



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1988

[Docket Number: OSHA-2015-0021]

RIN 1218-AC88

Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides the interim final text of regulations governing the employee protection (retaliation or whistleblower) provisions of section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21 or the Act). This rule establishes procedures and time frames for the handling of retaliation complaints under MAP-21, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor) and judicial review of the Secretary's final decision. It also sets forth the Secretary's interpretations of the MAP-21 whistleblower provision on certain matters.

DATES: This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments and additional materials must be submitted (post-marked, sent or received) by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit your comments by using one of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger or courier service: You may submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2015-0021, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, D.C. 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor’s and Docket Office’s normal business hours, 8:15 a.m. – 4:45 p.m., E.T.

Instructions: All submissions must include the agency name and the OSHA docket number for this rulemaking (Docket No. OSHA– 2015-0021). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

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OSHA.DWPP@dol.gov. This Federal Register publication is available in alternative formats.
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ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background.

The Moving Ahead for Progress in the 21st Century Act (MAP-21 or Act), Pub. L. 112-141, 126 Stat. 405, was enacted on July 6, 2012 and, among other things, funded surface transportation programs at over \$105 billion for fiscal years 2013 and 2014. Section 31307 of the Act, codified at 49 U.S.C. 30171 and referred to throughout these interim final rules as MAP-21, prohibits motor vehicle manufacturers, parts suppliers, and dealerships from discharging or otherwise retaliating against an employee because the employee provided, caused to be provided or is about to provide information to the employer or the Secretary of Transportation relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301 of title 49 of the U.S. Code (Chapter 301); filed, caused to be filed or is about to file a proceeding relating to any such defect or violation; testified, assisted or participated (or is about to testify, assist or participate) in such a proceeding; or objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of Chapter 301, or any order, rule, regulation, standard or ban under such provision. Chapter 301 is the codification of the National Traffic and Motor Vehicle

Safety Act of 1966, as amended, which grants the National Highway Traffic Safety Administration (NHTSA) authority to issue vehicle safety standards and to require manufacturers to recall vehicles that have a safety-related defect or do not meet federal safety standards. These interim final rules establish procedures for the handling of whistleblower complaints under the Act.

II. Summary of Statutory Procedures.

Under MAP-21, a person who believes that he has been discharged or otherwise retaliated against in violation of the Act (complainant) may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the respondent an opportunity to submit a response, meet with the investigator to present statements from witnesses, and conduct an investigation.

The Act provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity. (See § 1988.104 for a summary of the investigation process.) OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the complainant and respondent of those findings, along with a preliminary order that requires the respondent to, where appropriate: take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The complainant and the respondent then have 30 days after the date of receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an Administrative Law Judge (ALJ). The filing of objections under the Act will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, the Act requires the hearing to be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney and expert witness fees, reasonably

incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit where the complainant resided on the date of the violation.

The Act permits the employee to seek de novo review of the complaint 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 the complaint. 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.

III. Summary and Discussion of Regulatory Provisions.

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of the Act. Responsibility for receiving and investigating complaints under the Act has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) by Secretary of Labor's Order No. 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 ALJs are decided by the ARB. Secretary of Labor's Order No. 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

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

Section 1988.100 Purpose and scope.

This section describes the purpose of the regulations implementing the whistleblower provisions of MAP-21 and provides an overview of the procedures covered by these regulations.

Section 1988.101 Definitions.

This section includes the general definitions of certain terms used in section 31307 of MAP-21, 49 U.S.C. 30171, which are applicable to the Act's whistleblower provision. The term "dealership" appears only in section 30171 and does not appear in any other provision of Chapter 301, which consistently uses the term "dealer" to mean "a person selling and distributing new motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale." See 49 U.S.C. 30102(a)(1). Accordingly, the Secretary concludes that the term "dealership" in section 30171 refers to any "dealer" as that term is defined in section 30102(a)(1). The term defect "includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." See id. at (a)(2). The term manufacturer means "a person (A) manufacturing or assembling motor vehicles or motor vehicle equipment; or (B) importing motor vehicles or motor vehicle equipment for resale." See id. at (a)(5). The term motor vehicle means "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line." See id. at (a)(6). The term motor vehicle equipment means "(A) any system, part, or component of a motor vehicle as originally manufactured; (B) any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle; or (C) any device or an article or apparel, including a motorcycle helmet and excluding medicine or eyeglasses prescribed by a licensed practitioner, that (i) is not a system, part, or component of a motor vehicle; and (ii) is manufactured, sold, delivered, or

offered to be sold for use on public streets, roads, and highways with the apparent purpose of safeguarding users of motor vehicles against risk of accident, injury, or death.” See id. at (a)(7).

