



## **DEPARTMENT OF LABOR**

### **Occupational Safety and Health Administration**

#### **29 CFR Part 1978**

**[Docket Number: OSHA–2008–0026]**

**RIN 1218–AC36**

#### **Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982 (STAA), as Amended.**

**AGENCY:** Occupational Safety and Health Administration, Labor

**ACTION:** Final rule

**SUMMARY:** This document provides the final text of regulations governing employee protection (or “whistleblower”) claims under the Surface Transportation Assistance Act of 1982 (STAA), as amended, implementing statutory changes to STAA enacted into law on August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007. On August 31, 2010, the Occupational Safety and Health Administration (OSHA) published an interim final rule (IFR) for STAA whistleblower complaints in the Federal Register and requested public comment on the IFR. This final rule implements changes to the IFR in response to comments received, where appropriate. This final rule also finalizes changes to the procedures for handling whistleblower complaints under STAA that were designed to make them more consistent with OSHA’s procedures for handling retaliation complaints under Section 211 of the Energy Reorganization Act of 1974, and other whistleblower provisions. It also sets forth interpretations of STAA.

**DATES:** This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Sandra Dillon, Director, Office of the Whistleblower Protection Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3112, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2199. This is not a toll-free number. This Federal Register publication is available in alternative formats: large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System), and audiotape.

**SUPPLEMENTARY INFORMATION:**

**I. Background.**

Among other provisions of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act), Public Law 110-53, 121 Stat. 266, section 1536 re-enacted the whistleblower provision in STAA, 49 U.S.C. 31105 (previously referred to as “Section 405”), with certain amendments. The regulatory revisions described herein reflect these statutory changes and also seek to clarify and improve OSHA’s procedures for handling STAA whistleblower claims, as well as to set forth interpretations of STAA. To the extent possible within the bounds of applicable statutory language, these revised regulations are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA, including Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, and Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A. Responsibility for receiving and investigating complaints under 49 U.S.C. 31105 has been

delegated by the Secretary of Labor (Secretary) to the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary). Secretary's Order 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Department of Labor's Administrative Review Board (ARB) (Secretary's Order 1-2010), 75 FR 3924-01 (Jan. 25, 2010).

## **II. Summary of Statutory Changes to STAA Whistleblower Provisions.**

The 9/11 Commission Act amended 49 U.S.C. 31105, and the related definitions provision at 49 U.S.C. 31101, by making the changes described below.

### *Expansion of Protected Activity.*

Before passage of the 9/11 Commission Act, STAA protected certain activities related to commercial motor vehicle safety. The 9/11 Commission Act expanded STAA's coverage to commercial motor vehicle security. In particular, 49 U.S.C. 31105(a)(1)(A) previously made it unlawful for a person to discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because the employee, or another person at the employee's request, filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or testified or planned to testify in such a proceeding. The 9/11 Commission Act expanded this provision to include complaints and proceedings related to violations of commercial motor vehicle security regulations, standards, and orders.

Prior to the 2007 amendments, paragraph (a)(1)(B)(i) of STAA's whistleblower provision prohibited a person from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment for refusing to operate a vehicle in violation of

a regulation, standard, or order related to commercial motor vehicle safety or health. The statute also protected any employee who refused to operate a vehicle because he or she had a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's unsafe condition. The recent STAA amendments expanded these protections to cover: (1) any employee who refuses to operate a vehicle in violation of regulations, standards, or orders related to commercial motor vehicle security; and (2) any employee who refuses to operate a vehicle because he or she has a reasonable apprehension of serious injury to himself or herself or the public due to the vehicle's hazardous security condition.

Before the statutory amendments, paragraph (a)(2) of STAA's whistleblower provision provided that an employee's apprehension of serious injury was reasonable only if a reasonable person in the circumstances then confronting the employee would have concluded that the "unsafe condition" of the vehicle established a real danger of accident, injury, or serious impairment to health. Moreover, to qualify for protection under this provision the employee had to have sought from the employer, and been unable to obtain, correction of the "unsafe condition." The August 2007 amendments replaced the term "unsafe condition" with the phrase "hazardous safety or security condition" throughout this paragraph.

The 9/11 Commission Act added a new paragraph to 49 U.S.C. 31105(a)(1)(A)(ii), making it unlawful for a person to discharge, discipline or discriminate against an employee regarding pay, terms or privileges of employment because of a perception that the employee has filed or is about to file a complaint or has begun or is about to bring a proceeding concerning a violation of a commercial motor vehicle safety or security regulation, standard, or order. Paragraph (a)(1)(C) of 49 U.S.C. 31105 is also new and makes it unlawful to discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of

employment because the employee accurately reports hours on duty pursuant to 49 U.S.C. Chapter 315. The recent statutory amendments also added paragraph (a)(1)(D) to 49 U.S.C. 31105. This paragraph prohibits discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment because the employee cooperates, or is perceived as 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. Finally, the 9/11 Commission Act inserted paragraph (a)(1)(E) into 49 U.S.C. 31105. This provision prohibits a person from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because the employee furnishes, or is perceived as having furnished or being 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 about the facts concerning any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

*Legal Burdens of Proof for STAA Complaints.*

Prior to the 9/11 Commission Act, the parties' burdens of proof in STAA actions were understood to be analogous to those developed for retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. *See, e.g., Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). The plaintiff's prima facie case could be carried by a sufficient showing that (1) he or she engaged in protected activity; (2) he or she suffered an adverse action; and (3) a causal connection existed between the two events. *Id.* The ARB also required proof that the

employer was aware that the employee had engaged in the protected activity. *See, e.g., Baughman v. J.P. Donmoyer, Inc.*, No. 05-1505, 2007 WL 3286335, at \*3 (ARB Oct. 31, 2007).

Once the complainant made this showing, an inference of retaliation arose and the burden shifted to the employer to produce evidence of a legitimate, non-retaliatory reason for the adverse action. *Clean Harbors*, 146 F.3d at 21; *Yellow Freight*, 27 F.3d at 1138. If the employer met this burden of production, the inference of retaliation was rebutted and the burden shifted back to the complainant to show by a preponderance of the evidence that the legitimate reason was a pretext for unlawful retaliation. *Id.* Where there was evidence that the employer acted out of mixed motives, *i.e.*, it acted for both permissible and impermissible reasons, the employer bore “the burden of establishing by a preponderance of the evidence that it would have taken the adverse employment action in the absence of the employee’s protected activity.” *Clean Harbors*, 146 F.3d at 21-22.

The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C. 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21 at 49 U.S.C. 42121(b). AIR21 contains whistleblower protections for employees in the aviation industry. Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv). *See Vieques Air Link, Inc. v. Dep’t of Labor*, 437 F.3d 102, 108-09 (1st Cir. 2006) (*per curiam*) (burdens of proof under AIR21).

*Written Notification of Complaints and Findings.*

Prior to the 9/11 Commission Act, STAA's whistleblower provision required the Secretary to notify persons when complaints were filed against them. The statute has now been amended at paragraph (b)(1) to clarify that this notice must be in writing. Similarly, the 9/11 Commission Act amended paragraph (b)(2)(A) of 49 U.S.C. 31105 to clarify that the Secretary's findings must be in writing.

Expansion of Remedies.

Paragraph (b)(3)(A) of 49 U.S.C. 31105 previously compelled the Secretary, upon finding a violation of STAA's whistleblower provision, to order the employer to take affirmative action to abate the violation, reinstate the complainant to his or her former position with the same pay and terms and privileges of employment, and pay compensatory damages, including backpay. The 9/11 Commission Act amended paragraph (b)(3)(A)(iii) to reflect existing law on damages in STAA whistleblower cases and expressly provide for the award of interest on backpay as well as compensation for any special damages sustained as a result of the unlawful discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. The 2007 amendments also added a new provision to 49 U.S.C. 31105, paragraph (b)(3)(C), authorizing punitive damage awards of up to \$250,000.

De Novo Review.

The August 2007 amendments added paragraph (c) to 49 U.S.C. 31105. That paragraph provides for de novo review of a STAA whistleblower claim by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of a complaint and the delay is not due to the complainant's bad faith. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

### Preemption and Employee Rights.

The 9/11 Commission Act added a new provision to 49 U.S.C. 31105 at paragraph (f) clarifying that nothing in the statute preempts or diminishes any other safeguards against discrimination provided by Federal or State law. The 2007 amendments to STAA also added a provision at paragraph (g) in 49 U.S.C. 31105 stating that nothing in STAA 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. New paragraph (g) further states that rights and remedies under 49 U.S.C. 31105 “may not be waived by any agreement, policy, form, or condition of employment.”

### Miscellaneous Provisions.

The 9/11 Commission Act added a new provision to 49 U.S.C. 31105 at paragraph (h) regarding the circumstances in which the Secretary of Transportation and the Secretary of Homeland Security may disclose the names of employees who have provided information about certain alleged violations. In addition, the amendments added a new paragraph (i) to 49 U.S.C. 31105, which provides that the Secretary of Homeland Security will establish a process by which any person may report motor carrier vehicle security problems, deficiencies or vulnerabilities. Neither of these amendments significantly impacts OSHA’s handling of whistleblower complaints under STAA.

