

faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer's reasonable control.

(b) *Contents of petition.* A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps taken by the employer, and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(c) *When and where filed; posting requirement; responses to petition.* A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice of the petition or near each location where the violation occurred. The petition shall remain posted for a period of 10 working days.

(2) Affected employees or the representatives may file an objection in writing to such petition with the aforesaid Area Director. Failure to file such objection within 10 working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

(3) The Secretary or the Secretary's duly authorized agent shall have the authority to approve any uncontested petition for modification of abatement date filed pursuant to paragraphs (b)

and (c) of this section. Such uncontested petitions shall become final orders pursuant to sections 10(a) and (c) of the Act, 29 U.S.C. 659(a) and (c).

(4) The Secretary or the Secretary's authorized representative shall not exercise the Secretary's approval power until the expiration of 15 working days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) of this section by the employer.

(d) *Contested petitions.* Where any petition is objected to by the Secretary or affected employees, such petition shall be processed as follows:

(1) The Secretary shall forward the petition, citation, and any objections to the Commission within 10 working days after the expiration of the 15 working day period set out in paragraph (c)(4) of this section.

(2) The Commission shall docket and process such petitions as expedited proceedings as provided for in §2200.103 of this Part.

(3) An employer petitioning for a modification of the abatement period shall have the burden of proving in accordance with the requirements of section 10(c) of the Act, 29 U.S.C. 659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's reasonable control.

(4) Where the petitioner is a corporation, it shall file a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable, within 10 working days after service of the Commission docketing notice of the petition for modification of the abatement date. Service of the filed declaration on the other parties and intervenors shall be accomplished in a manner prescribed in §2200.7(c). The requirements set forth in §2200.35(b) through (c) shall apply.

(5) Each objecting party shall file a response setting forth the reasons for opposing the abatement date requested in the petition, within 10 working days after service of the Commission docketing notice of the petition for modification of the abatement date. Service

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of the response on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).

[84 FR 14558, Apr. 10, 2019; 84 FR 53053, Oct. 4, 2019; as amended at 87 FR 8949, Feb. 17, 2022]

§ 2200.38 Employee contests.

(a) *Secretary's statement of reasons.* Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Secretary shall, within 14 days from receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by the Secretary is not unreasonable.

(b) *Response to Secretary's statement.* Not later than 14 days after service of the Secretary's statement, referred to in paragraph (a) of this section, the contesting affected employee or authorized employee representative shall file a response. Service of the filed statement on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).

(c) *Expedited proceedings.* All contests under this section shall be handled as expedited proceedings as provided for in § 2200.103.

§ 2200.39 Statement of position.

At any time prior to the commencement of the hearing before the Judge, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard. The Judge may order the filing of a statement of position.

§ 2200.40 Motions and requests.

(a) *How to make.* An application or request for an order must be made by written motion. A motion shall not be included in another pleading or document, such as a brief or petition for discretionary review, but shall be made in a separate document. In exigent circumstances in cases pending before a Judge, an oral motion may be made during an off-the-record telephone conference if the motion is subsequently reduced to writing and filed within such time as the judge prescribes.

(b) *Form of motions.* All motions shall contain a caption complying with

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§ 2200.31 and a signature complying with § 2200.32. Requests for orders that are presented in any other form, such as by a business letter or by an email, shall not be considered or granted.

(c) *Content of motions.* A motion shall contain a clear and plain statement of the relief sought and state with particularity the grounds for seeking the order. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of the motion or a response.

(d) *Duty to confer.* Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with all other parties and shall state in the motion the efforts undertaken to confer. The motion shall also state if any other party opposes or does not oppose the motion.

(e) *Proposed order for procedural motions.* All procedural motions shall be accompanied by a proposed order that would grant the relief requested in the motion. A procedural motion may be ruled upon prior to the expiration of the time for response.

(f) *Oral motions.* Oral motions may be made during a hearing and shall be included in the transcript, if a transcript is being made.

(g) *When to make.* (1) A motion filed in lieu of an answer pursuant to § 2200.34(c) shall be filed no later than 21 days after service of the complaint.

(2) Motions shall be made as soon as the grounds for the motion are known. A party is not required to raise by motion any matter that the party has previously included in any pleading as defined in § 2200.1(n), unless the party seeks a ruling on the previously pleaded matter prior to the hearing on the merits.

