DOL-OSHA WHISTLE BLOWER INVESTIGATIONS: A LOOK INTO OSHA'S INVESTIGATIVE PROCEDURES DIRECTIVE AND THE INDIVIDUAL STATUTORY PROCEDURES

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I-INTRODUCTION

OSHA's Whistleblower Protection Program enforces the whistleblower provisions of more than twenty whistleblower statutes protecting employees who report violations of various workplace safety, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. Rights afforded by these whistleblower acts include, but are not limited to, worker participation in safety and health activities, reporting a work related injury, illness or fatality, or reporting a violation of the statutes.

Protection from discrimination means that an employer cannot retaliate by taking "adverse action" against workers, such as: firing or laying off, blacklisting, demoting, denying overtime or promotion, disciplining, denial of benefits, failure to hire or rehire, intimidation, making threats, reassignment affecting prospects for promotion or reducing pay or hours.

The OSH Act prohibits employers from discriminating against their employees for exercising their rights under the OSH Act. These rights include filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, and raising a safety or health complaint with the employer. If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action.

Since passage of the OSH Act in 1970, Congress has expanded OSHA's whistleblower authority to protect workers from discrimination under twenty-one federal laws. Complaints must be reported to OSHA within set timeframes following the discriminatory action, as prescribed by each law.

"Protecting workers who identify wrongdoing is an essential cornerstone of the U.S. Department of Labor's worker protection enforcement efforts," said Secretary Solis. "The members of the whistleblower committee, who represents the interests of labor, management and the public, will utilize their expertise to provide valuable advice and recommendations to help OSHA strengthen and improve our whistleblower protection program."

Of course, the OSH Act is the principal law protecting whistleblowers. Under § 11(c) of the Act, any "person: (who may be an employee, prospective employee, former employee, supervisor, or an employee of someone other than the discriminator) may file a complaint with

OSHA (or IOSHA) alleging that he or she suffered work-related discrimination as a result of engaging in protected activity."

Protective activity under § 11(c) includes such things as filing a complaint of unsafe conditions with OSHA or IOSHA inspector or participating in an OSHA or IOSHA inspection as a walk-around participant. It also may include filing a complaint of unsafe conditions with another government agency as well as making a complaint of unsafe conditions directly to the employer.

If an employee makes a complaint of unsafe conditions to his or her employer, and the employer does not address the complaint to the employee's satisfaction, the employer may have to face a refusal by the employee, or employees, to perform the allegedly unsafe work. OSHA recognizes a limited right of employees to refuse to perform unsafe work if (a) the refusal is made in good faith and with no other reasonable alternative available, (b) the condition the employee believes to be unsafe must be such that a reasonable person, under the same circumstances then confronting the employee, would conclude there is a real danger of death or injury, (c) because of the urgency of the situation, there is insufficient time to eliminate the hazard by complaining to OSHA or IOSHA and, (d) the employee, when possible, must have requested from the employer, but not obtained, a correction of the condition.

The right to refuse work under § 11(c) is the exception, not the rule. It does not require an employee to be paid for any non-work time due to a work refusal, and the employer may require the employee to perform safe alternative work even if the employee lawfully refuses an unsafe assignment.

II- RECENT OSHA WHISTLEBLOWER ACTIVITY

4/24/2013 –Feds say Metro whistleblower is owed thousands after dismissal

03/26/2013-OSHA orders George based Company to reinstate, may more than $190,000 to terminated whistleblower in Illinois.

02/28/2013 - Union Pacific Railroad ordered by US Labor Department to pay more than $309,000 for violating the Federal Railroad Safety Act.

02/28/2013 - Norfolk Southern Railway Co. ordered by US Labor Department's OSHA to pay $1.1 million after terminating 3 workers for reporting injuries.

02/06/2013 - US Department of Labor sues Duane Thomas Marine Construction in Florida for firing employee who reported workplace violence.

01/31/2013 - US Department of Labor files whistle-blower lawsuit against Helena, Mont.-based Kbec Inc.

11/29/2012-Norfolk Southern railway Co. ordered by US Labor Department to pay more than $288,000 for violating Federal Railroad Safety Act.

11/07/2012 - Northern Illinois Flight Center ordered by US Labor Department's OSHA to reinstate, pay more than $500,000 to illegally terminated pilot.

III-GENERAL RULES

Almost any action taken by an employer which has a negative effect on the employee's terms, conditions, or privileges of employment amounts to adverse action. This includes intimidating, threatening, restraining, coercing, blacklisting, or discharging an employee. DOL authority construing similar whistleblower protection statutes indicates that adverse action also includes demotion, reduction in salary, failure to hire, harassment, transfer to a less desirable position, and even a change of office location.

IV. PROVISION OF THE OSHA WHISTLEBLOWER INVESTIGATION MANUAL

Directive Number: CPL 02-03-003

Effective Date: September 20, 2011

This Instruction implements the OSHA Whistleblower Investigations Manual, and supersedes the August 22, 2003 Instruction. This manual outlines procedures, and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to OSHA and may be used as a ready reference. Section 11(c) of the Act provides, in general, that no person shall discharge or in any manner discriminate (retaliate) against any employee because the employee has exercised rights under the Act. Regional Administrators have overall responsibility for the investigation of retaliation complaints under Section 11(c). They have authority to dismiss non-meritorious complaints (absent withdrawal), approve acceptable withdrawals, and negotiate settlement of meritorious complaints or recommend litigation to the Solicitor of Labor in such cases. In addition to the overall responsibility of enforcing Section 11(c) of the Act, the Secretary of Labor has delegated to OSHA the responsibility for investigating claims of retaliation filed by employees under the whistleblower provisions of the following twenty statutes, which together constitute the whistleblower protection program:

a. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §2651.
b. International Safe Container Act (ISCA), 46 U.S.C. §80507.
c. Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105.
d. Clean Air Act (CAA), 42 U.S.C. §7622.
e. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9610.
f. Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367.
g. Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i).
h. Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971.
i. Toxic Substances Control Act (TSCA), 15 U.S.C. §2622.
j. Energy Reorganization Act (ERA), 42 U.S.C. §5851.
k. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (A1R21), 49 U.S.C. §42121
l. Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A (SOX).

m. Pipeline Safety Improvement Act (PSIA), 49 U.S.C. §60129.
n. Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109.
o. National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142.
p. Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087.
q. Affordable Care Act (ACA), 29 U.S.C. §218C.
r. Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §5567.
s. Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281.
t. FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d.

1. Responsibilities.

1. **Supervisor**. Depending on the organizational structure in place in a given Region, investigators may be supervised by an Area Director, a Regional Supervisory Investigator, or a Team Leader.

2. **Investigator**. Under the direct guidance and ongoing supervision of the Supervisor, the investigator assumes the following responsibilities included but not limited to:

a. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
b. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
c. Interviewing and obtaining statements from respondents' officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
d. Applying knowledge of the legal elements and evaluating the evidence revealed, analyzing the evidence, and recommending appropriate action to the Supervisor.
e. Composing draft Secretary's Findings for review by the area director, supervisor or team leader.
f. Negotiating with the parties to obtain a settlement agreement that provides prompt resolution and satisfactory remedy and negotiating with the parties when they are interested in early resolution of any case in which the investigator has not yet recommended a determination.
g. Monitoring implementation of settlement agreements and All, ARB and court orders, as assigned, determining specific actions necessary and the sufficiency of action taken or proposed by the respondent. If necessary, recommending that legal advice be sought on whether further legal proceedings are appropriate to seek enforcement of such settlement agreements or orders.
h. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.

3. **Office of the Whistleblower Protection Program (OWPP)**

a. Processing, hearing, and evaluating appeals that are to be presented to the Appeals Committee under Section 11(c) of the Occupational Safety & Health Act (Section

11(c)), the Asbestos Hazard Emergency Response Act (AHERA), and the International Safe Container Act (ISCA).

b. Organizing national conferences, such as conferences of whistleblower investigators to discuss recent developments in anti-retaliation law.

c. Providing technical assistance to field investigative staff, obtaining legal interpretations relevant to the whistleblower program nationwide, and disseminating those legal interpretations to field investigative staff.

d. Maintaining a law library of legal cases and decisions pertinent to whistleblower investigations. Sharing significant legal developments with field staff.

e. Maintaining a statistical database on whistleblower investigations.

f. Assisting in commenting on legislation on whistleblower matters.

g. Processing and reviewing significant whistleblower cases.

h. Maintaining Whistleblower Protection Program Web pages on Processing and reviewing significant whistleblower cases.

e. Assisting in the investigation of complex cases, as requested by the RA, or providing technical assistance in the investigation of such cases.

4. **Compliance Safety and Health Officer (CSHO)**. Each CSHO is responsible for maintaining a basic understanding of the employee protection provisions administered by OSHA, in order to advise employers and employees of their responsibilities and rights under these laws. Each CSHO must accurately record information about potential complaints on an OSHA-87 form (Appendix A) or the appropriate regional intake worksheet and immediately forward it to the Supervisor. In every instance, the date of the initial contact must be recorded.

5. **National Solicitor of Labor (NSOL)**. The National Solicitor of Labor provides assistance to the Regional Solicitors, advises the Office of the Whistleblower Protection Program, and represents the Assistant Secretary before the Administrative Review Board and the Secretary before the courts of appeals. The Division of Occupational Safety and Health in NSOL provides legal services under OSHA, STAA, AHERA, ISCA, and SPA, including participation on the appeals Committee. The Division of Fair Labor Standards in NSOL provides legal services under ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, and FSMA.

6. **Regional Solicitor of Labor (RSOL)**. Each RSOL reviews cases submitted by RAs for their legal merit, makes decisions regarding case merit, and litigates, as necessary, those cases deemed meritorious. Regional attorneys provide legal advice to the RA and represent the Secretary in federal district court proceedings under the various statutes and the Assistant Secretary for Occupational Safety and Health in proceedings before DOL administrative law judges.

2. Investigative Records.

Investigative materials or records include interviews, notes, work papers, memoranda, e-mails, documents, and audio or video recordings received or prepared by an investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original materials are records that are the

property of the United States Government and must be included in the case file. Under no circumstances are investigation notes and work papers to be destroyed or retained, or used by an employee of the Government for any private purpose. In addition, files must be maintained and destroyed in accordance with official agency schedules for retention and destruction of records. Investigators may retain copies of final Reports of Investigation (ROI) and Secretary's Findings for reference.

The disclosure of information in investigative records is governed by the Privacy Act (PA), the goal of which is to protect the privacy of individuals in whose names records are kept, and the Freedom of Information Act (FOIA), the goal of which is to enable public access to government records. The guidelines below are intended to ensure that the Whistleblower Protection Program meets its obligations under both of these statutes.

A. Non-public Disclosure.

1. While a case is under investigation or appeal, information contained in the case file will be disclosed to the parties in order to resolve the complaint; we refer to these as non-public disclosures. Once a case is closed at the agency level, any and all records not otherwise protected from disclosure may be disclosed to the parties, upon their request. This non-public disclosure may also occur at any level after the investigative stage, through the course of any administrative or judicial proceedings, until final disposition of the case, either through the administrative or judicial process. The procedures for non-public disclosures are as follows: During an investigation, disclosure must be made to the respondent (or the respondent's legal counsel if respondent is represented by counsel) of the complaint and any additional information provided by the complainant that is pertinent to the resolution of the complaint. If the complaint or information provided by the complainant contains personal, identifiable information about individuals other than the complainant, such information, where appropriate, should be redacted (without listing the specific exemptions that would be used if it were released under FOIA) before disclosure to the respondent. (This includes disclosures made in order to provide due process under the preliminary reinstatement provisions of STAA, AIR21, SOX, PSIA, NTSSA, FRSA, CPSIA, ACA, CFPA, SPA, and FSMA.)

2. Throughout the investigation, OSHA will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of the respondent's submissions to OSHA that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, OSHA will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. §552a, and other applicable confidentiality laws.

3. Personal, identifiable information about individuals, other than the complainant and management officials representing the respondent, that is contained in the investigative file, such as statements taken by OSHA or information for use as comparative data, such as wages, bonuses, the substance of promotion recommendations, supervisory assessments of professional conduct and ability, or disciplinary actions, should generally be withheld when such information could violate those persons' privacy rights, cause intimidation or harassment to those persons, or impair future investigations by making it more difficult for OSHA to collect similar information

from others.

4. In taking statements from individuals other than management officials representing the respondent, the investigator must specifically ask if confidentiality is being requested, and must document the answer in the case file. Witnesses who request confidentiality will be advised that their identity and all of OSHA's records of the interview (including interview statements, audio or video recordings, transcripts, and investigator's notes) will be kept confidential to the fullest extent allowed by law, but that if they are going to testify in a proceeding, the statement and their identity may need to be disclosed. Furthermore, they should be advised that their identity and the content of their statement may be disclosed to another Federal agency, under a pledge of confidentiality from that agency. In addition, all confidential interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the statement**.**

B. Trade Secrets and Confidential Business information (CBI)

1. A trade secret, under exemption 4 of FOIA, 5 U.S.C. §552(b)(4), is narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001), *quoting Public Citizen Health Research Group v. Food and Drug Admin*., 704 F.2d 1280, 1288 (D.C. Cir. 1983). As such, trade secrets would rarely be at issue in whistleblower cases. However, if, during the course of an investigation, a respondent has clearly labeled and explained in writing why a document or some portion of a document submitted constitutes a trade secret, the investigator should place the document under a separate tab clearly labeled "Trade Secret." If requested, assurance may be made in writing that the information will be held in confidence to the extent allowed by law, and that, under Executive Order 12600, submitters of confidential commercial or financial information will be notified in writing of a pending FOIA request for disclosure of such information and will be given an opportunity to comment on the impact of any potential disclosure before the Agency reaches a decision regarding its disclosure. As required by the Executive Order, if this agency does not agree with the submitter that materials identified by the business submitter as Confidential Business Information (CBI) should be protected, business submitters must be notified in writing and granted reasonable time to protest the release in a court of competent jurisdiction**.**

2. Should an assertion of trade secrets arise in an 11(c) case, whistleblower protection program staff should familiarize themselves with the requirements of Section 15 of the OSH Act, which provides: "All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this Act which contains or which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the

confidentiality of trade secrets."

3. Information is considered confidential business information if it is commercial or financial, obtained from a person, and privileged or confidential. These terms are defined as follows:

a. "Commercial or financial" is defined as relating to business or trade. Typically encountered examples are business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information on financial condition (unless that information is publicly available, as are filings with the SEC).

b. The criterion that the information be obtained from a person is easily met, since the definition of person in the Administrative Procedure Act at 5 U.S.C. §551(2) includes "an individual, partnership, corporation, association, or public or private organization other than an agency."

c. The definition of "confidential" depends on how it was obtained.

i. Information that is voluntarily provided to the government is confidential if it is of a kind that would normally not be released to the public by the person from whom it was obtained. Evidence obtained in the investigation of a case is generally voluntarily provided, unless it was obtained under subpoena.

ii. Information that is required of a person is confidential if its disclosure is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Competitive harm is limited to external harm that might result from the affirmative use of information by competitors; it should not be taken to mean simply any injury to competitive position such as might flow from customer or employee disgruntlement. Thus, unless the release of a settlement agreement would cause such harm, it is not CBI. Personally identifiable information in settlements that may be properly withheld under other FOIA exemptions, such as home addresses, phone numbers, and bank account information, must be redacted.

4. In the context of whistleblower investigations, most confidential business information is obtained voluntarily (subparagraph i., above); thus, if, during the course of an investigation, a respondent has clearly labeled and explained in writing why a document submitted is confidential commercial or financial information, the investigator should place it under a separate tab prominently labeled "Confidential Business Information," or "CBI." This tab is separate from any "Trade Secrets" tab. If the information was obtained under subpoena, it should be under a separate tab with the subpoena under which it was obtained. If requested, assurance may be made in writing that the information will be held in confidence to the extent

allowed by law, and that, under Executive Order 12600, submitters of confidential commercial or financial information will be notified in writing of a pending FOIA request for disclosure of such information and will be given an opportunity to comment on the impact of any potential disclosure before the agency reaches a decision regarding its disclosure. As required by the Executive Order, if this agency does not agree with the submitter that materials identified by the business submitter as CBI should be protected, business submitters must be notified in writing and granted reasonable time to protest the release in a court of competent jurisdiction. Care must be taken with information that may be CBI but was obtained from the complainant rather than directly from the respondent. If the investigator believes that information submitted by complainant is reasonably likely to be CBI, he or she should mark those exhibits accordingly.

C. Attorney-client privileged Information.

1. Attorney-complainants filing whistleblower complaints under any of the statutes administered by OSHA may use privileged information to the extent necessary to prove their claims, regardless of their employer's claims of attorney-client or work-product privilege. Thus, an employer who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.

2. In cases involving privileged information submitted by attorney-complainants, OSHA will assure the parties that the evidence submitted by the attorney-complainant will receive special handling, will be shared only with them, and will be secured from unauthorized access. Further, to the extent that this evidence falls under attorney-client privilege, it will be withheld, to the extent allowed by law, from public disclosure under FOIA exemption 4. Generally, if the respondent has asserted that the information referred to in the complaint is privileged, the entire case file should be clearly labeled as containing information that is to be withheld because the complainant is an attorney bound by attorney-client privilege. If the respondent asserts that only certain information is privileged, then that information should be sealed in an envelope, labeled as above, and placed under a clearly labeled tab. If requested, assurance may be made in writing that the evidence will receive special handling and will be held permanently in confidence to the extent allowed by law.

3. The guidance above applies only when there is an attorney-complainant and does not apply to other cases in which respondents assert attorney-client privilege. In such cases where the complainant is not an attorney for the respondent, OSHA will not accept blanket claims of privilege. Rather, the respondent will be required to make specific, per-document claims, which OSHA will assess and handle accordingly. If these claims are found to be reasonable, and if the respondent so requests, assurance may be made in writing that the information will be held in confidence to the extent allowed by law, and that, under Executive Order 12600, submitters of confidential commercial or financial information will be notified in writing of a pending FOIA request for disclosure of such information and will be given an opportunity to comment on the impact of any potential disclosure before the agency reaches a decision regarding its disclosure. As required by the Executive Order, if this agency does not agree with the submitter that materials identified by the business submitter as CBI should be protected, business submitters must be notified in writing and granted reasonable time to protest the release in a court of competent jurisdiction.

D. **Public Disclosure.**

FOIA requests from non-party requesters must be directed to the appropriate Disclosure Officer. Upon receipt of a FOIA request relating to a closed case, the Disclosure Officer must process the request in compliance with Departmental FOIA regulations. See 29 CFR Part 70 et seq. and Department of Labor Manual Series (DLMS) 5, Chapter 300. The following definitions should be used in determining whether a case is considered open or closed.

1. **Open Cases**. If a case is open, information contained in the case file may generally not be disclosed to the public. (Note: appropriate non-public disclosures are made to the parties while the case is open, as described above.) In the event that the matter has become public knowledge because the complainant has released information to the media, limited disclosure may be made to an equivalent extent, if circumstances warrant doing so. Consultation with OWPP or RSOL is advisable before disclosure, especially in high-profile cases.

2. **Closed Cases**. Generally, cases under 11(c), AHERA, and ISCA should be considered closed when a final determination has been made as to whether litigation will be pursued. In contrast, cases under STAA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA should generally be considered closed once OSHA has completed its investigation and issued its determination letter. However, these cases would be considered open if OSHA is participating as a party in the proceeding before the AU; recommending to RSOL that OSHA participate as a party in the proceeding; or if for any other reason, RSOL believes that it is appropriate to invoke the continuing application of exemption 7(A) of FOIA, 5 U.S.C. §552(b)(7)(A). (However, closure at the OSHA level has no bearing on appropriate, post-investigative, nonpublic disclosure of information between the parties described in paragraph A., above.)

3. Statistical Data. Disclosure may be in response to requests made by telephone, e-mail, fax, or letter, by a mutually convenient method. Statistical data may also be posted by the system manager on the OSHA Web page. Regional offices should refer requests for national data to OWPP.

D. OSHA-Initiated Disclosure.

1. The Agency may decide that it is in the public interest or the Agency's interest to issue a press release or otherwise to disclose to the media the outcome of a complaint. A complainant's name, however, may only be disclosed with his or her consent; otherwise, the disclosure must be without personal identifiers.

E. Statistics.

Statistics derived from reports containing aggregate results of program activities and outcomes may be posted by the system manager on the OSHA Web page.

3. Intake and Evaluation of Complaints

I. **Receipt of Complaint.**

Any applicant for employment, employee, former employee, or his or her authorized representative is permitted to file a whistleblower complaint with OSHA. No particular form of complaint is required. A complaint under any statute may be filed orally or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. OSHA will be accepting electronically-filed complaints on its Whistleblower Protection Program website, http://www.whistleblowers.gov. Although the implementing regulations for a few of the whistleblower statutes indicate that complaints must be filed "in writing,"[1] that requirement is satisfied by OSHA's longstanding practice of reducing all orally-filed complaints to writing.[2] Complaints are usually received at the Regional or Area Office level but may be referred by the National Office or from other government offices such as Congress or other administrative agencies.

A. For orally filed complaints, when a potential complaint is received at an Area or Regional Office, the receiving officer must accurately record the pertinent information on an OSHA-87 form or the appropriate regional intake worksheet and immediately forward it to the Supervisor. In every instance, the date of the initial contact must be recorded. Complaints where the initial contact is in writing do not require the completion of an OSHA-87 form, as the written filing will constitute the complaint.

B. Complaints received at the National Office or through other governmental units normally are forwarded to the RA or his or her designee for intake at the regional or area office level.

C. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the name, address, and phone number of the respondent or respondents; date of filing; date of adverse action; a brief summary of the alleged retaliation addressing the prima facie elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus), the statute(s) involved; and, if known, whether a safety, health, or other statutorily protected complaint has also been filed with OSHA or another enforcement agency.

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[1] As of the date of this publication, OSHA's implementing regulations for AIR21, SOX and PSIA state that complaints under those statutes must be in writing.

[2] See, *e.g., Roberts v. Rivas Environmental Consultants, Inc.,* 96-CER-1, 1997 WL 578330, at *3 n.6 (Admin. Review Bd. Sept. 17, 1997) (complainant's oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the "in writing" requirement of CERCLA, 42 U.S.C. § 9610(b), and the Department's accompanying regulations in 29 C.F.R. Part 24); *Dartey v. Zack Co. of Chicago,* No. 82ERA-2, 1983 WL 189787, at *3 n.1 (Sec'y of Labor Apr. 25, 1983) (adopting administrative law judge's findings that complainant's filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency's memorandum of the complaint satisfied the "in writing" requirement of the ERA and the Department's accompanying regulations in 29 C.F.R. Part 24.

D. OSHA is responsible for properly determining the statute(s) under which a complaint is filed. That is, a complainant need not explicitly state the statute(s) in the complaint. For example, a truck driver may mistakenly file a complaint under STAA regarding whistleblower activities that are in reality covered by an environmental statute rather than STAA. If a complaint indicates protected activities under multiple statutes, it is important to process the complaint in accordance with the requirements of each of those statutes in order to preserve the parties' rights under each of the laws.