### Definition of “Employee”.

Definitions applicable to STAA are found at 49 U.S.C 31101. That section 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 (i) directly affects commercial motor vehicle safety in the

course of employment by a commercial motor carrier; and (ii) is not an employee of the Federal, State or local government acting in the course of employment. The 9/11 Commission Act incorporated this definition into the whistleblower section of STAA, 49 U.S.C. 31105, at paragraph (j), and expanded it to include employees who directly affect commercial motor vehicle security in the course of employment by a commercial motor carrier.

### **III. Summary of Rulemaking Proceedings.**

On August 31, 2010, OSHA published in the Federal Register an IFR implementing statutory changes to STAA enacted into law on August 3, 2007, as part of the 9/11 Commission Act, Public Law 110-53, 121 Stat. 266, as well as making other improvements to Part 1978. 75 FR 53544 (Aug. 31, 2010). In addition to promulgating the IFR, OSHA's notice included a request for public comment on the interim rules by November 1, 2010. There were no objections to most of the IFR and thus OSHA has adopted the IFR, except as noted.

In response to the IFR, three organizations – the Government Accountability Project (GAP), the National Whistleblower Center (NWC), and the Transportation Trades Department, AFL-CIO (TTD), filed comments with the agency within the public comment period. OSHA has reviewed and considered these comments and now adopts this final rule, which has been revised in part to address problems perceived by the agency and the commenters.

#### General Comments.

NWC made several comments addressing particular provisions of the rule. These comments have been addressed, and changes to the regulatory provisions have been explained in the Summary and Discussion of Regulatory Provisions (below), where applicable. GAP commented that “these rules reasonably interpret statutory requirements and in some instances [will] significantly improve [OSHA] procedures to investigate whistleblower complaints.” GAP

specifically expressed support for the following provisions: .103(b), .103(d), .104(c), .104(d), and certain aspects of .104(f). Finally, TTD expressed its support for the interim final rules in general, commenting that the “rules implement improved procedures for handling whistleblower complaints under [STAA].” TTD believes that the changes “provide important protections for transportation workers,” and TTD applauded OSHA for moving forward with the rulemaking. TTD’s comments went on to suggest some changes and modifications to other interim final rules that were submitted on the same docket as the STAA interim final rule, namely the Procedures for the Handling of Retaliation Complaints Under the National Transit System Security Act and the Federal Railroad Safety Act. Those specific comments were not relevant to STAA and thus have not been addressed in the regulatory text.

#### **IV. Summary and Discussion of Regulatory Provisions.**

The regulatory provisions in this part have been made to reflect the 9/11 Commission Act’s amendments to STAA, to make other improvements to the procedures for handling STAA whistleblower cases, to interpret some provisions of STAA, and, to the extent possible within the bounds of applicable statutory language, to be consistent with regulations implementing the whistleblower provisions of the following statutes, among others, that are also administered and enforced by OSHA: the Safe Drinking Water Act, 42 U.S.C. 300j-9(i); the Federal Water Pollution Control Act, 33 U.S.C. 1367; the Toxic Substances Control Act, 15 U.S.C. 2622; the Solid Waste Disposal Act, 42 U.S.C. 6971; the Clean Air Act, 42 U.S.C. 7622; the ERA; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610 (all regulations for these statutory provisions jointly codified at 29 CFR Part 24); AIR21, codified at 29 CFR Part 1979; SOX, codified at 29 CFR Part 1980; the Pipeline Safety Improvement Act of 2002, 49 U.S.C. 60129, codified at 29 CFR Part 1981; the National Transit

Systems Security Act, 6 U.S.C. 1142, the Federal Railroad Safety Act, 49 U.S.C. 20109, codified at 29 CFR Part 1982; and the Consumer Product Safety Improvement Act, 15 U.S.C. 2087, codified at 29 CFR Part 1983. The section numbers of these STAA regulations correspond as closely as possible with the numbering in the regulations implementing other whistleblower statutes administered by OSHA.

These regulatory provisions use more appropriate terminology. First, cases brought under the whistleblower provisions of STAA are referred to as actions alleging “retaliation” rather than “discrimination.” This terminology, which has already been used in the regulations implementing the ERA and the other whistleblower statutes covered by 29 CFR Part 24, is not intended to have substantive effect. It simply reflects the fact that claims brought under these whistleblower provisions are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee’s protected activity rather than as a result of an employee’s characteristics (*e.g.*, race, gender, or religion).

Second, before the issuance of the IFR, the regulations referred to persons named in STAA whistleblower complaints as “named persons,” but in these regulations they are referred to as “respondents.” Again, this wording is not intended to have any substantive impact on the handling of STAA whistleblower cases. This wording simply reflects a preference for more conventional terminology.

*Section 1978.100 Purpose and scope.*

This section describes the purpose of the regulations implementing STAA’s whistleblower provision and provides an overview of the procedures contained in the regulations. Paragraph (a) of this section includes an updated citation reference to the correct section of the United States Code where STAA’s whistleblower provision is located and to

reflect the recent statutory amendments extending coverage to activities pertaining to commercial motor vehicle security matters. Minor editorial revisions made to paragraph (b) of this section in the IFR are continued here.

The express inclusion of certain provisions in Part 1978 should not be read to suggest that similar legal principles may not be implied under other OSHA whistleblower rules. In other words, the canon of construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) should not be applied in comparing these rules to other OSHA whistleblower rules. *See United States v. Vonn*, 535 U.S. 55, 65 (2002) (canon not applied when contrary to intent of drafters). For example, the express references to oral and internal complaints in these rules do not imply that oral and internal complaints are not protected under other OSHA whistleblower statutes.

#### Section 1978.101 Definitions.

This section includes general definitions applicable to STAA's whistleblower provision. The definitions are organized in alphabetical order and minor edits made to clarify regulatory text in the IFR are adopted here.

A definition of "business days" in paragraph (c) clarifies that the term means days other than Saturdays, Sundays, and Federal holidays. This definition is consistent with 29 CFR 1903.22(c), an OSHA regulation interpreting the analogous term "working days" in section 10 of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 659, in the same way.

The regulations in effect before the IFR defined "commercial motor carrier" as a person who satisfied the definitions of "motor carrier" and "motor private carrier" in 49 U.S.C. 10102(13) and 10102(16). The IFR replaced that definition with: "Commercial motor carrier means 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 employees to operate such a vehicle.” This definition of “commercial motor carrier” reflects the Secretary’s longstanding practice of giving that phrase expansive meaning, *i.e.*, including within its reach all motor carriers in or affecting commerce. *See, e.g., Arnold v. Associated Sand and Gravel Co.*, ALJ No. 92-STA-19, 1992 WL 752791, at \*3 (Sec’y Aug. 31, 1992) (appropriate to give the term “commercial” its legal meaning; “legislative history of the STAA . . . additionally militates in favor of construing the term expansively to describe motor carriers ‘in’ or ‘affecting’ commerce”). In addition, this definition of “commercial motor carrier” is more consistent with the statutory definition of “employer.” *See* 49 U.S.C. 31101(3). The definition in the IFR has been adopted here.

The statutory definition of “commercial motor vehicle” in paragraph (e) included in the IFR has been revised in the final rule. Rather than reiterate the statutory definition, the final rule simply refers to the definition of this term as provided in the statute, 49 U.S.C. 31101(1). This change is intended to ensure that the regulation refers to the appropriate statutory definition, should it be amended in the future. The definition of “employee” reflects the statutory amendment expanding coverage to individuals whose work directly affects commercial motor vehicle security. In addition, the statutory definitions of “employer” and “State” are in this section at paragraphs (i) and (n) respectively, and a paragraph at the end of this section clarifies that any future statutory amendments will govern in lieu of the definitions contained in section 1978.101. A definition of “complaint” in paragraph (g) clarifies the scope of activities protected by STAA’s whistleblower provisions. *See* discussion of section 1978.102 (Obligations and prohibited acts) below.

The definition of “complainant” in paragraph (f) in the IFR has been changed slightly. The word “whistleblower” has been deleted because it is unnecessary.

A sentence has been added to the definition of “employee” in section 1978.101(h) to include former employees and applicants. Such language is included in the definition of “employee” in other OSHA whistleblower rules, such as those under the National Transit Systems Security Act and the Federal Railroad Safety Act (29 CFR 1982.101(d)), SOX (29 CFR 1980.101(g)), and the OSH Act (29 CFR 1977.5(b)). This interpretation is consistent with the Supreme Court’s interpretation of the term “employee” in 42 U.S. C. 2000e-3a, the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, to include former employees. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Among the Court’s reasons for this interpretation were the lack of temporal modifiers for the term “employee”; the reinstatement remedy, which only applies to former employees; and the remedial purpose of preventing workers from being deterred from whistleblowing because of a fear of blacklisting. These reasons apply equally to the anti-retaliation provision of STAA and the other whistleblower provisions enforced by OSHA.