(3) A motion to postpone a hearing shall comply with § 2200.62.

(h) *Responses.* Any party or intervenor upon whom a motion has been served shall file a response within 14 days from service of the motion.

(i) *Reconsideration.* A party adversely affected by a ruling on any motion may file a motion for reconsideration within 7 days of service of the ruling.

(j) *Summary judgment motions.* The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment.

§ 2200.41 [Reserved]

Subpart D—Prehearing Procedures and Discovery

§ 2200.50 [Reserved]

§ 2200.51 Prehearing conferences and orders.

(a) *Scheduling conference.* (1) The Judge may, upon the Judge's discretion, consult with the attorneys, non-attorney party representatives, and any self-represented parties, by a scheduling conference, telephone, mail, or other suitable means, and within 30 days after the filing of the answer, enter a scheduling order that limits the time:

(i) To join other parties and to amend the pleadings;

(ii) To file and hear motions; and

(iii) To complete discovery.

(2) The scheduling order also may include:

(i) The date or dates for conferences before hearing, a final prehearing conference, and hearing; and

(ii) Any other matters appropriate to the circumstances of the case.

(b) *Prehearing conference.* In addition to the prehearing procedures set forth in Federal Rule of Civil Procedure 16, the Judge may, upon the Judge's own initiative or on the motion of a party, direct the parties to confer among themselves to consider settlement, stipulation of facts, or any other matter that may expedite the hearing.

(c) *Compliance.* Parties must fully prepare for a useful discussion of all procedural and substantive issues involved in prehearing conferences and shall participate in such conferences in good faith. Parties failing to do so may be subject to sanctions under §§ 2200.101 and 2200.104.

§ 2200.52 General provisions governing discovery.

(a) *General—(1) Methods and limitations.* In conformity with these rules, any party may, without leave of the Commission or the Judge, obtain discovery by one or more of the following methods:

(i) Production of documents or things or permission to enter upon land or other property for inspection and other

purposes to the extent provided in § 2200.53;

(ii) Requests for admission to the extent provided in § 2200.54; and

(iii) Interrogatories to the extent provided in § 2200.55.

(iv) Discovery is not available under these rules through depositions except to the extent provided in § 2200.56.

(v) In the absence of a specific provision, discovery procedures shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to Commission proceedings. This exception does not preclude any prehearing disclosures (including disclosure of expert testimony and written reports) directed in a scheduling order entered under § 2200.51.

(2) *Time for discovery.* A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than 14 days prior to the date set for hearing, unless the Judge orders otherwise.

(3) *Service of discovery documents.* Every document relating to discovery required to be served on a party shall be served on all parties.

(4) *Stipulations about discovery procedures.* Unless the Commission or the Judge orders otherwise, the parties may stipulate that:

(i) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(ii) Other procedures governing or limiting discovery may be modified—but a stipulation extending the time for any form of discovery must be approved by the Commission or the Judge if it would interfere with the time set forth for completing discovery, for hearing a motion, or for hearing.

(b) *Scope of discovery.* The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the

pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(c) *Limitations.* The frequency or extent of the discovery methods provided by these rules may be limited by the Commission or the Judge if it is determined that:

(1) The discovery sought is unreasonably cumulative or duplicative, or it is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or

(3) The proposed discovery is outside the scope permitted by paragraph (b) of this section.

(d) *Privilege—(1) Claims of privilege.* The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Commission or the Judge, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or ex parte, that is, without the participation of parties and their representatives. The Judge may enter an order and impose terms and conditions on the Judge's examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be dis-

closed until after the examination is completed.

(2) *Upholding or rejecting claims of privilege.* If the Judge upholds the claim of privilege, the Judge may order and impose terms and conditions as justice may require, including a protective order. If the Judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

(3) *Resolving claims of privilege outside of discovery proceedings.* A Judge may utilize the procedures set forth in paragraphs (d) and (e) of this section outside of discovery proceedings, including during the hearing.

(e) *Protective orders.* In connection with any discovery procedures and where a showing of good cause has been made, the Commission or the Judge may make any order including, but not limited to, one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Commission or the Judge;

(6) That a deposition after being sealed be opened only by order of the Commission or the Judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be