II. Intake and Docketing of Complaints.

A. Intake of Complaints.

Regional authority over a case will generally be determined by considered of the following factors: (1) the complainant's assigned duty station, or (2) where the majority of witnesses appear to be located. If an investigative assistance is required outside the assigned region, a written request must be coordinated through the RA.

1. Whenever possible, the evaluation of a potential complaint should be completed by the investigator that the supervisor anticipates will be assigned the case, and the evaluation should cover as many details as possible. When practical and possible, the investigator will conduct face-to-face interviews with complainants. When the investigator has tried and failed to reach a complainant at various times during normal work hours and in the evening, he or she must send a letter to the complainant stating that attempts to reach the complainant have been unsuccessful, and stating that if the complainant is interested in filing a complaint under any of the statutes enforced by OSHA, the complainant should make contact within 10 days of receipt of the letter, or OSHA will assume that the individual does not wish to pursue a complaint, and no further action will be taken. This letter must be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of delivery must be preserved in the file with a copy of the letter to maintain accountability.

2. OSHA, AHERA, and ISCA Complaints.

   a. OSHA, AHERA, and ISCA complaints that set forth *a prima facie* allegation and are filed within statutory time limits must be docketed for investigation.

   b. OSHA, AHERA, and ISCA complaints that do not set forth a *prima facie* allegation, or are not filed within statutory time limits may be closed administratively—that is, not docketed—provided the complainant accepts this outcome. When a complaint is thus "screened out," the investigator must appropriately enter the administrative closure in the IMIS. Additionally, the investigator must draft a letter to the complainant explaining the reason(s) the complaint is not going to be investigated and send it to the supervisor for concurrence. Once approved, it must be sent to the complainant, either by the investigator or the supervisor, depending on regional protocol. A copy of the letter, along with any related documents, must be preserved for five years, as are whistleblower case

files, per Instruction ADM 12-0.5A. However, if the complainant refuses to accept this determination, the case must be docketed and dismissed with appeal rights.

3. Complaints filed under STAA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, ERA, AIR21, SOX, PSIA, NTSSA, FRSACPSIA, ACA, CFPA, or FSMA that are either untimely or do not present a *prima facie* allegation, may not be "screened out" or closed administratively. Complaints filed under these statutes must be docketed and a written determination issued, unless the complainant, having received an explanation of the situation, withdraws the complaint.

4. OSHA must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact the respondent soon after completing the intake interview and docketing the complaint if he or she believes an early resolution may be possible. However, the investigator must first determine whether an enforcement action is pending with OSHA (or, in AIR21 cases, with the FAA) prior to any contact with a respondent.

B. Docketing.

The term “to docket” means to record the case in the Integrated Management Information System (IMIS), which automatically assigns the local case number, and to formally notify both parties in writing of OSHA's receipt of the complaint and intent to investigate. The appropriate way to docket a case file by title is Respondent/Complainant/Local Case Number.

1. Cases that are assigned for investigation must be given a local case number, which uniquely identifies the case. The IMIS automatically designates the case number when a new complaint is entered into the system. All case numbers follow the format 12222-33-444, where each series of numbers is represented as follows:

a. The region number (Region 10 is 0).
b. The four-digit area office city number.
c. The fiscal year.
d. The serial number of the complaint for the area office and fiscal year.

2. Cases involving multiple complainants and/or multiple respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.

3. As part of the docketing procedures, when a case is opened for investigation, the supervisor must send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an investigator. The name, address, and telephone number of the investigator will be included in the docketing letter. A Designation of Representative Form (see sample at the end of this chapter) will be attached to this letter to allow the complainant the option of designating an attorney or other official representative. The complainant notification may either be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation),

with the tracking number included on the first page of the notification letter, or may be hand-delivered to the complainant.

4. Also at the time of docketing, or as soon as appropriate, the Supervisor must prepare a letter notifying the respondent that a complaint alleging retaliation has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the respondent's due process rights and the timely completion of the investigation.

a. A copy of the whistleblower complaint should be sent to the - respondent along with the notification letter (Appendix B).
b. A Designation of Representative Form will be attached to this letter to allow the respondent the option of designating an attorney or other official representative.
c. The respondent notification may either be sent by certified U.S. mail, return receipt requested, with the tracking number included on the first page of the notification letter, or may be personally served on the respondent. Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

III. Timeline of Filing.

A. Timeliness.

Whistleblower complaints must be filed within specified statutory time frames (see Table II-1) which generally begin when the adverse action takes place. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant. Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at a Department of Labor office will be considered the date of filing. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if the relevant OSHA .Office is closed, then the next business day will count as the final day.

Table 1: Specific statutes and their filing deadlines	
Statute	**Filing Deadline**
OSHA	30 days
CAA, CERCLA, FWPCA, SDWA, TSCA	30 days
ISCA	60 days
AHERA, AIR21	90 days
STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA	180 days

B. Dismissal of Untimely Complaints.

Complaints filed after these deadlines will normally be closed without further investigation. However, there are certain extenuating circumstances that could justify tolling these statutory filing deadlines under equitable principles. (STAA, ERA, CAA, CERCLA,

FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA complaints may not be administratively closed. If the complainant does not withdraw, a dismissal must be issued if the complaint was untimely and there was no valid extenuating circumstance.) The general policy is outlined below, but each case must be considered individually. Additionally, when it appears that equitable tolling may be applicable, it is advisable for the investigator to seek concurrence from the supervisor before beginning the investigation.

C. Equitable Tolling.

The following are reasons that may justify the tolling of a deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. However, these circumstances are not to be considered all-inclusive, and the reader should refer to appropriate regulations and current case law for further information.

1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action in such a way as to prevent the complainant from knowing or discovering the requisite elements of a *prima facie* case, such as presenting the complainant with forged documents purporting to negate any basis for supposing that the adverse action was relating to protected activity. Mere misrepresentation about the reason for the adverse action is insufficient for tolling.

2. The employee is unable to file within the statutory time period due to debilitating illness or injury.

3. The employee is unable to file within the required period due to a major natural or man-made disaster such as a major snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.

4. The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant relief (e.g., filing an AIR21 complaint with the FAA or filing a STAA complaint with a state plan state).

5. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his rights. For example, when an employer repeatedly assured the complainant that he would be reinstated so that the complainant reasonably believed that he would be restored to his former position tolling may be appropriate. However, the mere fact that settlement negotiations were ongoing between the complainant and the respondent is not sufficient. *Hyman v. KD Resources*, ARB No. 09-076, AU No. 2009-SOX-20 (ARB Mar. 31, 2010).

D. **Conditions which will not justify extension of the filing period include**:

1. Ignorance of the statutory filing period.
2. Filing of unemployment compensation claims.
3. Filing of workers' compensation.
4. Filing a private lawsuit.
5. Filing a grievance or arbitration action.
6. Filing a retaliation complaint with a state plan or another agency that has the authority to grant the requested relief.

IV. **Scheduling the Investigation.**

A. The Supervisor must assign the case for investigation. Ordinarily, the case will be assigned to an investigator, taking into consideration such factors as the investigator's current caseload, work schedule, geographic location, and statutory time frames. However, in cases involving complex issues or unusual circumstances, the Supervisor may conduct the investigation or assign a team of investigators.

B. The investigator should generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the supervisor. Also, priority must be given to cases according to the statutory time frames shown in Table 11-2 below.

Table 2: Specific statutes and their filing deadlines	
Statute	**Time Frame**
CAA, CERCLA, FWPCA, SDWA, TSCA, ERA, ISCA	30 days
STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA	60 days
OSHA, AHERA	90 days

4. **Conduct of the Investigation**

I. **General Principles.**

The investigator should make clear to all parties that DOL does not represent either the complainant or respondent, and that both the complainant's allegation(s) and the respondent's proffered non-retaliatory reason(s) for the alleged adverse action must be tested. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case.

The investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by OSHA. This applies not only to complainants and respondents but to other witnesses as well; quite often witnesses are unaware that they have knowledge that would help resolve a jurisdictional issue or establish an element. This is solely the responsibility of the investigator, although it assumes the cooperation of the

complainant. If, having interviewed the parties and relevant witnesses and examined relevant documentary evidence, the complainant is unable to establish the elements of a *prima facie* allegation, then the case should, be dismissed. In addition, under some of the statutes (ERA, AIR21, STAA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, and FSMA) even if a complainant has made a *prima facie* allegation, an investigation of the complaint should not be conducted if the respondent demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the complainant's protected activity.

II. Preliminary Investigation.

A. Intake and Evaluation.

Intake may be performed directly by the supervisor or may be delegated to the investigator. Regardless of who completes the evaluation, it should cover as many details as possible, and may take place either in person or by telephone. Whenever practical and possible, the investigator will conduct face-to-face interviews with complainants.

The information obtained during the intake interview must be properly documented. At a minimum, a Memorandum of Interview must be prepared. As with any record of an interview, this Memorandum of Interview must preserve the complainant’s account of facts and record facts necessary to determine whether a *prima facie* allegation exists. This memorandum can be used later to refresh the complainant’s memory in the event his or her account deviates from the initial information provided; this is often the key to later assessing the credibility of complainant.

B. Early Resolution.

OSHA must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. At any point, the investigator may explore how an appropriate settlement may be negotiated and the case concluded. An early resolution is often beneficial to all parties, since potential losses are at their minimum when the complaint is first filed. Consequently, if the investigator believes that an early resolution may be possible, he or she is encouraged to contact the respondent immediately after completing the intake interview and docketing the complaint. However, the investigator must first determine whether an enforcement action is pending with OSHA (or, in AIR21 cases, with the FAA) prior to any contact with a respondent. Additionally, any resolution reached must be memorialized in a written settlement agreement.

C. Threshold Issues of Timeliness and Coverage.

During both the complaint evaluation process and after receiving a whistleblower case file, it is important to confirm that the complaint was timely filed, that a prima facie showing has been made under one or more of the statutes, that the case has been properly dockets and that all parties have been notified.

1. **Coverage.** The investigator must ensure that the complainant and the respondent(s) are covered under the statute(s) at issue. Detailed information regarding coverage

under each statute can be found in each statute's respective chapter. It will often be necessary for the investigator to consult with the Supervisor in order to identify and resolve issues pertaining to coverage.

2. **Commerce.** Some of the statutes may require for coverage purposes that the entity employing the complainant be “engaged in a business affecting commerce” (OSHA 11(c), STAA); “engaged in interstate or foreign commerce” (FRSA); or fulfill similar interstate commerce requirements. The former test is slightly easier to meet than the latter; but under either test, the respondent’s effect on commerce is generally not difficult to establish and is typically not disputed. The use of supplies and equipment from out of state sources, for example, is generally sufficient to show that the business “effects commerce.” See, e.g., *United States v. Dye Const. Co.,* 510 F.2d 78, 83 (10th Cir. 1975). In the rare circumstance that the respondent's connection to interstate commerce appears questionable, the investigator must advise the Supervisor, who may consult with RSOL or OWPP.

5. **Weighing the Evidence**.

The whistleblower statutes administered by OSHA fall into two groups, with distinct standards of causation and burdens of proof—the "motivating factor" and e "contributing factor" statutes.

A. “Motivating Factor” Statutes.

The Occupational Safety and Health Act of 1970 (hereinafter 11(c)), the Asbestos Hazard Emergency Response Act (AHERA), the International Safe Container Act (ISCA), and the six environmental statutes (Safe Drinking Water Act; Federal Water Pollution Control Act; Toxic Substances Control Act; Solid Waste Disposal Act; Clean Air Act; and Comprehensive Environmental Response, Compensation and Liability Act) require a higher standard of causation – “motivating factor” - and apply the traditional burdens of proof.

1. Under this standard, the investigation must disclose facts sufficient to raise the inference that the protected activity was a motivating factor in the adverse action. The Department of Labor relies on the standards derived from discrimination case law as set forth in *Mt. Healthy City School Board v. Doyle,* 429 U.S. 274 (1977) (mixed-motive analysis); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (pretext analysis); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (pretext analysis).

2. The possible outcomes of an investigation of a complaint under a motivating-factor statute are (1) a preponderance of the evidence indicates that the employer's reason for the retaliation was a pretext, and the complaint is meritorious; (2) a preponderance of the evidence indicates that the employer acted for both prohibited and legitimate reasons (that is, “mixed motives”), and—absent a preponderance of the evidence indicating that the respondent would have reached the same decision even if the complainant hadn't engaged in protected activity, the complaint is meritorious; (3) a preponderance of the evidence indicates that the employer acted for both prohibited and legitimate reasons, but a preponderance of the evidence indicates the respondent would have reached the same decision even in the absence of protected activity, and

the complaint must be dismissed; or (4) a preponderance of the evidence indicates that the employer was not motivated in whole or in part by protected activity and the complaint must be dismissed. In mixed-motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. The Department recognizes the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.,* 129 S.Ct. 2343 (2009). In that case the Court held that the prohibition against discrimination 'because of age in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a)(1), requires a plaintiff to "prove that age was the 'but-for' cause of the employer's adverse decision." 129 S.Ct. at 2350. The Court rejected mixed motive analysis, i.e., arguments that a plaintiff could prevail in an ADEA case by showing that discrimination was a motivating factor for the adverse decision, after which the employer had the burden of proving that it would have reached the same decision for non-discriminatory reasons. Id. at 2351-52. However, the Department does not believe that Gross affects the long-standing burden-shifting framework applied in mixed-motive cases under 11(c), AHERA, ISCA, and the six environmental whistleblower statutes. First, *Gross* involved an age discrimination case under the ADEA, not a retaliation case. The Court cautioned in *Gross* itself that "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Id. at 2349. Second, the Court based its decision that a mixed motive-analysis was inapplicable to the ADEA in part on its determination that Congress decided not to amend the ADEA to clarify that a mixed-motive analysis applied when it amended both the ADEA and Title VII in the Civil Rights Act of 1991. Negative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the language raising the implication was inserted. Id. Congress did not consider amendments to the OSHA "motivating factor" statutes when it amended Title VII and the ADEA in the Civil Rights Act of 1991. Thus, these OSHA statutes do not raise the strong negative implications that the Court noted in *Gross*. Third, in *Gross* the Court stated that its decision did not undermine prior Supreme Court precedent applying the mixed-motive burden-shifting framework to cases under the National Labor Relations Act (NLRA). 129 S. Ct. at 2352 n.6 (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 40103 (1983)). The Court in *Gross* noted that in *Transportation Management* it had deferred to the interpretation of the NLRA by the National Labor Relations Board. Ibid. Similarly, deference is owed to the reasonable interpretation of the Department of Labor's Administrative Review Board applying mixed-motive analysis under the environmental whistleblower statutes. *Cf. Anderson v. U.S. Department of Labor*, 422 F.3d 1155, 1173, 1181 (10th Cir. 2005) (providing *Chevron* deference to ARB's construction of I environmental whistleblower statutes). Since *Gross* was decided, the ARB has continued to apply mixed-motive analysis in environmental whistleblower cases. See, e.g., *Abdur-Rahman and Petty v. DeKalb County*, 2010 WL 2158226 (DOL. Adm.Rev.Bd. 2010) (Federal Water Pollution Control Act). *Gross* does not affect pretext analysis under *McDonnell Douglas*. *Geiger v. Tower Automotive,* 579 F.3d 614, 622 (6th Cir. 2009) (citing cases).

B. "Contributing Factor" Statutes.

The Energy Reorganization Act (ERA), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), the Surface Transportation Assistance Act (STAA), the Sarbanes-Oxley Act of 2002 (SOX), the Pipeline Safety Improvement Act of 2002 (PSIA), the Federal Railroad Safety Act (FRSA), the National Transit Security System Act (NTSSA), the Consumer Product Safety Improvement Act of 2008 (CPSIA), the Affordable Care Act (ACA),

Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. §5567; Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281; and FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d, require a lower standard to establish causation and a higher standard of proof in order to establish a respondent's affirmative defense.

1. Under these standards, a preponderance of the evidence must indicate that the protected activity was a contributing factor in the adverse action. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." See *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), 135 Cong.Rec. 5033 (1989). Thus, the protected activity, alone or in combination with other factors, must have affected in some way the outcome of the employer's decision.

2. The possible outcomes of investigation of a complaint under a contributing-factor statute are (1) a preponderance of the evidence indicates that protected activity was a contributing factor in the employer's decision, and absent clear and convincing evidence that the respondent would have taken the same adverse action even if the complainant had not engaged in protected activity, the complaint is meritorious; (2) a preponderance of the evidence indicates that protected activity was a contributing factor in the employer's decision, but clear and convincing evidence indicates that the respondent would have taken the same adverse action even in the absence of the protected activity, and the complaint must be dismissed; or (3) a preponderance of the evidence indicates that the protected activity was not a contributing factor in the decision to take the adverse action, and the complaint must be dismissed. In cases where protected activity is not the only factor considered in the adverse action, the employer bears the risk that the influence of legal and illegal motives cannot be separated.

C. Gateway Provision.

The "contributing factor" statutes also contain "gatekeeping" provisions, which provide that the investigation must be discontinued and the complaint dismissed if no *prima facie* showing is made. These provisions help stem frivolous complaints and simply codify the commonsense principle that no investigation should continue beyond the point at which enough evidence has been gathered to reach a determination.

6. **<u>Field Investigation.</u>**

Investigators ordinarily will be assigned multiple complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

A. The Elements of a Violation.

An illegal retaliation is an adverse action taken against an employee by a covered entity or individual in reprisal for the employee's engagement in protected activity. An effective investigation focuses on the elements of a violation and the burden of proof required. If the

investigation does not establish, by preponderance of the evidence, any of the elements of a *prima facie* allegation, the case should be dismissed. Therefore, the investigator should search for evidence that would help resolve each of the following elements of a violation:

1. **Protected Activity.** The evidence must establish that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed. However, with the exception of certain cases involving refusals to work, it is not necessary to prove the referenced statute(s) were actually violated. In other words, the complainant does not need to show that the conduct about which he/she initially complained, for example, wire fraud under SOX, actually took place. Rather, as long as the complainant's protected activity was made in good faith and a reasonable person could have raised the same issue, the action meets this element. Protected activity generally falls into four broad categories:

   a. Providing information to a government agency (including, but not limited to OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, TSA, FRA, FTA, CPSC, HHS), a supervisor (the employer), a union, health department, fire department, Congress, or the President.
   b. Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to OSHA under Section 8(f).
   c. Testifying in proceedings such as trials, hearings before the Office of Administrative Law Judges or the OSH Review Commission, or Congressional hearings. And, participating in inspections or investigations by agencies including, but not limited to OSHA, FMCSA, EPA, ERA, NRC, DOE, SEC, FAA, FTA, FRA, TSA, CPSC or HHS.
   d. Refusal to perform an assigned task. Section 11(c) of the OSH Act, STAA, ERA, NTSSA, FRSA, CPSIA, ACA, and CFPA specifically protect employees from retaliation for refusing to engage in an unlawful work practice. Although the other whistleblower statutes enforced by OSHA do not expressly provide protection for work refusals, the Secretary interprets all of the whistleblower protection statutes enforced by OSHA as providing some protection to employees from retaliation for refusing to engage in certain unlawful work practices. Generally, a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful, and he or she does not receive an adequate explanation from a responsible official that the conditions are safe.

2. **Employer Knowledge.** The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, one of the respondent's managers need not have specific knowledge that the complainant contacted a regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant. Also, the investigation need not show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity.

If the respondent does not have actual knowledge, but could reasonably deduce that the

complainant filed a complaint, it is referred to as *inferred knowledge.* Examples of *inferred knowledge* include, but are not limited to:

a. An OSHA complaint is about the only lathe in a plant, and the complainant is the only lathe operator.

b. A complaint is about unguarded machinery and the complainant was recently injured on an unguarded machine.

c. A union grievance is filed over a lack of fall protection and the complainant had recently insisted that his foreman provide him with a safety harness.

d. Under the *small plant doctrine*, in a small company or small work group where everyone knows each other, knowledge can also be attributed to the employer.

3. **Adverse Action.** The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer. An adverse action may occur at work; or, in certain circumstances, outside of work. Some examples of adverse actions may include, but are not limited to:

- Discharge
- Demotion
- Reprimand
- Harassment - unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- Hostile work environment - separate adverse actions that occur over a period of time, may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
- Lay-off
- Failure to hire
- Failure to promote
- Blacklisting
- Failure to recall
- Transfer to different job
- Change in duties or responsibilities
- Denial of overtime
- Reduction in pay
- Denial of benefits
- Making a threat
- Intimidation

- Constructive discharge - the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
-

It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as "adverse," in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action "materially adverse." Specifically, the evidence must show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation.[3] The investigator can test for material adversity by interviewing co-workers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

4. **<u>Nexus.</u>** A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited ill will) toward the protected activity, timing (proximity in time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees (or in comparison to how the complainant was treated prior to engaging in protected activity), false testimony or manufactured evidence.

Questions that will assist in testing the respondent's position include:

- Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did the complainant's productivity, attitude, or actions change after the protected activity?
- Did the respondent discipline other employees for the same infraction and to the same degree?
-

5. **<u>Amended Complaints.</u>** After filing a retaliation complaint with OSHA, a complainant may wish to amend the complaint to add additional allegations and/or additional respondents. It is OSHA's policy to permit the liberal amendment of complaints, provided that the original complaint was timely, and the investigation has not yet concluded.

a. **Form of Amendment**. No particular form of amendment is required. A complaint may be amended orally or in writing. Oral amendments will be reduced to writing by OSHA. If the complainant is unable to file the amendment in English, OSHA will accept the amendment in any language.

b. **Amendments Filed within Statute of Limitations**. At any time prior to the expiration of the statutory filing period for the original complaint, a complainant may amend

[3] *Burlington Northern & Santa Fe R. R. Co. v. White*, 548 U.S. 53, 68 (2006).

the complaint to add additional allegations and/or additional respondents.

c. **Amendments Filed After Statute of Limitations Has Expired**. For amendments received after the statute of limitations for the original complaint has run, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment, provided that the investigation remains open. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with the implicated statute.

d. **Processing of Amended Complaints**. Regardless of the statute, any amended complaint must be processed in the same manner as any original complaint. This means that all parties must be provided with a copy of the amended complaint, that this notification must be documented in the case file, and that the respondent(s) must be afforded an opportunity to respond. Investigators must review every amendment to ensure that a prima facie allegation is present. The investigator must ensure that all parties have been notified of the amendment in accordance with the applicable statute. See the chapter related to the implicated statute for specific information on processing complaints.

6. **Amended Complaints Distinguished from New Complaints.** The mere fact that the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean that new allegations should be considered an amendment. If the alleged retaliation involves a new or separate adverse action that is unrelated to the active investigation, then the complaint may be docketed with its own unique case number and processed as a new case.

7. **Early Dismissal.** If the investigator determines that the allegations are not appropriate for investigation under the covered statutes but may fall under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance. If the complaint fails to meet any of the elements of a *prima facie* allegation, the complaint must be dismissed, unless it is withdrawn.

8. **Inability to Location Complainant.** In situations where an investigator is having difficulty locating the complainant to initiate or continue the investigation, the following steps must be taken:

a. Telephone the complainant at various times during normal work hours and in the evening.

b. Mail a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation) to the complainant's last known address, stating that the investigator must be contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, management may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the letter must be preserved in the file along with a copy of the letter to maintain accountability.

