



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

September 2023

ACUS is an independent federal agency within the executive branch that develops recommendations to improve administrative processes, including adjudication, and arranges for the interchange of information to carry out its mission. The ACUS Office of the Chairman issues monthly *Updates* to share adjudication-related developments with agencies, Congress, and the public. For additional resources, visit www.acus.gov/adjudication.

This resource is for informational purposes only. Except as noted, these updates do not represent the position of ACUS or the federal government. New developments, feedback, and corrections are welcome at info@acus.gov.

IN THIS ISSUE

Administrative Review
Congressional Affairs
Constitutionality
COVID-19
Enforcement
Management and Operations
Procedural Rules
Representation
Technology

ADMINISTRATIVE REVIEW

[Rules Concerning Negotiability Proceedings](#) (FLRA, Sept. 12). In an effort to streamline the adjudication process, the Federal Labor Relations Authority revised its rules governing negotiability appeals, effective October 12, 2023.

[Appeal Process for Requests for Data Review](#) (FMCSA, Sept. 14). The Federal Motor Carrier Safety Administration issued a notice proposing to develop and implement an independent Federal appeals process for Requests for Data Review submitted through the agency's DataQs online system, which would provide users with an opportunity to have their requests reviewed by FMCSA after the request has been reviewed and denied after reconsideration by the State agency.



CONGRESSIONAL AFFIARS

Congressional Constituent Service Inquiries (ACUS). ACUS is examining how agencies receive, process, and respond to congressional inquiries made on behalf of constituents who need assistance accessing federal programs or navigating adjudicative and other similar administrative processes. The project will identify best practices for agencies to promote quality, efficiency, and timeliness in agency procedures for responding to such inquiries. Among other topics, the project will address the body of law governing agency responses to congressional constituent service inquiries; the extent to which agencies have developed procedures for receiving, processing, and responding to such inquiries; and the scope, content, internal dissemination, and public availability of these procedures where adopted. Sean Kealey (Boston University) is serving as consultant.

CONSTITUTIONALITY

SEC v. Jarkesy (U.S. Supreme Court). Petitioner Securities and Exchange Commission, and several amici, filed briefs in *SEC v. Jarkesy*. The Court granted certiorari earlier this year to review a Fifth Circuit decision holding that the statutory provisions that authorize the SEC to adjudicate administrative enforcement proceedings violate the Seventh Amendment and the nondelegation doctrine, and that statutory removal protections for SEC ALJs violate Article II.

COVID-19

Temporary Final Rule Extension: “Close Proximity of Time” Standard (SSA, Sept. 29). The Social Security Administration extended a temporary final rule, until May 11, 2025, that provides flexibility in evaluating the “close proximity of time” standard in the Listing of Impairments for musculoskeletal disorders to allow for additional time to study changes in medical treatment, and to account for the ongoing increased use of telehealth services following the COVID-19 public health emergency (PHE). The rule was originally issued due to barriers caused by the national COVID-19 PHE and was set to expire six months after May 11, 2023, when the PHE ended.

ENFORCEMENT

Civil Money Penalties Procedures (OWCP, Sept. 12). The Office of Workers’ Compensation Programs issued a notice proposing new rules for imposing and



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

reviewing civil money penalties prescribed by the Longshore and Harbor Workers' Compensation Act and new procedures for employers and insurance carriers to contest and challenge penalty determinations.

MANAGEMENT AND OPERATIONS

SSA Recommendation: Establish Metrics to Measure CARES Plan

Initiatives (SSA OIG, Sept. 8). The Social Security Administration Office of the Inspector General issued an audit report to determine whether the Compassionate And REsponsive Service (CARES) Plan initiatives have reduced the hearings backlog and average processing time (APT). SSA OIG recommended that, for future CARES Plan initiatives, SSA establish and document metrics to measure a direct impact on the hearings backlog and APT.

PACT Act Claims (VA, Sept. 14). The Department of Veterans Affairs announced that over one million claims for toxic exposure-related benefits under the PACT Act have been filed since August 10, 2022, when the Act was signed into law. Of those claims, the VA has processed more than 551,000, granting 77.9% of them and awarding more than \$2.2 billion in earned benefits to veterans and survivors.

Improving Timeliness in Agency Adjudication (ACUS). ACUS launched a project to survey strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication. Based on this survey, it will identify best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency. The project will also consider potential legislative reforms, if warranted. Jeremy Graboyes and Jennifer Selin, both of ACUS, are serving as researchers.

Identifying and Reducing Burdens in Administrative Processes (ACUS).

ACUS is undertaking a project to recommend best practices, such as public engagement and data analysis, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes, including adjudication. It will also recommend strategies agencies can use to reduce unnecessary burdens, such as streamlining processes and digitizing services. Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers) are serving as consultants.

