

# Office of Enforcement

## Pre-Investigation ADR

### Frequently Asked Questions

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#### **1. What is the pre-investigation ADR program?**

The NRC's pre-investigation program is a multifaceted program providing an individual and his/her employer (or former employer) the opportunity to resolve an allegation of discrimination through mediation rather than fully litigate the discrimination allegation or have the NRC initiate an investigation.

Pre-investigation program refers both to Early ADR (where the NRC is the sponsor) and Licensee Sponsored ADR programs (where the employer is the sponsor).

#### **2. Is the participation in the program voluntary?**

Participation in the program is entirely voluntary. Either party may withdraw from negotiations at any time for any reason.

#### **3. Who administers the pre-investigation ADR program?**

The pre-investigation ADR program is an umbrella term referring to NRC's Early ADR and Licensees' Sponsored ADR program. The NRC does not have any involvement in the Licensees' Sponsored ADR programs. So long as a licensee provides a settlement agreement to the NRC prior to the initiation of an OI investigation, the NRC will consider the settlement agreement as part of the pre-investigation ADR program. The NRC's involvement in Licensees' Sponsored ADR programs is limited to reviewing the settlement agreement for restrictive covenants in violation of the applicable employee protection rule.

As for Early ADR, the NRC has a contract with Cornell University's Scheinman Institute on Conflict Resolution ("Cornell") to act as the neutral program administrator for the Early ADR program's day-to-day operation, including handling mediation process logistical matters and working with parties to select a mediator from Cornell's roster of mediators. Cornell certifies a network of independent mediators who help the parties find ways to reach a common understanding and settle their disputes.

#### **4. Who are the parties to pre-investigation ADR (Early ADR or Licensee Sponsored ADR)?**

The parties to mediation are an individual and his/her employer (or former employer). The employer may be a NRC licensee, contractor to a NRC licensee or vendor. The NRC is not a party to the mediation.

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#### **5. Who pays the fees and expense of the mediator?**

The NRC (through Cornell) will pay the fees and expenses of the mediator that the parties mutually select from a list of mediators provided by Cornell. Parties preferring to locate their own mediator may do so at their own expense. The parties are also responsible for their own expenses such as travel, lodging, and meeting room or attorney fees, if any.

#### **6. What is the scope of the pre-investigation program?**

Pre-investigation ADR is limited to the resolution of allegations of discrimination. The resolution of technical safety concerns or other allegations (e.g. “chilling effect” or wrongdoing type concerns) are not within the scope of the program and cannot be the subject of any settlement agreement. To the extent an individual has a concern other than the allegation of discrimination, such other allegation are handled through the NRC’s Allegations program.

#### **7. What is mediation?**

Mediation is an informal process in which a trained neutral (the “mediator”) works with parties to help them reach a resolution. The mediator, who has no stake in the outcome and no power to make decisions, uses consensus-building skills and knowledge of negotiation to help parties find solutions. The mediator focuses the attention of the parties upon their needs and interests rather than on their stated positions. Mediation gives parties an opportunity to discuss issues, clear up misunderstandings, be creative, find areas of agreement, and reach a final resolution of the issues.

#### **8. What is “Early ADR”?**

Early ADR is the term commonly used to refer to the NRC’s pre-investigation program. In Early ADR, the NRC pays for the fees and expenses of the mediator that the parties select from Cornell’s roster of mediators. If the parties settle the allegation of discrimination, the agreement must be provided to the NRC for review for credit under the program. The NRC’s Office of the General Counsel will review the settlement agreement solely to ensure that the employee will not be prohibited from engaging in a protected activity. Provided no such prohibition exists in the settlement agreement, the NRC will not investigate the allegation of discrimination or take enforcement action.

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#### **9. What is “Licensee Sponsored ADR”?**

Licensee Sponsored ADR is one created and paid for by the licensee (the general reference to “licensee” includes licensee’s contractor or any other party who falls within the NRC’s purview). In Licensee Sponsored ADR the parties are not required to use mediators provided by Cornell to fall within the scope of the NRC’s ADR program. In fact, in a Licensee Sponsored ADR process, parties may or may not choose to utilize a mediator. Licensees are encouraged to develop dispute resolution processes internal to their companies that are similar to the NRC’s Early ADR program. If the parties settle an allegation of discrimination under any mediation process at their own expense and if either party provides a copy of the settlement agreement to the NRC prior to the initiation of an investigation by the NRC’s Office of Investigations, the NRC’s Office of the General Counsel will review the settlement agreement to ensure that the employee is not prohibited from engaging in a protected activity. Similar to the NRC’s Early ADR program, the resolution of technical safety concerns or other allegations (e.g. “chilling effect” or wrongdoing type concerns) may not be the subject of the settlement agreement. Provided no such prohibition exists in the settlement agreement, the NRC will not investigate the allegation of discrimination or take enforcement action.