B. On-site Investigation.

Personal interviews and collection of documentary evidence must be conducted on-site whenever practicable. Investigations should be planned in such a manner as to personally interview all appropriate witnesses during a single site visit. The respondent's designated representative has the right to be present for all interviews with currently-employed managers, but interviews of non-management employees are to be conducted in private. The witness may, of course, request that an attorney or other personal representative be present at any time. In limited circumstances, witness statements and evidence may be obtained by telephone, mail, or electronically.

If an interview is recorded electronically, the investigator must be a party to the conversation, and it is OSHA's policy to have the witness acknowledge at the beginning of the recording that they understand that the interview is being recorded. See 18 U.S.C. § 2511(2)(c). This does not apply to other audio or video recordings supplied by the complainant or witnesses. At the RA's discretion, in consultation with RSOL, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and need to be included in the case file.

C. Complainant Interview.

The investigator must attempt to interview the complainant in all cases. The investigator must arrange to meet with the complainant as soon as possible to conduct an interview regarding the complainant's allegations. When practical and possible, the investigator will conduct face-to-face interviews with complainants. It is highly desirable to obtain a signed interview statement from the complainant during the interview. A signed interview statement is useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in the complainant's account of the facts, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "designation of representative" form.

1. The investigator must attempt to obtain from the complainant all documentation in his or her possession that is relevant to the case. Relevant records may include, but are not limited to:

a. Copies of any termination notices, reprimands, warnings or personnel actions.
b. Performance appraisals.
c. Earnings and benefits statements.
d. Grievances.
e. Unemployment benefits, claims and determinations.
f. Job position descriptions.
g. Company employee and policy handbooks.
h. Copies of any charges or claims filed with other agencies.
i. Collective bargaining agreements.
j. Arbitration agreements.

k. Medical records. Because medical records require special handling, investigators should familiarize themselves with the requirements of OSHA Instruction CPL 02-02-072, Rules of agency practice and procedure concerning OSHA access to employee medical records, August 22, 2007.

2. The restitution sought by the complainant should be ascertained during the interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. The complainant should be advised that the respondent's back pay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

3. If the complainant is not personally interviewed and his or her statement is taken by telephone, a detailed Memo to File will be prepared relating the complainant's testimony.

D. Contact with Respondent.

1. In many cases, following receipt of OSHA's notification letter, the respondent forwards a written position statement, which may or may not include supporting documentation. Assertions made in the respondent's position statement do not constitute evidence, and generally, the investigator must still contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense. At a minimum, copies of relevant documents and records should be requested, including disciplinary records if the complaint involves a disciplinary action.

2. If the respondent requests time to consult legal counsel, the investigator must advise him or her that future contact in the matter will be through such representative. A Designation of Representative form should be completed by the respondent's representative to document his or her involvement.

3. In the absence of a signed Designation of Representative, the investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the investigator's initial contact should be the person who signed the letter.

4. The investigator should interview all company officials who had direct involvement in the alleged protected activity or retaliation and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality. Witnesses must be advised of their rights regarding protection under the applicable whistleblower statute(s), and advised that they may contact OSHA if they believe that they have been subjected to retaliation because they participated in an OSHA investigation.

5. If the respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.

6. Respondent's attorney generally does not, however, have the right to be present, and should not be permitted to be present, during interviews of non-management or non-supervisory employees. Any witness may, of course, have a personal representative or attorney present at any time. If the non-management or non-supervisory employee witness requests that Respondent's attorney be present, the investigator should ask Respondent's attorney on the record who he/she represents and specifically ask Respondent's attorney if he/she represents the non-management witness in the matter. It must be made clear to the witness that:

a. Respondent's attorney represents Respondent and not the witness; and
b. The witness has the right to be interviewed privately.

7. While at the respondent's establishment, the investigator should make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which respondent offers and which the investigator construes as being relevant to the case.

8. If at any time during the initial (or subsequent) meeting(s) with respondent officials or counsel, respondent suggests the possibility of an early resolution to the matter, the investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded.

E. Uncooperative Respondent.

When conducting an investigation under § 11(c) of the OSH Act, AHERA or ACA, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the Regional Administrator. The Agency has two types of subpoenas for use in these cases: A Subpoena *Ad Testificandum* is used to obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to obtain documentary evidence. They can be served on the same party at the same time, and the Agency can require the named party to appear at a designated office for production, at Agency costs. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present). When drafting subpoenas, the party should be given a short timeframe in which to comply, using broad language like "any and all documents" or "including but not limited to," and making the investigator responsible for delivery and completion of the service form (see example at the end of this chapter). If the respondent decides to cooperate, the Supervisor can choose to lift the subpoena requirements.

F. Further Interviews and Documentation.

It is the investigator's responsibility to pursue all appropriate investigative leads deemed pertinent to the investigation, with respect to the complainant's and the respondent's positions.

Contact must be made whenever possible with all relevant witnesses, and every attempt must be to gather all pertinent data and materials from all available sources.

1. The investigator must attempt to interview each relevant witness. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative present at any time.

2. The investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but not be limited to, safety and health inspections, or records of inspections conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceeding.

3. In cases where the complainant is covered by a collective bargaining agreement, the investigator should interview relevant union officials and obtain copies of grievance proceedings or arbitration decisions specifically related to the retaliation case in question.

4. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another Federal agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.

5. The investigator must document all telephone conversations with witnesses or party representatives in the case file.

G. <u>Conclusion of Investigations of Non-Merit Complaints</u>.

Upon completion of the field investigation and after discussion of the case with the Supervisor, the investigator must contact the complainant in order to provide him or her with the opportunity to present any additional evidence deemed relevant. This closing conference may be conducted with the complainant in person or by telephone.

1. During the closing conference, the investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.

2. It is unnecessary and improper to reveal the identity of witnesses interviewed. The complainant should be advised that OSHA does not reveal the identity of witnesses who request confidentiality. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.

3. During the closing conference, the investigator must inform the complainant of his/her rights to appeal or objection under the appropriate statute (which vary, as described in following chapters), as well as the time limitation for filing the appeal or objection.

4. The investigator should also advise the complainant that the decision at this stage is a recommendation subject to review and approval by higher management and the Office of the Solicitor.

7. Case Disposition

Report of Investigation.

The investigator must report the results of the investigation by means of a Report of Investigation. Once the ROI is approved, the investigator will write draft Secretary’s Findings for review and signature by the RA or his or her designee.

Case Review and Approval by Supervisor.

A. Review.

The investigator will provide the completed case file and draft determination letters to the Supervisor. Upon receipt of the completed case file, the Supervisor will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, completeness of the Secretary's Findings, and merits of the case. If legal action is being considered, the Supervisor will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practicable after receipt of the file.

B. Approval.

If the Supervisor concurs with the analysis and recommendation of the investigator, he or she will sign on the signature block on the last page of the ROI and record the date the review was completed. The Supervisor's signature on the ROI serves as approval of the recommended

determination. Appropriate determination letters must be issued to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

1. **Withdrawal**.

A complainant may withdraw his or her complaint at any time during OSHA's processing of the complaint. Withdrawals may be requested either orally or in writing. It is advisable, however, to obtain a signed withdrawal whenever possible. In cases where the withdrawal request is made orally, the investigator must send the complainant a letter outlining the above information and confirming the oral request to withdraw the complaint. Once the Supervisor reviews and approves the request to withdraw the complaint, a second letter must be sent to the complainant, clearly indicating that the case is being closed based on the complainant's oral request for withdrawal. Both letters must be sent via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation), or via any third-party commercial carrier that provides delivery confirmation. Proof of delivery of both letters must be preserved in the file with copies of the letters to maintain accountability.

2. **Settlement.**

Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached solely through the utilization of OSHA's standard settlement agreement. The language of this agreement generally should not be altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation. The investigator will obtain approval by the supervisor of the settlement agreement language prior to the parties signing the agreement. For recommendations to approve settlement, the supervisor's approval will be indicated by signature on both the settlement agreement and the ROI. The RA or his or her designee will issue appropriate letters to the parties forwarding copies of the signed settlement agreement, posters, the Notice to Employees, the back pay check, or any other relevant documents, including tax-related documents. Once an employee has filed a complaint and if the case is currently open, any settlement of the underlying claims reached between the parties must be reviewed by OSHA to ensure that the settlement is just, reasonable, and in the public interest. At the investigation stage, this requirement is fulfilled through OSHA's review of the agreement. Approved settlements may be enforced in accordance with the relevant statute and the controlling regulations. In cases other than those under 11(c), AHERA, or ISCA, the settlement must state that it constitutes the Secretary's Findings and that the parties' approval of the settlement makes it a final order under the relevant statute.

3. **Postponement.**

The Agency may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement or another law. The rights asserted in the other proceeding must be substantially the same as the rights under the relevant OSHA whistleblower statute and those proceedings must not likely violate rights under the relevant

OSHA whistleblower statute. The factual issues to be addressed by such proceedings must be substantially the same as those raised by the complaint under the relevant OSHA whistleblower statute. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective state whistleblower statute, but not when the proceeding is under an unemployment compensation statute, which typically does not deal with retaliation. To postpone the OSHA case, the parties must be notified that the investigation is being postponed in deference to the other proceeding and that the Agency must be notified of the results of that proceeding immediately upon its conclusion.

4. **Deferral.**

Voluntary resolution of disputes is desirable in many whistleblower cases. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints under the OSHA whistleblower statutes. The investigator and Supervisor must review the results of any proceeding to ensure all relevant issues were addressed, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the relevant OSHA whistleblower statute. Repugnancy deals not only with the violation, but also the completeness of the remedies. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. If the determination is accepted, the Agency may defer to the decision as outlined above. In cases where the investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration or other appropriate action, the Supervisor will issue letters of deferral to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in IMIS as “Dismissed.” If the other proceeding results in a settlement, it will be recorded as “Settled Other.”

6. **Merit Finding**.

All Secretary’s Findings and Preliminary Orders issuing merit determinations must be signed by the RA or designee. For recommendations of merit in OSHA, STAA, AHERA and ISCA cases, the RA or his or her designee must draft a memorandum to RSOL recommending litigation so that the case may be reviewed for legal sufficiency prior to issuing the determination in a STAA case or, in OSHA, AHERA and ISCA cases, filing a complaint in district court.

a. In STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, FSMA, and SPA cases involving discharge, where a bona fide offer of reinstatement has not been made, the Assistant Secretary must order immediate, preliminary reinstatement upon finding reasonable cause to believe that a violation occurred. Such a preliminary order may be issued any time after the Assistant Secretary has investigated a retaliation complaint and before issuing a final order (which is achieved after all appeals within the Department of Labor have been exhausted). To ensure respondent's due process rights under the Fifth Amendment of the Constitution, this notification is accomplished and documented by means of a "due process letter." RSOL must be consulted for concurrence prior to issuing any due process letter. Due process rights are afforded by giving the respondent notice

of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The letter must also indicate that the respondent may submit a written response, meet with the investigator, and present rebuttal witness statements within 10 days of receipt of OSHA's letter (or at a later agreed-upon date, if the interests of justice so require). Due process letters must be sent via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation), or via a third-party commercial carrier that provides delivery confirmation.

b. For merit recommendations under the remaining statutes, the Supervisor must finalize and the RA or designee sign the Secretary's Findings and Order issued to the respondent, with a copy sent to the complainant.

Agency Determination.

Once the Supervisor has reviewed the file and concurs with the recommendation, he or she will obtain the appropriate (the RA's or his or her designee's) signature on the findings, and in a merit case, the preliminary order. All findings and preliminary orders must be sent to the parties via certified U.S. mail, return receipt requested. Proof of receipt must be preserved in the file with copies of the findings and preliminary orders to maintain accountability. A copy of the findings and any preliminary order must be distributed to the appropriate federal agency as shown in the "Distribution of Investigation Findings List" at the end of this chapter. For complaints filed under STAA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA, that did not result in a settlement or withdrawal, a copy the original complaint, the determination letter and the first page of the ROI setting forth the names, addresses, and telephone numbers of the parties and their representatives must be sent to the Chief Administrative Law.

Appeals and Objections.

In any case in which objections to findings and preliminary orders may be heard by a DOL All, both the complainant and respondent must be given the opportunity to object to findings and preliminary orders in accordance with the procedures established under each of the whistleblower statutes. Objections must be in writing, with a copy to the RA, and must be submitted to the Chief Administrative Law Judge within the statutory time period.

A. OSHA, AHERA, and ISCA Cases.

It has been OSHA's long-standing policy and procedure to provide complainants with the right to appeal determinations under OSHA 11(c), AHERA, and ISCA, although such appeals are not specifically provided for by statute or regulation.

1. **Appeal Process.**

If an 11(c), AHERA, or ISCA complaint is dismissed, the complainant may appeal the dismissal to the Director of OSHA's Directorate of Enforcement Programs (DEP). The request must be made in writing to DEP within 15 calendar days of the complainant's receipt of the region's dismissal letter, with a copy to the RA. This review is not de novo. Rather, a committee constituted of National Office staff (Appeals Committee) reviews the case file and findings for proper application of the law to the facts. If the decision is supported by articulate, cogent, and reliable analysis, the Appeals Committee generally recommends to the Director that the determination stand. The agency-level decision is the final decision of the Secretary of Labor.

a. Upon receipt of the copy of an appeal under 11(c), AHERA, or ISCA, the Supervisor must immediately forward a copy of the case file and any additional comment regarding the appeal to the Director of the Office of the Whistleblower Protection Program (OWPP) for review.

b. The Appeals Committee must review the file and any other documentation supplied by the complainant or the supervisor. If either evidence or analysis is lacking, the Appeals Committee remands the case to the field office for additional investigation or analysis. If the result of reinvestigation or reanalysis is settlement of the case or the issuance of merit findings, either under section 11(c) or AHERA or ISCA, the appeal is considered to be upheld. If reinvestigation or reanalysis does not change the initial determination, the Director of the Directorate of Enforcement Programs must deny the appeal.

c. If the complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief to the complainant, such as a union arbitration procedure, the hearing of the appeal may be postponed pending a determination in the other forum, after which the Appeals Committee must either recommend deferring to the other determination, if it appears fair and equitable, or proceed with hearing the case.

B. Other Case Types.

The complainant’s and respondent's objections under ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA, are heard de novo before a DOL ALL The expression “hearing de novo” means that the ALJ hearing the case relies only on the evidence presented at the hearing. OSHA (referred to in the regulations as the Assistant Secretary) normally does not participate in the hearings; however, OSHA, represented by SOL, may, at its discretion, participate as a party or amicus curiae before the ALJ or the ARB.

Approval for Litigation.

A. 11(c), STAA, AHERA, and ISCA cases in which OSHA is recommending a merit finding must be forwarded to RSOL for review. If RSOL concurs that a STAA case is meritorious, the RA must issue Secretary's Findings and an order or preliminary order, and

RSOL ordinarily represents the Assistant Secretary before the AU if the Respondent files an appeal. If RSOL determines that additional investigation is required, the Supervisor normally will assign such further investigation to the original investigator.

B. If an 11(c), AHERA, or ISCA case is rejected by the RSOL for litigation, the RA or his or her designee must issue Secretary's Findings dismissing the case and providing appeal rights in accordance with other dismissals. NOTE: AHERA complainants may also have a right of private action under the whistleblower provision of §509 of the Asbestos School Hazard Abatement Act of 1984, which is not administered by OSHA.

3. Requests to Return Documents upon Completion of the Case. All documents received by the government from the parties during the course of an investigation become part of the case file and may not be returned. When such a request is made, the investigator should send a letter to the party that made the request, explaining that his or her request cannot be granted.

8. Alternative Dispute Resolution

October 2, 2012 OSHA's Alternative Dispute Resolution pilot program for whistleblower complaints.

9. Whistleblower Protection Advisory Committee

December 13, 2012 Secretary of Labor announces new member of Whistleblower Protection Advisory Committee. The 12 voting and three ad-hoc members of the WPAC were appointed by Secretary Solis. All members will serve two-year terms, and the committee will meet at least twice a year

WPAC is comprised of twelve voting members, with four members representing management, four members representing labor, one member representing State OSH Plan states, and three members representing the public. Non-voting members include representatives from three Federal Government agencies that have jurisdiction over statutes with whistleblower provisions. All members of WPAC were appointed by Secretary Solis and will serve two-year terms. The committee will meet at least twice a year.

10. Best Practices to Reduce or Avoid Whistleblower Claims

A. Establish an Employee Concerns Program or Ombudsperson Program

Establishing a forum in which employees can raise concerns and have assurance that their concerns will be investigated is an effective means of resolving an employee's grievance before the employee brings his or her concern to a regulatory agency or files a complaint. In addition, an employee concerns program or ombudsperson program can help alert management of alleged violations early on, thereby providing an opportunity to intervene and prevent further damage. To be successful, such a program must be perceived by employees as credible. Accordingly, the ombudsperson or employee concerns manager should promptly investigate concerns and should keep the concerned employee apprised of the status and results of the investigation.

Preferably, the ombudsperson or employee concerns manager should report directly to senior management. This ensures adequate independence and strengthens the credibility of the program, thereby increasing the likelihood that employees will raise their concerns internally before they raise them with regulatory agencies or the media. In addition, the program may provide options for employees to raise concerns anonymously. If an investigation substantiates an employee's concern, the company should take prompt correction action, which in some cases may mitigate a civil penalty resulting from enforcement action.

B. Train Managers and Supervisors

Managers and supervisors should be trained on how to handle employee concerns and how to instill a corporate culture in which employees raise concerns without fear of reprisal.

C. Adopt Anti-Retaliation Rules

D. Take Disciplinary Action Against Those Who Engage in Retaliation

All employees should be put on notice (e.g., through training and the employee handbook) that, if they harass or discriminate against another employee for raising a concern, they will be subject to disciplinary action.

E. Document Performance Issues

Some statutes such as AIR-21 provide that relief may not be awarded if the employer demonstrates by "clear and convincing" evidence that the employer would have taken the same unfavorable personnel action in the absence of the plaintiff's protected conduct. To meet this "clear and convincing" standard, it is critical to have thorough, unambiguous evidence demonstrating that the same unfavorable personnel action would have been taken in the absence of the plaintiff's protected conduct. Accordingly, managers should thoroughly document performance issues on a routine basis.

F. Manage Contractors

The DOL construes employee status broadly. Therefore, an employee of a contractor can sometimes bring a retaliation claim against both the contractor (his or her direct employer) and the carrier. While carriers should avoid managing contractors in a manner that could give rise to co-employment liability, they should also take measures to ensure that their contractors maintain a work environment in which workers feel comfortable raising safety concerns. These measures include: (1) requiring contractors to train their managers concerning whistleblower protections; (2) requiring contractors to investigate claims of retaliation; and (3) requiring contractors to adopt a policy prohibiting retaliation.

III. Secretary's Findings.

A. Purpose.

Secretary's Findings, which are issued at the conclusion of the investigation, inform the parties of the outcome of OSHA's investigation, succinctly documenting the factual findings as well as OSHA``s analysis of the elements of a violation and conveying any order or preliminary order. Secretary's Findings also formally advise the parties of the right to appeal or object to the determination and the procedures for doing so.

B. When Required.

1. OSHA 11(c), AHERA, and ISCA. Although not specifically required by statute or regulation, it is OSHA policy to issue Secretary's Findings in all dismissals of OSHA 11(c), AHERA, or ISCA cases. In merit cases under OSHA 11(c), AHERA, or ISCA, the sending of the district court complaint by RSOL to the complainant fulfills the Secretary's obligation under these statutes to notify the complainant of the determination. If RSOL does not do this, the RA [or other appropriate official] must do so. The RA must consult with the RSOL as to its practice to make sure that the district court complaints are provided to the complainant.

2. STAA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA. OSHA is required by statute and/or regulation to issue Secretary's Findings under all of these statutes, in both merit and non-merit cases.

C. Orders and Preliminary Orders in Cases which may be Heard by OALJ.

Meritorious Secretary's Findings must include an order or preliminary order, depending on the statute. Non-meritorious Secretary's Findings will not include an order or preliminary order, because no relief is being awarded.

1. Orders Involving Preliminary Reinstatement. Under STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA, immediate ("preliminary") reinstatement generally must be ordered if the complainant has been discharged or demoted. This portion of the preliminary order is effective immediately upon receipt by the respondent. The preliminary order shall also set forth the other relief provided by the statute, such as back pay. In Secretary's Findings awarding preliminary reinstatement under those statutes, the order must be called a preliminary order. Preliminary orders may not be included in Secretary's Findings under OSHA 11(c), AHERA, ISCA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, or TSCA.

2. Orders Involving Reinstatement. Under ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, reinstatement must be ordered if the complainant has been discharged or demoted. Under these statutes, the reinstatement order does not become effective unless and until it becomes a final order. Therefore, orders accompanying merit Secretary's Findings under ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA must not be called "preliminary orders," even when reinstatement is being ordered.

D. Procedure for Issuing Findings under OSHA 11(c), AHERA, and ISCA.

For all dismissal determinations under these statutes, the parties must be notified of the results of the investigation by issuance of Secretary's Findings appeal rights must be noted. The Secretary's Findings will be prepared for appropriate signature, as set forth above. The RA or designee will send the Secretary's Findings to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt will be preserved in the file with copies of the letters to maintain accountability. For merit cases the district court complaint filed by RSOL constitutes the Secretary's Findings. RSOL ordinarily will send the district court complaint to the complainant, but the RA (or other appropriate official) must consult with RSOL as to its practice to make sure that OSHA sends the district court complaint to the complainant if RSOL does not.

E. Procedure for Issuing Findings under STAA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA.

For all merit or dismissal determinations under these statutes, the parties must be notified of the results of the investigation by issuance of a Secretary's Findings and, in merit cases, an Order or Preliminary Order, as the case may be under the applicable statute. The Secretary's Findings will be prepared for appropriate signature, as set forth above. The RA or designee will send the Secretary's Findings and Order or Preliminary Order, if applicable, to the parties via certified U.S. mail, return receipt requested. Proof of receipt will be preserved in the file with copies of the letters to maintain accountability.

1. Any party may object, in writing, to the Secretary's Findings, Order (or Preliminary Order), or both and request a hearing on the record. A written objection must be submitted to the Chief Administrative Law Judge within thirty (30) days of receipt of the Secretary's Findings, with copies of the written objection provided to the RA or his or her designee and the other parties.

2. If no objection is filed within thirty (30) days of the receipt, the Secretary's Findings and Order (or Preliminary Order), if applicable, will become final and not subject to judicial review.

3. Regardless of whether an objection is filed by any party, any portion of a Preliminary Order requiring reinstatement will be effective immediately upon the receipt of the Finding and Preliminary Order. Enforcement of the Preliminary Order is in U.S. District Court.

REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope.

This section covers policy and procedures for the determination of appropriate remedies in whistleblower cases and for the effective negotiation of settlements their documentation of cases at the Regional level.

II. Remedies.

In cases where OSHA is ordering monetary and other relief or recommending litigation, the investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation.

