

OSHA Whistleblowers May Now Use Alternative Dispute Resolution (ADR)

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PRACTICES OSHA, Labor and Employment

After piloting an Alternative Dispute Resolution (“**ADR**”) process in two regions from 2012-2013, OSHA has determined that an “early resolution” process effectively streamlines whistleblower disputes and encourages early settlement between the parties.

On August 18, 2015, OSHA released an instruction making ADR available for all regions and setting forth the process for ADR.¹ OSHA enforces the whistleblower provisions of twenty-two (22) federal statutes and receives several thousand whistleblower complaints per year and, thus, thousands of investigations per year.² Early resolution, prior to the costly investigation stage, could result in cost savings for OSHA.

However, as set forth in the instruction, the ADR process must be mutually agreed upon by both parties. Further, the parties may engage in the process after the investigation has commenced, in which case the investigation is stayed. The ADR process is handled by an independent Regional ADR Coordinator (“**RADRC**”), who is bound by confidentiality provisions preventing any of the information or discussions disclosed in the ADR process from reaching the investigator. The RADRC cannot share information from the ADR process with any third parties or OSHA’s investigative staff. The RADRC may advise the parties of the strengths and weaknesses or their positions, but cannot decide any matters on the merits. Ultimately, if the parties do not reach a settlement, or if either party terminates the ADR process, the matter is transferred to an investigator, or the investigation is resumed if it was already ongoing.

As far as the state programs, they are highly encouraged to adopt the ADR process or a similar process to address whistleblower claims akin to those under section 11(c) of the Occupational Safety and Health Act. The instruction published on August 18, 2015 gives the state programs sixty (60) days to notify OSHA whether a similar or different ADR process will be adopted. State programs’ ADR policies will eventually be available on the OSHA website.

Similar alternative dispute resolution processes exist for other federal agencies and employment statutes. And, while these processes offer another option for employers rather than bearing the costs of time and money of an investigation, ADR processes come with their own costs. If unsuccessful, ADR processes become an additional cost over and above the costs of the investigation.

¹ OSHA Instruction, Alternative Dispute Resolution (ADR) Process of Whistleblower Protection Program, August 18, 2015, [available here](#).

² OSHA Trade News Release, OSHA directive explains new process to assist early resolution of whistleblower complaints, August 19, 2015, [available here](#).