However, if a settlement agreement is provided to the NRC after the initiation of an investigation, the settlement agreement will not fall within the scope of the ADR program and will not have an impact on the continuation of the investigation.

If the parties don’t settle the allegation of discrimination that falls within the NRC’s jurisdiction, the NRC’s Office of Investigations will initiate an investigation into the allegation of discrimination.

#### **10. What is the role of the mediator?**

The mediator is neutral. In other words, he or she has no stake in the outcome of the mediation and does not have any power to make decisions that may bind either party. The role of the mediator is to facilitate communications between the parties and provide an environment where the parties have an opportunity to address their differences. The mediator uses consensus building skills and knowledge of negotiation to help the parties find ways to overcome any misunderstandings and reach a common understanding on issues. The mediator does not act as legal counsel nor provide legal advice to any party. Each party should consult an attorney or

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other professional if any question regarding the law, the content of a proposed agreement, or similar issues arise.

#### **11. How does the Early ADR mediation process work?**

Recognizing that each mediation is different, the process is generally as follows. After filing of an allegation of discrimination, the Allegor is offered the choice of engaging in ADR with his/her employer or having an NRC investigation initiated. If the Allegor elects to engage in ADR, then the employer is offered ADR. If the employer agrees to engage in ADR with the Allegor, Cornell provides a list of three mediators from which the parties mutually select a mediator. Once the parties agree on a mediator, the mediator will contact the parties to discuss the mediation process, reconfirm interest in proceeding, establish a date and location for the session, and obtain other information.

The mediator will usually start the mediation session by calling the parties together to give each an opportunity to explain the issues of the conflict. Often, the mediator will then meet separately with each party (since they are likely to speak more freely in private) to understand the parties' situations better. The mediator can ask questions that will help the parties assess the merits of their positions, suggest potential settlement options, float trial balloons, probe participants about their realistic alternatives to settling, and converse in an atmosphere free of name calling and posturing.

The mediator's role may shift gradually during the session. A skilled mediator will initially begin to instill an atmosphere of reasonableness and build the parties' trust in the mediator and in their ability to work together. S/he may use these and later sessions to let parties "let off steam" before moving on to more productive talks.

The mediator will also help parties see the dispute from the other party's perspective, and help them generate and evaluate possible solutions. Some mediators explore hypothetical solutions separately with each side, helping them generate alternatives and explore promising options without revealing confidential information. S/he may seek to stimulate momentum to settle, narrow differences, and help parties build on areas of agreement.

Near the process's conclusion, the mediator may help parties to draft a document spelling out the terms of any agreement. Even when mediation does not end in a written agreement resolving all of the issues, the process still can be useful by helping to eliminate points in dispute and improve parties' communication level and understanding of their situation.

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Many mediators operate much like an interpreter, easing communication between people who do not speak a common language. By listening carefully and shaping messages in order to transmit the views of persons with vastly different views and styles of persuasion, a mediator can help parties to make their cases in the most convincing way. For example, a mediator may listen to a message that is not being "heard" by a party and, without changing the intent, communicate it in a manner that the other understands as a positive suggestion and perceives to be more acceptable--in other words, reducing "heat" while increasing "light".

The mediator often can help the parties agree on realistic, objective standards (appraisals, precedents, or methodologies) by which to judge the merits of their claims. He or she can help the parties devise structures for reaching closure in the instant dispute, or future ones. Although the mediator does not have any binding authority, if requested by a party, the mediator can even preview how an administrative judge or other authority might view the strengths and weaknesses of a party's position. Such a well-timed dose of objectivity by an "agent of reality" may help the parties to bridge their gap.

#### **12. Who will serve as a mediator?**

In Early ADR, the parties select a mediator from the Scheinman Institute on Conflict Resolution at Cornell University ("ICR") list of mediators.

In Licensee Sponsored ADR, it's up to the parties whether to use a mediator and if so, the source for such mediator.

#### **13. What does Early ADR cost?**

The parties are responsible for their own expenses such as travel, lodging and meeting room or attorney fees, if any.