A. Reinstatement and Front Pay.

Under all whistleblower statutes enforced by OSHA, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases and is a critical component of making the complainant whole. Where reinstatement is not feasible, such as where the employer has ceased doing business or there is so much hostility between the employer and the complainant that complainant's continued employment would be unbearable, front pay in lieu of reinstatement should be awarded from the date of discharge up to a reasonable amount of time for the complainant to obtain another job. RSOL should be consulted on front pay.

B. Back Pay.

Back pay is available under all whistleblower statutes enforced by OSHA. Back pay is computed by deducting net interim earnings from gross back pay. Gross back pay is the total taxable earnings complainant would have earned during the quarter if he or she had remained in the discharging employer’s employment. Usually, the hourly wage is multiplied by the number of hours a week the complainant typically worked. If the complainant has not been reinstated, the gross pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. Net interim earnings are interim earnings reduced by expenses. Interim earnings are the total taxable earnings complainant earned from interim employment (other employers). Expenses are 1) those incurred in searching for interim employment, e. g., mileage at the current IRS rate per driving mile; toll and long distance telephone call; employment agency fees, other job registration fees, meals and lodging if travel away from home; bridge and highway tolls; moving expenses, etc.; and those incurred as a condition of accepting and retaining an interim job, e.g., special tools and equipment, safety clothing, union fees, employment agency payments, mileage for any increase in commuting distance from distance traveled to the discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc. Unemployment insurance is not deducted from gross back pay. Worker’s compensation is not deducted from back pay, except for the portion which compensates for lost wages.

C. Compensatory Damages.

Compensatory damages may be awarded under all the OSHA whistleblower statutes. Compensatory damages include, but are not limited to, out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy, expenses incurred in searching for a new job (see paragraph B above), vested fund or profit-sharing losses, credit card interest and other property loss resulting from missed payments, annuity losses, compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health

professional and medication related to that mental distress. RSOL should be consulted on computing the amount of compensation for mental distress.

D. Punitive Damages.

1. Under 11(c), AHERA, ISCA, STAA,SPA, SDWA, TSCA, NTSSA, and FRSA, punitive damages are available in cases where the respondent's conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the rights of the employee under the relevant statute.

Punitive damages are appropriate:

a. when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before the adverse action occurred (unless the employer had a clear-cut, enforced policy against retaliation); or

b. when the respondent’s conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, when there has been a pattern or practice of retaliation in violation of the statutes OSHA enforces, when there is a policy contrary to rights protected by these statute (for example, a policy requiring safety complaints to be made to management before filing them with OSHA or restricting employee discussions with OSHA compliance officers during inspections) and the retaliation relates to this policy, when a management official commits violence against the complainant, or when the adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.

2. Coordination with the supervisor and RSOL as soon as possible is imperative when considering a punitive damages award. If RSOL agrees that such damages may be appropriate, further development of evidence should be coordinated with RSOL. When determining punitive damages, management and investigators should review ARB, ALJ, and court decisions, such as *Reich v. Skyline Terrace, Inc.,* 977 F.Supp. 1141 (N. **D.** Okl. 1997), for determining if punitive damages are appropriate and the appropriate amounts to award. Inflation in the time period after the issuance of the decision relied upon should be considered.

3. Punitive damages awards under STAA, NTSSA, SPA, FRSA, and NTSSA are subject to a statutory cap of $250,000.

E. Attorney’s Fees.

In merit cases where the complainant has been represented by an attorney, OSHA must award reasonable attorney’s fees where authorized by the applicable statute(s).

Attorney's fees are authorized by all whistleblower statutes enforced by OSHA except for 11(c), AHERA, and ISCA. Complainant's attorney must be consulted to determine the hourly fee and the number of hours worked. This work would include, for example, the attorney's preparation of the complaint filed with OSHA and the submission of information to the investigator. Most attorney fees awards, however, are determined by the ALJ and the ARB because they reflect the attorney's work in litigating the case.

F. Interest.

Interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes. See 26 U.S.C. §6621 (the Federal short—term rate plus three percentage points). That underpayment rate can be determined for each quarter by visiting www.irs.gov and entering "Federal short-term rate" in the search expression. The press releases for the interest rates for each quarter will appear. The relevant rate is the one for underpayments (not large corporate underpayments). A definite amount should be computed for the time up to the date of calculation, but the findings should state that in addition interest at the IRS underpayment rate at 26 U.S.C. §6621, compounded daily, must be paid on monies owed after that date. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function.

G. Expungement of warnings, reprimands, and derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file.

H. Providing the complainant a neutral reference for potential employers.

I. The following table summarizes the remedies available at the OSHA investigative level under all 21 whistleblower statutes currently enforced by OSHA. This summary is provided for the convenience of the reader and should not substitute for a careful review of the statutes themselves and the applicable regulations.

<table>
<tr><th colspan="4">Remedies that Vary by Statute</th></tr>
<tr><td>Statute</td><td>Preliminary Reinstatement</td><td>Punitive Damages</td><td>Attorney’s Fees</td></tr>
<tr><td>11(c)</td><td rowspan="3">No</td><td rowspan="3">Yes</td><td rowspan="3">No</td></tr>
<tr><td>AHERA</td></tr>
<tr><td>ISCA</td></tr>
<tr><td>STAA</td><td>Yes</td><td>Yes, up to $250,000</td><td>Yes</td></tr>
<tr><td>CAA</td><td rowspan="7">No</td><td rowspan="3">No</td><td rowspan="16">Yes</td></tr>
<tr><td>CERCLA</td></tr>
<tr><td>FWPCA</td></tr>
<tr><td>SDWA</td><td>Yes</td></tr>
<tr><td>SWDA</td><td>No</td></tr>
<tr><td>TSCA</td><td>Yes</td></tr>
<tr><td>ERA</td><td rowspan="4">No</td></tr>
<tr><td>AIR21</td><td rowspan="9">Yes</td></tr>
<tr><td>SOX</td></tr>
<tr><td>PSIA</td></tr>
<tr><td>NTSAA</td><td>Yes, up to $250,000</td></tr>
<tr><td>CPSIA</td><td rowspan="3">No</td></tr>
<tr><td>ACA</td></tr>
<tr><td>CFPA</td></tr>
<tr><td>SPA</td><td>Yes, up to $250,000</td></tr>
<tr><td>FSMA</td><td>No</td></tr>
</table>

III. Settlement Policy.

Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it. OSHA should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

IV. Settlement Procedure.

A. Requirements.

Requirements for settlement agreements are:

1. The file must contain documentation of all appropriate relief at the time the case has settled and the relief obtained.
2. The settlement must contain all of the core elements of a settlement agreement.
3. To be finalized, every settlement, or in cases where the Agency approves a private settlement, every approval letter must be signed by the appropriate OSHA official.
4. To be finalized, every settlement must be signed by the respondent.

5. To be finalized, every settlement under a statute other than OSHA 11(c), AHERA, and ISCA must be signed by the complainant.

B. Adequacy of Settlements.

1. **Full Restitution.** Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass and is not necessarily limited to any or all of the following:

a. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.

b. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.

c. Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant's attempt to mitigate his or her losses are subtracted from the full back wages (NOTE: Unemployment compensation benefits may never be considered as an offset to back pay).

d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which have been placed in the complainant's personnel file or other records.

e. The respondent's agreement to provide a neutral reference to potential employers of the complainant.

f. Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting.

g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property loss resulting from missed payments, compensation for mental distress caused by the adverse action, and out-of-pocket expenses for treatment by a mental health professional and medication related to that distress.

h. Attorneys' fees, if authorized by the applicable statute(s).

i. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.

j. Punitive damages may be considered under certain statutes. They may be awarded when a management official involved in the adverse action knew

that the adverse action violated the relevant whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of the statutes OSHA enforces. See Ch. 6 II D above for more guidance, including other examples. However, coordination with the supervisor and RSOL as soon as possible is imperative when considering such action. If RSOL agrees that such damages may be appropriate, further development of evidence should be coordinated with the RSOL.

C. The Standard OSHA Settlement Agreement.

Whenever possible, the parties should be encouraged to utilize OSHA's standard settlement agreement containing all of the core elements outlined below. (See sample OSHA settlement agreement at the end of this chapter.) This will ensure that all issues within OSHA's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

1. It must be in writing.
2. It must stipulate that the employer agrees to comply with the relevant statute(s).
3. It must address the alleged retaliation.
4. It must specify the relief obtained.
5. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting.

Adherence to these core elements should not create a barrier to achieving an early resolution and adequate relief for the complainant, but according to the circumstances, concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the Supervisor. All pre-settlement discussions with the Supervisor must be documented in the case file.

All appropriate relief and damages to which the complainant is entitled must be documented in the file. If the settlement does not contain a make-whole remedy, the justification must be documented and the complainant's concurrence must be noted in the case file.

In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Yet, posting of a settlement agreement, standard poster and/or notice to employees, while an important remedy, may also be an impediment to a settlement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

The investigator should try as much as possible to obtain a single payment of all monetary relief. This will ensure that complainant obtains all of the monetary relief.

The settlement should require that a certified or cashier's check, or where installment payments are agreed to, the checks, to be made out to the complainant, but sent to OSHA. OSHA shall promptly note receipt of the checks, copy the check[s], and mail the check[s] to the complainant.

6. Much of the language of the standard agreement should generally not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Those sections that can be omitted or included, with management approval include:

a. *POSTING OF NOTICE* (See sample of Notice to Employees at the end of this chapter.)
b. COMPLIANCE WITH NOTICE
c. GENERAL POSTING
d. NON-ADMISSION
e. REINSTATEMENT *(this section may be omitted if adequate front pay is offered)*
   i. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted.

   ii. Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.

7. MONIES

a. Respondent agrees to make Complainant whole by payment of $ (less normal payroll deductions)
b. Respondent agrees to pay Complainant a lump sum of $. Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check[s] shall be made out to the complainant, but mailed to OSHA.

In all cases other than those under OSHA 11(c), AHERA, and ISCA, the settlement must include a statement that the settlement constitutes findings and a preliminary order under [cite the provision of the relevant whistleblower statute on findings and preliminary orders], that complainant's and respondent's approvals of the agreement constitute failures to object to the findings and the preliminary order under [cite relevant provision], and therefore the settlement is an order enforceable in an appropriate United States district court under [cite relevant provision]. In OSHA 11(c), AHERA, and ISCA cases the settlement must state that the employer's violation of any terms of the settlement will be considered to be a violation of the statute, which the Secretary may address by filing a civil action in an appropriate United States district court under the statute.

OSHA settlements should generally not be altered beyond the options outlined above. Any changes to the standard OSHA settlement agreement language, beyond the few options noted above, must be approved in a pre-settlement discussion with the Supervisor. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the employer belongs. Settlement agreements must not contain provisions which prohibit DOL's release of the agreement to the general public.

D. Settlements to which OSHA is not a Party.

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without OSHA's participation in settlement negotiations. Because voluntary resolution of disputes is desirable in many whistleblower cases, OSHA's policy is to defer to adequate privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved by the Supervisor to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest (See E. below). Approval of the settlement demonstrates the Secretary's consent and achieves the consent of all three parties. However, OSHA's authority over settlement agreements is limited to the statutes within its authority. Therefore, the Agency's approval only relates to the terms of the agreement pertaining to the referenced statute[s] under which the complaint was filed. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand OSHA's involvement in any resolution reached after a complaint has been initiated.

1. In most circumstances, issues are better addressed through an OSHA agreement, and if the parties are amenable to signing one as well, the OSHA settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the OSHA agreement. This is achieved by inserting the following paragraph in the OSHA agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration's (OSHA's) authority. OSHA's authority over that agreement is limited to the statutes within its authority. Therefore, OSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to the [Insert name of the statute[s] under which the complaint was filed] [You may also modify the sentence to identify the specific sections or paragraph numbers of the agreement that are under the Secretary's authority.]" These cases must be recorded in the IMIS as "Settled."

2. If the Agency approves a settlement agreement, it constitutes the final order of the Secretary and may be enforced in an appropriate United States district court according to the provisions of OSHA's whistleblower statutes. [4]

3. The approval letter must include the following statement: "The Occupational Safety and Health Administration's authority over this agreement is limited to the statutes it enforces Therefore, the Occupational Safety and Health Administration only approves the terms

[4] This is true for all whistleblower statutes within OSHA's authority except for Section 11(c) of the OSH Act, AHERA, and ISCA, which provide for litigation in U.S. District Court and do not involve final orders of the Secretary.

of the agreement pertaining to the [insert the name of the relevant OSHA whistleblower statute [s]" (the sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under OSHA's authority). These cases must be recorded in the IMIS as "Settled-Other."

4. If the parties do not submit their agreement to OSHA or if OSHA does not approve the agreement signed, OSHA must deny the withdrawal, inform the parties that the investigation will proceed, and issue Secretary's Findings on the merits of the case. The findings must include the statement that the parties reached a settlement that was either not submitted for review by OSHA or not approved by OSHA.

E. Criteria by which to Review Private Settlements.

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest, supervisors must carefully review unredacted settlement agreements in light of the particular circumstances of the case.

1. OSHA will not approve a provision that states or implies that OSHA or DOL is party to a confidentiality agreement.

2. OSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or shall prevent or interfere with Complainant's nonwaivable right to engage in any future activities protected under the whistleblower statutes administered by OSHA."

3. OSHA will not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency."

4. OSHA must ensure that the complainant's decision to settle is voluntary.

5. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file.

a. **The breadth of the waiver**. Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether the complainant's skills are

readily transferable to other employers or industries. Waivers that more narrowly restrict future employment, for example, to a single employer or its subsidiaries or parent company may generally be less problematic than broad restrictions such as any employers at the same worksite or any companies with which the respondent does business.

The investigator must ask the complainant, "Do you feel that, by entering this agreement, your ability to work in your field is restricted?" If the answer is yes, then the follow-up question must be asked, "Do you feel that the monetary payment fairly compensates you for that?" The complainant also should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the monetary payment, fairly compensates for the waiver of employment. The case file must document the complainant's replies and any discussion thereof.

b. **The amount of the remuneration**. Does the complainant receive adequate consideration in exchange for the waiver of future employment?

c. **The strength of the complainant's case**. How strong is the complainant's retaliation case, and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver is, unless very well remunerated. Consultation with RSOL may be advisable.

d. **Complainant's consent**. OSHA must ensure that the complainant's consent to the waiver is knowing and voluntary. The case file must document the complainant's replies and any discussion thereof.

If the complainant is represented by counsel, the investigator must ask the attorney if he or she has discussed this provision with the complainant.

If the complainant is not represented, the investigator must ask the complainant if he or she understands the waiver and if he or she accepted it voluntarily. Particular attention should be paid to whether or not there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, if threats were made in order to persuade the complainant to agree, or if additional monies or forgiveness of debt were promised as additional incentive.

V. **Bilateral Agreements (Formerly Called Unilateral Agreements**).

A. A bilateral settlement is one between the U.S. Department of Labor (DOL), signed by a Regional Administrator, and a respondent—without the complainant's consent—to resolve a complaint filed under OSHA 11(c), AHERA, or ISCA. It is an acceptable remedy to be used only under the following conditions:

1. The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.

2. The complainant refuses to accept the settlement offer. (The case file should fully

set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by management.)

3. If the complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses), attempts to resolve these demands fail, and the final offer from the respondent is reasonable to OSHA.

B. When presenting the proposed agreement to the complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and that DOL may settle the case without the complainant's participation. This is also the time to explain that, once settled, the case cannot be appealed, as the settlement resolves the case .

C. All potential bilateral settlement agreements must be reviewed and approved in writing by the Regional Administrator. The bilateral settlement is then signed by both the respondent and the Regional Administrator. Once settled, the case is entered in IMIS as "settled."

D. Complaints filed under STAA, ERA, EPA, A1R21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, SPA, or FSMA may not be settled without the consent of the complainant.

E. Documentation and implementation.

1. Although each agreement will, by necessity, be unique in its details, in settlements negotiated by OSHA, the general format and wording of the standard OSHA agreement should be used.

2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.

3. Back pay computations must be included in the case file, with explanations of calculating methods and relevant circumstances, as necessary.

4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function. See Ch. 6 II. F.

5. Any check from the employer must be sent to the complainant even if he or she did not agree with the settlement. If the complainant returns the check to OSHA, the Area or Regional Office shall record this fact and return it to the employer.

VI. Enforcement of settlements.

In any case under statutes other than OSHA 11(c), AHERA, and ISCA that has settled, if the

employer fails to comply with the settlement, the RA or designee shall refer the case to RSOL to file for enforcement of the order in federal district court. A letter shall be sent to the complainant informing the complainant about this referral and in cases under statutes allowing the complainant to seek enforcement of the order in federal district court the complainant shall be so advised. If an employer fails to comply with a settlement in an OSHA 11(c), AHERA, or ISCA, case, the RA or designee shall refer the case to RSOL for litigation and the complainant shall be so informed.

SECTION 11(C) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

29 U.S. C. §660(c)

I. Introduction

Section 11(c) of the OSH Act mandates: "No *person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."*

Section 11(c) generally provides protection for individuals who engage in protected activity related to safety or health in the workplace. The Secretary of Labor is represented by RSOL in any litigation deemed appropriate, and cases are heard in United States District Court.

II. Regulations

Regulations pertaining to the administration of Section 11(c) of the OSH Act are contained in 29 CFR Part 1977.

III. Coverage

A. Any private-sector employee of an employer engaged in a business affecting interstate commerce or an employee of the U.S. Postal Service (USPS) is covered by the Act.

B. Public- sector employees (those employed as municipal, county, state, territorial or federal workers) are not covered by Section 1 1(c), with the following exception: On September 29, 1998, OSH Act coverage was extended to employees of the U.S. Postal Service. (Public Law 105-241; 29 U.S.C. §652(5).

C. Executive Order 12196 and 29 CFR 1960.46 require all federal agencies to establish procedures to assure that no employee is subject to retaliation or reprisal for the types of activities protected by Section 11(c). A federal employee who wishes to file a complaint alleging retaliation due to occupational safety or health activity should be referred to his or her personnel office and OSHA's Office of Federal Agency Programs for assistance in filing a complaint, as well as to the Office of Special Counsel.

IV. Protected Activity.

Activities protected by Section 11(c) include, but are not limited to, the following: (Except to the extent that the context indicates otherwise, references to OSHA in this paragraph are references both to federal OSHA and OSHA state plan agencies.

A. Occupational safety or health complaints filed orally or in writing with OSHA, a state agency operating under an OSHA-approved state plan (state OSHA), the National Institute of Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department, health department, or police department. The time of the filing of the safety or health complaint in relation to the alleged retaliation and employer knowledge are often the focus of investigations involving this protected activity. The employee filing a signed complaint with OSHA (a section 8(f) complaint) has a right to request review of a determination not to conduct an inspection. 29 CFR § 1903.12.

B. Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel.

C. Instituting or causing to be instituted any proceeding under or related to the OSH Act. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a section 8(f) complainant of a determination not to issue a citation, employee contests of abatement dates, employee initiation of proceedings for the promulgation of OSHA standards, employee application for modification or revocation of a variance, employee judicial challenge to an OSHA standard, employee petition for judicial review of an order of the Occupational Safety and Health Review Commission, and analogous proceedings in OSHA state plan states. Filing an occupational safety or health grievance under a collective bargaining agreement would also fall into this category. Communicating with the media about an unsafe or unhealthful workplace condition is also in this category. Donovan v. R.D. Andersen Construction Company, Inc., 552 F.Supp. 249 (D. Kansas, 1982).

D. Providing testimony or being about to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, depositions during inspections and investigations.

E. Exercising any right afforded by the OSH Act. The following is not an exhaustive list. This broad category includes communicating orally or in writing with the employee's supervisor or other management personnel about occupational safety or health matters, including asking questions; expressing concerns; reporting a work-related injury or illness; requesting a material safety data sheet (MSDS); and requesting access to records, copies of the OSH Act, OSHA regulations, applicable OSHA standards, or plans for compliance (such as the hazard communication program or the bloodborne pathogens exposure control plan), as allowed by the standards and regulations. This right is derived both from the employer’s obligation to comply with OSHA standards (29 U.S.C. §653(a)(2)) and regulations (29 U.S.C. §666) and to keep the workplace free from recognized hazards causing or likely to cause death or serious physical harm (29 U.S.C. §654(a) (1) (general duty clause)), as well as the employee's obligation to comply

with OSHA standards and regulations (29 U.S.C. §654(b)). Such communication is essential to the effectuation of these provisions. *Cf. Whirlpool Corp. v. Marshall, 445 U.S. 1, 12-13* (1980) (right to refuse imminently dangerous work appropriate aid to the full effectuation of the general duty clause). This communication also carries out methods noted by the Act to implement its goal of assuring safe and healthful working conditions, i. e. "...encouraging employers a and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions..., providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions..., [and] ...encouraging joint labor-management efforts to reduce injuries and disease arising out of employment" 29 U.S.C. §651(b)(1), (2), and (13).

Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with union officials or coworkers. This right is derived from the employer and employee obligations and 29 U.SC. § 651(b)(1), (2), and (13) noted in the paragraph above. Such communication is vital to the fulfillment of those provisions. See Memorandum of Understanding between OSHA and NLRB, 40 FR 20083 (June 16, 1975) (section 11(c) rights overlap with right under section 7 of the National Labor Relations Act to ".. engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection..."; cases involving the exercise of such rights in connection with occupational safety or health should primarily be handled as 11(c) cases).

This category (exercising any right afforded by the Act), also includes refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury. The OSHA regulation regarding work refusals can be found at 29 CFR §1977.12(b)(2). An employee has the right to refuse to perform an assigned task if he or she:

1. Has a reasonable apprehension of death or serious injury, and

2. Refuses in good faith, and

3. Has no reasonable alternative, and

4. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting OSHA, and
5. Where possible, sought from his or her employer, and was unable to obtain, a correction of the dangerous condition.

An employee also has the right to comply with, and to obtain the benefits of, OSHA standards and rules, regulations, and orders applicable to his or her own actions or conduct. This right is derived from 29 U.S.C. §654(a)(2), which requires employers to comply with OSHA standards and from 29 U.S.C. §654(b), which provides: "(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders which are applicable to his own actions and conduct." Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by an OSHA standard, to refuse to purchase PPE

(except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work. See 29 CFR §1977.12 (b)(1). To be protected activity a refusal to work must meet the criteria set forth in 29 CFR §1977.12(b)(2), as explained above.

An employee has the right to participate in an OSHA inspection. He or she has the right to communicate with an OSHA compliance officer, orally or in writing. 29 U.S.C. §657(a)(2), (e), and (f)(2); 29 CFR §1977.12(a), 1903.11(c). Subject to 29 CFR §1903.8, an authorized representative of employees has a right to accompany the OSHA compliance officer during the walkaround inspection. 29 U.S.C. §657(e). He or she must not suffer retaliation because of the exercise of this right. An employee representative has the right to participate in an informal conference, subject to OSHA's discretion, as specified in 29 CFR §1903.20.

An employee has a right to request information from OSHA. 29 CFR § 1977.12(a).