User Fees (ACUS). ACUS is undertaking a project that will recommend best practices for agencies—and Congress, if warranted—to consider in designing and



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

implementing user fees in administrative programs (including application fees and filing fees in agency adjudications). It will examine, among other topics, how Congress and agencies determine when user fees are appropriate; how agencies determine fair and reasonable user fees for specific programs; how they engage with the public in determining user fees; and how often they review their user fee programs. Erika Lietzan (Missouri Law) is serving as consultant.

PROCEDURAL RULES

Revisions to Appellate Procedures (EOIR, Sept. 8). The Executive Office for Immigration Review proposed changes to the rules on appellate process, decisional finality, and administrative closure in immigration proceedings to restore longstanding procedures that were in place prior to the publication of a final rule (the “AA96 Final Rule”) in December 2020, which was enjoined in March 2021. The proposed revisions generally adopt the framework currently in place—the pre-AA96 Final Rule status quo that has been in effect since the injunction.

Deadline for Submitting Evidence and Filing Appeals (Labor, Sept. 15). The Employment and Training Administration and the Wage and Hour Division issued a notice of proposed rulemaking to amend their regulations governing the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of nonimmigrant workers. The proposed revisions would, among other things, reduce the time for parties to submit rebuttal evidence to the Office of Foreign Labor Certification (OFLC), the time for parties to appeal Notices of Debarment to the Office of Administrative Law Judges (OALJ), and the time for parties to appeal debarment decisions to the Administrative Review Board (ARB) from the OALJ from 30 calendar days to 14 calendar days.

Withdrawn: Proposed Rule Changes for Adjudicative Proceedings (CPSC, Sept. 28). The Consumer Product Safety Commission withdrew its proposed rule to update its Rules of Practice for Adjudicative Proceedings because no actions have been taken on the proposed rule since it was published in 2016.

Disclosure of Interests in Commission Proceedings (CPSC, Sept. 29). The Consumer Product Safety Commission issued a notice of proposed rulemaking to require disclosure of interests and sources of funding by those seeking to present oral testimony, request rulemaking before the Commission, or participate in an adjudicative proceeding.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

[Best Practices for Adjudication Not Involving an Evidentiary Hearing \(ACUS\)](#). ACUS launched a project to examine the wide range of procedures that agencies use when adjudicating cases in programs in which there is no legally required opportunity for an evidentiary hearing. It will offer a set of broadly applicable best practices that account for the diversity of matters that agencies decide through truly informal adjudication and promote fairness, accuracy, and efficiency. Michael Asimow (UCLA, Santa Clara) is serving as consultant.

[Public Participation in Agency Adjudication \(ACUS\)](#). ACUS launched a project to identify best practices for public participation in agency adjudicative proceedings. Among other topics, the project will address circumstances in which public participation may be appropriate; options for public participation (e.g., written comments, oral presentations, intervention, amicus briefing); methods for facilitating public participation (e.g., notice, managing oral and written comments, technology use); and agencies' use of information obtained through public engagement efforts. Michael Sant'Ambrogio (MSU Law) is serving as consultant.

REPRESENTATION

[Legal Representation in Foster Care Proceedings \(ACF, Sept. 28\)](#). The Administration for Children and Families issued a notice of proposed rulemaking to allow a title IV–E agency to claim federal financial participation for the administrative cost of an attorney providing certain legal representation in foster care and other civil legal proceedings.

[Model Rules of Representative Conduct \(ACUS\)](#). Following the adoption of [Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings](#), Chair Fois has convened a working group of public- and private-sector representatives to develop model rules of representative conduct. The model rules will help federal agencies amend or develop their own rules consistent with the best practices identified in Recommendation 2021-9.

TECHNOLOGY

[Identify Verification Requirement for Attorney-Sponsored Accounts \(USPTO, Sept. 5\)](#). The United States Patent and Trademark Office issued a notice announcing that, beginning January 20, 2024, all attorney support staff with USPTO.gov accounts will be required to verify their identity to access trademark filing systems.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Email Service of Documents (FLRA, Sept. 26). The Federal Labor Relations Authority issued a final rule adopting, without change, an interim final rule published in July that allows parties to proceedings before the FLRA’s three-Member, decisional component to voluntarily request email service in individual cases filed through the FLRA’s electronic filing system.

Mandatory Electronic Filing (MSPB, Sept. 29). The Merit Systems Protection Board issued an interim final rule requiring all pleadings filed by agencies and attorneys who represent appellants in MSPB proceedings, with certain exceptions, to be electronically filed via its [new electronic filing system, e-Appeal](#). The Board requests comments on the interim final rule by December 31, 2023.