with Section 8 of the ADR Act of 1996, before participating in binding arbitration, the Department will consult with the Attorney General and will issue guidance on the appropriate use of arbitration and when Department staff are authorized to use arbitration.

The Department also believes that the pilot test would advance the goals of Executive Order 12988 on Civil Justice Reform, issued by the President on February 5, 1996 (61 FR 4729). Section 1(c) of the Executive Order encourages the use of ADR techniques and processes by litigation counsel for federal agencies, if the ''use of a particular technique is warranted in the context of a particular claim or claims, and * * * such use will materially contribute to the prompt, fair, and efficient resolution of the claims.''

The Philadelphia ADR Pilot

The Department issued its 1992 interim ADR policy in conjunction with the start of a pilot test in the Philadelphia Region in which DOL managers 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

[1] The most recent views of the Department of Justice are reflected in a September 7, 1995 memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to John Schmidt, Associate Attorney General (''Constitutional Limitations on Federal Government Participation in Binding Arbitration'').

complex and would have cost the Department and the outside parties substantial time and resources to litigate.

Public Agency Use of ADR

In 1993, a National Performance Review report strongly endorsed ADR as a means of reducing governments costs and improving efficiency. Today, the use of ADR by public agencies is growing.

In the federal government, for example, the Equal Employment Opportunity Commission (with the assistance of the Federal Mediation and Conciliation Service) and the National Labor Relations Board are exploring various ADR techniques for employment-related disputes brought before those agencies. The Department of Justice (DOJ), in turn, has begun a program to facilitate mediation in civil litigation handled by DOJ. A pilot test of mediation to resolve complaints under the Americans with Disabilities Act is also underway at DOJ.

The States have begun to expand their use of alternative dispute resolution as well. On February 16, 1996, for example, the Massachusetts Commission against Discrimination (MCAD) launched an ADR program that will offer voluntary arbitration of employment discrimination disputes. The MCAD program will operate under a new due-process protocol to assure that the arbitration process is fair.

The December 1994 Report and Recommendations of the Commission on the Future of Worker-Management Relations (the Dunlop Commission) urged the Department to expand the Philadelphia ADR Pilot to the remaining DOL regions and to enlarge the mix of cases submitted to mediation. The Dunlop Commission also advised DOL to ''explore the use of different forms of ADR, including mini trials, early neutral evaluation, and arbitration to determine which processes are most effective for different kinds of cases.''

Proposed Pilot Test

In light of the enactment of the ADR Act of 1996, the recommendations of the National Performance Review and the Dunlop Commission, as well as the ADR initiatives of federal and state agencies, the Department is interested in building on its past use of mediation and in exploring the possible benefits of arbitration, under appropriate circumstances. After inviting and considering public comments, the Department therefore plans to proceed with a pilot test to help determine whether private, voluntary mediation and/or arbitration can achieve the goals of (1) resolving disputes faster and more cheaply than conventional litigation; (2) producing resolutions that satisfy the parties and DOL; and (3) using the enforcement and litigation resources of DOL more effectively. (The Department will continue to consider, on a case-by-case basis, other opportunities to participate in ADR, either when DOL is asked to do so by an outside party or by a court or other adjudicative authority, or when a DOL agency otherwise believes that ADR would be effective in resolving a particular dispute.)

Under the proposed pilot test, the Department will continue to fully investigate employees' complaints of violations of the laws covered by this pilot test, as warranted. In selected cases, as described below, employees and employers will be offered the option to mediate and/or arbitrate disputes under the Department's auspices. In these cases, the Solicitor's Office may provide legal representation to employees. In other types of cases, as indicated, the Department would offer an employer/contractor the option of mediation or arbitration, and the Department itself would be a party to the proceeding. The pilot test will not include disputes in which private parties entered into an arbitration or mediation agreement prior to the dispute.

The Department recognizes that Federal agencies acquired little if any experience with arbitration during the five-year life of the original ADR Act (1990–1995) and thus intends to proceed carefully in this area. For example, the Department is committed to following proper due process safeguards in any use of ADR techniques. In proposing the pilot test described in this Notice, the Department reviewed the ''Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship'' issued by the Task Force on Alternative Dispute Resolution in Employment. (The Task Force, an outgrowth of the Dunlop Commission, included representatives of diverse organizations involved in labor and employment law.) In addition to developing fair ADR procedures, the Department would also make arbitrators' decisions available to the public.