Section 1988.102 Obligations and prohibited acts.

This section describes the activities that are protected under the Act and the conduct that is prohibited in response to any protected activities. The Act protects individuals who provide information to the employer or to the Secretary of Transportation relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301. The Act also protects individuals who file, testify, assist, or participate in proceedings concerning motor vehicle defects, noncompliance, or violations or alleged violations of any notification or reporting requirement of Chapter 301. Finally, the Act protects individuals who objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of Chapter 301 or any order, rule, regulation, standard, or ban under that Chapter. More information regarding Chapter 301 and NHTSA’s regulations can be found at www.nhtsa.gov.

Under the Act, an employee who provides information, files a proceeding, or objects to or refuses to participate in any activity is protected so long as the employee’s belief of a defect, noncompliance or violation is subjectively and objectively reasonable. See, e.g., Benjamin v. CitationShares Management. L.L.C., ARB No. 12-029, 2013 WL 6385831, at *4 (ARB Nov. 5, 2013) (noting that, as a matter of law, an employee is protected under the aviation whistleblower protections of 49 U.S.C. 42121 when he provides or attempts to provide information regarding conduct he reasonably believes violates FAA regulations) (citations omitted); Sylvester v. Parexel Int’l LLC, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011) (discussing the reasonable belief standard under analogous language in the Sarbanes-Oxley Act

whistleblower provision, 18 U.S.C. 1514A). The requirement that the complainant have a subjective, good faith belief is satisfied so long as the complainant actually believed that the conduct objected to violated the relevant law or regulation. See Sylvester, 2011 WL 2165854, at *11-12. The objective “reasonableness” of a complainant’s belief is typically determined “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” Id. at *12 (internal quotation marks and citation omitted). However, the complainant need not show that the conduct constituted an actual violation of law. Pursuant to this standard, an employee’s whistleblower activity is protected where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. Id. at *13.

Section 1988.103 Filing of retaliation complaint.

This section explains the requirements for filing a retaliation complaint under MAP-21. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), an alleged violation occurs 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 to take an adverse action. Equal Emp’t Opportunity Comm’n v. United Parcel Serv., Inc., 249 F.3d 557, 561-62 (6th Cir. 2001). The time for filing a complaint under MAP-21 may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

Complaints filed under MAP-21 need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

OSHA notes that a complaint of retaliation filed with OSHA under MAP-21 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, 2011 WL 2165854, at *9–10 (holding that 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 OSHA to the existence of the alleged retaliation and the complainant's desire that OSHA investigate the complaint.

Section 1988.104 Investigation.

This section describes the procedures that apply to the investigation of MAP-21 complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and the NHTSA of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) specifies that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA will do so at a time permitting the other party an opportunity to respond to those submissions. Before providing such materials, OSHA will redact them consistent with the Privacy Act of 1974, 5 U.S.C. 552a and other applicable confidentiality laws.

Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. MAP-21 requires that a complainant make an initial prima facie showing that a 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. 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. The complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. See, e.g. Porter v. Cal. Dep’t of Corrs., 419 F.3d 885, 895 (9th Cir. 2005) (years between the protected activity and the retaliatory actions did not defeat a finding of a causal connection where the defendant did not have the opportunity to retaliate until he was given responsibility for making personnel decisions).