The definition of “person” in paragraph (k) is basically the same as the one in the IFR except for the addition of “organized” before the word “group.” The definition reflects the statutory definition of “person” for the STAA whistleblower provision in 49 App. U.S.C. 2301(4) that existed before the 1994 codification of Title 49 of the United States Code, dealing with transportation. *See* P.L.103-272, 108 Stat. 984. The provision at 49 App. U.S.C. 2301(4) stated: “‘person’ means one or more individuals, partnerships, associations, corporations, business trusts, or any other organized group of individuals.” The definition of “person” was deleted from the codification because it was regarded as unnecessary due to the Dictionary Act’s

definition of “person” in 1 U.S.C. 1, which states that the term “includes” entities, such as individuals and corporations, which for the most part are the same as the entities listed in the definition in this rule. *See* note after 49 U.S.C. 31101. Changes in codifications are not intended to make substantive changes in a statute unless the congressional intent to do so is clear. *Muniz v. Hoffman*, 422 U.S. 454, 472 n.11 (1975); *Carbo v. United States*, 364 U.S. 611, 618-19 (1961). The congressional intent to rely on the definition of “person” in 1 U.S.C. 1 does not indicate an intent to change the definition. Practically all of the entities listed in 49 App. U.S.C. 2314 are the same as the ones specifically listed in 1 U.S.C. 1. Some of the entities are different, but the Dictionary Act definition, using the word “includes,” is not an exclusive list. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“... term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”). Furthermore, because the term “person” includes an individual and it is a “person” who is prohibited from engaging in the retaliation described in 49 U.S.C. 31105, a corporate officer or other individual responsible for the retaliation is individually liable under the STAA whistleblower provision. *Smith v. Lake City Enterprises, Inc., Crystle Morgan, and Donald Morgan*, Nos. 09-033, 08-091, 2010 WL 3910346, at \*6 (ARB Sept. 24, 2010) (corporate president and sole shareholder individually liable under STAA), citing *Wilson v. Bolin Assocs., Inc.*, ALJ No. 1991-STA-004 (Sec’y Dec. 30, 1991). Section 1978.102 has been corrected to reflect the fact that the statute imposes obligations on “person[s].”

*Section 1978.102 Obligations and prohibited acts.*

This section describes the activities that are protected under STAA and the conduct that is prohibited in response to any protected activities. Insertion of this section in the IFR resulted in the renumbering of many subsequent sections; that renumbering is continued in the final rule.

The discussion below highlights some significant interpretations of STAA in these provisions, but it is by no means exhaustive.

Among other prohibited acts, it is unlawful under STAA for a person to retaliate against an employee because the employee, or someone acting pursuant to the employee's request, has filed a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard or order. 49 U.S.C. 31105(a)(1)(A)(i). STAA's whistleblower provision also prohibits a person from retaliating against an employee because the person perceives that the employee has filed or was about to file such a complaint. 49 U.S.C. 31105(a)(1)(A)(ii).

The Secretary has long taken the position that these provisions of STAA, as well as similarly worded provisions in other whistleblower statutes enforced by OSHA, cover both written and oral complaints to the employer or a government agency. The U.S. Supreme Court held that an analogous whistleblower provision in the Fair Labor Standards Act (FLSA), 29 U.S.C. 215(a)(3), protects oral as well as written complaints. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1329 (2011). Among other things, the FLSA forbids employers from discriminating against any employee "because such employee has filed any complaint." Although the Court examined "filed any complaint" in the FLSA, the decision is applicable to analogous language in STAA, as well as in other OSHA whistleblower statutes. See Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 427-28 (1973) (statutes in pari materia should be construed similarly). Specifically, Congress's intent in passing the whistleblower provision of STAA was to encourage employee reporting of noncompliance with safety regulations. Brock v. Roadway Exp., Inc., 481 U.S. 252, 258 (1987). As with the FLSA, those employees who are in the best position to report complaints under this provision may find it difficult or impractical to reduce a complaint to writing. It is particularly

important for STAA to cover oral as well as written complaints 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. Requiring that complaints of safety concerns and violations be in writing would undermine the basic purpose of the statute. Furthermore, since the passage of the STAA whistleblower provision, the ARB and federal courts have consistently held that protected activity under STAA includes oral, informal, and unofficial complaints about violations of commercial motor vehicle regulations. *See, e.g., Harrison v. Roadway Express, Inc.*, No. 00-048, 2002 WL 31932546, at \*4 (ARB Dec. 31, 2002) (“[C]omplaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial.”), *aff’d on other grounds*, 390 F.3d 752 (2d Cir. 2004); *see also, e.g., Calhoun v. Dep’t of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993)) for the proposition that “written or oral” complaints can be protected under STAA). *Cf. Power City Elec., Inc.*, No. C-77-197, 1979 WL 23049, at \*2 (E.D. Wash. Oct. 23, 1979) (noting that the term “filed”, as used in Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), “is not limited to a written form of complaint.”). As the Court noted in *Kasten*, long-standing interpretations suggest that such views are “reasonable” and “consistent with the Act.” *Kasten*, 131 S.Ct. at 1335. For these reasons, sections 1978.102(b)(1) and 1978.102(e)(1) cover the filing of written *and* oral complaints with employers or government agencies, and the definition of the term “complaint,” reflecting this intent, in the IFR in section 1978.101 is reiterated here. Similarly, the words “orally or in writing” have been added after the words “filed” and “file” in sections 1978.102(b)(1) and .102(e)(2) to clarify that the protected activity includes oral as well as written communication.

Sections 1978.102(b)(1) and 1978.102(e)(2) clarify the long-standing position of the Secretary, supported by the courts of appeals, that under STAA and other OSHA whistleblower statutes the filing of a complaint is protected, whether the complaint is filed with an employer, a government agency, or others. Similarly, the definition of “complaint” in section 1978.101(g) states that the term includes complaints to employers, government agencies, and others. *See* 29 CFR 1977.9(c) (section 11(c) of the OSH Act protects complaints to an employer); *McKoy v. North Fork Services Joint Venture*, No. 04-176, 2007 WL 1266925, at \*3 (ARB Apr. 30, 2007) (complaining to employer about violations of environmental statutes is protected activity). STAA does not specify the entities to whom a complaint may be filed in order to be protected. The preamble to the interim final rule noted: “The Secretary has long taken the position that these provisions of STAA, as well as similarly worded provisions in other whistleblower statutes enforced by OSHA, cover both written and oral complaints to the employer or a government agency.” 75 FR 53544, 53547 (Aug. 31, 2010) (emphasis added). In particular, the Secretary has ruled that complaints to an employer are protected under STAA in order to promote the statute’s goal of highway safety. *Israel v. Branrich, Inc.*, No. 09-069, 2011 WL 5023051, at \*4 (ARB Sept. 29, 2011); *Davis v. H.R. Hill, Inc.*, ALJ No.1986-STA-018 (Sec’y Mar. 19, 1987). This interpretation has been adopted by courts of appeals. *Calhoun v. Dep’t of Labor*, 576 F.3d 201, 212 (4th Cir. 2009); *Clean Harbors Env’tl Services, Inc. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998). *Cf. Minor v. Bostwick Laboratories, Inc.*, 669 F.3d 428 (4th Cir. 2012) (analogous anti-retaliation provision of Fair Labor Standards Act protects complaints to an employer).

In describing the conduct that is prohibited under STAA, the final rule adds the words “harass, suspend, demote” to paragraphs (b), (c), and (e) to make this rule more consistent with other OSHA whistleblower rules.

Section 1978.103 Filing of retaliation complaints.

This section (formerly section 1978.102) was revised in the IFR to make it more consistent with the regulatory procedures for other OSHA-administered whistleblower laws; that revision is adopted here with minor editorial corrections.

Complaints filed under STAA's whistleblower provision need not be in any particular form. Complainants have always been permitted to file STAA whistleblower complaints either orally or in writing. In light of this longstanding practice, OSHA will continue to accept STAA whistleblower complaints in either oral or written form. Allowing STAA whistleblower complaints to be filed orally is also consistent with OSHA's practice under other OSHA whistleblower laws. Language has been added to paragraph (b) to clarify that when a complaint is made orally, OSHA will reduce the complaint to writing. In addition, paragraph (b) provides that if an employee is not able to file a complaint in English, OSHA will accept the complaint in any other language.

Language in paragraph (c) of the IFR providing that the complaint should be filed with the "... OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed..." has been changed. "Area Director" has been changed to "office" in recognition of the possibility that organizational changes may take place.

Language in paragraph (d) clarifies the date on which a complaint will be considered "filed," *i.e.*, the date of postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office. To be timely, a complaint must be filed within 180 days of the occurrence of the alleged violation. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the

complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. Equal Emp't Opportunity Comm'n v. United Parcel Serv., Inc., 249 F.3d 557, 561-62 (6th Cir. 2001).

Provisions dealing with tolling of the 180-day period for the filing of STAA whistleblower complaints were deleted in the IFR for consistency with other OSHA whistleblower regulations, which do not contain this language; the final rule makes no changes in this regard. This revision is not intended to change the way OSHA handles untimely complaints under any whistleblower laws. A sentence in the regulatory text clarifies that filing deadlines may still be tolled based on principles developed in applicable case law. See, e.g., Donovan v. Hahner, Foreman & Harness, Inc., 736 F.2d 1421, 1423-29 (10th Cir. 1984).