The Department's proposed pilot test will be limited to six types of cases, described below. These programs were selected because they seem to present promising opportunities for effective use of voluntary ADR. The results of the proposed pilot test will guide DOL in future ADR initiatives, including the possible expansion of voluntary mediation and/or arbitration to other types of cases. The Department invites comment on its selection of programs for the proposed pilot test and on possible alternatives or additions to the programs selected.

The six types of cases that would be included in the Department's pilot test are: (1) Discrimination cases under Section 11(c) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 660(c); (2) environmental whistleblower cases under the employee-protection provisions of seven separate environmental safety and health statutes;[2] (3) cases under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*; (4) cases under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*; (5) compliance review cases under Executive Order 11246; and (6) complaint investigation cases under the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. 4212.

OSH Act Discrimination Cases: Section 11(c) of the OSH Act prohibits employers from discharging or discriminating against employees for engaging in protected, safety-related activity under the Act. Discrimination cases under Section 11(c) are initiated by an employee filing a complaint with the Occupational Safety and Health Administration (OSHA). OSHA investigates such complaints. Meritorious complaints which OSHA cannot settle administratively are referred to the Solicitor's Office for legal action. The OSH Act authorizes the Secretary of Labor to file suit in federal district court to enforce Section 11(c). The statute does not create a private right of action for employees. (The Department's regulations interpreting OSH Act Section 11(c) appear at 29 CFR Part 1977.)

In recent years, OSHA has been receiving approximately 3,200–3,300 complaints under Section 11(c) annually. The great majority of these complaints are either determined to be meritless or are settled administratively. On average, about 120 cases per year are referred to the Solicitor's Office, which in turn files about 20 cases per year in federal district court. Because of heavy caseloads in the courts, these cases can be subject to significant delays.

[2] The statutes are: the Clean Air Act, 42 U.S.C. 7622; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9610; the Energy Reorganization Act, 42 U.S.C. 5821; the Federal Water Pollution Control Act, 33 U.S.C. 1367; the Safe Drinking Water Act, 42 U.S.C. 300j–9(I); the Resource Conservation and Recovery Act, 42 USC 6971; and the Toxic Substances Control Act, 15 U.S.C. 2622.

Environmental Whistleblower Cases: The Secretary of Labor is responsible for administering the employee-protection provisions of several environmental safety and health statutes (identified above). (The Environmental Protection Agency, the Nuclear Regulatory Commission, or the Department of Energy otherwise administer and enforce these laws.) These laws protect employees against discharge or discrimination for certain conduct, such as testifying in a statutory enforcement proceeding.

Environmental whistleblower cases are handled in an administrative process which results in a determination by the Department's Administrative Review Board (ARB). Employees who believe that they have been discriminated against may file complaints with the Occupational Safety and Health Administration. (Under Secretary's Order 6–96, issued on December 27, 1996, responsibility for handling these cases was transferred to OSHA, from the Wage and Hour Division of the Employment Standards Division.)

Under DOL regulations (29 CFR Part 24), within 30 days, the Department must complete an investigation, determine whether the alleged violation occurred, and notify the parties. That determination becomes final unless the employee or the employer seeks a hearing before the Department's Office of Administrative Law Judges. After the hearing, the administrative law judge (ALJ) will issue a recommended decision, which is forwarded to the ARB for a final order. Final orders may be appealed to the federal courts of appeals. The DOL Solicitor's Office does not represent employees in the administrative hearing process, nor does DOL typically participate in the administrative adjudication. Employees must secure their own legal representation.

In recent years, the Department has received about 90 environmental whistleblower complaints every year. The Department's Office of Administrative Law Judges (OALJ) conducts about 80 hearings each year in this type of case, resulting in 30 to 40 final decisions of the ARB. In the past, there have been significant delays in the administrative adjudication process. Most recently, cases have been adjudicated or resolved more promptly. The OALJ has instituted a ''settlement judge'' procedure, in which cases may be temporarily transferred from the presiding judge to another judge, whose role is to explore the possibility of settling the case.

Family and Medical Leave Act Cases: Under the recently-enacted FMLA, the Department's Wage and Hour Division is authorized to receive, investigate, and attempt to resolve complaints of statutory violations. The Wage and Hour Division first seeks to resolve complaints by conciliation. If that effort is unsuccessful, the Division may choose to conduct a complete investigation. Meritorious complaints that cannot be settled administratively are referred to the Solicitor's Office, which may bring suit in federal district court. The FMLA also creates a private right of action for employees, who may bring suit themselves in either state or federal court.