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 Energy Reorganization Act of 1974, which is the same as that under MAP-21, serves a “gatekeeping function” that “stem[s] 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. Thus, OSHA must dismiss a complaint under MAP-21 and not investigate further if either: (1) the complainant fails to meet the prima facie showing that protected activity was a contributing factor in the alleged 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.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. 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.” Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); see also Lockheed Martin Corp. v. Admin. Rev. Bd., 717 F.3d 1121, 1136 (10th Cir. 2013) (discussing Marano as applied to analogous whistleblower provision in the Sarbanes-Oxley Act); Araujo v. New Jersey Transit Rail Ops., Inc., 708 F.3d 152, 158 (3d Cir. 2013) (discussing Marano as applied to analogous whistleblower provision in the Federal Railroad Safety Act). For protected activity to be a contributing factor in the adverse action, “‘a complainant need not necessarily prove that the respondent’s articulated reason was a pretext in order to prevail,’ because a complainant alternatively can prevail by showing that the respondent’s ‘reason, while true, is only one of the reasons for its conduct,’ and that another reason was the complainant’s protected activity.” See Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (quoting Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing

factor test under the Sarbanes-Oxley Act whistleblower provision), aff'd sub nom. Klopfenstein v. Admin. Rev. Bd., 402 F. App'x 936, 2010 WL 4746668 (5th Cir. 2010).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 30171(b)(2)(B). The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. Clarke v. Navajo Express, ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011).

Paragraph (f) describes the procedures OSHA will follow prior to the issuance of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (requiring OSHA to give a Surface Transportation Assistance Act respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement).

Section 1988.105 Issuance of findings and preliminary orders.

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including preliminary reinstatement, affirmative action to

abate the violation, back pay with interest, compensatory damages, attorney and expert witness fees, and costs. The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, the preliminary order, also advise the respondent of the right to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

The remedies provided under MAP-21 aim to make the complainant whole by restoring the complainant to the position that he or she would have occupied absent the retaliation and to counteract the chilling effect of retaliation on protected whistleblowing in complainant's workplace. The back pay and other remedies appropriate in each case will depend on the individual facts of the case and the complainant's interim earnings must be taken into account in determining the appropriate back pay award. However, OSHA notes that a back pay award under MAP-21 includes not only wages but also may include other compensation that the complainant would have received from the employer absent the retaliation, such as lost bonuses, overtime, benefits, raises and promotions when there is evidence to determine these figures. Thus, for example, a back pay award under MAP-21 might include amounts that the complainant would have earned in commissions or amounts that the employer would have contributed to a 401(k) plan on the complainant's behalf had the complainant not been discharged in retaliation for engaging in protected activity under MAP-21.

In ordering interest on back pay under MAP-21, the Secretary has determined that interest due will be computed by compounding daily 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, against back pay. In the Secretary's view, 26 U.S.C. 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation under MAP-21 are made whole. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases. Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at *14–15, 17 (ARB May 17, 2000); see also Cefalu v. Roadway Express, Inc., ARB No. 09-070, 2011 WL 1247212, at *2 (ARB Mar. 17, 2011); Pollock v. Cont'l Express, ARB Nos. 07-073, 08-051, 2010 WL 1776974, at *8 (ARB Apr. 10, 2010); Murray v. Air Ride, Inc., ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000). Section 6621 provides the appropriate measure of compensation under MAP-21 and other Department of Labor (DOL)-administered whistleblower statutes because it ensures that the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. See Ass't Sec'y v. Double R. Trucking, Inc., ARB No. 99-061, slip op. at 5 (ARB July 16, 1999) (interest awards pursuant to section 6621 are mandatory elements of complainant's make-whole remedy). Section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer's benefit from use of the withheld money) and thus provides the complainant with appropriate make-whole relief. See EEOC v. Erie Cnty., 751 F.2d 79, 82 (2d Cir. 1984) (“[S]ince the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [section 6621] has been adopted as a good indicator of the value of the use of money, it was well within” the district court's discretion to calculate

prejudgment interest under § 6621); New Horizons for the Retarded, 283 NLRB No. 181, 1987 WL 89652, at *2 (NLRB May 28, 1987) (observing that “the short-term Federal rate [used by section 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces”).

The Secretary further believes that daily compounding of interest achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board (NLRB). 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 (NLRB Oct. 22, 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).