Finally, paragraph (e), "Relationship to Section 11(c) complaints," conforms to similar provisions implementing other OSHA whistleblower programs and more clearly describes the relationship between Section 11(c) complaints and STAA whistleblower complaints. Section 11(c) of the OSH Act generally prohibits employers from retaliating against employees for filing safety or health complaints or otherwise initiating or participating in proceedings under the OSH Act. In some circumstances an employee covered by STAA may engage in activities that are protected under STAA and Section 11(c) of the OSH Act. For example, a freight handler loading cargo onto a commercial motor vehicle may complain about both the overloading of that vehicle (a safety complaint protected by STAA) and also about an unsafe forklift (a safety complaint covered by the OSH Act). In practice, OSHA would investigate whether either or both of these protected activities caused the firing. Paragraph (e) now clarifies that STAA whistleblower complaints that also allege facts constituting an 11(c) violation will be deemed to have been filed under both statutes. Similarly, Section 11(c) complaints that allege facts

constituting a violation of STAA's whistleblower provision will also be deemed to have been filed under both laws. In these cases, normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

OSHA notes that a complaint of retaliation filed with OSHA under STAA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Sylvester v. Parexel Int'l, Inc.*, ARB Case No. 07-123, 2011 WL 2165854, at \*9-10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts the agency to the existence of the alleged retaliation and the complainant's desire that the agency investigate the complaint. Upon the filing of a complaint with OSHA, the Assistant Secretary is to determine whether "the complaint, supplemented as appropriate by interviews of the complainant" alleges "the existence of facts and evidence to make a prima facie showing." 29 CFR 1978.104(e). As explained in section 1978.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. *See* 49 U.S.C. 42121(b)(2), 29 CFR 1978.104(e). *Section 1978.104 Investigation.*

This section (formerly section 1978.103) more closely conforms to the regulations implementing other whistleblower provisions administered by OSHA. Former paragraph (f) in section 1978.102, which deals with the notice sent to employers when complaints are filed

against them, is in paragraph (a) in section 1978.104, where it more appropriately appears under the “Investigation” heading. In addition, OSHA here adopts minor revisions made to that paragraph in the IFR to be more consistent with similar provisions in other OSHA whistleblower regulations. Of particular note, OSHA adopts language in the IFR which was added requiring OSHA to send the Federal Motor Carrier Safety Administration (FMCSA) a copy of the notice that goes to the employer. This has been standard practice in any event. Minor editorial changes to the language of the IFR have been made.

Former section 1978.103(a), which simply stated that OSHA would investigate and gather data as it deemed appropriate, was deleted in the IFR as unnecessary; that deletion remains. The language in paragraph (a) of the IFR relating to the provision of information to respondent’s counsel has been deleted because when the respondent is first notified about the complaint the respondent is usually not represented by counsel. Paragraph (b) conforms to other OSHA whistleblower regulations. Language describing the persons who can be present and the issues that can be addressed at OSHA’s meetings with respondents was deleted in the IFR and is not present in the final rule, but this deletion is not substantive.

Paragraph (c) specifies that throughout the investigation the agency will provide to the complainant (or the complainant’s legal counsel, if the complainant is represented by counsel) a copy of all of respondent’s submissions to the agency that are responsive to the complainant’s whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The phrase “if necessary” has been added because not all of respondent’s submissions will contain confidential information. Paragraph (d) addresses confidentiality in investigations. Minor editorial changes have been made.

Paragraph (e) reflects the incorporation of the AIR21 burdens of proof provision by the second sentence of 49 U.S.C. 31105(b)(1), which was added by the 9/11 Commission Act. This paragraph generally conforms to similar provisions in the regulations implementing the AIR21 and ERA whistleblower laws. All of these statutes now require that a complainant make an initial prima facie showing that protected activity was “a contributing factor” in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. *Ferguson v. New Prime, Inc.*, No. 10-75, 2011 WL 4343278, at \*3 (ARB Aug. 31, 2011); *Clarke v. Navajo Express*, No. 09-114, 2011 WL 2614326, at \*3 (ARB June 29, 2011). The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. Complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action. Language from some of OSHA’s other whistleblower regulations, including those implementing AIR21 and ERA, setting forth specific elements of the complainant’s prima facie case, has been carried over into these regulations.

The revised STAA provision specifically bans retaliation against employees because of their perceived protected activity. This provision clarifies existing whistleblower law. *See Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368 (8th Cir. 1994) (“Construing § 11(c), the OSH Act’s anti-retaliation provision, to protect employees from adverse employment actions because they are suspected of having engaged in protected activity is consistent with . . . the specific purposes of the anti-retaliation provisions.”). However, the references in this section to perceived protected

activity have been deleted here because the concept is covered by the language of paragraph (e)(2)(ii) on suspected protected activity. Also, the final rule adds language clarifying that the revised STAA provision protects not only actual protected activity but also activity about to be undertaken.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same framework now found in the AIR21 law and STAA, served a “gatekeeping function” that “stemm[ed] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Cf. Ferguson, supra* (analogous burden shift in litigation); *Clarke, supra* (same). Thus, OSHA must dismiss a complaint under STAA and not investigate (or cease investigating) if either: (1) the complainant fails to meet the prima facie showing that protected activity or the perception of protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity or the perception thereof. The final rule makes other minor editorial corrections.

Former section 1978.103(c) was moved to paragraph (f) of this section in the IFR; that change remains. In the IFR minor revisions were made to this paragraph to conform to similar paragraphs in the regulations implementing the AIR21 and SOX whistleblower provisions; those changes remain. The provision allows 10 business days (rather than 5 days) for the respondent to present evidence in support of its position against an order of preliminary reinstatement.

Paragraph (f) of this section has been revised to provide complainants with copies of the same materials provided to respondents under this paragraph, except to the extent that confidentiality laws require redaction.

NWC and GAP commented on the provisions in section 1978.104. NWC noted that to conduct a full and fair investigation, OSHA needs to obtain the available, responsive information from both parties. If one party does not have the information submitted by the other, NWC explained, that party cannot help the investigation by providing available information to shed light on the matter. NWC also suggested that the phrase “other applicable confidentiality laws” be replaced with more specific language describing the confidentiality laws that might apply to a respondent’s answer.

GAP commented that while it was pleased with the provisions in section 1978.104 providing copies of respondent’s submissions to complainants and protecting witness confidentiality, it was concerned that the procedures under section 1978.104(f) “disenfranchise[d] the victim, giving only one side of the dispute the chance to participate in the most significant step of the process” and that “[a]t a minimum, this procedural favoritism means there will not be an even playing field in the administrative hearing.” GAP advocated removing section 1978.104(f).

OSHA agrees with NWC and GAP that the input of both parties in the investigation is important to ensuring that OSHA reaches the proper outcome during its investigation. To that end, in response to the comments, the procedures under STAA have been revised to contain the following safeguards aimed at ensuring that complainants and respondents have equal access to information during the course of the OSHA investigation:

- Section 1978.104(c) provides that, throughout the investigation, the agency will provide the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint, with confidential information redacted as necessary, and the complainant will have an opportunity to respond to such submissions; and
- Section 1978.104(f) provides that the complainant will receive a copy of the materials that must be provided to the respondent under that paragraph, with confidential information redacted as necessary.

Regarding NWC's suggestion that OSHA provide more specific information about the confidentiality laws that may protect portions of the information submitted by a respondent, OSHA anticipates that the vast majority of respondent submissions will not be subject to any confidentiality laws. However, in addition to the Privacy Act, a variety of confidentiality provisions may protect information submitted during the course of an investigation. For example, a respondent may submit confidential business information, the disclosure of which would violate the Trade Secrets Act, 18 U.S.C. 1905. While the agency recognizes that a respondent must meet a high standard to show that the information it submits is protected and that it has a responsibility to independently evaluate claims that submissions contain confidential business information not subject to disclosure, it believes that the provision as drafted appropriately allows it to address legitimate claims of confidentiality.

With regard to GAP's comment that section 1978.104(f) should be removed, OSHA notes the purpose of 1978.104(f) is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted in the Supreme Court's ruling in *Brock v. Roadway Express*,

*Inc.*, 481 U.S. 252, 264 (1987), requiring OSHA to give the respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement.

Nonetheless, while recognizing that the purpose of section 1978.104(f) is to ensure that the respondents have been afforded due process prior to OSHA ordering preliminary reinstatement, OSHA appreciates that complainants wish to stay informed regarding their cases and may continue to have valuable input, even at this late stage in the investigation. Thus, under these rules, OSHA will provide complainants with a copy of the materials sent to the respondent under section 1978.104(f), with materials redacted in accordance with confidentiality laws.