Since the FMLA was enacted in 1993, the Department has received more than 6,300 employee complaints, through September 30, 1996. The great majority of these complaints were resolved through conciliation, many without the need for a full investigation by the Wage and Hour Division. The Solicitor's Office has filed fifteen lawsuits to enforce the FMLA. Federal courts have issued preliminary or final rulings in more than twenty FMLA cases brought directly by individual employees against their employers.

Fair Labor Standards Act Cases: Under the Fair Labor Standards Act, which establishes minimum-wage and overtime compensation standards (as well as other employee protections), the Wage and Hour Division is authorized to receive, investigate, and attempt to resolve complaints of statutory violations. Meritorious complaints that cannot be settled in conciliation are referred to the Solicitor's Office, which may bring suit in federal court. The FLSA also creates a private right of action for employees, who may file suit in either state or federal court. The vast majority of cases under the FLSA are brought by private employees directly against their employers.

Compliance Review Cases under Executive Order 11246 and Complaint Investigation Cases under the Vietnam Era Veterans'' Readjustment Assistance Act: The Department's Office of Federal Contract Compliance Programs (OFCCP) administers three equal employment opportunity programs applicable to Federal contractors and subcontractors: Executive Order 11246, Section 503 of the Rehabilitation Act, and the affirmative action provisions of the Vietnam Era Veterans'' Readjustment Assistance Act (VEVRAA). Taken together, these laws require covered contractors and subcontractors to refrain from discrimination and to take affirmative action to ensure equal employment opportunity without regard to race, color, sex, national origin, religion, or status as an individual with disabilities, a Vietnam era veteran, or a special disabled veteran.

OFCCP conducts compliance reviews of covered contractors and subcontractors, and investigates and attempts to resolve complaints received from employees and job applicants who allege that there have been violations of these laws. OFCCP first seeks to resolve complaints and issues revealed during a compliance review by conciliation. If that effort is unsuccessful, OFCCP refers the matter to the Solicitor's Office, which is authorized to institute administrative enforcement proceedings.

After a full evidentiary hearing, a Department of Labor Administrative Law Judge issues a recommended decision. On the basis of the entire record, the Department's Administrative Review Board issues a final administrative order. Contractors may appeal final adverse orders to the Federal district courts. The laws administered by OFCCP do not create a private right of action for contractors'' employees or job applicants. (OFCCP regulations implementing contract compliance laws are published at 41 CFR Chapter 60.)

About 4,000 compliance reviews are closed by OFCCP annually. About 3,000 reviews result in findings of violations. About 200 complaints per year alleging violations of the affirmative action provisions of VEVRAA are filed with OFCCP. On average, OFCCP refers 20 cases a year to the Solicitor's Office, which in turn files about 10 administrative complaints annually. Lengthy delays may occur in cases resolved through the complete formal enforcement process.

Scope of Mediation or Arbitration Under the Proposed Pilot

The Department invites comment on the scope of mediation and arbitration under the proposed pilot test. In DOL's experience, employment disputes that involve laws enforced by the Department often implicate other statutory, common-law, or other legal rights, outside of DOL's jurisdiction. For example, an employee with a colorable claim under the Family and Medical Leave Act or Section 503 of the Rehabilitation Act may also have a claim under the Americans with Disabilities Act. An employee with a colorable OSH Act discrimination claim or environmental whistleblower claim may also have claims under the National Labor Relations Act, a private collective bargaining agreement, or state common law.

An ADR proceeding that addresses only claims under DOL-administered laws may not resolve the entire dispute between an employee and an employer. Employers may be reluctant to participate in a process that leaves some employee claims outstanding. The Department's authority, however, is limited to the laws it administers and enforces. DOL invites comments on how best to ensure that the pilot test appropriately addresses the full range of employees' legal rights and remedies.

Case Selection Process

Cases for the proposed pilot test will be selected from the six categories described. After a complaint has been investigated and found to have merit (or violations have been identified during a compliance review), and after efforts to settle the case administratively have failed, cases will be screened for ADR suitability by the local office of the program agency (e.g., OSHA), in consultation with the regional office of the Solicitor. (The criteria for case selection are described below.) Employers who agreed to mediate or arbitrate a dispute would be expected to waive any applicable statute of limitations.

OSH Act Discrimination Cases: As explained, Section 11(c) of the OSH Act creates no private right of action for employees. The Department thus anticipates that in OSHA discrimination cases, the Department would decide whether to seek mediation or arbitration.