In ordering back pay, OSHA will require the respondent to submit the appropriate documentation to the Social Security Administration (SSA) allocating the back pay to the appropriate calendar quarters. Requiring the reporting of back pay allocation to the SSA serves the remedial purposes of MAP-21 by ensuring that employees subjected to retaliation are truly made whole. See Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10, 2014 WL 3897178, at *4-5 (NLRB Aug. 8, 2014). As the NLRB has explained, when back pay is not properly allocated to the years covered by the award, a complainant may be disadvantaged in several ways. First, improper allocation may interfere with a complainant’s ability to qualify for any old-age Social Security benefit. Id. at *4 (“Unless a [complainant’s] multiyear backpay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age social security

benefit.”). Second, improper allocation may reduce the complainant’s eventual monthly benefit. Id. “[I]f a backpay award covering a multi-year period is posted as income for 1 year, it may result in SSA treating the [complainant] as having received wages in that year in excess of the annual contribution and benefit base.” Id. Wages above this base are not subject to Social Security taxes, which reduces the amount paid on the employee’s behalf. “As a result, the [complainant’s] eventual monthly benefit will be reduced because participants receive a greater benefit when they have paid more into the system.” Id. Finally, “social security benefits are calculated using a progressive formula: although a participant receives more in benefits when she pays more into the system, the rate of return diminishes at higher annual incomes.” Therefore, a complainant may “receive a smaller monthly benefit when a multiyear award is posted to 1 year rather than being allocated to the appropriate periods, even if social security taxes were paid on the entire amount.” Id. The purpose of a make-whole remedy such as back pay is to put the complainant in the same position the complainant would have been absent the prohibited retaliation. That purpose is not achieved when the complainant suffers the disadvantages described above. The Secretary believes that requiring proper SSA allocation is necessary to achieve the make-whole purpose of a back pay award.

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 termination but not actually return to work. Such “economic reinstatement” is akin to an order of front pay and frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., Sec’y of Labor ex rel. York v. BR&D Enters., Inc., 23 FMSHRC 697, 2001 WL 1806020, at *1 (ALJ June 26, 2001). Front pay has been recognized as a possible remedy in cases under the

whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., Brown v. Lockheed Martin Corp., ALJ No. 2008-SOX-00049, 2010 WL 2054426, at *55-56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under Sarbanes-Oxley, front pay may be awarded as a substitute when reinstatement is inappropriate); see, e.g., Luder v. Cont’l Airlines, Inc., ARB No. 10-026, 2012 WL 376755, at *11 (ARB Jan. 31, 2012), aff’d, Cont’l Airlines, Inc. v. Admin. Rev. Bd., No. 15-60012, slip op. at 8, 2016 WL 97461, at *4 (5th Cir. Jan. 7, 2016) (unpublished) (under Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, “front-pay is available when reinstatement is not possible”); see also Moder v. Vill. of Jackson, ARB Nos. 01-095, 02-039, 2003 WL 21499864, at *10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”); Hobby v. Georgia Power Co., ARB Nos. 98-166, 98-169 (ARB Feb. 9, 2001), aff’d sub nom. Hobby v. U.S. Dep’t of Labor, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (noting circumstances where front pay may be available in lieu of reinstatement but ordering reinstatement). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of MAP-21. 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 immediate reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is

completed as long as the employee 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 an employee should the employer ultimately prevail in the whistleblower adjudication.

Subpart B – Litigation.

Section 1988.106 Objections to the findings and the preliminary order and requests for a hearing.

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, 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 also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as the OSHA official who issued the findings and order, OSHA, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards, the failure to serve copies of the objections on the other parties of record 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., ARB No. 04-101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005).

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes

that a stay of the Assistant Secretary's preliminary order of reinstatement under MAP-21 would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. If no timely objection to the Assistant Secretary's findings and/or preliminary order is filed, then the Assistant Secretary's findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

Section 1988.107 Hearings.

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides that 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. As noted in this section, 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.

Section 1988.108 Role of Federal agencies.

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under MAP-21. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the

Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, multiple employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The NHTSA, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings.

Section 1988.109 Decision and orders of the administrative law judge.

This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under MAP-21. Specifically, the complainant must demonstrate (i.e. prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. See, e.g., Allen v. Admin. Rev. Bd., 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“The term ‘demonstrates’ [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provision] means to prove by a preponderance of the evidence.”). If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 30171(b)(2)(B).

Paragraph (c) of this section further provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation under section 1988.104 is not subject to review. Thus, section 1988.109(c) clarifies that OSHA’s determinations on whether to proceed with an investigation under MAP-21 and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or make further factual findings. Paragraph (d) notes the remedies that

the ALJ may order under MAP-21 and, as discussed under section 1988.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily, and that the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate calendar quarters. Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. Paragraph (e) also provides that any ALJ 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. 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 ARB. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review.