*Section 1978.105 Issuance of findings and preliminary orders.*

Paragraph (a) in section 1978.104, as it existed before the IFR, now at paragraph (a) in this section, was updated in the IFR to reflect the recent amendments to STAA expanding available remedies; the final rule adopts those revisions. Minor editorial corrections have been made in the final rule. If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will order appropriate relief. Such order will include, where appropriate: a requirement that the respondent take affirmative action to abate the violation; reinstatement of the complainant to his or her former position with the same compensation, terms, conditions and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred); and payment of punitive damages up to \$250,000. The final rule adds the words "take affirmative action" in connection with abatement of the violation because the statute uses this important term of labor law, found in the National Labor Relations Act at 29 U.S.C. 160(c) and Title VII of the Civil Rights Act of 1964,

as amended, at 42 U.S.C. 2000e-5(g)(1). The word “same” has been inserted before “compensation” because this language is in the statute. A minor wording change, the deletion of the word “together”, has been made in the final rule. The discussion of punitive damages has been put in a separate sentence to track the statute.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he or she received prior to his or her termination, but not actually return to work. *Smith, supra*, at \*8 (front pay under STAA). Such front pay or economic reinstatement is also employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). *See, e.g., Secretary of Labor ex rel. York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at \*1 (ALJ June 26, 2001). Congress intended that complainants be preliminarily reinstated to their positions if OSHA finds reasonable cause that they were discharged in violation of STAA’s whistleblower provision. When a violation is found, the norm is for OSHA to order immediate, preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the complainant. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the complainant continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating a complainant should the employer ultimately prevail in the whistleblower litigation.

In ordering interest on backpay, the agency has determined that, instead of computing the

interest due by compounding quarterly the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points, interest will be compounded daily. The Secretary believes that daily compounding of interest better achieves the make-whole purpose of a backpay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on backpay by the National Labor Relations Board. See Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 356 NLRB No. 8, 2010 WL 4318371, at \*3-4 (2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

Paragraph (a)(2) of this section requires the Assistant Secretary to notify the parties if he or she finds that a violation has not occurred. Former section 1978.104(c), which provided for the suspension of 11(c) complaints pending the outcome of STAA proceedings, was deleted in the IFR; the final rule adopts that revision. As described above, section 1978.103(e) adequately describes the relationship between STAA and 11(c) complaints.

Paragraph (b) clarifies that OSHA need not send the original complaint to the Chief Administrative Law Judge when it issues its findings and preliminary order; a copy of the complaint will suffice. Former section 1978.105(b)(1) was moved to section 1978.105(c) in the IFR; the final rule adopts that revision. This paragraph states that the Assistant Secretary's preliminary order will be effective 30 days after receipt, or on the compliance date set forth in the preliminary order, whichever is later, unless an objection is filed. It also clarifies that any preliminary order requiring reinstatement will be effective immediately. This paragraph mirrors

existing provisions in other OSHA whistleblower regulations. Minor editorial changes have been made in the final rule.

Subpart B – Litigation.

Section 1978.106 Objections to the findings and the preliminary order and request for a hearing.

Minor revisions were made to paragraph (a), formerly section 1978.105(a), in the IFR to conform to other OSHA whistleblower regulations; the final rule adopts those revisions. Other minor revisions have been made in the final rule. The paragraph clarifies that with respect to objections to the findings and preliminary order, the date of the postmark, fax, or electronic communication transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery, or other means, the objection is filed upon receipt. The filing of objections is also considered a request for a hearing before an ALJ. The amended language also clarifies that in addition to filing objections with the Chief Administrative Law Judge, the parties must serve a copy of their objections on the other parties of record and the OSHA official who issued the findings and order. The requirement in the IFR that objections be served on the Assistant Secretary and the Associate Solicitor for Occupational Safety and Health has been deleted because such service is unnecessary. A failure to serve copies of the objections on the appropriate parties does not affect the ALJ's jurisdiction to hear and decide the merits of the case. *See Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, No. 04-101, 2005 WL 2865915, at \*7 (ARB Oct. 31, 2005).

The title to former section 1978.105(b) was deleted in the IFR because it was unnecessary; the final rule adopts that revision. In addition, as previously mentioned, former paragraph (b)(1) in section 1978.105 was moved to new paragraph (c) in section 1978.105; the

final rule adopts that revision. Finally, some minor, non-substantive revisions were made in the IFR to former 1978.105(b)(2), now at 1978.106(b), and additional language was added to that paragraph to clarify that all provisions of the ALJ's order, with the exception of any order for preliminary reinstatement, will be stayed upon the filing of a timely objection; the final rule adopts those revisions. A respondent may file a motion to stay OSHA's preliminary reinstatement order with the Office of Administrative Law Judges. However, such a motion will be granted only on the basis of exceptional circumstances. A stay of the Assistant Secretary's preliminary order of reinstatement would be appropriate only where the respondent can establish the necessary criteria for a stay, i.e. the respondent would suffer irreparable injury; the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

#### Section 1978.107 Hearings.

Former section 1978.106, which became section 1978.107 in the IFR, was titled "Scope of rules; applicability of other rules; notice of hearing." The title was changed to "Hearings," the title assigned to similar sections in other OSHA whistleblower regulations. The final rule adopts those revisions. Other minor revisions have been made in the final rule.

Minor revisions were made to paragraph (a) in the IFR, which adopted the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at 29 CFR Part 18; those revisions have been adopted here. However, in the final rule the reference to the ALJ rules of evidence has been deleted. This change is discussed below. Changes were also made in the IFR to paragraph (b) to conform to other OSHA whistleblower regulations. The requirements for the ALJ to set a hearing date within 7 days and to commence a hearing within 30 days were deleted, and language was added

in the IFR to clarify that hearings will commence expeditiously and be conducted de novo and on the record. The language in the IFR is not intended to change case-handling practices. The final rule adopts those revisions.

Paragraph (b) has been modified in the final rule to add language providing that ALJs have broad discretion to limit discovery in order to expedite the hearing. This provision furthers an important goal of STAA—to have unlawfully terminated employees reinstated as quickly as possible.

Paragraph (c), which deals with situations in which both the complainant and the respondent object to the findings and/or preliminary order, was revised in the IFR, consistent with the changes made to paragraph (b), to remove language stating that hearings shall commence within 30 days of the last objection received. The final rule adopts those revisions.

Former paragraph (d), dealing with the ALJ's discretion to order the filing of prehearing statements, was deleted in the IFR as unnecessary; the final rule adopts that change.

A new paragraph (d) has been added to this section. It provides that in ALJ proceedings formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. Furthermore, the ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. This evidence provision differs from the practice under the STAA IFR (section 1978.107(a)) and the original STAA rules (section 1978.106(a)) to follow the ALJ rules of evidence in 29 CFR Part 1918. The new provision is consistent with the Administrative Procedure Act, which provides at 5 U.S.C. 556(d): "...Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence...." *See also Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 705-06 (1948) (administrative agencies not restricted by rigid

rules of evidence). Furthermore, it is inappropriate to apply the technical rules of evidence in Part 18 because complainants often appear *pro se*. Also, hearsay evidence is often appropriate in whistleblower cases, as there often is no relevant evidence other than hearsay to prove discriminatory intent. ALJs have the responsibility to determine the appropriate weight to be given to such evidence. For these reasons, the interests of determining all of the relevant facts are best served by not having strict evidentiary rules.

Section 1978.108 Role of Federal agencies.

Former section 1978.107, titled “Parties,” was moved in the IFR to section 1978.108 with the new title “Role of Federal agencies.” The final rule adopts that change. This conforms to the terminology used in OSHA’s other whistleblower regulations.

Former paragraphs (a), (b), and (c) in section 1978.107 were combined in section 1978.108(a)(1) in the IFR; that revision remains. The changes which were made to these paragraphs are not intended to be substantive, *i.e.*, there is no intent to change the rights to party status currently afforded the Assistant Secretary, complainants, or respondents. The Assistant Secretary, represented by an attorney from the appropriate Regional Solicitor’s Office, will still generally assume the role of prosecuting party in STAA whistleblower cases in which the respondent objects to the findings or preliminary order. This continues longstanding practice in STAA cases. The public interest generally requires the Assistant Secretary’s continued participation in such matters. Relatively few private attorneys have developed adequate expertise in representing STAA whistleblower complainants, and complainants in the motor carrier industry have been more likely to proceed *pro se* than employees covered by OSHA’s other whistleblower programs. Where the complainant, but not the respondent, objects to the findings or order, the regulations retain the Assistant Secretary’s discretion to participate as a

party or amicus curiae at any stage of the proceedings, including the right to petition for review of an ALJ decision.

Paragraph (a)(2) clarifies that if the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1), he or she may, upon written notice to the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party, and the ALJ will issue appropriate orders to regulate the course of future proceedings.

Paragraph (a)(3) provides that copies of documents in all cases must be sent to all parties, or, if represented by counsel, to them. If the Assistant Secretary is a party, documents shall be sent to the Regional Solicitor's Office representing the Assistant Secretary. This is a departure from the IFR, which also required distribution of documents to the Assistant Secretary and, where he or she was a party, to the Associate Solicitor for Occupational Safety and Health. Experience has shown that the additional distribution was not necessary. In the interest of saving time and resources the requirements for this additional distribution are being deleted.