This decision would be made after an employee's complaint was investigated, but before suit was filed in federal district court. In selecting cases for mediation or arbitration, the Department would be governed by the case selection criteria set forth in this Notice. The Department would consult the complaining employee, as well as the National Labor Relations Board (NLRB) if the employee has filed a related complaint with the NLRB. The Department invites comment on whether it should ever pursue mediation or arbitration without the agreement of the complaining employee.

DOL would be a party to the subsequent mediation or arbitration proceeding, and the Solicitor's Office would represent the public interest and the interests of the employee. The Department would be bound by the results of the ADR proceedings, except as otherwise provided by law. The Department invites comment on whether employees' own attorneys or other representatives should ordinarily be permitted to participate in a mediation or arbitration proceeding.

Alternatively, if the Department determined that a case is suitable for ADR under the criteria described below, DOL could invite the employee and the employer to participate in a mediation or arbitration proceeding. DOL would not be a party or a participant, nor would it necessarily be bound by a settlement or an arbitrator's decision. Rather, the Department would determine whether to defer to the parties' resolution by foregoing its exclusive right to bring suit under Section 11(c) of the OSHA Act. (The Department's current policy on deferral to the outcome of other proceedings initiated by a complainant appears at 29 CFR 1977.18(c).) The Department invites comment on this alternative approach.

Only the OSH Act discrimination complaint would be subject to mediation or arbitration. Consistent with longstanding OSHA practice, the underlying allegation of a safety or health standard violation would be handled separately in administrative proceedings prescribed by the OSH Act.

The Department would revise or supplement its existing regulations for OSHA discrimination cases (29 CFR Part 1977), as necessary, to incorporate the procedures described here.

Environmental Whistleblower Cases: Environmental whistleblower cases are handled through an administrative process (described above) in which employees are responsible for securing their own representation or proceeding *pro se*. Under the proposed pilot test, after an employee's complaint had been investigated by the Department, DOL would determine whether the case was suitable for ADR under the criteria described in this Notice. If ADR was appropriate, the Department would offer the employer and the employee the option of mediation and/or arbitration, conducted either by a Settlement Judge in DOL's Office of Administrative Law Judges or by a private mediator or arbitrator. The Department would not be a party to, or participant in, this mediation or arbitration. The Department invites comment on how best to coordinate the pilot test with OALJ's existing settlement judge process.

The Administrative Review Board would not be bound by any resolution reached by the parties, but instead would review the results of mediation or arbitration. If appropriate (using the same standard now applied in ARB review of certain environmental-whistleblower settlements between employees and employers), the parties' mediated settlement or the arbitrator's decision would be embodied in a final order of the Administrative Review Board. The Department would revise or supplement its existing regulations for environmental whistleblower cases (29 CFR Part 24), as necessary, to incorporate these procedures.

Family and Medical Leave Act Cases: Under the pilot test, after an employee's FMLA complaint was investigated and found to be meritorious, and after administrative efforts to settle the case had failed, the Department would determine whether the case was suitable for ADR under the criteria described in this Notice. (The Department would consult the complaining employee in making this determination.) If ADR was appropriate, the Department would offer the employer and the employee the option of mediation.

If requested by the employee, the DOL Solicitor's Office would represent the employee in mediation. The employee would be free to choose other representation (including representation by non-lawyers) at the employee's expense, or to proceed individually. Whether or not an employee was represented by the Solicitor's Office in mediation, the employee would be free to resolve the dispute on terms acceptable to the employee. If a mediated settlement were reached, the Department ordinarily would close its file on the matter.

Because only a few judicial decisions have been issued under the FMLA, the need to develop authoritative precedent on many issues remains. This consideration will guide the Department's use of ADR. Moreover, about ninety per cent of the FMLA complaints that the Department finds to be meritorious are resolved in conciliation. Therefore, the pool of cases that are appropriate for ADR may be quite small. The Department invites comment on the types of FMLA cases that are most likely to be appropriate for mediation.

Fair Labor Standards Act Cases: Under the pilot test, after an employee's FLSA complaint was investigated and found to be meritorious, and after administrative efforts to settle the case had failed, the Department would determine whether the case was suitable for ADR under the criteria described in this Notice. (The Department would consult the complaining employees in making this determination.) If ADR was appropriate, the Department would offer the employer and the employee the option of mediation.