Section 1988.110 Decision and orders of the Administrative Review Board.

Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. 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. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary.

If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under MAP-21, which otherwise would be effective, while review is conducted by the ARB. The Secretary believes that a stay of an ALJ's preliminary order of reinstatement under MAP-21 would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay.

If the ARB concludes that the respondent has violated the law, it 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, together with the compensation (including back pay and interest), terms, conditions, and privileges of employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes pursuant to 26 U.S.C. 6621 and will be compounded daily, and the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate calendar quarters. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the

request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

Subpart C – Miscellaneous Provisions.

Section 1988.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

This section provides the procedures and time periods for withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It permits complainants to withdraw their complaints orally, and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

Section 1988.112 Judicial review.

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ARB or the ALJ to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Section 1988.113 Judicial enforcement.

This section describes the Secretary's authority under MAP-21 to obtain judicial enforcement of orders and terms of settlement agreements. MAP-21 expressly authorizes district courts to enforce orders issued by the Secretary under 49 U.S.C. 30171. Specifically, the statute provides that "[w]henever any person fails to comply with an order issued under paragraph (3), the Secretary [of Labor] may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this

paragraph, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory damages.” 49 U.S.C. 30171(b)(5).

All orders issued by the Secretary under 49 U.S.C. 30171 may also be enforced by any person on whose behalf an order was issued in district court, under 49 U.S.C. 30171(b)(6). The Secretary interprets these provisions to grant the district court authority to enforce preliminary orders of reinstatement. Subsection (b)(3) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position, (49 U.S.C. 30171(b)(3)(B)(ii)). Subsection (b)(2) also instructs the Secretary to accompany any reasonable cause finding that a violation has occurred with a preliminary order containing the relief prescribed by paragraph (b)(3)(B), which includes reinstatement, (see 49 U.S.C. 30171(b)(3)(B)). Subsection (b)(2)(A) declares that any reinstatement remedy contained in a preliminary order is not stayed upon the filing of objections. 49 U.S.C. 30171(b)(2)(A) (“The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.”). Thus, under the statute, enforceable orders under paragraph (b)(3) include both preliminary orders issued under subsection (b)(2)(A) and final orders issued under subsection (b)(3), both of which may contain the relief of reinstatement as prescribed by subsection (b)(3)(B).

This statutory interpretation is consistent with the Secretary’s interpretation of similar language in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121, and Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A. See Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602 (6th Cir. 2010); Solis v. Tenn. Commerce Bancorp, Inc., 713 F. Supp. 2d 701 (M.D.

Tenn. 2010); but see Bechtel v. Competitive Techs., Inc., 448 F.3d 469 (2d Cir. 2006); Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006), (decision vacated, appeal dismissed, No. 06-2295 (4th Cir. Feb. 20, 2008)).

Section 1988.114 District court jurisdiction of retaliation complaints.

This section sets forth MAP-21's provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 210 days after the date of the filing of the complaint. See 49 U.S.C. 30171(b)(3)(E). This section also incorporates the statutory provisions that allow for a jury trial at the request of either party in a district court action and that specify the burdens of proof in a district court action.

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the ARB, depending on where the proceeding is pending. A copy of the district court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. 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.

Finally, the Secretary notes that although a complainant may file an action in district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint with OSHA, it is the Secretary's position that complainants may not 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 complaint. Thus, for example, after the ARB has issued a final decision denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. 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. See 49 U.S.C. 30171(b)(4)(B) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

Section 1988.115 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 notice to the parties, waive any rule as justice or the administration of MAP-21 requires.

IV. Paperwork Reduction Act.

This rule contains a reporting provision (filing a retaliation complaint, section 1988.103) which was previously reviewed as a statutory requirement of MAP-21 and approved for use by the Office of Management and Budget (OMB), as part of the Information Collection Request (ICR) assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act of 1995 (PRA). See Pub. L. 104-13, 109 Stat. 163 (1995). An ICR has been submitted to OMB to include the regulatory citation.

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- Enhancing the quality, utility, and clarity of the information collected; and
- Minimizing the burden on employees who must comply; for example, by using automated or other technological information collection and transmission techniques.