THE WHISTLEBLOWER PROVISION OF THE ASBESTOS HAZARD EMERGENCY RESPONSE ACT (AHERA)

15 U.S.C. §2651

I. Introduction.

15 U.S.C. §2651 (Section 211 of AHERA) provides: *"(a) No State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this subchapter to any other person, including a State or the Federal Government. (b) Any public or private employee or representative of employees who believes he or she has been fired or otherwise discriminated against in violation of subsection (a) may within 90 days after the alleged violation occurs apply to the Secretary of Labor for a review of the firing or alleged discrimination. The review shall be conducted in accordance with section 660(c)(c) of Title 29."*

The AHERA whistleblower provision, which OSHA enforces, 15 U.S.C. §2651, applies to state and local primary and secondary educational agencies; certain schools funded by the Bureau of Indian Education; private, nonprofit elementary or secondary schools; and defense dependents' education system schools. Since Section 211 of AHERA specifically refers to Section 11(c) of the OSH Act, all of the procedures and remedies under Section 11(c), including, but not limited to, administrative subpoenas and suits filed by the Secretary in federal district court, apply to AHERA cases, except as expressly noted.

II. Regulations.

AHERA specifically states that the Secretary's "review" will be conducted in accordance with Section 11(c). Regulations pertaining to the administration of Section 11(c) of the OSH Act are contained in 29 CFR Part 1977.

III. Coverage.

A. The general provisions of AHERA are administered by the Environmental Protection Agency.

1. Under Section 211 of AHERA, OSHA covers all employees, public or private, whether or not they are employed by a school, and any representatives of employees, who engage in the protected activity described in Section 211(a).

2. Although the language of §211(a) covers "persons," §211(b) authorizes the Secretary of Labor to handle only discrimination against "employees." However, the employees need not be employees of state or local educational agencies.

3. Complaints filed under this statute may also be covered under one or more of the environmental statutes (See Chapter 11). If a complaint is covered under multiple statutes, it is important to process the complaint in accordance with the requirements related to each statute in order to preserve the respondent and complainant's rights under the differing laws.

B. State educational agencies are primarily responsible for the state supervision of public elementary and secondary schools. A local educational agency is any public authority controlling public elementary or secondary schools, including certain schools funded by the Bureau of Indian Education; the owner of any private, nonprofit elementary or secondary school building; and the governing authority of any school operated under the defense dependents' education system.

IV. Protected Activity.

The activity protected by AHERA is reporting to any person, including a state or federal agency, violations of AHERA, which deals with asbestos in the covered schools, including violations involving the accreditation of a contractor or laboratory to do asbestos work under 15 U.S.C. §2646.

THE WHISTLEBLOWER PROVISION OF THE INTERNATIONAL SAFE CONTAINER ACT (ISCA)

46 U.S.C. §80507

I. Introduction.

46 U.S.C. §80507 provides:

A. Prohibition. A person may not discharge or discriminate against an employee because the employee has reported the existence of an unsafe container or a violation of this chapter or a regulation prescribed under this chapter.

B. Complaints. An employee alleging to have been discharged or discriminated against in violation of subsection (a) may file a complaint with the Secretary of Labor. The complaint must be filed within 60 days after the violation.

C. Enforcement. The Secretary of Labor may investigate the complaint. If the Secretary of Labor finds there has been a violation, the Secretary of Labor may bring a civil action in an appropriate district court of the United States. The court has jurisdiction to restrain violations of subsection (a) and order appropriate relief, including reinstatement of the employee to the employee's former position with back pay.

D. Notice to complainant. Within 30 days after receiving a complaint under this section, the Secretary of Labor shall notify the complainant of the intended action on the complaint.

The International Safe Container Act establishes uniform structural requirements for intermodal cargo containers designed to be transported interchangeably by sea and land carriers, and moving in, or designed to move in, international trade.

II. Regulations.

As a matter of policy, ISCA investigations must generally be conducted in accordance with Section 11(c). There is no separate set of regulations, but the regulations pertaining to the administration of Section 11(c) of the OSH Act, contained in 29 CFR Part 1977, should be consulted.

III. Coverage.

The general provisions of ISCA are administered by the Coast Guard, an agency of the Department of Homeland Security. The definition of the term "person" is found in 1 U.S.C. § 1. The term includes private-sector companies, as well as local governments and interstate compact agencies that lack the attributes of state sovereignty (the RSOL should be consulted on this issue); federal and state governments are not included. By analogy, OSHA interprets the term "employee" in the same way that it interprets the term in enforcing the OSH Act, except that employees of local governments and the interstate compact agencies described above are covered.

IV. Protected Activity

Protected activity under ISCA includes reporting to the Coast Guard, the employer, or others an unsafe intermodal cargo container, or a violation of ISCA, 46 U.S.C. §80507, et seq., which includes, among other things, procedures for the testing, inspection, and initial approval of containers, or a violation of an ISCA regulation.

THE WHISTLEBLOWER PROVISION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT (STAA)

46 U.S.C. §31105

I. Introduction.

49 U.S.C. § 31105(a)(1) provides: *"(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; (B) the employee refuses to operate a vehicle because--(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition; (C) the employee accurately reports hours on duty pursuant to chapter 315; (D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or (E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation."*

II. Regulations.

Regulations pertaining to the administration of 49 U.S.C. §31105 are contained in 29 CFR Part 1978.

III. Coverage.

The safety regulations for commercial motor vehicles are enforced by the Department of Transportation, Federal Motor Carrier Safety Administration.

A. Employee.

Section 31105(j) defines "employee" as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who:

1. Directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and

2. Is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

B. Commercial Motor Vehicle (CMV)(49 U.S.C. §31101(1)).

Any self-propelled or towed vehicle used on the highways in commerce principally to transport cargo or passengers, if the vehicle.

1. Has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; or

2. Is designed to transport more than 10 passengers, including the driver; or

3. Is used in the transportation of material found by the Secretary of Transportation to be hazardous, and in a quantity requiring that the cargo be placarded, under regulations issued pursuant to the Hazardous Materials Transportation Act, as amended (49 U.S.C. § 5103). For a list of hazardous materials and related provisions, see 49 CFR Parts 171 and 172.

C. Commercial Motor Carrier.

Any person engaged in a business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce. The definition, which is consistent with 49 U.S.C. §31101(3), does not include the United States, including the U.S. Postal Service, a State, or a political subdivision of a State; however, private-sector companies under contract or subcontract with such entities are covered if the other coverage requirements are met.

D. Person.

For purposes of STAA, including the definition of commercial motor carrier, a “person” is one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other group of individuals.

E. In Commerce.

The term applies to trade, traffic, commerce, transportation, or communication between any State and any place outside thereof, or affecting the commerce between these places. The test is similar to the commerce test under the OSH Act. In the context of Section 31105, the “commerce” test is met if the commercial motor carrier's vehicles traveled out of state, the vehicles used interstate highways or roads connecting with interstate highways, or the carrier purchased or transported goods or supplies manufactured out of state. This test is separate from the other criteria mentioned above and the criteria for coverage by the FMCSA.

IV. Protected Activity.

A. Filing a complaint, beginning a proceeding, or testifying or being about to testify in a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. The Secretary has long taken the position under STAA and similarly worded provisions in other whistleblower statutes that filing a complaint includes making a complaint orally or in writing. *Harrison v. Roadway Express, Inc*., No. 00-048, 2002 WL 31932456, at *4 (ARB Dec. 31, 2002), *aff'd on other grounds*, 390 F.3d 752 (2d Cir. 2004). See also Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980, 986 (4th Cir. 1993). 75 FR 5347 (Aug. 31, 2010). The STAA whistleblower provision, originally enacted in 1983, was readopted in 2007 with some new language not relevant to this issue. Congress is assumed to have been aware of these prior administrative and judicial interpretations and to have adopted them when it re-enacted the STAA whistleblower provision. See *Forest Grove School District v. TA*., 129 S.Ct. 2484, 2492 (2009) (Congress presumed to be aware of administrative and judicial interpretation of statute and to adopt it when it re-enacts statute without change). It is particularly important for STAA to cover oral as well as written filings because in many cases truck drivers are out on the road and the only way they can communicate immediate concerns about violations of safety and security regulations is via CB radio or phone.

B. Being perceived to have filed or to be about to file a complaint or to have begun or to be about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

C. Refusing to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;

1. This protected activity often is a refusal to drive a property-carrying commercial motor vehicle in excess of FMCSA "Hours of Service" regulations at 49 CFR 395.1 and .3.

2. Passenger- carrying carriers or drivers must comply with separate FMCSA regulations at 49 CFR 395.5.

3. Under this provision an employee has the right to refuse to drive at any time that driving violates or would violate these regulations. For example, if an assigned trip would require a driver to exceed the allowed hours (taking into consideration the speed limits and the distance), the driver may refuse to begin the trip. See also 49 CFR 392.6 (no operation if it would necessitate violating the speed limit.)

4. Related regulations are 49 CFR 392.3 (no driving if driver's ability so impaired or is likely to be so impaired by illness or fatigue as to make driving unsafe), 49 CFR 392.4 (no driving under the influence of drugs), and 49 CFR 392.5 (no driving under the influence of alcohol).

5. Driving in violation of state or local laws, such as weight limits, is a violation

of 49 CFR 392.2.

6. Driving a CMV not meeting the equipment requirements in 49 CFR Part 393 is a violation of 49 CFR 393.1.

D. Cooperating, or being perceived as cooperating or being about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board.

E. Refusing to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or to the public because of the vehicle's hazardous safety or security condition.

Section 31105(a)(2) provides that, for purposes of this STAA work refusal provision ("reasonable apprehension") an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

F. Reporting accurate hours on duty pursuant to chapter 315 of Title 49 of the United States Code.

G. Furnishing, or being perceived to have furnished or be about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

CAA coverage extends to all private-sector employees in the United States, as well as to all federal, state, and municipal employees Furnishing, or being perceived to have furnished or be about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

V. "Kick-out" Provision.

Complainants have the right to bring an action in district court for de novo review if there has been no final decision of the Secretary within 210 days of the filing of the complaint, and there is no delay due to the complainant's bad faith.

THE WHISTLEBLOWER PROVISIONS OF THE ENVIRONMENTAL STATUTES

I. Introduction.

OSHA enforces the whistleblower provisions of the following six environmental statutes: Clean Air Act, Comprehensive Environmental Response, Compensation and Liability Act; Federal Water Pollution Control Act; Safe Drinking Water Act; Solid Waste Disposal Act; and Toxic Substances Control Act. The general provisions of these statutes are administered by the Environmental Protection Agency (EPA). Under the whistleblower provisions of the environmental statutes, employees are protected from retaliation for engaging in environmentally related activities such as filing complaints with the EPA, testifying at a proceeding under one of the statutes, or otherwise participating in activities related to the statutes**.**

A. Section 322 of the Clean Air Act, 42 U.S.C. § 7622, provides, *"No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testes in any such proceeding, or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter."*

1. Background.

The Clean Air Act (CAA) is the comprehensive federal law that regulates air emissions from area, stationary, and mobile sources. This law authorizes the U.S. Environmental Protection Agency to establish National Ambient Air Quality Standards (NAAQS) to protect public health and the environment. The goal of the Act was to set and achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans (SIPs) applicable to appropriate industrial sources in the state. The Act was amended in 1977, primarily to set new goals (dates) for achieving attainment of NAAQS, since many areas of the country had failed to meet the original deadlines. The 1990 amendments to the CAA in large part were intended to meet unaddressed or insufficiently addressed problems such as acid rain, ground-level ozone, stratospheric ozone depletion, and air toxics**.**

2. Coverage.

CAA coverage extends to all private-sector employees in the United States, as well as to all federal, state, and municipal employees.

B. Section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610(a), provides, "No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or

representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testes in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

1. Coverage

CERCLA coverage extends to all private-sector employees in the United States, as well as to all federal, state, and municipal employees.

C. Section 507 of the Federal Water Pollution Control Act, 33 U.S.C. §1367(a), provides, *"No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testes in any proceeding resulting from the administration or enforcement of the provisions of this chapter."*

1. Coverage

FWPCA coverage extends to all private-sector employees in the United States, as well as to all state and municipal employees, and to employees of Indian tribes.

D. Section 1450 of the Safe Drinking Water Act, 42 U.S.C. §300j-9(i)(1), provides, *"No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) testified or is about to testy in any such proceeding, or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter."*

1. Coverage

SDWA coverage extends to all private-sector employees in the United States, as well as to all federal, state and municipal employees, and to employees of Indian tribes.

E. Section 23 of the Toxic Substances Control Act, 15 U.S.C. § 2622(a), provides, "*No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; (2) testified or is about to testify) in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry Out the purposes of this Act."*

1. Coverage

TSCA coverage extends to all private-sector employees in the United States. TSCA coverage does not extend to federal, state or municipal employees.

II. Regulations.

A. Regulations pertaining to the administration of the environmental statutes are contained in 29 CFR Part 24.

III. Coverage Under the Environmental Statutes, Generally.

A. Although the referenced environmental statutes are similar in language regarding whistleblower protection, there is one recognizable difference. SWDA, FWPCA & CERCLA state "*No person shall . . .* ", while TSCA, SDWA, and CAA state "*No employer may . . ..*" However, the ARB and the courts have consistently held an employer-employee relationship must exist between the parties, even if filed under one of the statutes referring to "no person. A complainant generally fulfills the requirement of having an employer-employee relationship with the respondent even if the complainant is only an applicant for employment. However, individuals named as respondents rarely meet the legal requirement that complainants have an employment relationship with them.

B. As noted above, many of the environmental statutes cover certain public sector employees. However, claims of sovereign immunity may impact a complainant's right to move the case beyond the OSHA investigation phase if the respondent is a federal, state, or tribal government entity. Investigators should inform their supervisors or RSOL when they receive complaints from public sector employees.

IV. Protected Activity.

Each of the six environmental statutes protects employees who provide information, file complaints, or in any manner participate in a proceeding or other action related to the administration or enforcement of the statutes. The Secretary and the courts have consistently taken a broad view of what is considered protected under the environmental statutes, including internal complaints to management, and refusals to perform work. Under the environmental statutes, an employee may refuse work if he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful.

THE WHISTLEBLOWER PROVISION OF THE ENERGY REORGANIZATION ACT (ERA)

42 U.S.C. §5851

I. Introduction.

Section 211 of the ERA, 42 U.S.C. § 5851(a), provides, "*No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms,*

conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.); (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer; (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954; (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; (E) testified or is about to testify in any such proceeding or; (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended."

II. Regulations.

Regulations pertaining to the administration of the Section 211 of the ERA are contained in 29 CFR Part 24.

III. Coverage.

The general provisions of this statute are administered by the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE). The Energy Policy Act of 2005, Public Law 109-58, enacted on August 8, 2005, amended the employee protection provisions for nuclear whistleblowers under Section 211 of the ERA, 42 U.S.C. 5851. Under Section 629 of the Energy Policy Act of 2005, from August 8, 2005 forward, covered employers under Section 211 of the ERA are:

- **A.** The NRC.
- **B.** Licenses of the NRC.
- **C.** Applicants for such NRC licenses, as well as their contractors and subcontractors.
- **D.** Contractors and subcontractors of the NRC.
- **E.** Licensees of an agreement State under Section 274 of the Atomic Energy Act of 1954, as well as their contractors and subcontractors.
- **F.** Applicants for such agreement-state licenses, as well as their contractors and subcontractors.
- **G.** DOE.
- **H.** Contractors and subcontractors of DOE, that are indemnified by DOE under section 170d of the Atomic Energy Act of 1954, except those involved in naval nuclear propulsion work under Executive Order 12344.

Claims of sovereign immunity may impact a complainant's right to move the case beyond the OSHA investigation phase if the respondent is a federal, state, or tribal government entity. Investigators should inform their supervisors or RSOL when they receive complaints from public sector employees.

IV. Protected Activity.

The activities protected under ERA include complaints to the employer, NRC, DOE or other agency responsible for nuclear safety or testifying in any proceeding related to the ERA or the Atomic Energy Act of 1954, as amended. The ERA requires that a complainant make an initial *prima facie* showing that protected activity was a “contributing factor” in the unfavorable personnel action alleged in the complaint, i.e., that whistleblowing activity, alone or in combination with other factors, affected in some way the outcome of the employer's personnel decision. The Secretary must dismiss the complaint and not investigate (or cease investigating) if either: (1) The complainant fails to make a *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected activity. The statute also provides specific protection with respect to an employee's refusal to engage in any activity made unlawful by the ERA or Atomic Energy Act, i.e., a worker may refuse work when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful.

V. Nuclear Regulatory Commission Investigations of Retaliation Claims.

NRC also investigates allegations of employee retaliation for raising potential safety concerns to a licensee or the NRC. Discrimination against an employee for raising safety concerns is prohibited by the Commission's regulations (Title 10 of the Code of Federal Regulations, Parts 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10, and 76.7). In a fashion similar to Section 211, the NRC defines discrimination to include discharge and other actions that relate to compensation or terms, conditions, and privileges of employment. An NRC investigator normally interviews the person making the allegation and reviews available documentation within 30 days of opening an investigatory case. Based on the results of the interview and review of the documentation, an NRC Allegation Review Board will assess the safety or regulatory significance and assign a priority to the investigation. Enforcement actions available to the NRC against licensees, their employees, contractors, or contractor employees include denying, revoking, or suspending a license, imposing civil penalties, and criminal sanctions. However, even if the NRC substantiates that discrimination occurred, it does not have the authority to provide a personal remedy such as reinstatement or back pay to an employee. OSHA has the sole responsibility to obtain personal remedies. Since theses complaints inevitably cover the same material issues, it is advantageous for the agencies to coordinate investigative activity whenever possible.

The Nuclear Regulatory Commission recently revised its enforcement policy to include the voluntary use of Alternative Dispute Resolution (ADR) in addressing retaliation complaints and other allegations of wrongdoing (i.e., harassment, intimidation, retaliation or discrimination). The agency's goal is to use ADR to resolve allegations where there is reasonable likelihood that the person was involved in a protected activity and the discriminatory act was the result of engaging in a protected activity. If both parties agree to participate, a neutral mediator will be appointed to help them reach resolution. The aim is to reach settlement within 90 days of agreeing to mediation. The process is completely voluntary and any party may withdraw from the negotiation at any time. OSHA is still required to conduct its investigation in a timely manner

once a complaint is received, but may consider deferring to a settlement reached through ADR if the OSHA investigation has not been completed and corrective action was taken to cover the complainant's personal remedy.

VI. Department of Energy Contractor Employee Protection Program (DOE-CEPP.)

DOE also has a program designed to provide relief to DOE contractor employees who have suffered retaliation by their employers for engaging in certain protected activities, including allegations of danger to employees or to public health or safety. The DOE Office of Hearings and Appeals is responsible for investigations, hearings and appeals. The Director of the Office of Hearings and Appeals appoints an investigator, who then conducts an investigation. When the investigator issues a report of the investigation, the Director appoints a different individual to serve as the hearing officer. The office publishes the regulations and its whistleblower decisions on its web site. In general, if the employee prevails, he or she may obtain employment-related relief, such as back pay, reinstatement, and reasonable attorneys' fees and expenses incurred in pursuing the complaint. More information about DOE-CEPP can be found in 10 CFR Part 708 or on the Office of Hearings and Appeals web site, http://www.oha.doe.gov.

VII. "Kick-out" Provision

Complainants have the right to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within one year of the filing of the complaint, and there is no delay due to the complainant's bad faith.

THE WHISTLEBLOWER PROVISION OF THE WENDELL H. FORD AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY (AIR21)

42 U.S.C. §42121

I. Introduction.

Section 519 of AIR21, 49 U.S.C.§ 42121, provides, "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

II. Regulations.

Regulations pertaining to the administration of Section 519 of AIR21 are contained in 29 C.F.R. Part 1979.

III. Coverage.

The general provisions of this statute are administered by the Federal Aviation Administration. Under Section 519, employees of air carriers or their contractors or subcontractors are protected from retaliation for participating in activities relating to aviation safety. To qualify for coverage, the complainant must be a present or former employee of, or an applicant for employment with an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

A. Air Carrier.

Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. It does not include foreign air carriers.

1. Citizen of the United States means: (1) an individual who is a United States citizen; or (2) a partnership, each of whose partners is an individual who is a United States citizen; or (3) a corporation or association organized under United States law, of which the president and at least two thirds of the board of directors and other managing officers are United States citizens; and which is under the actual control of United States citizens; and in which at least 75% of the voting interests are owned or controlled by persons who are United States citizens. See 49 U.S.C. § 40102.

2. Air transportation means: (1) foreign air transportation; (2) interstate air transportation; or (3) the transportation of mail by aircraft.

   a. Foreign air transportation means: (1) the transportation of passengers or property by aircraft as a common carrier for compensation; or (2) the transportation of mail by aircraft, between a place in the United States and a place outside the United States, when any part of the transportation is by aircraft. See 49 U.S.C. § 40102.
   b. Interstate air transportation means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft between a place in: (1) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States; or (2) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; or (3) the District of Columbia and another place in the District of Columbia; or (4) a territory or possession of the United States and another place in the same territory or possession; when any part of the above transportation is by aircraft. See 49 U.S.C. § 40102.

3. The transportation of mail by aircraft involves transporting United States mail or foreign transit mail. A "citizen of the United States," as defined above, performing solely *intrastate* transportation of United States mail by aircraft will qualify as an air carrier.

B. Contractor.

Contractor means a company that performs safety-sensitive functions by contract for an air carrier. It may include aircraft or aircraft parts manufacturers, drug testing labs, parts manufacturers, repair stations, and training centers. See 49 U.S.C. § 42121(e).

C. Subcontractor.

The term subcontractor is not defined in the statute or regulation. There may be several subcontractors or layers of subcontractors working for a contractor.

IV. Protected Activity.

AIR21 explicitly protects employees who provide information to any federal government agency, or to the employees' employer, relating to an alleged violation of any order, regulation or standard of the FAA or any other federal law relating to air carrier safety. Although not stated in the statute, the ARB has held that AIR21 protects employees who refuse to perform work assignments that they reasonably believe would cause them to violate air safety regulations. *See, e.g., Douglas v. Skywest Airlines,* ARB Nos. 08-070, 08-074; AU No. 2006-AIR-014 (ARB Sept. 30, 2009).

THE WHISTLEBLOWER PROVISION OF THE SARBANES-OXLEY ACT (SOX)

18 U.S.C. §1514A

I. Introduction.

Section 806 of SOX, 18 U.S.C. § 1514A, as amended on July 21, 2010 by section 922 of the Dodd-Frank Financial Reform and Consumer Protection Act, P.L. 111-203, provides, *"No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S. C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-- (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-- (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of*

Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

II. Regulations.

Regulations pertaining to the administration of Section 806 of SOX are contained in 29 CFR Part 1980.

III. Coverage.

The general provisions of these statutes are administered by the Securities and Exchange Commission and the Department of Justice. Coverage under Section 806 is set out as follows:

A. Companies.

1. It has a class of securities registered under section 12 of the Securities Exchange Act of 1934.

   a. Section 12 provides, in part, that "(a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this title and the rules and regulations thereunder. The provisions of this subsection shall not apply in respect of a security futures product traded on a national securities exchange. (b) A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require)..."

   b. Since any company with a class of securities under section 12 also is required to file under section 15(d), then a company covered under the first prong is also covered under the second prong.