If requested by the employee, the DOL Solicitor's Office would represent the employee in mediation. The employee would be free to choose other representation (including representation

by non-lawyers) at the employee's expense, or to proceed individually. Whether or not an employee was represented by the Solicitor's Office in mediation, the employee would be free to resolve the dispute on terms acceptable to the employee. If a mediated settlement were reached, the Department ordinarily would close its file on the matter.

Executive Order 11246 Compliance Review Cases and Complaint Investigation Cases under the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212): As explained, there is no private right of action under the laws administered by OFCCP. Under the pilot test, after an Executive Order 11246 compliance review or a Vietnam Era Veterans' Readjustment Assistance Act discrimination complaint investigation are completed, violations have been identified, and administrative efforts to resolve the case have failed, the Department would determine whether the case was suitable for ADR under the criteria described in this Notice. If ADR was appropriate, the Department would offer the contractor the option of mediation. If the contractor agreed to mediation, the Department's OFCCP staff would represent the interests of the Department in the mediation process. The Department would revise or supplement its existing regulations (41 C.F.R. Chapter 60), as necessary, to incorporate these procedures.

Case Selection Criteria

Whether or not DOL is a party to an arbitration or mediation proceeding, the Department will use, encourage, or defer to ADR only when it is consistent with existing law. The Department will not use, encourage, or defer to ADR when it believes (1) That the need for injunctive relief makes ADR inappropriate; or (2) based on consultation with the Department of Justice or other concerned government agencies, that the dispute involves a criminal violation; or (3) that the dispute implicates the authority of the DOL Inspector General. Nor will the Department recognize any prior agreement that makes the use of mediation or arbitration a condition of employment or otherwise prospectively requires the use of ADR in an employment dispute.

In selecting cases for possible voluntary mediation or arbitration, the Department will follow the ADR Act, which provides that:

An agency shall consider not using a dispute resolution proceeding if—

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

5 U.S.C. 572.

The Department invites comment on appropriate case-selection criteria. In particular, the Department invites comment on the suitability of ADR proceedings, especially arbitration, in cases in which an employee-complainant lacks legal or other representation. The Department is advised that some court-sponsored ADR programs exclude unrepresented persons.

Selection of Mediators and Arbitrators

Mediators and arbitrators under the proposed pilot test will be selected consistent with all applicable legal requirements.

The Department intends for mediation and arbitration to be conducted only by impartial, experienced, and qualified persons. Mediators and arbitrators who participate in the pilot test would be required to disclose to the parties and to the Department any relationship that might reasonably constitute or be perceived as a conflict of interest. The Department invites comment on appropriate conflict-of-interest standards.

The Department also invites comment on the best means of selecting suitable mediators and arbitrators. DOL anticipates that it will maintain a roster of qualified persons. Parties to a mediation or arbitration proceeding would be provided with a panel of mediators and arbitrators from which they could make a selection.

The Department is considering entering into an agreement with a qualified nation-wide contractor who would serve as a sponsor of mediators and arbitrators and who would handle the administration of the roster. The Department would reserve the right to set standards for inclusion on the roster and to oversee its final composition. DOL invites comment on this approach.

The Department also invites comment on the specific qualifications that should be required for mediators and arbitrators. DOL believes that only mediators and arbitrators who are able to provide evidence of an established part-time or full-time practice in mediation or arbitration, and to complete a DOL classroom training course in the relevant statutes and ADR procedures, should be eligible for the pilot-test roster. In addition, DOL believes that the following factors, among others, should be considered: (1) Professional standing and good character; (2) experience as an arbitrator, mediator, adjudicator, or litigator of employment-related disputes, particularly in the areas covered by the pilot test; and (3) other experience in the fields of labor and employment law, industrial relations, or dispute resolution.

Compensation of Mediators and Arbitrators

Mediators and arbitrators who participate in the proposed pilot test would be compensated by the parties to the proceeding (including the Department), according to their agreement. The parties themselves would determine how to fairly allocate the fees and expenses of a mediator or arbitrator.

The Department believes that requiring the parties to share the fees and expenses of the mediator or arbitrator helps ensure impartiality. In cases in which the Department is a party or a participant, DOL generally expects that it would pay one-half of the mediator or arbitrator's fees and expenses. The Department invites comment on whether permitting the negotiation of a different arrangement is advisable. To reduce the possibility of bias based on disparate contributions, payment would be forwarded to the mediator or arbitrator by the sponsor of the roster (or by the Department, when it is not a party or participant), without disclosing the parties' respective shares.