Paragraph (b) states that the Federal Motor Carrier Safety Administration (FMCSA), an agency of the U.S. Department of Transportation, may participate in the proceedings as amicus curiae at its own discretion. This paragraph also permits the FMCSA to request copies of all documents, regardless of whether it is participating in the case. This provision mirrors similar language in the regulations implementing other OSHA-administered whistleblower laws.

The provisions formerly at section 1978.108, which described the manner in which STAA whistleblower cases would be captioned or titled, were deleted in the IFR. It is unnecessary to continue to include that material in these regulations.

*Section 1978.109 Decisions and orders of the administrative law judge.*

This section sets forth the content of the decision and order of the ALJ, and includes the standards for finding a violation under STAA's whistleblower provision. Minor editorial revisions have been made in the final rule. References to the perception of protected activity have been deleted in the final rule. This concept is adequately covered by section 1978.104(e)(2)(ii) (employer knowledge shown by suspicion of protected activity). The title of this section conforms to the title assigned to similar provisions in other OSHA whistleblower regulations. Before the issuance of the IFR, section 1978.109 addressed decisions of both the ALJs and the ARB. In conformance with other OSHA whistleblower regulations, these two topics were separated by the IFR into individual sections; this separation remains in the final rule. Section 1978.109 covers only ALJ decisions and section 1978.110 addresses ARB decisions.

Former paragraph (a) was divided in the IFR among multiple paragraphs in this section and otherwise revised to reflect the parties' new burdens of proof and to conform more closely to the regulations implementing other OSHA-administered whistleblower laws. Those changes remain in the final rule. In litigation, the statutory burdens of proof require a complainant to prove that the alleged protected activity was a "contributing factor" in the alleged adverse action. If the complainant satisfies his or her burden, the employer, to escape liability, must prove by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Clarke, supra*, at \*3. The complainant (whenever this term is used in this paragraph, it also refers to the Assistant Secretary) can succeed by providing either direct or indirect proof of contribution. Direct evidence is "smoking

gun” evidence that conclusively connects the protected activity and the adverse action and does not rely upon inference. If the complainant does not produce direct evidence, he or she must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that a motive prohibited by STAA was the true reason for the adverse action. One type of circumstantial evidence is evidence that discredits the respondent’s proffered reasons for the adverse action, demonstrating instead that they were pretexts for retaliation. *Id.* Another type of circumstantial evidence is temporal proximity between the protected activity and the adverse action. *Ferguson, supra*, at \*2. The respondent may avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. *Clarke, supra*, at \*3. This burden of proof regimen supersedes the one in effect before the 2007 amendments to STAA. *Id.* at 7, n.1.

The requirements that the ALJ close the record within 30 days after the filing of the objection and issue a decision within 30 days after the close of the record are not in these rules because procedures for issuing decisions, including their timeliness, are addressed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR 18.57.

Section 1978.109(c), which is similar to provisions in other OSHA whistleblower regulations, provides that the Assistant Secretary’s determinations about when to proceed with an investigation and when to dismiss a complaint without completing an investigation are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, may not remand cases to the Assistant Secretary to conduct an investigation or make

further factual findings. If there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if warranted by the facts and circumstances.

Section 1978.109(d)(1) now describes the relief the ALJ can award upon finding a violation and reflects the recent statutory amendments (see earlier discussion of section 1978.105(a)). The language of the IFR has been slightly modified to clarify the available remedies. The requirement to take appropriate affirmative action to abate the violation is separated from the other remedies, as it is in the STAA remedy provision, 49 U.S.C. 31105(b)(3)(A). Affirmative action to abate the violation, required by section 31105(b)(3)(A)(i), includes a variety of measures in addition to others in (3)(A), such as posting notices about STAA orders and rights, as well as expungement of adverse comments in a personnel record. *Scott v. Roadway Express, Inc.*, No. 01-065, 2003 WL 21269144, at \*1-2 (ARB May 29, 2003) (posting notices of STAA orders and rights); *Pollock v. Continental Express*, Nos. 07-073, 08-051, 2010 WL 1776974, at \*9 (ARB Apr. 7, 2010) (expungement of adverse references). Other minor wording changes have been made. In addition, paragraph (d)(2) in this section requires the ALJ to issue an order denying the complaint if he or she determines that the respondent has not violated STAA.

Before the IFR, ALJs' decisions and orders were subject to automatic review by the ARB. These procedures were unique to STAA whistleblower cases and resulted in a heavy STAA caseload for the ARB. This made it more difficult for the ARB to promptly resolve the cases on its docket and delayed the resolution of STAA cases in which the parties were mutually satisfied with the ALJ's decision and order. Overall, requiring mandatory ARB review of every STAA whistleblower case is an inefficient use of limited resources. In conformance with the procedures used for the other whistleblower cases investigated by OSHA and adjudicated by

ALJs, these regulations provide for ARB review of an ALJ's decision only if one or more of the parties to the case files a petition requesting such review. These procedures for review of ALJ decisions apply to all ALJ decisions issued on or after the effective date of the IFR, August 31, 2010. The final rule adopts these revisions.

In the IFR, former section 1978.109(b) was deleted, although much of its content was moved to paragraph (e); the final rule adopts those revisions. Section 1978.109(e), which borrows language from similar provisions in other OSHA whistleblower regulations, gives parties 14 days after the date of the ALJ's decision to file a petition for review with the ARB. If no petition for review is filed within that timeframe, the ALJ's decision is final and all portions of the order become effective. Paragraph (e), in addition to giving parties 14 days to seek review before the ARB, clarifies that any orders relating to reinstatement will be effective immediately upon receipt of the decision by the respondent.

In the IFR, all of the provisions in former section 1978.109, which codified the automatic review process, primarily former paragraphs (c)(1) and (c)(2), were deleted. The content of former paragraph (c)(3), regarding the standard for ARB review of ALJ decisions, was moved to new section 1978.110(b). The content of former paragraph (c)(4), which required the ARB to issue an order denying the complaint if it determined that the respondent had not violated the law, was moved to section 1978.110(e). Former paragraph (c)(5), which required service of the ARB decision on all parties, became a part of section 1978.110(c). The final rule adopts all those revisions.

OSHA has revised the period for filing a timely petition for review with the ARB to 14 days rather than 10 business days. With this change, the final rule expresses the time for a petition for review in a way that is consistent with the other deadlines for filings before the ALJs

and the ARB in the rule, which are also expressed in days rather than business days. This change also makes the final rule congruent with the 2009 amendments to Rule 6(a) of the Federal Rules of Civil Procedure and Rule 26(a) of the Federal Rules of Appellate Procedure, which govern computation of time before those tribunals and express filing deadlines as days rather than business days. Accordingly, the ALJ's order will become the final order of the Secretary 14 days after the date of the decision, rather than after 10 business days, unless a timely petition for review is filed. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

*Section 1978.110 Decisions and orders of the Administrative Review Board.*

This section is borrowed largely from existing regulations implementing other OSHA whistleblower laws. Minor editorial corrections have been made in the final rule. In accordance with the decision to discontinue automatic ARB review of ALJ decisions, paragraph (a) of this section gives the parties 14 days from the date of the ALJ's decision to file a petition for review with the ARB. If no timely petition for review is filed, the decision of the ALJ becomes the final decision of the Secretary, and is not subject to judicial review. Paragraph (a) also clarifies that the date of the postmark, fax, electronic communication transmittal, or hand-delivery will be deemed the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. In its comments, NWC suggested that the filing period be extended from 10 business days to 30 days to make this section parallel to the provision in 1978.105(c), which allows for 30 days within which to file an objection. OSHA declines to extend the filing period to 30 days because the 14-day filing period is consistent with the practices and procedures followed in OSHA's other whistleblower programs. Furthermore, parties may file a motion for extension of time to appeal an ALJ's decision, and the ARB has

discretion to grant such extensions. However, as explained above, OSHA has revised the period to petition for review of an ALJ decision to 14 days rather than 10 business days. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

With regard to section 1978.110(a), NWC urged deletion of the provision that “[t]he parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived.” NWC commented that parties should be allowed to add additional grounds for review in subsequent briefs and that allowing parties to do so would further the goal of deciding cases on the merits. OSHA's inclusion of this provision is not intended to limit the circumstances in which parties can add additional grounds for review as a case progresses before the ARB, but rather the rules include this provision to put the public on notice of the possible consequences of failing to specify the basis of a petition to the ARB. OSHA recognizes that while the ARB has held in some instances that an exception not specifically urged may be deemed waived, the ARB also has found that the rules provide for exceptions to this general rule. *See, e.g., Furland v. American Airlines, Inc.*, Nos. 09-102, 10-130, 2011 WL 3413364, at \*7, n.5 (ARB Jul. 27, 2011), *petition for review filed*, (11th Cir. Oct. 3, 2011) (No. 11-14419-C) (where a complainant consistently made an argument throughout the administrative proceedings the argument was not waived simply because it appeared in the complainant's reply brief to the ARB rather than in the petition for review); *Avlon v. American Express Co.*, No. 09-089, 2011 WL 4915756, at \*4-5, n.1 (ARB Sept. 14, 2011) (consideration of an argument not specifically raised in complainant's petition for review is believed to be within the authority of the ARB, and parallel provisions in Sarbanes-Oxley whistleblower regulations do not mandate that the ARB must limit its review to ALJ conclusions assigned as

error in the petition for review); *Brookman v. Levi Strauss*, No. 07-074, 2008 WL 7835844, at \*5 (ARB Jul. 23, 2008) (concurring with the ALJ's findings despite Complainant's failure to specifically identify objections and invoke ARB review). However, recognizing that the interim final rule may have suggested too stringent a standard, the phrase "will ordinarily" has been replaced with "may."