In addition to having an opportunity to file comments with the Department, the PRA provides that an interested party may file comments on the information collection requirements contained in an interim final rule directly with OMB by mail: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OSHA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments to the Department. See ADDRESSES section of the preamble. OMB will consider all written comments that the agency receives within thirty (30) days of publication of this Interim Final Rule in the Federal Register. In order to help ensure appropriate consideration, comments should mention OMB control number 1218-0236. Comments submitted in response to this rule are public records; therefore, OSHA cautions commenters about submitting personal information such as Social Security numbers and date of birth.

To access the complete electronic copy of the related ICR, containing the Supporting Statement with attachments describing the paperwork requirement and determinations of the ICR in detail, visit the Web page, <http://www.reginfo.gov/public/do/PRAMain>, select "Department of

Labor” under the "Currently under Review" to view all DOL ICRs currently under OMB consideration, including the ICR related to this rulemaking.

OSHA notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless the collection of information displays a currently valid OMB control number. Also, notwithstanding any other provision of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.

V. Administrative Procedure Act.

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section. Therefore, publication in the Federal Register of a notice of proposed rulemaking and request for comments are not required for this rule, which provides the procedures for the handling of retaliation complaints. Although this is a procedural and interpretive rule not subject to the notice and comment procedures of the APA, OSHA is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after OSHA receives and reviews the public’s comments.

Furthermore, because this rule is procedural and interpretative 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. OSHA also finds good cause to provide an immediate effective

date for this interim final 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.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132.

The Department 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: (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 economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and because no notice of proposed rulemaking has been 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).

VII. Regulatory Flexibility Analysis

The notice and comment rulemaking procedures of Section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See Small Business Administration Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, at 9; also found at <https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act>. This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and, therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

List of Subjects in 29 CFR Part 1988

Administrative practice and procedure, Automobile dealers, Employment, Investigations, Motor vehicle defects, Motor vehicle manufacturers, Part supplies, Reporting and recordkeeping requirements, Whistleblower.

Authority and Signature.

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

Signed at Washington, D.C. on February 25, 2016.

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

Accordingly, for the reasons set out in the preamble, 29 CFR part 1988 is added to read as follows:

PART 1988 – PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER SECTION 31307 OF THE MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT (MAP-21)

Subpart A – Complaints, Investigations, Findings and Preliminary Orders

Sec.

- 1988.100 Purpose and scope.
- 1988.101 Definitions.
- 1988.102 Obligations and prohibited acts.
- 1988.103 Filing of retaliation complaint.
- 1988.104 Investigation.
- 1988.105 Issuance of findings and preliminary orders.

Subpart B – Litigation

- 1988.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1988.107 Hearings.
- 1988.108 Role of Federal agencies.
- 1988.109 Decision and orders of the administrative law judge.
- 1988.110 Decision and orders of the Administrative Review Board.

Subpart C – Miscellaneous Provisions

- 1988.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1988.112 Judicial review.
- 1988.113 Judicial enforcement.
- 1988.114 District court jurisdiction of retaliation complaints.
- 1988.115 Special circumstances; waiver of rules.

Authority: 49 U.S.C. 30171; Secretary of Labor’s Order No. 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor’s Order No. 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

Subpart A – Complaints, Investigations, Findings and Preliminary Orders

§ 1988.100 Purpose and scope.

(a) This part sets forth procedures for, and interpretations of, section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21)), Pub. L. 112-141, 126 Stat. 405, 765 (July 6, 2012) (codified at 49 U.S.C. 30171). MAP-21 provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to the manufacture or sale of motor vehicles and motor vehicle equipment.

(b) This part establishes procedures under MAP-21 for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set forth the procedures under MAP-21 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. In addition, these rules provide the Secretary's interpretations on certain statutory issues.

§ 1988.101 Definitions.

As used in this part:

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 MAP-21.

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

Complainant means the person who filed a MAP-21 complaint or on whose behalf a complaint was filed.

Dealer or Dealership means a person selling and distributing new motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale.

Defect includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.

Employee means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a motor vehicle manufacturer, dealer, part supplier, or dealership.

Manufacturer means a person:

- (1) Manufacturing or assembling motor vehicles or motor vehicle equipment; or
- (2) Importing motor vehicles or motor vehicles equipment for resale.