One of the potential benefits of using ADR is lower litigation costs to the parties and, in the case of government agencies, the ability to resolve more cases with the same resources. Based on its experience with the Philadelphia ADR pilot test, the Department believes that ADR can reduce enforcement and litigation costs per case. In this pilot test, the threshold questions of who

pays the private mediator or arbitrator (the neutral) and how much the neutral is paid are central to the evaluation of the program's costs and benefits.

DOL tentatively estimates that the typical neutral's fees in cases under the proposed pilot test will be in the range of $1,000 to $1,500 per case. (The Department invites comment on this estimate.) If the Department pays these fees, the opportunity to reduce agency costs per case (and to increase DOL's ability to process more cases with the same resources) will be greatly diminished. At the same time, the Department recognizes both that employer payment of the arbitrator or mediator raises conflict-of-interest concerns, and that in many cases employees will be unable or unwilling to pay half of the neutral's fee.

Accordingly, the Department invites comment on the best mechanism for compensating mediators and arbitrators, as well as on the following specific issues: (1) Whether the Department should consider making a contribution toward the fees of a mediator or arbitrator in cases involving a low-income complainant; and (2) whether to authorize arbitrators to tax attorney's fees and costs to the losing party (if lawful) and/or to apportion the arbitrator's fees and costs equitably.

Authority of the Mediator or Arbitrator; Arbitration Proceedings

The authority of mediators and arbitrators under the proposed pilot test, as well as the rules for arbitration proceedings, would be determined largely by the ADR Act.

The Department anticipates that consistent with the ADR Act, DOL would draft standard mediation and/or arbitration agreements recognizing the authority of mediators and arbitrators under the pilot test. Parties who agreed to mediation or arbitration would be expected to sign such a standard agreement.

Under Section 8 of the ADR Act of 1996, arbitration agreements ''shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.'' DOL anticipates that arbitrators would be authorized to make awards imposing the full range of remedies provided by the statutes involved in the pilot test.

Consistent with the ADR Act, arbitrators would have the authority to regulate the course of and conduct hearings, to administer oaths and affirmations, and to compel the attendance of witnesses and the production of evidence to the extent permitted by law. The Department also expects to authorize pre-hearing discovery by the parties, such as the production of documents.

With the consent of the parties, arbitrators would be responsible for ensuring that a record (stenographic or tape recording) of the proceeding was made. Arbitrators would also be required to issue a written opinion and award within 30 days of the close of the proceeding. Copies of the opinion and award would be provided to the parties and to the Department and would be made available to the public.

The Department invites comment on the relationship between mediation and arbitration proceedings. In some instances, the parties may wish to attempt mediation and proceed to arbitration only if mediation fails. In those cases, it may be inappropriate for the mediator to serve as an arbitrator of the dispute.

Effect of an Arbitrator's Award

If a case were mediated to a successful conclusion or arbitrated under the proposed pilot test, the Department would ordinarily close its file on the matter at the conclusion of the proceeding. In environmental whistleblower cases (as described above), an arbitrator's award would, if appropriate, be incorporated in a final order of the Administrative Review Board.

The binding effect of an arbitrator's award under the pilot test will be determined by the ADR Act, which provides that an award becomes final 30 days after service on all parties, that a final award is binding on the parties, and that a final award may be enforced pursuant to the provisions of the Federal Arbitration Act (9 USC 9–13).

The Federal Arbitration Act (9 USC 10) specifies the circumstances under which a federal court may vacate an arbitration award. They include cases: where there has been dishonesty by a party or an arbitrator, where there has been prejudicial misconduct by the arbitrator, or where the arbitrator has exceeded his authority or failed to make a definite award. Only in such cases would the Department choose not to recognize an arbitration award issued under the pilot test.

The Department invites comment on its appropriate role in reviewing the results of ADR proceedings to ensure fairness to the parties and conformity with the law.

Evaluation

The Department has not yet established a time-table for the proposed pilot and invites comment on this issue. DOL does intend to carefully evaluate the results of the pilot test described in this Notice. This evaluation would be conducted by a working group drawn from participating DOL agencies and from the Solicitor's Office, comprised of both field and national office staff members. The Department also contemplates a review of the pilot test by representatives of employees, employers, and the public. Comments and suggestions on the implementation of the Department's ADR policy are welcome.

Signed at Washington, DC this 6th day of February, 1997.

Cynthia A. Metzler,

Acting Secretary of Labor.

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