Consistent with the procedures for petitions for review under other OSHA-administered whistleblower laws, paragraph (b) provides that the ARB has discretion to accept or reject review in STAA whistleblower cases. Congress intended these whistleblower cases to be expedited, as reflected by the recent amendment to STAA providing for a hearing de novo in district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint. Making review of STAA whistleblower cases discretionary may assist in furthering that goal.

The ARB has 30 days to decide whether to grant a petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. This section further provides that when the ARB accepts a petition for review, it will review the ALJ's factual determinations under the substantial evidence standard, a standard previously set forth in section 1978.109(c)(3) before the issuance of the IFR. If a timely petition for review is filed with the ARB, relief ordered by the ALJ is inoperative while the matter is pending before the ARB, except that orders of reinstatement will be effective pending review. Paragraph (b) does provide that in exceptional circumstances the ARB may grant a motion to stay an ALJ's order of reinstatement. A stay of a reinstatement order is only appropriate when the respondent can establish the necessary criteria for a stay, *i.e.*, the respondent will suffer irreparable injury;

the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

Paragraph (c), which provides that the ARB will issue a final decision within 120 days of the conclusion of the ALJ hearing, was revised to state that the conclusion of the ALJ hearing will be deemed to be 14 days after the date of the decision of the ALJ, rather than after 10 business days, unless a motion for reconsideration has been filed with the ALJ in the interim. Like the revision to section 1978.110(a), explained above, this revision does not substantively alter the length of time before the ALJ hearing will be deemed to have been concluded. This paragraph further provides for the ARB's decision in all cases to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health.

Paragraph (d) describes the remedies the ARB can award if it concludes that the respondent has violated STAA's whistleblower provision (see earlier discussion of section 1978.109(d)(1)). In addition, under paragraph (e), if the ARB determines that the respondent has not violated STAA, it will issue an order denying the complaint. Paragraph (f) clarifies that the procedures for seeking review before the ARB apply to all cases in which ALJ decisions were issued on or after the effective date of the IFR, August 31, 2010.

#### Subpart C – Miscellaneous Provisions.

##### Section 1978.111 Withdrawal of STAA complaints, findings, objections, and petitions for review; settlement.

This section provides procedures and time periods for the withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, the withdrawal of objections to findings and/or preliminary orders, and the withdrawal of petitions for review of

ALJ decisions. It also provides for the approval of settlements at the investigative and adjudicative stages of the case. Minor editorial changes have been made in the final rule.

Paragraph (a) permits a complainant to withdraw orally or in writing his or her complaint to the Assistant Secretary, at any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order. The Assistant Secretary confirms in writing the complainant's desire to withdraw and will determine whether to approve the withdrawal. The Assistant Secretary will notify all parties if the withdrawal is approved. Paragraph (a) clarifies that complaints that are withdrawn pursuant to settlement agreements prior to the filing of objections must be approved in accordance with the settlement approval procedures in paragraph (d). In addition, paragraph (a) clarifies that the complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order. Paragraph (c) addresses situations in which parties seek to withdraw either objections to the Assistant Secretary's findings and/or preliminary order or petitions for review of ALJ decisions. Paragraph (c) provides that a party may withdraw objections to the Assistant Secretary's findings and/or preliminary order at any time before the findings and preliminary order become final by filing a written withdrawal with the ALJ. Similarly, if a case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, depending on where the case is pending, will determine whether to approve the withdrawal of the objections or the petition for review. Paragraph (c) clarifies that if the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or preliminary order, and there are no other pending objections, the Assistant Secretary's findings and preliminary order will become the final order of the Secretary. Likewise, if the ARB approves a request to withdraw a petition for

review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. Finally, paragraph (c) provides that if objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d).

Paragraph (d)(1) states that a case may be settled at the investigative stage if the Assistant Secretary, the complainant, and the respondent agree. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties. Minor, non-substantive changes are being made to paragraph (d)(2). Paragraph (d)(3) is being deleted because the withdrawal of the Assistant Secretary as a party as a matter of prosecutorial discretion is adequately covered by section .107(a)(2). Paragraph (e), borrowing language from similar provisions in other OSHA whistleblower regulations, clarifies that settlements approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in federal district court pursuant to 49 U.S.C. 31105(e).

*Section 1978.112 Judicial review.*

This section describes the statutory provisions for judicial review of decisions of the Secretary and, in cases where judicial review is sought, requires the ARB to submit the record of proceedings to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court. Non-substantive revisions to paragraphs (a), (b), and (c) were made in the IFR and are continued here. Minor editorial changes from the IFR were made in the final rule. In the final rule a reference to the transmission of the record to a court of appeals by an ALJ has been made because parties may file petitions for review of those decisions in the courts

of appeals where they have previously requested review by the ARB and the ARB has denied review.

Former section 1978.112, which addressed postponement due to the pendency of proceedings in other forums, including grievance-arbitration proceedings under collective bargaining agreements, and deferral to the outcomes of such proceedings, was deleted in the IFR to conform to other OSHA whistleblower regulations, which do not contain similar provisions; that deletion remains. This is a non-substantive change. Postponement and deferral principles will still be applied in accordance with case law.

Section 1978.113 *Judicial enforcement.*

In the IFR, non-substantive revisions were made to this section, which describes the Secretary's power under STAA's whistleblower provision to obtain judicial enforcement of orders, including orders approving settlement agreements; the final rule adopts those revisions. Minor editorial corrections have been made in the final rule.

Section 1978.114 *District court jurisdiction of retaliation complaints under STAA.*

This section deals with the recent amendment to STAA, 49 U.S.C. 31105(c), allowing a complainant in a STAA whistleblower case to bring an action in district court for de novo review if there has been no final decision of the Secretary and 210 days have passed since the filing of the complaint and the delay was not due to the complainant's bad faith. Section 1978.114 has been drafted to reflect the Secretary's position that it would not be reasonable to construe the statute to permit a complainant to initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the administrative complaint. In the Secretary's view, the purpose of the "kick-out" provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation

where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. The regulations have been drafted in accordance with this position. Minor editorial corrections have been made in the final rule.

The IFR did not note that 49 U.S.C. 31105(c) guarantees the right to a jury trial at the request of either party in these cases. This rule notes that statutory provision.

In this section, OSHA eliminated the requirement that complainants provide the agency 15 days advance notice before filing a de novo complaint in district court. Instead, this section provides that within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. A copy of the complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed. The reference to the OSHA Regional Administrator in the IFR has been changed in the final rule to a reference to the OSHA official who issued the findings and/or preliminary order to reflect the possibility (not currently contemplated) of future organizational changes.

This change responds to NWC's comment that the 15-day advance notice requirement for filing a suit in district court should be eliminated because it inhibits complainants' access to

federal courts. OSHA believes that a provision for notifying the agency of the district court complaint is necessary to avoid unnecessary expenditure of agency resources once a complainant has decided to remove the case to federal district court. OSHA believes that the revised provision adequately balances the complainant's interest in ready access to federal court and the agency's interest in receiving prompt notice that the complainant no longer wishes to continue with the administrative proceeding.

Section 1978.115 Special circumstances; waiver of rules.

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and three days notice to the parties, waive any rule or issue such orders as justice or the administration of STAA's whistleblower provision requires.

In the IFR, OSHA deleted former section 1978.114, which provided that the time requirements imposed on the Secretary by these regulations are directory in nature and that a failure to meet those requirements did not invalidate any action by the Assistant Secretary or Secretary under STAA; that deletion remains. These principles are well-established in the case law, *see, e.g., Roadway Express v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991), and this provision, which was unique to OSHA's STAA regulations, is unnecessary. The deletion of this provision is a non-substantive amendment. No significant change in STAA practices or procedures is intended.

**V. Paperwork Reduction Act.**

This rule contains a reporting provision (filing a retaliation complaint, section 1978.103) which was previously reviewed and approved for use by the Office of Management and Budget

(OMB) under the provisions of the Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995). The assigned OMB control number is 1218-0236.

#### **VI. Administrative Procedure Act.**

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (“APA”) do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Part 1978 sets forth interpretive rules and rules of agency procedure and practice within the meaning of that section. Therefore, publication in the Federal Register of a notice of proposed rulemaking and request for comments was not required. Although Part 1978 was not subject to the notice and comment procedures of the APA, the Assistant Secretary sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural and interpretive rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the Federal Register is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases. Furthermore, most of the provisions of this rule were in the IFR and have already been in effect since August 31, 2010.