MAP-21 means Section 31307 of the Moving Ahead for Progress in the 21st Century Act of 2012, Pub. L. 112-141, 126 Stat. 405, 765 (July 6, 2012) (codified at 49 U.S.C. 30171).

Motor vehicle means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

Motor vehicle equipment means --

- (1) Any system, part, or component of a motor vehicle as originally manufactured;
- (2) Any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle; or
- (3) Any device or an article or apparel, including a motorcycle helmet and excluding medicine or eyeglasses prescribed by a licensed practitioner, that –
 - (i) Is not a system, part or component of a motor vehicle; and

(ii) Is manufactured, sold, delivered, or offered to be sold for use on public streets, roads, and highways with the apparent purpose of safeguarding users of motor vehicles against risk of accident, injury, or death.

NHTSA means the National Highway Traffic Safety Administration of the United States Department of Transportation.

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

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Respondent means the person named in the complaint who is alleged to have violated MAP-21.

Secretary means the Secretary of Labor.

§ 1988.102 Obligations and prohibited acts.

(a) No motor vehicle manufacturer, part supplier, or dealership may discharge or otherwise retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, an employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) through (5) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by a motor vehicle manufacturer, part supplier, or dealership because he or she:

(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation, information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301 of Title 49 of the United States Code;

(2) Filed, or caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301 of Title 49 of the United States Code;

(3) Testified or is about to testify in such a proceeding;

(4) Assisted or participated or is about to assist or participate in such a proceeding; or

(5) Objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of Chapter 301 of Title 49 of the United States Code, or any order, rule, regulation, standard, or ban under such provision.

§ 1988.103 Filing of retaliation complaint.

(a) Who may file. A person who believes that he or she has been discharged or otherwise retaliated against by any person in violation of MAP-21 may file, or have filed by any person on his or her 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 the complaint in English, OSHA will accept the complaint in any language.

(c) Place of filing. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the complainant 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 MAP-21 occurs, any person who believes that he or she has been retaliated against in violation of the MAP-21 may file, or have filed by any person on his or her 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. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1988.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and paragraph (e) of § 1988.110. OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the NHTSA.

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

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's 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 a 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;

(ii) The respondent knew or suspected 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 complaint shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, 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, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, OSHA 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 § 1988.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated MAP-21 and that preliminary reinstatement is warranted, OSHA will 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, OSHA will redact them, if necessary, consistent 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 investigator, 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 OSHA's notification pursuant to this paragraph, or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

§ 1988.105 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 or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of MAP-21.

(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 to the complainant. The preliminary order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

(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 (or other means that allow OSHA to confirm receipt), 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 order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad

faith. 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 any 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/or a request for hearing has been timely filed as provided at § 1988.106. 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.

§ 1988.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under MAP-21, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1988.105. The objections, request for a hearing, and/or request for attorney fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney fees. 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, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(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.

§ 1988.107 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. ALJs 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.

§ 1988.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as amicus curiae at any time 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) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

(b) The NHTSA, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at NHTSA's discretion. At the request of NHTSA, copies of all documents in a case must be sent to NHTSA, whether or not it is participating in the proceeding.

§ 1988.109 Decision 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 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 OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1988.104(e) nor OSHA'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, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

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

complaint was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, 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. 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. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

§ 1988.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, 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 must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, 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 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 will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, 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, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

Subpart C – Miscellaneous Provisions.

§ 1988.111 Withdrawal of 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 OSHA, orally or in writing, of his or her withdrawal. OSHA then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. OSHA 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 § 1988.106, 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 order become final, a party may withdraw objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the 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 complaint, but before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's

approval of a settlement reached by the respondent and the complainant demonstrates OSHA'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 appropriate.

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1988.113.

§ 1988.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1988.109 and 1988.110, 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 complainant 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.

§ 1988.113 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 MAP-21, 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. 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 MAP-21, a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate United States district court.

§ 1988.114 District court jurisdiction of retaliation complaints.

(a) If the Secretary has not issued a final decision within 210 days of 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. At the request of either party, the action shall be tried by the court with a jury.

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1988.109.

(c) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, 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 Fair Labor Standards, U.S. Department of Labor.

§ 1988.115 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 that justice or the administration of MAP-21 requires.

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