2. It is required to file reports under section 15(d) of the Securities Exchange Act of 1934.

Section 15(d)(1) provides that "Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the

public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof."

3. **Other named persons.**

In addition, any officer, employee, contractor, subcontractor, or agent of a covered company or NRSRO is covered. For example, an employer that may not be covered in its own right (e.g. a small accounting firm) but who is a contractor of a covered company is covered.

4. Subsidiaries.

A subsidiary or affiliate of a covered company whose financial information is included in the consolidated financial statements of such company is covered by SOX.

B. Employee.

An Employee is an individual presently or formerly working for a covered company, including a covered subsidiary or affiliate, or a nationally recognized statistical rating organization or its representative (that is, its officer, employee, contractor, subcontractor, or agent), applying for work, or whose employment could be affected by a company or its representative.

IV. Protected Activity.

A. Alleged Violations.

SOX protects employees who provide information to any federal regulatory or law enforcement agency, any member of Congress or Congressional committee, or a supervisor relating to a reasonably believed violation of any of the following:

1. 18 U.S.C. §1341, frauds and swindles by mail or other interstate carrier
2. 18 U.S.C. § 1343, fraud by wire, radio or television
3. 18 U.S.C. § 1344, defrauding a financial institution

4. 18 U.S.C. §1348, frauds involving securities
5. Any rule or regulation of the SEC
6. Any other provision of federal law relating to fraud against shareholders

B. Reasonable Belief.

1. The ARB has interpreted the concept of "reasonable belief" to require the complainant to have a subjective belief that the complained-of conduct constitutes a violation, and also that the belief is objectively reasonable, given the complainant's training and experience. An employee does not need to communicate the reasonableness of his or her beliefs to management or the authorities. See, e.g., *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006).

2. The subject matter of the complaint should relate to one or more of the violations listed in the statute. However, the information provided by the complainant does not need to cite specific rules or regulations, nor must it describe an actual violation of the law or explicitly reference "fraud" in the complaint. In addition, an employee may file a complaint based upon a violation about to be committed, provided that the employee reasonably believes that the violation is likely to occur. *See Sylvester, et al. v. Parexel Int'l LLC* (ARB May 25, 2011).

V. "Kick-out" Provision.

Complainants have the right to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 180 days of the filing of the complaint, provided that there has been no delay due to the complainant's bad faith. See 18 U.S.C. § 1514A(b)(1)(B).

A. Special Procedures for SOX Cases.

In order to ensure consistency among the Regions and to alert the National Office of any significant or unusual issues, Secretary's Findings in all merit SOX cases and all "significant" dismissals must be reviewed by OWPP. "Significant" dismissals are those involving complex coverage issues; extraterritoriality; or significant media attention. Proposed merit SOX Findings and "significant" dismissals must be emailed to the Director of OSHA's Directorate of Enforcement Programs, with a copy to the Director of OWPP, for review prior to issuance. OWPP will ordinarily review the proposed letter within 5 working days. If the Regional Office has not received this review within 15 working days, then the Regional Office is authorized to proceed with its determination letter, unless the National Office has advised that it needs additional time in which to complete its review.

<u>THE WHISTLEBLOWER PROVISION OF THE PIPELINE SAFETY IMPROVEMENT ACT (PSIA)</u>

49 U.S.C. §60129

I. Introduction.

Section 6 of PSIA provides, *"No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety; (B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer; (C) provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or any other Federal law relating to pipeline safety; (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any other Federal law relating to pipeline safety; (E) provided, caused to be provided, or is about to provide or cause to be provided, testimony in any proceeding described in subparagraph (D); or (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or any other Federal law relating to pipeline safety."*

II. Regulations.

Regulations pertaining to the administration of Section 6 of the PSIA are contained at 29 CFR Part 1981.

III. Coverage.

The general provisions of the PSIA are administered by the Department of Transportation-Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA is the federal agency charged with the safe and secure movement of hazardous materials to industry and consumers by all modes of transportation, including the nation's pipelines.

A. Employer is defined in PSIA as "a person owning or operating a pipeline facility or a contractor or subcontractor of such a person."

B. A person is defined as a corporation, company, association, firm, partnership, joint stock company, an individual, a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person.

C. A state is defined a State of the United States, the District of Columbia, and Puerto Rico.

D. A pipeline facility is defined as "a gas pipeline facility and a hazardous liquid pipeline facility."

E. A gas pipeline facility is defined as "a pipeline, a right of way, a facility, a building, or equipment used in transporting gas [meaning natural gas, flammable gas, or toxic or corrosive gas] or treating gas during its transportation." A hazardous liquid pipeline facility is a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid [meaning petroleum, a petroleum product, or a substance the Secretary of Transportation decides may pose an unreasonable risk to life or property when transported by a hazardous liquid pipeline facility in a liquid state; except for liquefied natural gas]."

IV. Protected Activity.

Protected activity includes.

A. Providing, causing to be provided, or being about to provide or cause to be provided to the employer or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety;

B. Refusing to engage in any practice made unlawful by chapter 601, in subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;

C. Providing, causing to be provided, or being about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or testimony in any proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety;

D. Commencing, causing to be commenced, or being about to commence or cause to be commenced a proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or providing or causing to be provided, or being about to provide or cause to be provided testimony in any such proceeding; or

E. Assisting or participating or being about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety.

THE WHISTLEBLOWER PROVISION OF THE FEDERAL RAILROAD SAFETY ACT (FRSA)

49 U.S.C. §20109

I. Introduction.

U.S.C. §20109 provides: *"(a) IN GENERAL. - A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee' lawful, good faith act done, or perceived by the employer to have been done or about to be done — (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by - (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452); (B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security; (3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify, in that proceeding; (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee; (5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; (6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or (7) to accurately report hours on duty pursuant to chapter 211.*

(b)HAZARDOUS SAFETY OR SECURITY CONDITIONS. - (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for — (A) reporting, in good faith, a hazardous safety or security condition; (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or

security condition, if the conditions described in paragraph (2) exist. (2) A refusal is protected under paragraph (1)(B) and (C) if - (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; (B) a reasonable individual in the circumstances then confronting the employee would conclude that - (i) the hazardous condition presents an imminent danger of death or serious injury; and (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced. (3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad."

(c)PROMPT MEDICAL ATTENTION.

(1) PROHIBITION-A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) DISCIPLINE.-A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

II. Regulations.

Regulations pertaining to the administration of 49 U.S.C. §20109 are contained at 29 CFR Part 1982.

III. Coverage.

The general provisions of FRSA are administered by the Department of Transportation, Federal Railroad Administration (FRA). FRA is the federal agency charged with promulgating and enforcing rail safety regulations.

A. Under §20109(a) and (b) of FRSA, a covered respondent is defined as: "A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a

railroad carrier." For certain protected activities, it also includes "a contractor or a subcontractor of such a railroad carrier." §20109(a).

B. "Railroad carrier" is defined in 49 U.S.C. §20102(3) as "a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary [of Transportation] determines is operating within the United States as a single, integrated rail system, the Secretary [of Transportation] may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of this title and implementing regulations and order, subject to any appropriate conditions that the Secretary [of Transportation] may impose."

C. In deciding whether a railroad carrier is covered under FRSA, OSHA must determine whether the entity meets the statutory definition of "railroad." "Railroad" is defined in 49 U.S.C. §20102(2) as: "(A) ...any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including-- (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation."

D. The "general railroad system" is the network of standard gauge track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas. A railroad may lack a physical connection but still be part of the general system, by virtue of the nature of operations that take place there. The boundaries of the general system are not fixed. Thus, for example, the Alaska Railroad is considered part of the general railroad system and is therefore covered under FRSA. In general, the types of covered railroad carriers under FRSA include, but are not limited to: freight operations; commuter operations; intercity passenger operations; short-haul passenger service; and urban rapid transit operations if connected to the general railroad system. Generally, the types of railroad carriers that will not be covered under FRSA include: plant railroads and urban rapid transit operations if not connected to the general railroad system. (See the subparagraphs below for additional explanation.)

1. Commuter Railroads. Commuter railroads may be operated by state, local, or regional authorities, corporations, or other entities established to provide commuter service. An entity may be a commuter railroad if: 1) it serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area; 2) its primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function; and 3) the vast bulk of the system's trains are operated in the morning and evening peak periods with few trains at other hours.

a. Commuter railroads operated by public transit agencies are also covered under NTSSA.

b. Examples of commuter railroads include, but are not limited to: Metra and the Northern Indiana Commuter Transportation District in the Chicago area, Virginia Railway Express and MARC in the Washington area; and Metro-North, the Long Island Railroad, New Jersey Transit, and the Port Authority Trans Hudson (PATH) in the New York area, as well as commuter authorities, as cited in 45 U.S.C. §1104(3), which include, but are not limited to: Metropolitan Transportation Authority, Connecticut Department of Transportation, Maryland Department of Transportation, Southeastern Pennsylvania Transportation Authority, New Jersey Transit Corporation, Massachusetts Bay Transportation Authority, and Port Authority Trans-Hudson Corporation.

2. Intercity Passenger Operations. All intercity passenger operations are covered under FRSA, including Amtrak (also known as the National Railroad Passenger Corporation) and, for example, intercity high speed rail with its own right of way but that is not physically connected to the general railroad system.

3. Short-Haul Passenger Operations. Short-haul passenger operations are generally covered under FRSA. A short-haul passenger system, for example, could be a railroad designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area. When a short-haul passenger railroad is operated by a public transit agency, it is also covered under NTSSA.

4. Tourist, Scenic and Excursion Operations. Tourist, scenic and excursion operations are generally covered under FRSA, with two exceptions. These operations are not covered if they run either: (1) on smaller than 24-inch gauge (which, historically, have never been considered railroads under the Federal railroad safety laws); or (2) off the general system and are considered "insular."

a. Insularity. Insularity is only an issue with regard to tourist operations over tracks outside of the general system used exclusively for such operations. An operation is insular if it is limited to a separate enclave in such a way that there is no reasonable expectation that public safety, except safety of a business guest, a licensee of the tourist operations, or a trespasser, would be affected by the operation.

5. Plant Railroads. Under FRSA, there is no coverage of railroads whose entire operations are confined to an industrial installation. However, when a railroad operating in the general system, on occasion, enters the plant's property via its railroad tracks to pick up or deliver, the railroad that is part of the general system remains part of that system while inside the installation, thus, all of its activities are covered during that period. The plant railroad, itself, however, does not get swept into the general system by virtue of the other railroad's activity.

6. Urban Rapid Transit Operations (URTs). Under the FRSA, an URT that is connected to the general railroad system is covered; an URT that is not connected to the general railroad system is not covered. An operation is an URT not connected to the general railroad

system and therefore not covered if it is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area, and moves passengers from station to station within the urban area as one of its major functions. If an operation does not met these criteria, it is nonetheless likely to be an URT that is not connected to the general railroad system and therefore not covered under FRSA if it serves an urban area (and may also serve its suburbs); moves passengers from station to station within the urban boundaries as a major function of the system, and there are multiple station stops within the city for that purpose (even if transportation of commuters is also a major function); and provides frequent train service even outside the morning and evening peak periods. Examples of URTs not connected to the general railroad system and therefore not covered under the FRSA include: Metro in the Washington, D.C. metropolitan area; CTA in Chicago; and the subway systems in Boston, New York and Philadelphia.

URTs operated by public transit agencies have coverage under NTSSA, regardless of whether they are connected or unconnected to the general railroad system.

E. Correspondence with FRA Jurisdiction.

Railroad carriers covered under the FRSA are generally the same as those that are subject to the FRA's statutory jurisdiction, which extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use. However, the FRA sometimes elects not to exercise the full extent of its jurisdiction. For more information about the FRA's statutory authority and enforcement policy, investigators may refer to 49 CFR Part 209, Appendix A, "Statement of Agency Concerning Enforcement of the Federal Railroad Safety Laws," and the section within this statement titled "FRA's Policy On Jurisdiction Over Passenger Operations." Investigators must bear in mind that OSHA's jurisdiction to investigate FRSA whistleblower complaints is not affected by whether the FRA has chosen to exercise its jurisdiction over a particular railroad operation.

F. Overlap Between FRSA and NTSSA.

If respondent is a public transportation agency operating a commuter railroad, an urban rapid transit system connected to the general railroad system, or a short-haul passenger service, or a contractor or subcontractor of such entities, there may be overlap in respondent coverage between FRSA and NTSSA.

IV. Protected Activity.

Protected activity includes.

A. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation (or being perceived by the employer to have done or to be about to do any of these activities) regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be

used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by - (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452)); (B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

B. Refusing to violate or assist in the violation (or being perceived by the employer to have done or to be about to do either of these activities) of any Federal law, rule, or regulation relating to railroad safety or security.

C. Filing a complaint, directly causing to be brought a proceeding, or testifying in a proceeding (or being perceived by the employer to have done or to be about to do any of these activities) related to the enforcement of:

1. 49 U.S.C. Subtitle V, “Rail Programs,” Part A, “Safety”;

2. 49 U.S.C. Chapter 51, "Transportation of Hazardous Material," as applicable to railroad safety or security;

3. 49 U.S.C. Chapter 57, "Sanitary Food Transportation," as applicable to railroad safety or security, which covers:

a. Food in violation of regulations promulgated under section 416 of the Federal Food, Drug, and Cosmetic Act;

b. Carcasses, parts of a carcass, meat, meat food product, or animals subject to detention under 402 of the Federal Meat Inspection Act (21 U.S.C. §672); and

c. Poultry products or poultry subject to detention under section 19 of the Poultry Products Inspection Act (21 U.S.C. §467a).

D. Notifying, or attempting to notify (or being perceived by the employer to have done or to be about to do either of these activities), the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

E. Cooperating (or being perceived by the employer to have cooperated, or to be about to cooperate) with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

F. Furnishing (or being perceived by the employer to have furnished, or to be about to furnish) information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation;

G. Accurately reporting (or being perceived by the employer to have accurately reported, or to be about to accurately report) hours on duty pursuant to 49 U.S.C. Chapter 211, “Hours of Service”;

H. Reporting, in good faith, a hazardous safety [including occupational safety] or security condition;

I. Refusing to work when confronted by a hazardous safety [including occupational safety] or security condition related to the performance of the employee's duties, or refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the following conditions exist:

1. The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

2. A reasonable individual in the circumstances then confronting the employee would conclude that:

a. The hazardous condition presents an imminent danger of death or serious injury; and

b. The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal.

3. The employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

4. Work Refusal Exception — Security Personnel. Under FRSA, security personnel employed by a railroad carrier to protect individuals and property transported by railroad are not considered to have engaged in a protected activity when they refuse to work due to a hazardous safety or security condition related to their duties, or refuse to authorize the use of any safety-related equipment, track, or structures, if they are responsible for the inspection or repair of the equipment, track, or structures. However, security personnel are protected for reporting, in good faith, a hazardous safety or security condition.

J. Requesting medical or first aid treatment or following orders or a treatment plan of a treating physician.

1. Specifically, railroad carriers are prohibited from disciplining or threatening to discipline employees for engaging in this protected activity, and the term “discipline” is defined

as bringing charges against a person in a disciplinary proceeding, suspending, terminating, placing on probation, or making note of reprimand on an employee's record.

2. A railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty.

V. “Kick-out Provision.”

Complainants have the right to bring an action in district court for de novo review if there has been no final decision of the Secretary within 210 days of the filing of the complaint, and there is no delay due to the complainant's bad faith. Either party may request a jury trial.

VI. “Election of Remedies.”

FRSA provides at 49 U.S.C. 20109(f): “An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.” OSHA takes the position that this provision does not preclude a FRSA complaint where an employee has pursued a grievance and/or arbitration pursuant to the employee’s collective bargaining agreement. However, election of remedies is an evolving area of law. Investigators should consult with their supervisor, who may wish to consult with RSOL or OWPP, on questions involving election of remedies.

VII. “No Preemption.”

FRSA provides at 49 U.S.C. 20109(g): "Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.”

VIII. “Rights Retained by Employee.”

FRSA provides at 49 U.S.C. 20109(h): "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.”

THE WHISTLEBLOWER PROVISION OF THE NATIONAL TRANSIT SYSTEMS SECURITY (NTSSA)

6 U.S.C. §1142

I. Introduction.

6 U. S.C. §1142 provides: *(a) IN GENERAL. - A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if*

such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done — (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by - (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452); (B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security; (3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding; (4) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or (5) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

(*b) HAZARDOUS SAFETY OR SECURITY CONDITIONS. - (1) A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for - (A) reporting a hazardous safety or security condition; (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or (C) refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) of this subsection exist. (2) A refusal is protected under paragraph (1)(B) and (C) if - (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; (B) a reasonable individual in the circumstances then confronting the employee would conclude that - N the hazardous condition presents an imminent danger of death or serious injury; and (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and (C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced. (3) In this subsection, only subsection (b)(1)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities*.

II. Regulations.

Regulations pertaining to the administration of 6 U.S.C. 1142 are contained at 29 CFR Part 1982.

III. Coverage.

The general provisions of NTSSA are administered by the Department of Transportation, Federal Transit Administration (FTA) and the Department of Homeland Security, Transportation Security Administration (TSA). FTA is the federal agency responsible for administering federal funding to support locally planned, constructed, and operated public transportation systems throughout the United States, including buses, subways, light rail, commuter rail, streetcars, monorail, passenger ferry boats, and inclined railways. As part of its mission, the FTA, Office of Safety and Security, is responsible for developing safety, security and emergency management policies and guidelines for public transit system oversight, and provides training and performs system safety analyses and reviews for public transit systems. The TSA is responsible for protecting the nation's transportation systems to ensure freedom of movement for people and commerce. TSA's coverage extends to air travel, highways, maritime, mass transit and railroads.

A. Under NTSSA, a covered respondent is defined as: "A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency."

B. Under NTSSA, a covered public transportation agency is defined in 6 U.S.C. 1131(5) as a "publicly owned operator of public transportation eligible to receive federal assistance under Chapter 53 ['Mass Transportation'] of Title 49."

1. A covered public transportation agency must be an "operator" of public transportation.

2. A covered public transportation agency need not actually receive federal assistance under Chapter 53 to be covered. Rather, the public transportation agency must only be eligible to receive such assistance.

3. The FTA National Transit Database is a useful resource to begin an evaluation of respondent coverage in NTSSA cases. (See: http://www.ntdprogram.gov/ntdprogram/data.htm.) However, a public transportation agency not found in the database may still be covered. When questions regarding NTSSA coverage arise, the investigator must advise the supervisor, who may consult with RSOL or OWPP.

C. Chapter 53 of Title 49, 49 U.S.C. §5302, defines the term "public transportation" to mean "transportation by a conveyance that provides regular and continuous general or special transportation to the public, but does not include school bus, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 [Amtrak] (or a successor to such entity)." Therefore, the following are not covered under NTSSA.

1. School bus, charter or intercity bus transportation; or

2. Intercity passenger rail transportation provided by Amtrak.

D. Overlap Between FRSA and NTSSA.

If respondent is a public transportation agency operating a commuter railroad, an urban rapid transit system connected to the general railroad system, or a short-haul passenger service, or a contractor or subcontractor to such entities, there may be overlap in respondent coverage between FRSA and NTSSA.

IV. Protected Activity.

Protected activity includes.

A. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation (or being perceived by the employer to have done or to be about to do any of these activities) regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452)); (B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

B. Refusing to violate or assist in the violation (or being perceived by the employer to have done or to be about to do either of these activities) of any Federal law, rule, or regulation relating to public transportation safety or security;

C. Filing a complaint, directly causing to be brought a proceeding, or testifying in that proceeding (or being perceived by the employer to have done or to be about to do any of these activities) related to the enforcement of this section;

D. Cooperating (or being perceived by the employer to have cooperated, or to be about to cooperate) with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

E. Furnishing (or being perceived by the employer to have furnished, or to be about to furnish) information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any federal, state, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation;

F. Reporting a hazardous safety [including occupational safety] or security condition;

G. Refusing to work when confronted by a hazardous safety [including occupational safety] or security condition related to the performance of the employee's duties, or refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the following conditions exist:

1. The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; and

2. A reasonable individual in the circumstances then confronting the employee would conclude that:

   a. The hazardous condition presents an imminent danger of death or serious injury; and

   b. The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal.

3. The employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

4. Work Refusal Exception — Security Personnel. Under NTSSA, security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities, are not considered to have engaged in a protected activity when they refuse to work due to a hazardous safety or security condition related to their duties, or refuse to authorize the use of any safety-related equipment, track, or structures, if they are responsible for the inspection or repair of the equipment, track, or structures. However, security personnel are protected for reporting, in good faith, a hazardous safety or security condition.

V. "Kick-out Provision."

Complainants have the right to bring an action in district court for de novo review if there has been no final decision of the Secretary within 210 days of the filing of the complaint, and there is no delay due to the complainant's bad faith. Either party may request a jury trial.

VI. "Election of Remedies."

NTSSA provides at 6 U.S.C. 1142(e): "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public

transportation agency." This provision does not preclude a NTSSA complaint where an employee has pursued a grievance and/or arbitration pursuant to the employee's collective bargaining agreement. However, election of remedies is an evolving area of law. Investigators should consult with the supervisor, who may wish to consult with RSOL or OWPP, on questions involving election of remedies.

VII. "No Preemption."

NTSSA provides at 6 U.S.C. 1142(f): "Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law."

VIII. "Rights Retained by Employee."

NTSSA provides at 6 U.S.C. 1142(g): "Nothing in this section shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."

THE WHISTLEBLOWER PROVISION OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT (CPSIA)

15 U.S.C. §2087

I. Introduction.

15 U.S.C. §2087 provides: *(a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—*

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

(2) testified or is about to testify in a proceeding concerning such violation;

(3) assisted or participated or is about to assist or participate in such a proceeding; or,

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

II. Regulations.

Regulations pertaining to the administration of 15 U.S.C. §2087 are contained in 29 CFR 1983.

III. Coverage.

The general provisions of CPSIA are administered by the U.S. Consumer Product Safety Commission (CPSC or the Commission). The Commission is an independent Federal regulatory agency charged with protecting the public from unreasonable risks of serious injury or death associated with consumer products. The CPSC's jurisdiction extends to more than 15,000 types of consumer products used in the home, in schools, and in recreation. In general, the Commission protects consumers and families from products that can injure children or pose a fire, electrical, chemical or mechanical hazard.

A. The CPSA defines a “consumer product” as: “any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .”See paragraph V.A.2., below, for the full definition.

B. Under CPSIA, a covered respondent is defined as a: “manufacturer, private labeler, distributor, or retailer.” These terms are further defined under the Consumer Product Safety Act at 15 U.S.C. §2052, as follows:

1. “Manufacturer” means “any person who manufactures or imports a consumer product.”

a. The term “manufacture” means “to manufacture, produce or assemble.”

2. “Private labeler” means “an owner of a brand or trademark on the label of a consumer product which bears a private label.”

a. A consumer product bears a private label if, “(i) the product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product, (ii) the person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and (iii) the brand or trademark of a manufacturer of such product does not appear on such label.”

b. A trademark is a word, name, symbol, or device, or any combination used, or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by others, and to indicate the source of the goods. In short, a trademark is a brand name. The United States Patent and Trademark Office (USPTO) reviews trademark applications for federal

registration. USPTO maintains an online database, TESS, for searching federal trademarks.