#### **VII. Executive Order 12866, Executive Order 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132.**

The agency has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or

more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Because no notice of proposed rulemaking was published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretive in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have "federalism implications." The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" and therefore is not subject to Executive Order 13132 (Federalism).

#### **VIII. Regulatory Flexibility Analysis.**

The agency has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation sets forth procedures and interpretations, many of which were necessitated by statutory amendments enacted by Congress. Additionally, the regulatory revisions are necessary for the sake of consistency with the regulatory provisions governing procedures under other whistleblower statutes administered by OSHA. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

## **List of Subjects in 29 CFR Part 1978**

Administrative practice and procedure, Employment, Highway safety, Investigations, Motor carriers, Motor vehicle safety, Reporting and Recordkeeping requirements, Safety, Transportation, Whistleblowing.

### **Authority and Signature.**

This document was prepared under the direction and control of David Michaels, PhD., MPH, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC, on July 18, 2012.

---

**David Michaels,**  
*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, for the reasons set out in the preamble Part 1978 of Title 29 of the Code of Federal Regulations is revised to read as follows:

## **PART 1978 – PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 (STAA), AS AMENDED**

### **Subpart A – Complaints, Investigations, Findings and Preliminary Orders.**

Sec.  
1978.100 Purpose and scope.  
1978.101 Definitions.  
1978.102 Obligations and prohibited acts.  
1978.103 Filing of retaliation complaints.  
1978.104 Investigation.  
1978.105 Issuance of findings and preliminary orders.

## **Subpart B – Litigation.**

- 1978.106 Objections to the findings and the preliminary order and request for a hearing.
- 1978.107 Hearings.
- 1978.108 Role of Federal agencies.
- 1978.109 Decisions and orders of the administrative law judge.
- 1978.110 Decisions and orders of the Administrative Review Board.

## **Subpart C – Miscellaneous Provisions.**

- 1978.111 Withdrawal of STAA complaints, findings, objections, and petitions for review; settlement.
- 1978.112 Judicial review.
- 1978.113 Judicial enforcement.
- 1978.114 District court jurisdiction of retaliation complaints under STAA.
- 1978.115 Special circumstances; waiver of rules.

**Authority:** 49 U.S.C. 31101 and 31105; Secretary’s Order 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary’s Order 1-2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

## **Subpart A – Complaints, Investigations, Findings, and Preliminary Orders.**

### **§ 1978.100 Purpose and scope.**

(a) This part sets forth, the procedures for, and interpretations of, the employee protection (whistleblower) provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105, as amended, which protects employees from retaliation because the employee has engaged in, or is perceived to have engaged in, protected activity pertaining to commercial motor vehicle safety, health, or security matters.

(b) This part establishes procedures under STAA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings

and orders, litigation before administrative law judges (ALJs), post-hearing administrative review, and withdrawals and settlements. This part also sets forth interpretations of STAA.

**§ 1978.101 Definitions.**

(a) Act means the Surface Transportation Assistance Act of 1982 (STAA), as amended.

(b) Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

(c) Business days means days other than Saturdays, Sundays, and Federal holidays.

(d) Commercial motor carrier means 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 employees to operate such a vehicle.

(e) Commercial motor vehicle means a vehicle as defined by 49 U.S.C. 31101(1).

(f) Complainant means the employee who filed a STAA complaint or on whose behalf a complaint was filed.

(g) Complaint, for purposes of § 1978.102(b)(1) and (e)(1), includes both written and oral complaints to employers, government agencies, and others.

(h) Employee means 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.

(3) The term includes an individual formerly performing the work described above or an applicant for such work.

(i) Employer means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce, but does not include the Government, a State, or a political subdivision of a State.

(j) OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

(k) Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals.

(l) Respondent means the person alleged to have violated 49 U.S.C. 31105.

(m) Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

(n) State means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(o) Any future statutory amendments that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

#### **§ 1978.102 Obligations and prohibited acts.**

(a) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in any of the activities specified in paragraphs (b) or (c) of this section. In addition, no person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because a person

acting pursuant to the employee's request engaged in any of the activities specified in paragraph (b).

(b) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or a person acting pursuant to the employee's request has:

(1) Filed orally or in writing a complaint with an employer, government agency, or others or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; or

(2) Testified or will testify at any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.

(c) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee:

(1) 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) He or she has a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's hazardous safety or security condition;

(2) Accurately reports hours on duty pursuant to Chapter 315 of Title 49 of the United States Code; or

(3) Cooperates with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(4) Furnishes 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.

(d) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the person perceives that the employee has engaged in any of the activities specified in paragraph (e) of this section.

(e) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that:

(1) The employee has filed orally or in writing or is about to file orally or in writing a complaint with an employer, government agency, or others 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;

(2) 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

(3) The employee has furnished 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.

(f) For purposes of this section, 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.

### **§ 1978.103 Filing of retaliation complaints.**

(a) *Who may file.* An employee who believes that he or she has been retaliated against by an employer in violation of STAA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file a complaint in English, OSHA will accept the complaint in any other language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address:

<http://www.osha.gov>.

(d) *Time for filing.* Within 180 days after an alleged violation of STAA occurs, any employee who believes that he or she has been retaliated against in violation of STAA may file,

or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(e) Relationship to section 11(c) complaints. A complaint filed under STAA alleging facts that would also constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both STAA and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would also constitute a violation of STAA will be deemed to be a complaint filed under both STAA and section 11(c). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

#### **§ 1978.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974, 5 U.S.C. 552a and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of the respondent's rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the Federal Motor Carrier Safety Administration.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written

statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

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

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity, either actual activity or activity about to be undertaken;

(ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel, if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued 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.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1978.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the

procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give 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 complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

**§ 1978.105 Issuance of findings and preliminary orders.**

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of STAA.

(1) 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. Such order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions and privileges of the complainant's employment; and payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred). Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order may also require the respondent to pay punitive damages up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or the order and to request a hearing. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and the preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and request for a hearing have been timely filed as provided at § 1978.106. However, the portion of

any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

### **Subpart B – Litigation.**

#### **§ 1978.106 Objections to the findings and the preliminary order and request for a hearing.**

(a) Any party who desires review, including judicial review, must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1978.105(c). The objections and request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record and the OSHA official who issued the findings.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review.

### **§ 1978.107 Hearings.**

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

### **§ 1978.108 Role of Federal agencies.**

(a)(1) The complainant and the respondent will be parties in every proceeding. In any case in which the respondent objects to the findings or the preliminary order the Assistant Secretary ordinarily will be the prosecuting party. In any other cases, at the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as amicus curiae at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) If the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1) of this section, he or she may, upon written notice to the ALJ or the Administrative Review Board, as the case may be, and the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ or the Administrative Review Board, as the case may be, will issue appropriate orders to regulate the course of future proceedings.

(3) Copies of documents in all cases shall be sent to the parties or, if they are represented by counsel, to the latter. In cases in which the Assistant Secretary is a party, copies of documents shall be sent to the Regional Solicitor's Office representing the Assistant Secretary.

(b) The Federal Motor Carrier Safety Administration, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at its discretion. At the request of the Federal Motor Carrier Safety Administration, copies of all documents in a case must be sent to that agency, whether or not that agency is participating in the proceeding.

#### **§ 1978.109 Decisions and orders of the administrative law judge.**

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and

convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1978.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the

Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. For ALJ decisions issued on or after the effective date of the interim final rule, August 31, 2010, all other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. Any ALJ decision issued on or after the effective date of the interim final rule, August 31, 2010, will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the decision for review.

**§ 1978.110 Decisions and orders of the Administrative Review Board.**

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted

for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary, and on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees the complainant may have incurred); and payment of

punitive damages up to \$250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.

(f) Paragraphs (a) and (b) of this section apply to all cases in which the decision of the ALJ was issued on or after August 31, 2010.

### **Subpart C – Miscellaneous Provisions.**

#### **§ 1978.111 Withdrawal of STAA complaints, findings, objections, and petitions for review; settlement.**

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1978.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or preliminary order become final, a party may withdraw objections to the Assistant Secretary's findings and/or preliminary

order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) Investigative settlements. At any time after the filing of a STAA complaint and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary's consent and achieves the consent of all three parties.

(2) Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ or by the ARB, if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to 49 U.S.C. 31105(e).

**§ 1978.112 Judicial review.**

(a) Within 60 days after the issuance of a final order under §§ 1978.109 and 1978.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the person resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

**§ 1978.113 Judicial enforcement.**

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order, including one approving a settlement agreement issued under STAA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

**§ 1978.114 District court jurisdiction of retaliation complaints under STAA.**

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the

appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. The action shall, at the request of either party to such action, be tried by the court with a jury.

(b) Within seven days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

**§ 1978.115 Special circumstances; waiver of rules.**

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue such orders as justice or the administration of STAA requires.

**Billing Code: 4510-26-P**

[FR Doc. 2012-17994 Filed 07/26/2012 at 8:45 am; Publication Date: 07/27/2012]