The NRC (through Cornell) will pay the fees and expenses of the mediator that the parties mutually select from a list of mediators provided by Cornell. Parties preferring to locate their own mediator may do so at their own expense.

#### **14. When and where do Early ADR mediation sessions occur?**

Although up to the parties, the mediation session will occur at or near the workplace, depending on availability and party desires. The parties are

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generally expected to complete the mediation within 90 days after referral, unless the parties and the NRC agree to a brief extension.

#### **15. How long does a mediation session last?**

Most Early ADR cases will be completed in one session lasting several hours. Depending on the nature and complexity of the issues, some could require one or more additional sessions (although uncommon).

#### **16. Does participation in pre-investigation affect the DOL complaint filing requirements?**

Participation in the Early ADR program or the Licensee's Sponsored ADR program does not change the timeliness requirements for filing the discrimination complaint with any other governmental entity under any other law including Section 211 of the Energy Reorganization Act of 1974. Individuals should confer with counsel or other competent advisors or refer to the DOL website to ensure that they comply with all relevant DOL deadlines.

#### **17. Does participation in pre-investigation ADR affect the NRC enforcement process?**

If Early ADR or a Licensee's Sponsored ADR program is utilized to settle a discrimination concern, the NRC will not investigate the particular allegation of discrimination or take enforcement action relating to such allegation of discrimination so long as the NRC receives the settlement agreement prior to initiation of an investigation by OI and the NRC's Office of General Counsel has reviewed the settlement agreement for any restrictive terms in violation of the applicable NRC employee protection regulation.

#### **18. Will the NRC investigate an alleged violation of the applicable NRC employee protection rule if the Allegor settles his/her allegation of discrimination with his/her employer?**

The NRC will not investigate or take enforcement action relating to the specific allegation of discrimination given an acceptable settlement prior to the initiation of an investigation by OI.

#### **19. What if the parties settle the allegation of discrimination after the initiation of an OI investigation?**

If a settlement agreement is provided to the NRC after the initiation of an investigation, the settlement agreement will not fall within the scope of the

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ADR program and will not have an impact on the continuation of the investigation. If the allegation of discrimination is substantiated by OI and the staff takes enforcement action, the settlement agreement will be a factor to consider for severity level/imposition of civil penalty considerations.

#### **20. Is the mediation process confidential?**

With limited exceptions (e.g. intent to commit violence or court order), the mediation process is confidential regardless of the mediation outcome. The mediator is prohibited from discussing the mediation proceedings, testifying on anyone's behalf concerning the mediation, or submitting a report on the substance of the discussions.

#### **21. When will a settlement agreement be final and enforceable?**

In order to provide assurance that negotiations do not result in an agreement a party later regrets, a settlement agreement is not final until three days after the parties sign it. Either party may reconsider the settlement agreement during this three-day period. After three days, any written agreement that the parties (i.e., the complainant and the licensee or the licensee's contractor) reach becomes fully effective and enforceable as a contract.

#### **22. What can parties agree to do as part of a settlement agreement?**

The parties may craft an agreement agreeable to them, as long as the terms of the agreement do not restrict or discourage the individual from engaging in a protected activity e.g. raising safety concerns. The parties are not prohibited from including SCWE corrective actions in a settlement agreement.

#### **23. What happens if mediation does not result in a settlement agreement?**

If the parties fail to settle the allegation of discrimination, an Allegation Review Board requests that OI initiate an investigation just as it would had the parties not tried mediation.

#### **24. Can a party withdraw from pre-investigation ADR?**

The program is entirely voluntary. Any party may withdraw at any time. No one can be forced to agree to anything.

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#### 25. What role do representatives play in mediation?

Parties may consult with advisors, legal counsel, or representatives at any time during the mediation or prior to signing any agreement.

#### 26. What is the Department of Labor process?

The U.S. Department of Labor (DOL) has the authority to order personal remedies in the event an allegation of discrimination is substantiated by DOL (whereas the NRC does not have such authority). Unlike the NRC, the DOL has a **180 day deadline** for filing a discrimination complaint under Section 211 of the Energy Reorganization Act of 1974 ("Section 211") (*shorter deadlines for other laws pursuant to which similar complaints maybe filed*). While participation in the Early ADR program may result in negotiation of the same discrimination complaint that may be filed with the DOL under Section 211, the timeliness requirements for filing a discrimination complaint with the DOL is in no way altered by filing an allegation with the NRC or participating in the Early ADR program.

For this reason, in many instances, an Alleger files the same allegation of discrimination in more than forum.