3. "Distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

a. "To distribute in commerce" means "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce."

b. The term "commerce" means "trade, traffic, commerce, or transportation (A) between a place in a State any place outside thereof, or (B) which affects trade, traffic, commerce or transportation described in subparagraph (A)."

4. "Retailer" means "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer."

a. A common carrier, contract carrier, or freight forwarder is not deemed to be a "manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder."

IV. Protected Activity.

Protected activity includes:

A. Providing, causing to be provided, or being about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

B. Testifying or being about to testify in a proceeding concerning such violation.

C. Assisting or participating or being about to assist or participate in such a proceeding. (For example, participating in the development of a consumer product safety standard.)

D. Objecting to, or refusing to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

V. Overview – Acts and Requirements Enforced by the Commission.

To engage in protected activity under the CPSIA, the evidence must demonstrate the employee's reasonable belief of a violation of a Commission requirement (any Act enforced by the Commission, or any order, rule, regulation, standard or ban under any such Acts). Currently, the Commission administers eight statutes passed by Congress. They are: (1) the Consumer Product Safety Act (CPSA), 15 U.S.C. §2051 *et seq*.; (2) the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087 *et seq*., (3) the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261 *et seq*.; (4) the Flammable Fabrics Act (FFA), 15 U.S.C. § 1191 *et seq*.; (5) the Poison Prevention Packaging Act (PPPA), 15 U.S.C. §1471 *et seq*.; (6) the Refrigerator Safety Act (RSA), 15 U.S.C. §1211 *et seq*.; (7) Children's Gasoline Burn Prevention Act (CGBPA), Public Law 110278; and (8) Virginia Graeme Baker Pool and Spa Safety Act (PSSA), Public Law 110-140, Title XIV.

The Commission's website is a valuable resource for determining whether a specific product is regulated by the Commission under the various Acts it enforces. For a list of regulated products and the statutes and regulations that cover each, see: http://www.cpsc.gov/businfo/regl.html. The following is an overview of each statute.

A. Consumer Product Safety Act (CPSA), 15 U.S.C. §2051 *et seq.*

1. The CPSA is the Commission's umbrella statute. It established the CPSC, defined its basic authority, and provided that when the Commission finds an unreasonable risk of injury associated with a consumer product it can develop a standard to reduce or eliminate the risk. The CPSA also provides the authority to ban a product if there is no feasible standard. The Act also gives the Commission authority to pursue recalls for products that present a substantial product hazard.

2. Under the CPSA, the full definition of "consumer product" is defined as:

Any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include--

a. any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

b. tobacco and tobacco products,

c. motor vehicles or motor vehicle equipment (as defined by section 30102(a)(6) and (7) of Title 49),

d. pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. §136 *et seq.*]),

e. importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C. §4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,

f. aircraft, aircraft engines, propellers, or appliances (as defined in section 40102(a) of Title 49),

g. boats which could be subjected to safety regulation under chapter 43 of Title 46; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 2101(1) of Title 46) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

h. drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. §321(g), (h), and (i)]), or

i. food. The term "food," as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. §321(0], including poultry and poultry products (as defined in sections 4(e) and (f) of the Poultry Products Inspection Act [21 U.S.C. §453(e) and (f)]), meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C. §601(j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C. §1033]).

Such term includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site.

B. Children's Gasoline Burn Prevention Act (CGBPA), Public Law 110-278. Enacted on July 17, 2008, this Act is a consumer product safety rule concerning portable gasoline containers intended for use by consumers. The Act requires conformity with the child-resistance closure requirements for portable gasoline containers that were manufactured on or after January 17, 2009 for sale in the United States.

C. Federal Hazardous Substances Act (FHSA), 15 U.S.C. §1261 *et seq*. The FHSA requires cautionary labeling on the immediate container of hazardous household products to help consumers safely store and use those products and to inform them about immediate first aid steps to take if an accident happens. The Act also allows the Commission to ban certain hazardous products that are so dangerous or hazardous that the labeling required by the Act is not adequate to protect consumers.

1. The FHSA only covers products that, during reasonably foreseeable purchase, storage, or use, may be brought into or around a place where people live. Products used or stored in a garage, shed, carport, or other building that is part of the household are also covered.

2. To require labeling under the FHSA, a product must first be toxic, corrosive, flammable or combustible, an irritant, a strong sensitizer, or it must generate pressure through decomposition, heat, or other means, and the product may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonable foreseeable handling or use, including reasonable foreseeable ingestion by children.

3. Any toy or other article that is intended for use by children and that contains a hazardous substance is also banned under the FHSA if a child can gain access to the substance. In addition, the Act gives the Commission authority to ban by regulation any toy or other article intended for use by children which presents a mechanical, electrical or thermal hazard. The Commission has issued regulations under this provision relating to specific products such as electrically operated toys, cribs, rattles, pacifiers, bicycles, and children's bunk beds.

D. Flammable Fabrics Act (FFA), 15 U.S.C. §1191 *et seq*. The Flammable Fabrics Act was passed in 1953 to regulate the manufacture of highly flammable clothing, such as brushed rayon sweaters and children's cowboy chaps. In 1967, Congress amended the Flammable Fabrics Act to expand its coverage to include interior furnishings as well as paper, plastic, foam and other materials used in wearing apparel and interior furnishings. Under the Flammable Fabrics Act, CPSC can issue mandatory flammability standards. Standards have been established for the flammability of textiles for clothing, vinyl plastic film (used in clothing), carpets and rugs, children’s sleepwear, and mattresses and mattress pads.

E. Poison Prevention Packaging Act (PPPA), 15 U.S.C. §1471 *et seq*. Enacted in 1970, the PPPA requires a number of household substances to be packaged in child-resistant packaging. The packaging must be designed or constructed to be significantly difficult for children under five years of age to open within a reasonable time and not difficult for normal adults to use properly. For the sake of the elderly and handicapped who might have difficulty opening such containers, the Act provides that a regulated product available for purchase on store shelves may be packaged in one noncomplying size provided it carries a warning that it is not recommended for use in households with children, and provided that the product is also supplied in popular sizes in compliant packaging. Regulated prescription drugs may be dispensed in non-child-resistant packaging upon the specific request of the prescribing doctor or the patient. The Environmental Protection Agency regulates economic poisons, such as pesticides. Since the regulation has been in effect, there have been significant declines in reported deaths from ingestions by children of toxic household products including medications.

F. Refrigerator Safety Act (RSA), 15 U.S.C. §1214 *et seq*. The RSA was enacted in 1956. The Act's regulations, which became effective October 30, 1958, require a mechanism (usually a magnetic latch), which enables the door to be opened from the inside in the event of accidental entrapment. This type of latch, therefore, makes the hazardous refrigerators manufactured before that date easy to identify. Many pre-RSA refrigerators are still in use, and when they are carelessly discarded or stored where they are accessible to children, they create a serious entrapment hazard, when children, during play, climb inside the old abandoned or carelessly stored refrigerators.

G. Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087 *et seq*. The CPSIA that establishes OSHA's jurisdiction for whistleblower protections also makes substantive amendments to the other statutes enforced by the Commission. Among the CPSIA's amendments are requirements for: reductions in lead in children's products and in paint, third-party testing of and tracking labels for children's products, labeling requirements for advertising toys and games, prohibition on the sale of certain products containing phthalates, prohibition on the stockpiling of consumer products under all statutes enforced by the Commission, clarification of the Commission's authority to inspect the proprietary laboratories that will be conducting testing of children's products to support manufacturer certification of those products; expanded recordkeeping requirements, and a mandatory consumer product safety standard for four-wheel all-terrain vehicles or ATVs. The CPSIA also provides for enforcement under the CPSA by State attorneys general.

H. Virginia Graeme Baker Pool and Spa Safety Act (PSSA), Public Law 110-140. Enacted on October 7, 2008, this Act specifically addresses the risk of childhood drowning and near-drowning in residential swimming pools. It is a safety standard for swimming pools and spas, which are defined as "any outdoor or indoor structure intended for swimming or recreational bathing, including in-ground and above-ground structures," including hot tubs, spas, portable spas, and non-portable wading pools.

VI. "Kick-out" Provision.

Complainants have the right to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 210 days of the filing of the complaint, and there is no delay due to the complainant's bad faith.

PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER SECTION 1558 OF THE AFFORDABLE CARE ACT

I. Background.

The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, was signed into law on March 23, 2010 and was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029, that was signed into law on March 20, 2010. The Affordable Care Act contains various provisions designed to make health care more affordable and accountable. 29 CFR 1984.

Among the policies to achieve its goals, the Affordable Car Act's section 1558 amended the Fair Labor Standards Act (FLSA) to add section 18C, 29 U.S.C. 218C (section 18C), which provides protection to employees against retaliation by an employer for engaging in certain protective activities.

Under section 18C, an employer may not retaliate against an employee for receiving a credit under section 36B of the Internal Revenue Code of 1986 or cost-sharing reduction (referred to as "subsidy" in Section 18C) under section 1402 of Affordable Care Act. These provisions allow employees to receive tax credits or cost-sharing reductions while enrolled in a qualified heath plan through an exchange, if their employer does not offer a coverage option that is affordable and provides a basic level of value (*i.e.* "minimum value"). Certain large employees who fail to offer affordable plans that meet this minimum value may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through the Exchange. Thus, the relationship between the employee's receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.

Section 18C also protects employees against retaliation because they provided or are about to provide to their employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of or amendment made by Title I of the Affordable Care Act; testified or are about to testify in a proceeding concerning such violation; assisted or participated, or are about to assist or participate, in such a proceeding; or object to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any provision of Title I of the Act (or amendment), or any order, rule, regulation, standard or ban, under Tile I of the Act (or amendment). Title I includes a range of insurance company accountability policies such as: the prohibition of lifetime dollar limits on coverage, the requirement for most plans to cover recommended preventive services with no cost sharing, and, starting in 2014, guaranteed available (also known as guaranteed issue) protections so that individuals and employers will be able to obtain coverage that currently can be denied due to a pre-existing condition, and the prohibition on the use of factors such as health status, medical history, gender, and industry employment to set premium rates.

II. Summary of Statutory Procedures.

A covered employee may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, along with a preliminary order that requires the respondent to, where appropriate: take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as

all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The complainant and the respondent then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an ALJ.

Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's fees and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

DIRECTIVE NUMBER: DIR 12-01 (CPL 02) - ADR

Purpose: The purpose of this direction is to establish two one-year pilots: one in Region V and one in Region IX to administer an Alternative Dispute Resolution (ADR) program for its whistleblower complaint activities. Both pilots will operate concurrently and implement the attached proposed ADR policy and procedures.

I. Definitions.

Alternative Dispute Resolution (ADR)-is an approach to the settlement of disputes (whistleblower complaints) by means other than binding decisions made by courts or tribunals. As a general matter, ADR is broadly understood to involve the use of negotiation, mediation, conciliation, or arbitration. These techniques are not mutually exclusive in any particular conflict, but can be used sequentially or in combination with other adjudicative methods for resolving disputes (whistleblower complaints). ADR is typically a consensual process that involves the intervention of a third-party neutral to assist parties in resolving their conflict.

Early Resolution- s a voluntary process in which the parties to a dispute (whistleblower complaint) attempt to resolve the dispute (whistleblower complaint) prior to OSHA launching an investigation. If the parties elect to pursue early resolution, an OSHA regional ADR coordinator (RARDC) may help the parties reach a settlement agreement before the respondent provides a response to the complaint. The focus of early resolution is quick resolution of the dispute

(whistleblower complaint) rather than an investigation to determine the validity of the charge, pretext, or potential violations. Should the parties elect to pursue early resolution but fail to enter into a settlement agreement within the specified time frame, the case will be assigned to an investigator to investigate the complaint.

Investigation- is a process in which an OSHA official (the investigator) investigates the dispute (whistleblower complaint) and provides a written determination based on the evidence and the facts of the case.

Mediation -is a voluntary process in which the parties agree to utilize a neutral third party to assist them in resolving a dispute (whistleblower complaint) by mutual agreement. Mediators have no authority to impose settlements. A mediator can help parties reach agreement by clarifying differences in a dispute (whistleblower complaint) or negotiation; defining problems or issues; establishing realistic expectations; maintaining the pace and track of negotiations; generating options; and improving communications.

Shuttle Diplomacy-is a technique used in mediation, whereby the mediator may move between participants who are located in different rooms, or meet different participants at different times for all or part of the process. This technique may also be referred to as "caucusing" or "use of private sessions."

Settlement-An agreement between parties, on the area of dispute (whistleblower complaint), that was mutually resolved without resorting to legal proceedings. A settlement may be reached at any time after the filing of the complaint and prior to the issuance of the Secretary's Findings.

II. Core ADT Concepts.

A. ADR must be voluntary**.**

B. Parties Must Participate in Good Faith

ADR is only effective when the parties participate in good faith. Participating in "good faith" means that the parties engage in the process with openness to resolving the dispute (whistleblower complaint) and that they treat each other, the process and any third-party neutrals with respect. Parties should come fully prepared to discuss resolution of the dispute (whistleblower complaint), and must have full settlement authority.

III. Early Resolution.

A. Overview.

Early resolution is a valuable alternative to the expensive and time-consuming process of an investigation. Before beginning an investigation, OSHA will offer the parties the option to resolve their dispute (whistleblower complaint) quickly and informally with the assistance of an OSHA representative, e.g., RADRC, RSI or investigator.

IV. Mediation.

A. Overview.

1. Mediation is a valuable alternative to the expensive and time-consuming process of an investigation.

2. Mediation is a voluntary process in which the parties agree to utilize a neutral third party to assist them in resolving a dispute (whistleblower complaint) by mutual agreement.

3. A mediator can assist the parties in reaching an agreement by clarifying differences in a dispute (whistleblower complaint) or negotiation; defining problems or issues; establishing realistic expectations; maintaining the pace and track of negotiations; generating options; and improving communications. However, mediators have no authority to impose settlements.

4. The mediator has no authority to determine whether a complaint has merit or the amount of a complainant's damages. The mediator may suggest how the parties might reach an agreement. The mediator may also give the parties an objective perspective on the strengths and weaknesses of their positions.

5. Mediation is a separate process from an investigation. Information obtained during mediation is confidential and will not be disclosed to OSHA.

6. While the parties are in mediation, OSHA will stay the investigation.

7. The parties may request mediation at any point during the investigation. OSHA will strive to accommodate such requests, but does not guarantee that it will be able to provide a mediator in every case.

8. In the event that parties are unable to reach an agreement within a reasonable time frame, as determined by the mediator and as outlined below, the mediator will announce that the mediation process has concluded. OSHA will resume its investigation following the procedures outlined in Chapters 3 to 5 of the Manual, as appropriate.

V. Parties’ Ability to Settled During OSHA Investigation.

Nothing in OSHA's ADR program precludes or prohibits the parties' ability to settle their whistleblower complaint with the assistance of their investigator, the RSI, or other mediation/ADR service during an OSHA investigation, as provided in the Manual, Chapter 6.

<u>APPENDIX A</u>

U.S. Department of Labor Occupational Safety and Health Administration
Whistleblower Case Activity Worksheet
Note: A. separate worksheet from must be completed for each complainant

<table>
<tr><td colspan="3">Case Type: ☐ OSHA ☐ ACA ☐ SPA
☐ STAA ☐ AHERA ☐ ISCA ☐ SDWA ☐ FWPCA ☐ TSCA ☐ SWDA ☐ CAA
☐ CERCLA ☐ ERA ☐ AIR21 ☐ SOX ☐ PSIA ☐ FRSA ☐ NTSSA ☐ CPSIA</td></tr>
<tr><td colspan="3">Statutory Implications: ☐ OSHA ☐ ACA ☐ SPA
☐ STAA ☐ AHERA ☐ ISCA ☐ SDWA ☐ FWPCA ☐ TSCA ☐ SWDA ☐ CAA
☐ CERCLA ☐ ERA ☐ AIR21 ☐ SOX ☐ PSIA ☐ FRSA ☐ NTSSA ☐ CPSIA</td></tr>
<tr><td colspan="3">Complaint Information</td></tr>
<tr><td>Last</td><td>First</td><td>Middle</td></tr>
<tr><td colspan="3">Address</td></tr>
<tr><td>City</td><td>State</td><td>Zip</td></tr>
<tr><td>Phone 1</td><td colspan="2">Email</td></tr>
<tr><td>Phone 2</td><td colspan="2"></td></tr>
<tr><td>Phone 3</td><td colspan="2"></td></tr>
<tr><td colspan="3">Respondent Information</td></tr>
<tr><td colspan="3">Name ☐ Company ☐ Individual</td></tr>
<tr><td colspan="3">Address</td></tr>
<tr><td>City</td><td>State</td><td>Zip</td></tr>
<tr><td>Phone 1</td><td colspan="2">Email</td></tr>
<tr><td>Phone 2</td><td colspan="2"></td></tr>
<tr><td>Phone 3</td><td colspan="2"></td></tr>
<tr><td># of employees</td><td colspan="2">Unionized?</td></tr>
<tr><td colspan="3">Summary of the alleged retaliation (protective activity, respondent knowledge, adverse action, nexus)</td></tr>
<tr><td colspan="3">I certified that the complaint was filed with me on ______
(date)

Print Name:</td></tr>
<tr><td>Signature</td><td>Title</td><td>Date</td></tr>
<tr><td colspan="3">For local use</td></tr>
</table>

APPENDIX B

Respondent Notification Letter

Certified Mail #[1234 5678 9012 3456 7890]

[date]

ABC Company

Street Address

City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001 Dear

Sir or Madam:

We hereby serve you notice that a complaint has been filed with this office by [Mr./Ms.] [Complainant' name] alleging retaliatory employment practices in violation of the whistleblower provisions of [name of statute], [citation]. A copy of the complaint is enclosed. You may obtain a copy of the pertinent statute, [name of statute], and regulations, 29 CFR Part [number], at http://www.whistleblowers.gov. Upon request, a printed copy of these materials will be mailed to you.

We would appreciate receiving from you within 20 days a written account of the facts and a statement of your position with respect to the allegation that you have retaliated against [Mr./Ms.] [Complainant's last name] in violation of the Act. Please note that a full and complete initial response, supported by appropriate documentation, may help to achieve early resolution of this matter. Voluntary adjustment of complaints can be effected by way of a settlement agreement at any time.

The following two paragraphs must be included for complaints filed under STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA. Do not include these two paragraphs in notification letters for complaints filed under the other statutes, as they do not provide for preliminary, immediate reinstatement of the complainant.

[Within 20 days of your receipt of this complaint you may submit to this agency a written statement and any affidavits or documents explaining or defending your position. Within the same 20 days you may request a meeting to present your position. The meeting will be held before the issuance of any findings and a preliminary order. At the meeting, you may be accompanied by counsel and by any persons relating to the complaint, who may make statements concerning the case.

If investigation provides this agency with reasonable cause to believe that the Act has been violated and reinstatement of the complaint is warranted, you will again be contacted prior to the issuance of findings and a preliminary order, at which time you will be advised of the substance of the relevant evidence supporting the complainant's allegations, and you will be given the opportunity to submit a written response, to meet with the investigator and to present statements from rebuttal witnesses. Your rebuttal evidence must be presented within ten business days of this agency's notification described in this paragraph.]

Please note that OSHA will disclose to the parties in this case any information relevant to the resolution of the case, because evidence submitted by the parties must be tested and the opposing party provided the opportunity to fully respond. If information provided contains personal, identifiable information about individuals other than Complainant, such information, where appropriate, will be redacted before disclosure.

Attention is called to your right and the right of any party to be represented by counsel or other

representative in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly. All communications and submissions should be made to the investigator assigned below. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Name
Supervisor
Enclosures: Copy of Complaint
Designation of Representative

Investigator:
Name:
U.S. Department of Labor-OSHA
Street Address
City, State ZIP

Telephone: (123) 456-7890
Fax: (123) 456-7890
Email: last.first@dol.gov

APPENDIX C

A. Upon assignment, the Investigator normally prepares a standard case file containing the OSHA-87 form or the appropriate regional intake worksheet, screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side.

1. Evidentiary material normally is arranged as follows:

   a. Copy of the complaint, OSHA-87 form or the appropriate regional intake worksheet.
   b. Documents from OSHA or other agency enforcement files.
   c. Complainant's signed statement.
   d. Remaining evidence (statements, records, etc., in logical sequence).
   e. Investigator's rough notes.
   f. Case Activity/Telephone log.
   g. Report of Investigation.
   h. Table of Contents (Exhibit Log).

2. Table V-1 depicts a typical case file

Table V-I: Case File Organization		
Left Side		**Right Side**
Administrative Materials	**Tab Number**	**Evidentiary Materials**
Assignment Memorandum	1	Complaint /Intake Form
Complainant Notification	2	OSHA-7
Respondent Notification	3	Complainant's Statement
Designation(s) of Representative(s)	4	CSHO Statement
Correspondence, organized chronologically	5	Witness Statement
Determination Letter	6	Witness Statement
Final Case Summary Worksheet	7	RP Position Statement
(Any post-determination documents such as appeals, ALJ, ARB, or court decisions or orders, etc. filed on top, left side)	8	Attendance Records
	9	Investigator’s memos to file
	10	Investigator's Rough Notes

	11	Case Activity/Telephone Log
	14	Report of Investigation
	15	Table of Contents/Exhibit Log

APPENDIX D

Sample Secretary's Findings and Order and Preliminary Order (Merit)

Note: Comments in bold italics are notes for the user and must be deleted from final finding, and any section that does not pertain to the case must be deleted. In addition, [ ] indicates that the text inside it must be overwritten with appropriate wording.

[Date]
[Respondent/Respondent's Attorney]
Street
City, State ZIP

This letter is address to Respondent (or Respondent's attorney) because the complaint this letter contains merit findings. Dismissals of complaints must be addressed to Complainant (or Complainant's attorney), with a copy to Respondent.

Re: ABC Company/Complainant/Case No. 1-2345-02-0001
[ABC Company's USDOT No.: 1234567] **In STAA cases only, include the respondent's USDOT number, if applicable.**

Dear [Complaint/Complainant's Attorney]:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by [you/your client] (Complainant) against [Respondent's name] (Respondent) on [date], under [name of statute], [citation]. In brief, [you/your client] alleged that Respondent [adverse action] [you/your client] in retaliation for [protected activity].

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through [his][her] agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region [#], finds that there is reasonable cause to believe that Respondent violated [abbreviated name of statute] and issues the following findings:

Secretary's Findings

Timeliness of complaint

Complainant was [adverse action] on or about [date]. On [date filed], Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against [him/her] in violation of [abbreviated name of statute]. As this complaint was filed within [30/90/180] days of the alleged adverse action, it is deemed timely.

Coverage

(Note: in OSHA 11(c) merit cases, no Secretary's Findings are issued; rather, the case is referred to RSOL with a recommendation for litigation.)

STAA

Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105. Respondent is also a commercial motor carrier within the meaning of 49 U.S.C. §31101. Respondent is engaged in transporting products on the highways via commercial motor vehicle, that is, a vehicle ***(select one or more, as applicable)*** [with a gross vehicle weight rating of 10,001 pounds or more]; [designed to transport more than 10 passengers including the driver]; [used in transporting hazardous material in a quantity requiring placarding].

Complainant is an employee within the meaning of 49 U.S.C. §31101. In the course of [his/her] employment, Complainant directly affected commercial motor vehicle safety, in that [he/she did something to directly affect commercial motor vehicle safety, *e.g.,* drove Respondent's trucks over highways in commerce to haul timber products].

SDWA

Respondent is an employer within the meaning of 42 U.S.C. §300j-9(i).
Complainant is an employee within the meaning of 42 U.S.C. §300j-9(i).
FWPCA
Respondent is a person within the meaning of 1 U.S.C. §1 and 33 U.S.C. § 1367.
Complainant is an employee within the meaning of 33 U.S.C. § 1367.
TSCA
Respondent is an employer within the meaning of 15 U.S.C. §2622.
Complainant is an employee within the meaning of 15 U.S.C. §2622. ***SWDA***
Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §6971.
Complainant is an employee within the meaning of 42 U.S.C. §6971.
CAA
Respondent is an employer within the meaning of 42 U.S.C. §7622.
Complainant is an employee within the meaning of 42 U.S.C. §7622.
CERCLA
Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §9610.
Complainant is an employee within the meaning of 42 U.S.C. §9610.
ERA
Respondent is an employer within the meaning of 42 U.S.C. §5851.
Complainant is an employee within the meaning of 42 U.S.C. §5851. ***AIR21***
Respondent is an air carrier ***(or a contractor or a subcontractor of an air carrier)*** within the meaning of 49 U.S.C. §42121 and 49 U.S.C. §40102(a)(2).
Complainant is an employee within the meaning of 49 U.S.C. §42121. ***SOX***
If covered under both 12 and 15(d):
Respondent is a company within the meaning of 18 U.S.C. §1514A ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such a company)*** in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).
If covered only under 15(d):
Respondent is a company within the meaning of 18 U.S.C. §1514A ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such a company)*** in that it is a company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).
If covered as a Nationally Recognized Statistical Rating Organization (NSRO):
Respondent is a nationally recognized statistical rating organization ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such an NSRO)*** within the meaning of 18 U.S.C. §1514A.
AND, in either case:
Complainant is an employee within the meaning of 18 U.S.C. §1514A. ***PSIA***
Respondent is an employer within the meaning of 49 U.S.C. §60129.
Complainant is an employee within the meaning of 49 U.S.C. §60129
FRSA
Respondent is a railroad carrier ***(or a contractor, subcontractor, officer, or employee of such a railroad carrier)*** within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent provides railroad transportation, in that it [does something to meet the statutory definition of a railroad, *e.g.,* transports passengers and goods using the general railroad

system].
Complainant is an employee within the meaning of 49 U.S.C. §20109.
NTSSA
Respondent is a public transportation agency ***(or a contractor, subcontractor, officer, or employee of such a public transportation agency)*** within the meaning of 6 U.S.C. §1142 and 6 U.S.C. §1131(5), in that it is a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of Title 49 of the U.S. Code.
Complainant is an employee within the meaning of 6 U.S.C. § 1142.
CPSIA
Respondent is a ***(select one or more, as applicable)*** [manufacturer, private labeler, distributor, or retailer] within the meaning of 15 U.S.C. §2087.
Complainant is an employee within the meaning of 15 U.S.C. §2087. ***ACA***
Respondent is an employer within the meaning of 29 U.S.C. §218C.
Complainant is an employee within the meaning of 29 U.S.C. §218C. ***CFPA***
Respondent is covered person or service provider within the meaning 12 U.S.C. §5567.
Complainant is an employee within the meaning of 12 U.S.C. §5567.
SPA
Respondent is a person within the meaning of 1 U.S.C. §1 and 46 U.S.C. §2114.
Complainant is an employee within the meaning of 46 U.S.C. §2114.

FSMA
Respondent is an entity engaged in the ***(select one or more, as applicable)*** [manufacture, processing, packing, transporting, distribution, reception, holding, or importation] of food, within the meaning of 21 U.S.C. §399d(a).
Complainant is an employee within the meaning of 21 U.S.C. §399d(a).
Complainant and Respondent both covered
Complainant was employed by Respondent as a [job title]. Complainant and Respondent are, therefore, covered by [abbreviated name of statute].
Findings of the investigation:
[A concise narrative of the facts of the case, addressing, in order, the prima facie elements; if one of the elements is not met, then the analysis ends with that element. Address disputed facts only if they are critical to the outcome.]
Protected activity
Complainant engaged in protected activity under [note specific statutory provision] when....
Respondent knowledge
Respondent knew of [or suspected] Complainant's protected activity....
Adverse action
Complainant experienced an adverse action when....[specify date of adverse action]
Nexus —11(c), AHERA, ISCA, SDWA, FWPCA, TSCA, SWDA, CAA, CERCLA
Complainant's protected activity was a motivating factor in the adverse action. Consequently, OSHA finds reasonable cause to believe that Respondent has violated [insert specific provision [s]of statute, such as 49 U.S.C. §31105(a)(1)(B)(ii) note all violated provisions] and issues the following order.
Nexus — STAA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA
Complainant's protected activity was a contributing factor in the adverse action. OSHA finds

reasonable cause to believe that Respondent has violated [insert specific provision[s] of statute —see above] and issues the following preliminary order.

ORDER

Upon receipt of this Secretary's Finding and [Preliminary] Order, Respondent shall immediately reinstate Complainant to [his] [her] former position at the rate of $[insert amount] per [insert appropriate time unit]. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had [s]he never been discharged. Such reinstatement is not stayed by an objection to this order (only for statutes allowing preliminary orders—see second set of nexus findings above for list).

Respondent shall pay Complainant back pay, minus interim earnings, at the rate of [$amount per week/month], for the period [Date] until Respondent makes Complainant a bona fide offer of reinstatement.

Respondent shall pay Complainant $[insert amount] as a bonus for [year].

Respondent shall pay interest on the back wages and bonus in accordance with 26 U.S.C. 6621.

Respondent shall reinstate Complainant's right to exercise stock options on *[x]* shares, pursuant to Respondent's equity plan. Complainant's enrollment shall be deemed to have been continuous for purposes of vesting requirements.

Respondent shall pay Complainant compensatory damages in the amount of [$insert amount], for the following:

- Out- of -pocket medical expenses in the amount of $[insert amount].
- Medical plan payments in the amount of $[insert amount].
- Job-hunting expenses in the amount of $[insert amount].
- Pain and suffering, including mental distress [insert amount]

When punitive damages are awarded, the rationale for doing so must be set forth in the body of the findings.

Respondent shall pay Complainant punitive damages in the amount of $[insert amount].

Respondent shall pay Complainant's attorney's fees in the amount of $[insert amount].

Respondent shall expunge Complainant's employment records of any reference to the exercise of [his] [her] rights under [statute].

Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to [statute].

Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal Web site for employees or e-mails, if respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of posting, the attached notice to employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

Appeal or objection rights (must be included in all Secretary's Findings): Objection rights for STAA, ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA

Respondent and Complainant have [30/60] days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400
North Washington, D.C. 20001-8002
Telephone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

[Respondent/Respondent's Attorney]
Street Address
City, State ZIP
Regional Administrator
U. S. Department of Labor
OSHA Street Address
City, State ZIP

In addition, please be advised that the U.S. Department of Labor does not represent any complainant or respondent in the hearing; rather, each party presents his or her own case. However, in STAA cases, OSHA, represented by the Regional Solicitor, usually appears in cases in which merit findings have been issued. The complainant and the respondent may also appear in those cases. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence for the record. The All who conducts the hearing will issue a decision based on the evidence and arguments presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the [abbreviated name of statute]. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of [abbreviated name of statute] cases can be found in Title 29, Code of Federal Regulations Part [24/1977/1978/1979/1980/1981/1982/1983], and may be obtained at www.whistleblowers.gov.

Sincerely,

Regional Administrator
cc: Respondent/Respondent's attorney
Chief Administrative Law Judge, USDOL
[Primary enforcement agency]
SOL-OSH Division ***(STAA, SPA)***
SOL-FLS Division ***(ERA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, and FSMA)***
OWPP

APPENDIX E

Sample Secretary's Findings (Non-Merit)

Note: Comments in bold italics are notes for the user and must be deleted from final finding, and any section that does not pertain to the case must be deleted. In addition, [ ] indicates that the text inside it must be overwritten with appropriate wording.

[Date]
[Complaint/Complainant's Attorney]
Street
City, State ZIP

This letter is address to Complaint (or Complaint's attorney) because the complaint the complaint is being dismissed. Merit findings must be addressed to Respondent (or Respondent's attorney), with a copy to Complainant.

Re: ABC Company/Complainant/Case No. 1-2345-02-0001
[ABC Company's USDOT No.: 1234567] In STAA cases only, include the respondent's USDOT number, if applicable.

Dear [Complaint/Complainant's Attorney]:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by [you/your client] (Complainant) against [Respondent's name] (Respondent) on [date], under [name of statute], [citation]. In brief, [you/your client] alleged that Respondent [adverse action] [you/your client] in retaliation for [protected activity].

Pick only one of the following two paragraphs, as appropriate:

Insert the following paragraph if dismissing on a "threshold" issue, such as timeliness or lack of coverage.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region [#], issues the following findings:

Insert the following paragraph if dismissing on the merits

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region [#], finds that there is reasonable cause to believe that Respondent violated [abbreviated name of statute] and issues the following findings:

Secretary's Findings

Timeliness of complaint

Complainant was [adverse action] on or about [date]. On [date filed], Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against [him/her] in violation of [abbreviated name of statute]. As this complaint [was/was not filed within [30/90/180] days of the alleged adverse action, it is deemed [timely/not timely]. [If untimely, and no grounds exist for equitable tolling, then include: Consequently, this complaint is dismissed.]

Coverage (if no coverage, then the language must be altered accordingly)

OSHA 11(c)

Respondent is a person within the meaning of 29 U.S.C. §652(4)
Complainant is an employee within the meaning of 29 U.S.C. §652(4)

STAA

Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105. Respondent is also a commercial motor carrier within the meaning of 49 U.S.C. §31101. Respondent is engaged in transporting products on the highways via commercial motor vehicle, that is, a vehicle ***(select one or more, as applicable)*** [with a gross vehicle weight rating of 10,001 pounds or more]; [designed to transport more than 10 passengers including the driver]; [used in transporting hazardous material in a quantity requiring placarding].
Complainant is an employee within the meaning of 49 U.S.C. §31101. In the course of [his/her] employment, Complainant directly affected commercial motor vehicle safety, in that [he/she did something to directly affect commercial motor vehicle safety, *e.g.,* drove Respondent's trucks over highways in commerce to haul timber products].

SDWA

Respondent is an employer within the meaning of 42 U.S.C. §300j-9(i).
Complainant is an employee within the meaning of 42 U.S.C. §300j-9(i).

FWPCA

Respondent is a person within the meaning of 1 U.S.C. §1 and 33 U.S.C. § 1367.
Complainant is an employee within the meaning of 33 U.S.C. § 1367.

TSCA

Respondent is an employer within the meaning of 15 U.S.C. §2622.
Complainant is an employee within the meaning of 15 U.S.C. §2622. ***SWDA***

Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §6971.
Complainant is an employee within the meaning of 42 U.S.C. §6971.

CAA

Respondent is an employer within the meaning of 42 U.S.C. §7622.
Complainant is an employee within the meaning of 42 U.S.C. §7622.

CERCLA

Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §9610.
Complainant is an employee within the meaning of 42 U.S.C. §9610.

ERA

Respondent is an employer within the meaning of 42 U.S.C. §5851.
Complainant is an employee within the meaning of 42 U.S.C. §5851. ***AIR21***

Respondent is an air carrier ***(or a contractor or a subcontractor of an air carrier)*** within the meaning of 49 U.S.C. §42121 and 49 U.S.C. §40102(a)(2).
Complainant is an employee within the meaning of 49 U.S.C. §42121.

SOX

If covered under both 12 and 15(d):

Respondent is a company within the meaning of 18 U.S.C. §1514A ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such a company)*** in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).

If covered only under 15(d):

Respondent is a company within the meaning of 18 U.S.C. §1514A ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such a company)*** in that it is a

company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).

If covered as a Nationally Recognized Statistical Rating Organization (NSRO):

Respondent is a nationally recognized statistical rating organization ***(or an officer, employee, contractor, subcontractor, agent, subsidiary or affiliate of such an NSRO)*** within the meaning of 18 U.S.C. §1514A.

AND, in either case:

Complainant is an employee within the meaning of 18 U.S.C. §1514A. ***PSIA***

Respondent is an employer within the meaning of 49 U.S.C. §60129.

Complainant is an employee within the meaning of 49 U.S.C. §60129.

FRSA

Respondent is a railroad carrier ***(or a contractor, subcontractor, officer, or employee of such a railroad carrier)*** within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. Respondent provides railroad transportation, in that it [does something to meet the statutory definition of a railroad, *e.g.,* transports passengers and goods using the general railroad system].

Complainant is an employee within the meaning of 49 U.S.C. §20109.

NTSSA

Respondent is a public transportation agency ***(or a contractor, subcontractor, officer, or employee of such a public transportation agency)*** within the meaning of 6 U.S.C. §1142 and 6 U.S.C. §1131(5), in that it is a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of Title 49 of the U.S. Code.

Complainant is an employee within the meaning of 6 U.S.C. § 1142.

CPSIA

Respondent is a ***(select one or more, as applicable)*** [manufacturer, private labeler, distributor, or retailer] within the meaning of 15 U.S.C. §2087.

Complainant is an employee within the meaning of 15 U.S.C. §2087. ***ACA***

Respondent is an employer within the meaning of 29 U.S.C. §218C.

Complainant is an employee within the meaning of 29 U.S.C. §218C. ***CFPA***

Respondent is covered person or service provider within the meaning 12 U.S.C. §5567.

Complainant is an employee within the meaning of 12 U.S.C. §5567.

SPA

Respondent is a person within the meaning of 1 U.S.C. §1 and 46 U.S.C. §2114.

Complainant is an employee within the meaning of 46 U.S.C. §2114.

FSMA

Respondent is an entity engaged in the ***(select one or more, as applicable)*** [manufacture, processing, packing, transporting, distribution, reception, holding, or importation] of food, within the meaning of 21 U.S.C. §399d(a).

Complainant is an employee within the meaning of 21 U.S.C. §399d(a).

Complainant and Respondent both covered

Complainant was employed by Respondent as a [job title]. Complainant and Respondent are, therefore, covered by [abbreviated name of statute].

Findings of the investigation:

[A concise narrative of the facts of the case, addressing, in order, the *prima facie* elements; if one of the elements is not met, then the analysis ends with that element. Address disputed facts only if they are critical to the outcome. Whenever possible, the dates for protected activities

and adverse actions should be stated.]

Complainant and Respondent both covered

Complainant was employed by Respondent as a [job title]. Complainant and Respondent are, therefore, covered by [abbreviated name of statute]

Findings of the investigation:

[A concise narrative of the facts of the case, addressing, in order, the *prima facie* elements; if one of the elements is not met, then the analysis ends with that element. Address disputed facts only if they are critical to the outcome. Whenever possible, the dates for protected activities and adverse actions should be stated.]

Select one of the following options to explain the reason for the dismissal:

Complainant and/or Respondent not covered

[Complainant and/or Respondent] [is/are] not covered under [abbreviated name of statute and general statutory cite, such as 49 U.S.C. 31105].

No protected activity

Complainant did not engage in any activity protected by [abbreviated name of statute and general statutory cite, such as 49 U.S.C. 31105].

No Respondent knowledge

Respondent lacked knowledge of and did not suspect
Complainant's protected activity. ***No adverse act*** Complainant did not experience an adverse action.

OSHA 11(c), AHERA, ISCA, SD WA, FWPCA, TSCA, SWDA, CAA, CERCLA:

No nexus — Complainant's protected activity was not a motivating factor in the adverse action.

Or, Nexus but mixed motive, and other factor precludes merit: Complainant's protected activity was a motivating factor in the adverse action. However, Respondent would have taken the same adverse action in the absence of Complainant's protected activity.

STAA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA: No nexus

Complainant's protected activity was not a contributing factor in the adverse action.

Or, Nexus but other factor precludes merit — STAA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA:

Complainant's protected activity was a contributing factor in the adverse action. However, Respondent would have taken the same adverse action in the absence of Complainant's protected activity.

Conclusion

Consequently, this complaint is dismissed.

Appeal rights (must be included in all Secretary's Findings):

Appeal rights for OSHA 11(c), AHERA, ISCA

This case will be closed unless Complainant files an appeal by sending a letter to:

Director	with a copy to:
Directorate of Enforcement Programs	Regional Administrator
U.S. Department of Labor — OSHA	U.S. Department of Labor — OSHA
200 Constitution Avenue, N.W.	Street Address
Room N3610	City, State ZIP
Washington, D.C. 20210	

To be considered, an appeal must be postmarked within 15 days of receipt of this letter. If this finding is appealed, then the Directorate of Enforcement Programs will review the case file in

order to ascertain whether the investigation dealt adequately with all factual issues and the investigation was conducted fairly and in accordance with applicable laws. The outcome of an appeal is either the return of the case to the investigator for further investigation, a recommendation to the Regional Solicitor's Office for litigation, or denial of the appeal, after which the case is closed.

Appeal rights for STAA, SDWA, FWPCA, TSCA, SWDA, CAA, CERCLA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA

Respondent and Complainant have [30/60] days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400
North Washington, D.C. 20001-8002
Telephone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

[Respondent/Respondent's Attorney]
Street Address
City, State ZIP
Regional Administrator

U. S. Department of Labor — OSHA
Street Address
City, State ZIP

In addition, please be advised that the U.S. Department of Labor does not represent any complainant or respondent in the hearing; rather, each party presents his or her own case. However, in STAA cases, OSHA, represented by the Regional Solicitor, usually appears in cases in which merit findings have been issued. The complainant and the respondent may also appear in those cases. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence for the record. The All who conducts the hearing will issue a decision based on the evidence and arguments presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the [abbreviated name of statute]. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of [abbreviated name of statute] cases can be found in Title 29, Code of Federal Regulations Part [24/1977/1978/1979/1980/1981/1982/1983], and may be obtained at www.whistleblowers.gov.

Sincerely,

Regional Administrator

cc: Respondent/Respondent's attorney
Chief Administrative Law Judge, USDOL
[Primary enforcement agency, for statutes other than OSHA 11(c)]
SOL-OSH Division ***(STAA, SPA)***

SOL-FLS Division ***(SDWA, FWPCA, TSCA SWDA, CAA, CERCLA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, and FSMA)***
OWPP

<u>APPENDIX F</u>

Sample Standard OSHA Settlement Agreement

In the matter of: John Doe v. ABC Corporation
Case No. 1-2345-08-001

SETTLEMENT AGREEMENT

The undersigned Respondent and the undersigned Complainant, in the settlement of the above-captioned matter and subject to the approval of the Occupational Safety and Health Administration, hereby agree as follows:

Compliance with Acts. Respondent will not discharge or in any other manner discriminate against Complainant or any other employee because of activity protected by the whistleblower provision of the [insert name of statute], [insert statutory cite].

Posting of Notice. Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice attached hereto and made a part hereof, said Notice to be signed by a responsible official of Respondent organization and the date of actual posting to be shown thereon. [For employers who communicate with their employees electronically] Respondent shall e-mail this notice to all employees at [insert establishment] [or post this notice on its intranet].

Compliance with Notice. Respondent will comply with all of the terms and provisions of said Notice.

General Posting. Respondent will permanently post in a conspicuous place in or about its premises, including all places where posters for employees are customarily posted, including electronic posting, where the employer communicates with its employees electronically [select appropriate poster [OSHA 3165-12-06R ("Job Safety and Health: It's the Law!"); OSHA 3113 ("Attention Drivers"); FAA-WBPP-Ol ("Whistleblower Protection Program"); 29 CFR Part 24, Appendix A ("Your Rights Under the Energy Reorganization Act"); OR the applicable OSHA Whistleblower Rights Fact Sheet(s)].

Reinstatement. Respondent has offered [or shall offer as soon as possible] reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted. [OR Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.]

Monies. Respondent agrees to make the Complainant whole by payment of $ ____________ (less normal payroll deductions). [OR Respondent agrees to pay Complainant a lump sum of $ ___________. Complainant agrees to comply with applicable tax laws requiring the reporting of income.] [Any check shall be made payable to the complainant and mailed to the OSHA Area Office [give address].

Personnel Record. Respondent shall expunge any adverse references from Complainant's personnel records relating to the adverse action and not make any negative references relating to the adverse action in any future requests for employment references.

Inquiries Concerning Complainant. Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain

from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to any third party that could be construed as damaging the name, character, or employment of Complainant.

Performance. Performance by both parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved.

Enforcement of settlement. [For all cases other than OSHA 11(c), AHERA, or ISCA cases] This settlement constitutes the Secretary's findings and preliminary order under [insert name of statute and cite to provision on issuance of findings and preliminary order.] The parties' signatures constitute a failure to object to the findings and order under that statute. Therefore, this settlement is a final order under that statute and is enforceable in an appropriate United States district court. [For OSHA 11(c), AHERA, and ISCA] Failure to comply with this settlement constitutes a violation of the whistleblower provision of [insert statute], [insert cite] for which the Secretary of Labor may seek redress by filing a civil action in an appropriate United States district court under [insert cite for whistleblower provision].

Non-Admission. Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation enforced by the Occupational Safety and Health Administration. Nothing in this Agreement may be used against either party except for the enforcement of its terms and provisions.

Notification of Compliance. Respondent agrees that within ten (10) days of receiving a fully executed and approved copy of this Agreement, Respondent will notify the Regional Administrator in writing of the steps it has taken to comply with the terms and conditions of this Agreement.

Closure of Complaint. Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against ABC Corporation arising out of Complainant's complaint filed with OSHA on June 5, 2008, and will cause the complaint to be closed. This Agreement has been obtained and entered into without duress and in the best interest of all parties**.**

RESPONDENT:

____
(Signature/title/date)

COMPLAINANT:

____
(Signature/date)

RECOMMENDED BY:

____
(Signature/title/date)
Investigator

APPROVED BY:

____
(Signature/date)
Regional Supervisory Investigation

NOTICE TO EMPLOYEES

PURSUANT TO A SETTLEMENT AGREEMENT
ENTERED INTO BY THE U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

The employer agrees that it will not discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Occupational Safety and Health Act (OSH Act) ***(or specify other Act)*** or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

The employer agrees that it will not advise employees against exercising rights guaranteed under the OSH Act ***(or specify other Act),*** such as contacting, speaking with, or cooperating with Occupational Safety and Health Administration (OSHA) officials either during the conduct of an occupational safety and health inspection of the employer's facilities or in the course of an investigation.

The employer agrees that it will not intimidate employees by suggesting or threatening that employee contact, conversation, or cooperation with OSHA officials might result in closure of the employer's facilities, in loss of employment for the employees, or in civil legal action being taken against the employees.

______________________________	________________________
President ABC Corporation	Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL.