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DEPARTMENT OF ENERGY

10 CFR Part 708

[DOE-HQ-2026-0496]

RIN 1910-AA55

Revisions to the Office of Hearings and Appeals Procedural Regulations for the DOE Contractor Employee Protection Program

AGENCY: Office of Hearings and Appeals. Department of Energy.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The United States (U.S.) Department of Energy (DOE) publishes a proposed rule to amend its regulations, which set forth the policies and procedures for resolving questions concerning protections for DOE contractor employees alleging retaliation by their employers. The proposed revisions would clarify deadlines and tolling practices throughout the regulation; make grammatical changes throughout the rule for consistency with national policies and DOE practices; and update references to DOE officials and offices in order to ensure clarity, consistency, and fairness in DOE's administration of the Contractor Employe Protection Program.

DATES: Written comments on this proposed rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. See section III, *Public Participation,* for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number DOE-HQ-2026-0496. Please follow the instructions for submitting comments in section III. Alternatively, interested persons may submit comments, identified by docket number DOE-HQ-2026-0496, by any of the following methods:

(1) *Email: OHA@hq.doe.gov.* Please include the docket number DOE-HQ-2026-0496 in the subject line of the message.

(2) *Postal Mail:* U.S. Department of Energy, Office of Hearings and Appeals, 1000 Independence Avenue SW, Washington, DC 20585.

(3) *Hand Delivery/Courier:* U.S. Department of Energy, Office of Hearings and Appeals, 1000 Independence Avenue SW, Washington, DC 20585. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles ("faxes") will be accepted.

FOR FURTHER INFORMATION CONTACT: Erin C. Weinstock, U.S. Department of Energy, Office of Hearings and Appeals, 1000 Independence Avenue, SW, Washington, DC 20585; (301) 366-1076, *OHA@hq.doe.gov*.

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I. Background and Summary

DOE is publishing this notice of proposed rulemaking in order to update and clarify DOE's policies and procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for:

(1) Disclosure of information concerning dangers to public or worker health or safety, substantial violations of law, or gross mismanagement;

(2) Participation in Congressional proceedings; or

(3) Refusal to participate in dangerous activities.

The current rule was last updated in 2019.[1] Since then, the rule has been applied to numerous investigations, hearings, appeals, and petitions for Secretarial review regarding contractor complaints filed under this rule. The proposed changes are intended to address areas of potential confusion and bring the regulations in line with current practice in order to ensure clarity, consistency, and fairness in DOE's administration of the Contractor Employe Protection Program. The proposed revisions would:

(1) Update definitions to reflect current practice and understanding;

(2) Encourage use of alternative dispute resolution services;

(3) Authorize the processing of a complaint to be tolled when parties use alternative dispute resolution services and make clear what kinds of alternative dispute resolution services qualify for tolling;

(4) Allow agency officials to grant extensions to file or amend a complaint for good reason;

(5) Provide clearer deadlines for parties and agency officials;

(6) Formalize requirements regarding the submission of confidential information;

(7) Extend time to complete an investigation;

(8) Clarify the role of the Administrative Judge in hearings;

(9) Update titles of various DOE officials; and

(10) Amend the regulations so they are gender neutral and in line with regulations throughout the Federal Government.

II. Section-by-Section Description of Proposed Changes

A. Section 708.1

[1] 84 FR 37757 (Aug. 2, 2019). DOE rescinded 10 CFR 708.10 in 2025. 90 FR 31136 (July 14, 2025).

The proposed rule would amend § 708.1, "Scope and purpose," by updating the descriptions of the types of protected disclosures that are covered by part 708 to match the text of § 708.5, "Protected conduct," for consistency.

B. Section 708.2

The proposed rule would amend § 708.2, "Definitions," by deleting "(a)" before "For purposes of this part".

The proposed rule would amend the definition for "Alternative Dispute Resolution" to "Alternative dispute resolution" to keep the capitalization consistent.

The proposed rule would amend the definition of "Day" by adding several sentences that detail how the deadlines operate in practice to provide clarity to parties.

The proposed rule would replace the term "EC Director" with "ECP Director" here and throughout the following proposed part 708 regulations. The proposed rule would also replace the term "Office of Employee Concerns" with "Employee Concerns Program" to be consistent with the terminology in DOE O 442.1B.

The proposed rule would amend the definition for "Party" by replacing the term "party" with "individual" to avoid confusion that may result from using the same term twice in the definition.

The proposed rule would add a definition for the term "Law, rule, or regulation" and would define the term as "policies or procedures that are government mandates or implement government mandates." This proposed addition would clarify the types of violations that may constitute protected disclosures under part 708.

The proposed rule would add a definition for the term "Union-negotiated grievance-arbitration procedure" and would define the term as "one that has been negotiated by a labor organization." This definition is one that is long-established in Office of Hearings and Appeals (OHA) case law.

The proposed rule would also add a definition of "Verified email" and would define the term as "an email sent to the email address provided by a party." The proposed addition of this definition reflects a proposed change to acceptable methods of notification under § 708.18.

Lastly, the proposed rule would delete subsection (b) in its entirety because the proposed rule would revise part 708 so the provisions are gender neutral. For example, in place of "he," the proposed rule would use "he or she," and in place of "his," the proposed rule would use "his or her." Such revisions are proposed throughout part 708 and are consistent with the regular practice of DOE and other federal agencies.

C. Section 708.4

The proposed rule would amend § 708.4, "Complaints not covered," to clarify which other types of complaints bar an employee from filing a complaint under Part 708. Specifically, the reference in § 708.4(c) through § 708.15(a) would refer instead to § 708.16(a) for accuracy. In addition, the words "a regulation, statute, or other law, including" would be added after "chosen to pursue a remedy available under" in § 708.4(c) to clarify the basis upon which a complaint may be excluded if it is based on the same facts for which the employee chose to pursue another remedy. The proposed rule would also revise the list of regulations, statutes, or other laws listed under § 708.4(c) to update the referenced regulations and to add "41 U.S.C. 4712, 'Enhancement of contractor protection from reprisal for disclosure of certain information.'"

D. Section 708.9

The proposed rule would amend § 708.9(a), "How to file complaints or other documents," to state that a complaint or other document is considered filed on the date it is received by the specified official or office.

E. Section 708.10

The proposed rule would add § 708.10, "Informal resolution of complaints." This section would encourage the use of alternative dispute resolution services to resolve complaints arising

under part 708. To facilitate the use of these services, this section would explain where parties can seek these services, allow for the tolling of deadlines under part 708 while using these services, and provide instructions for the steps to take if a complaint is resolved. The addition of this section will reduce costs associated with part 708 complaints, increase processing efficiency, and improve the effectiveness of alternative dispute resolution services for part 708 complaints.

F. Section 708.13

The proposed rule would amend § 708.13, "Requirements for the form and content of a complaint," so that the term "union-negotiated" is included before "grievance or arbitration procedures" to be consistent with the proposed revisions to § 708.2.

G. Section 708.14

The proposed rule would amend the title to § 708.14 so that it reads "Exhaustion of union-negotiated grievance-arbitration procedures" and would amend § 708.14 so that "union-negotiated" is added to every reference to "grievance-arbitration procedure" to be consistent with the proposed revisions to § 708.2.

H. Section 708.15

The proposed rule would amend § 708.15, "Time to file a complaint," as follows. In the proposed first sentence of § 708.15(b), the word "any" replaces the word "an" before "internal company grievance-arbitration procedure" to clarify the types of procedures covered under the regulations. In the second sentence, "period" is removed for brevity, the word "internal" is removed for brevity, and the remainder of the sentence is amended to form a proposed third sentence. The proposed third sentence is amended to state, before introducing subparts, "The time begins to run again on the earlier of:" and, in subpart (2), "If a union-negotiated grievance-arbitration procedure, 150 days after the grievance was initiated if a final decision has not been issued." These changes clarify that use of any internal company grievance-arbitration procedure may toll the deadline to file a complaint even if it was not negotiated by a labor organization. In the proposed § 708.15(d), "not" is removed, "during" is replaced by "on a date later than," "90

day period" is replaced by "applicable deadline," and "filing within that period" is replaced by "meeting that deadline" to be consistent with the proposed amended filing deadlines.

I. Section 708.16

The proposed rule would amend § 708.16, "Duplicative actions under State or other law," as follows. Section 708.16(a)(2) would be amended to include a relevant duplicate proceeding and would add "or 41 U.S.C. 4712" after "48 CFR part 3, Subpart 3.9", and § 708.16(a)(3) would be amended to include "union-negotiated" in front of "grievance-arbitration" to be consistent with the proposed revisions to § 708.2.

J. Section 708.17

The proposed rule would amend § 708.17, "Notification of complaints and opportunities to respond," as follows. Section 708.17(a) would be amended to add "upon its receipt" to the end of the third sentence after "will provide the complainant with a copy of the employer's response" to clarify when the response must be provided; to add "upon their receipt" after "copy of those additional comments" to clarify when the complainant's additional comments to the employer's response is to be provided; and to add a final sentence that states "The deadline set forth in this subsection may be extended by the Head of Field Element or ECP Director (as applicable) for good reason" to clarify that the Head of Field Element or ECP Director may extend the deadline for good reason. Section 708.17(b) would be amended to add "The Head of Field Element or ECP Director (as applicable) will provide the comments to the complainant and employer upon his or her receipt" to clarify when the comments submitted by a labor organization bargaining unit representative per § 708.17(b) must be provided to the complainant and employer. A proposed § 708.17(c) would be added and states "The Head of Field Element or ECP Director (as applicable) must provide the contact information for the DOE's Alternative Dispute Resolution Office to the parties as soon as is practicable after receiving the complaint" to promote the use of alternative dispute resolution.

K. Section 708.18

The proposed rule would amend § 708.18, "Dismissal for lack of jurisdiction or other good cause," as follows. Section 708.18(a) would be amended so that the second sentence states "If the employer does not file a response, such decisions are issued by the 20th day after the employer's period to respond under § 708.17(a) has elapsed." The third sentence would be amended to state "If the employer files a timely response, such decisions are issued by the 20th day after the complainant files additional comments under § 708.17(a), or the 20th day after the period to file additional comments has elapsed, whichever is soonest." These changes would clarify deadlines and help the Head of Field Element or ECP Director determine when it will be decided if a complaint is dismissed. Section 708.18(b) would be amended by adding "verified email or" before "certified email" to be consistent with the proposed amended § 708.2 definition of verified email. Section 708.18(c)(1) through (c)(4) would be amended to remove the "or" after each semicolon for brevity.

L. Section 708.19

The proposed rule would amend § 708.19, "Appealing the dismissal of a complaint by the Head of Field Element or ECP Director for lack of jurisdiction or other good cause," by deleting "as evidenced by a receipt for delivery or certified email" after "dismissal" in § 708.19(a) to allow electronic notice.

M. Section 708.20

The proposed rule would amend § 708.20, "Review by the Secretary of Energy of a decision on appeal of a dismissal," by replacing "any party" with "the complainant" in § 708.20(a) to reflect the reality that only complainants appeal dismissals. The proposed rule would also replace "a petition for Secretarial review of a dismissal" with "a notice indicating he or she is petitioning for Secretarial review" in § 708.20(a) to clarify that the filing required by the 30th day after a decision on an appeal under § 708.19 is a notice of appeal rather than a statement of the issues being raised on appeal.

N. Section 708.21

The proposed rule would amend § 708.21, "Referral to the Office of Hearings and Appeals," as follows to clarify the deadlines by which the Head of Field Element or ECP Director must transmit the complaint to OHA. Section 708.21(a) would be amended by deleting "the later of" before the colon to be consistent with the amendments in the proposed subparts that follow it. Section 708.21(a)(1) would be amended to read "The 25th day after receipt of the final submission permitted by § 708.17" for consistency. Section 708.21(a)(2) would be added and would state "If the employer does not respond to the complaint, the 25th day after the period for responses permitted by § 708.17 ends." Section 708.21(a)(3) would be added and would state "If the complainant does not submit additional comments regarding the response, the 25th day after the period for additional comments permitted by § 708.17 ends." The proposed rule would renumber § 708.21(a)(2) as proposed § 708.21(a)(4). The language from § 708.21(c) would be moved to proposed § 708.21(d), and a new § 708.21(c) would be added and would state "Where the Head of Field Element or ECP Director (as applicable) found the complaint to be untimely filed, but nonetheless accepted the complaint for processing as a matter of discretion in accordance with § 708.15(d), he or she must indicate upon referring the complaint to the Office of Hearings and Appeals that good reason was found to accept the complaint for processing." The proposed § 708.21(c) would establish a record of the reason why an untimely complaint was accepted for processing. Proposed § 708.21(d) would be composed of the language from the current § 708.21(c) and would be amended to replace "OHA" with "Office of Hearings and Appeals" for consistency. Section 708.21(e) would be composed of the language from the current § 708.21(d) and would amend § 708.21(e)(1) by adding "and" to the end of the phrase and would amend § 708.21(e)(2) by replacing "OHA" with "Office of Hearings and Appeals" for consistency.

O. Section 708.22

The proposed rule would amend § 708.22, "Investigation of complaint," as follows. Section 708.22(b) would be amended to add "Documents containing trade secrets or confidential

commercial or financial information must be marked as such when submitted. A copy of the document with the protected information redacted must be submitted with the original document." The proposed revision formalizes the requirement for parties to mark confidential information as such when submitted.

P. Section 708.23

The proposed rule would amend § 708.23, "Time to issue a report of investigation," by replacing "60th" with "90th" and deleting "unless the OHA Director, for good cause, extends the investigation for no more than 30 days" in § 708.23(a) to extend the time to issue a report of investigation from 60 days to 90 days. This proposed revision would reflect the reality that Part 708 investigations very frequently require more than 60 days to complete.

Q. Section 708.26

The proposed rule would amend § 708.26, "Time and location of hearings," by replacing "for a location near the site where the alleged retaliation occurred or the complainant's place of employment" with "at a time and place that is appropriate" in § 708.26(b) to make clear that the location of the hearing is at the Administrative Judge's discretion.

R. Section 708.28

The proposed rule would amend § 708.28, "Hearing procedures," as follows. Section 708.28(b) would be amended by replacing the period with a colon after "following". Section 708.28(b)(1) would be amended to add "or defense raised in the contractor's response" at the end of the sentence to clarify that discovery is appropriate to obtain evidence concerning a raised defense. Section 708.28(b)(2) would be amended to replace "may" with "will" before "permit" to clarify that the Administrative Judge must allow the parties to conduct discovery upon request. The proposed rule would add § 708.28(b)(3) and would read "The period for discovery shall be established by the presiding Administrative Judge. A party may seek discovery anytime during the discovery period" to clarify the Administrative Judge's powers in the proceeding. The current § 708.28(b)(3) would be renumbered as proposed § 708.28(b)(4). The proposed rule

would add proposed § 708.28(b)(5) and would read "The Administrative Judge may rule on any motions filed by the parties, with or without oral argument. The Administrative Judge may set deadlines for the filing of motions and responses" to clarify the Administrative Judge's power in the proceeding. The proposed rule would renumber the current § 708.28(b)(4) as proposed § 708.28(b)(6) and would be amended so that "motions," after "direct that written," and the comma after "documents" are removed to clarify the Administrative Judge's powers in the proceeding. The proposed rule would renumber current § 708.28(b)(5) through (b)(8) to proposed § 708.28(b)(7) through (b)(10). The proposed rule would add § 708.28(c) and would read "The hearing record consists of all documents and exhibits filed with the Office of Hearings and Appeals under the hearing case number; the report of investigation, including any exhibits or attachments to the report of investigation except as ordered by the Administrative Judge; the hearing transcript; and all motions, rulings, and orders." This proposed revision would create a formal and consistent practice about which documents and exhibits are included in the hearing record.

S. Section 708.29

The proposed rule would amend § 708.29, "Burdens of proof," by dividing the current language into paragraphs (a) and (b) and would further amend as follows. Proposed § 708.29(a) would be composed of the first sentence from the original text with the following added language: "A complainant can demonstrate that a protected activity was a contributing factor to an alleged act of retaliation by establishing, among other things: (1) that the person taking the adverse action had actual or constructive knowledge of the protected activity; and (2) that the alleged retaliatory act had sufficient temporal proximity to the protected activity to give rise to a reasonable inference of a causal connection." Proposed § 708.29(b) would state "Once the complainant has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the complainant's

disclosure, participation, or refusal." The proposed amendments clarify how a complainant can meet their burden of proof by using language long-established in OHA case law.

T. Section 708.30

The proposed rule would amend § 708.30, "Timing for issuing an initial agency decision," by replacing "§ 708.28(b)(7)" with "§ 708.28(b)(9)" in § 708.30(c) to be consistent with the proposed amendments to § 708.28(b).

U. Section 708.31

The proposed rule would amend § 708.31, "Procedure for issuing an initial agency decision," by replacing the text after "the initial agency decision will" with "as appropriate, order any form of relief as permitted under § 708.36, or the Administrative Judge will initiate a second proceeding for the purpose of determining the appropriate form of relief" in § 708.31(c) to align the regulations with the common OHA practice of holding a second hearing to determine the appropriate form of relief.

V. Section 708.34

The proposed rule would amend § 708.34, "Procedure for issuing an appeal decision," to include "or remand the matter to the Administrative Judge for further proceedings regarding the appropriate relief" at the end of the sentence in § 708.34(b)(2) to allow flexibility for any case to be remanded back to the Administrative Judge for a determination on appropriate relief.

W. Section 708.36

The proposed rule would amend § 708.36, "Remedies," to include "incurred in pursuing the complaint" after "reasonable costs and expenses" in § 708.36(a)(4) to clarify the scope of allowable reimbursement for the complainant's cost and expenses.

X. Section 708.40

The proposed rule would amend § 708.40, "Notice of program requirements," by including "obtain information about filing and" after "the DOE Office where employes can" to clarify that employee notices must also inform employees where they can obtain information

about filing a complaint from the appropriate office in addition to where they can file a complaint.

Y. Section 708.42

The proposed rule would amend § 708.42, "Extension of deadlines," by removing "OHA" after "relating to the investigation, hearing, and" for consistency.

III. Regulatory Review

A. Executive Order 12866 and Executive Order 14192

Section 6(a) of Executive Order (E.O.) 12866 "Regulatory Planning and Review" requires agencies to submit "significant regulatory actions" to the Office of Information and Regulatory Affairs (OIRA) for review. OIRA has determined that this regulatory action does not constitute a "significant regulatory action" under section 3(f) of E.O. 12866 because it does not have an annual effect on the economy of $100 million or adversely affect the economy; create an inconsistency or interfere with any action planned or taken by another agency; materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues. Accordingly, this action was not submitted to OIRA for review.

This proposed rule has also been determined to be an "E.O. 14192 deregulatory action" under E.O. 14192, "Unleashing Prosperity Through Deregulation," 90 FR 9065 (February 6, 2025) because the changes would create a cost savings for the agency. DOE estimates that this proposed rule will save DOE approximately $250,000 annually by encouraging the early resolution of complaints through alternative dispute resolution, with potential additional savings benefits to DOE contractors and contractor-employees.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis whenever an agency is required by section 553 of this title, or any other law, to publish a general notice of proposed rulemaking for any proposed rule. This

proposed rule would alter procedural rules primarily for the OHA, with little impact on the conduct of or burdens on regulated entities. DOE has determined that the proposed rule, if adopted, would not result in a significant economic impact on a substantial number of small entities because few small entities are involved in part 708 proceedings and because the proposed rule contains few changes in the obligations of the litigants. DOE has therefore determined that the regulatory flexibility analysis is inapplicable.

C. The Paperwork Reduction Act of 1995

Proposed part 708 does not contain information collection requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

D. National Environmental Policy Act of 1969

DOE has considered this proposed rule in accordance with the National Environmental Policy Act (NEPA), as amended, DOE's NEPA regulations, set forth in 10 CFR part 1021, and DOE's NEPA implementing procedures published outside the Code of Federal Regulations at *www.energy.gov/nepa*. DOE has determined that NEPA does not apply to this action because this proposed rule is an administrative and routine action excepted from NEPA review. DOE has determined that this rulemaking is a Federal action, but it is not "major" and therefore not subject to NEPA. This action is one in which NEPA does not apply because it does not fall within the definition of "major Federal action" in section 111(10) of NEPA, 42 U.S.C. 4336e(10). See section 2.1(c)(5) of DOE's NEPA implementing procedures. For more information, please see appendix A of 10 CFR part 1021 ("A5, Interpretive rulemakings with no change in environmental effect") and appendix A of DOE's NEPA implementing procedures, "A5, Interpretive rulemakings with no change in environmental effect."

E. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996),

imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them.

DOE has completed the required review and determined that, to the extent permitted by law, the proposed part 708 meets the relevant standards of E.O. 12988.

F. Executive Order 13132

E.O. 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

DOE has examined the proposed part 708 and has determined that it will not preempt State law and will not have a substantial direct effect 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. No further action is required by E.O. 13132.

G. Executive Order 13175

Under E.O. 13175, "Consultation and Coordination with Indian Tribal Governments," 65 FR 67249 (Nov. 9, 2000), DOE may not issue a discretionary rule that has Tribal implications and imposes substantial direct compliance costs on Indian Tribal governments without prior Tribal consultation. DOE has determined that this proposed rule will not have such effects and has concluded that E.O. 13175 does not apply.

H. The Unfunded Mandates Reform Act of 1995

Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires each Federal agency to provide a written statement assessing the effects of Federal regulatory actions on State, local, and tribal governments and the private sector that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), before promulgating any general notice of proposed rulemaking, and before promulgating any final rule for which a general notice of proposed rulemaking was published.

The proposed rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

I. The Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The proposed rule will not affect the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to

the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M-19-15, "Improving Implementation of the Information Quality Act" (April 24, 2019), DOE published updated guidelines, which are available at: *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 3211

E.O. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation and that "(1)(i) is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action." For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and accordingly, DOE has not prepared a Statement of Energy Effects.

IV. Public Participation

DOE will accept all comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE OHA staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, people viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information [CBI]). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that www.regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comments or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This format reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and request for comments.

List of Subjects in 10 CFR Part 708

Administrative practice and procedure; Whistleblower Protection.

Signing Authority

This document of the Department of Energy was signed on September 15, 2026, by Chris Wright, Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on September 18, 2026.

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons set out in the preamble, DOE proposes to amend part 708 of chapter III of title 10 of the Code of Federal Regulations, as set forth:

PART 708—DOE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

1. The authority citation for part 708 continues to read as follows:

Authority: 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

§§ 708.8, 708.11, 708.34, and 708.38 [Amended]

2. Remove the words “EC Director” and add in their place the words “ECP Director” in the following places:

a. Section 708.8.

b. Section 708.11(a).

c. Section 708.34(c).

d. Section 708.38(a).

3. Revise § 708.1 to read as follows:

§ 708.1 Scope and purpose.

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning substantial violations of laws, rules, or regulations; substantial and specific danger to public or worker health or safety; fraud, gross mismanagement, gross waste of funds, or abuse of authority; participation in Congressional or administrative proceedings; or refusal to participate in certain unlawful activities or activities that make an employee reasonably fearful of serious injury to himself or herself or others.

4. Revise § 708.2 to read as follows:

§ 708.2 Definitions.

For purposes of this part:

Administrative Judge means an attorney appointed by the OHA Director to preside over the disposition of a complaint.

Alternative dispute resolution means any technique for resolving disputes and managing conflict without resorting to litigation in either an administrative or judicial forum. Alternative dispute resolution techniques include, but are not limited to, mediation, facilitation, shuttle diplomacy, partnering, and dispute systems design.

Complainant means an employee who has filed a complaint under 10 CFR part 708.

Contractor means a seller of goods or services who is a party to a management and operating contract or other type of contract with DOE, or subcontract to such a contract, to perform work directly related to activities at DOE-owned or -leased facilities.

Day means a calendar day. In computing any period of time prescribed or allowed by these regulations, the day of the act, event, or default from which the designated period of time begins to run is not to be included. If the last day of the period is a Saturday, Sunday, or federal legal holiday, then the period runs until the end of the following day that is not a Saturday, Sunday, or a federal legal holiday. Documents received by the Office of Hearings and Appeals on a Saturday, Sunday, or federal legal holiday, or after 5 p.m., Eastern Standard Time, are deemed filed on the following regular business day.

Discovery means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property, and requests for production of documents.

DOE Official means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract.

ECP Director means the Director of the Employee Concerns Programs at DOE Headquarters, or any official to whom the Director delegates his or her functions under this part.

Employee means a person employed by a contractor and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart.

Field element means a DOE operations office or field office that is responsible for the management, coordination, and administration of operations at a DOE facility.

Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate his or her functions under this part.

Management and operating contract means an agreement under which DOE contracts for the operation, maintenance, or support of a Government-owned or -leased research, development, special production, or testing establishment that is wholly or principally devoted to one or more of the programs of DOE.

OHA Director means the Director of the Office of Hearings and Appeals, or any official to whom the Director delegates his or her functions under this part.

Party means an employee, contractor, or other individual named in a proceeding under this part.

Retaliation means an action (including intimidation, threats, restraint, coercion, or similar action) taken by a contractor against an employee with respect to employment (*e.g.,* discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment) that would not have been taken but for the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

Law, rule, or regulation means policies or procedures that are government mandates or implement government mandates.

Union-negotiated grievance-arbitration procedure means one that has been negotiated by a labor organization.

Verified email is an email sent to the email address provided by a party.

5. Amend § 708.4 by revising undesignated introductory text and paragraph (c) to read as follows:

§ 708.4 Complaints not covered.

An employee of a contractor may not file a complaint against the contractor under this part if:

* * * * *

(c) Except as provided in § 708.16(a), the complaint is based on the same facts for which the employee has chosen to pursue a remedy available under a regulation, statute, or other law, including:

(1) Department of Labor regulations at 29 CFR part 24, "Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended";

(2) Federal Acquisition Regulation, 48 CFR part 3, subpart 3.9, "Whistleblower Protections for Contractor Employees";

(3) 41 U.S.C. 4712, "Enhancement of contractor protection from reprisal for disclosure of certain information"; or

(4) State or other applicable law, including final and binding grievance-arbitration, as described in § 708.16 of subpart B.

* * * * *

6. Revise § 708.5 to read as follows:

§ 708.5 Protected conduct.

An employee of a contractor may file a complaint against the contractor alleging that he or she has been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employer, or any higher tier contractor, information that the employee reasonably believes reveals—

(1) A substantial violation of a law, rule, or regulation;

(2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if the employee believed participation would—

(1) Constitute a violation of a Federal health or safety law; or

(2) Cause the employee to have a reasonable fear of serious injury to himself or herself, other employees, or members of the public.

7. Amend § 708.6 by revising paragraph (b) to read as follows:

§ 708.6 Reasonable fear of serious injury.

* * * * *

(b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

8. Amend § 708.7 by revising paragraph (b) to read as follows:

§ 708.7 Filing a complaint based on retaliation for refusal to participate.

* * * * *

(b) By the 30th day after the refusal to participate, the employee reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, the employer, or any higher tier contractor, and he or she stated the reasons for refusing to participate.

9. Amend § 708.9 revising paragraph (a) to read as follows:

§ 708.9 How to file complaints or other documents.

(a) Under this part, a complaint or other document is considered filed on the date it is received by the specified official or office.

* * * * *

10. Add § 708.10 to read as follows:

§ 708.10 Informal resolution of complaints.

(a) DOE encourages the use of alternative dispute resolution. If the parties are willing, they can seek to utilize alternative dispute resolution techniques, such as settlement discussions or mediation, in an attempt to resolve the complaint.

(b) The parties may engage in alternative dispute resolution at any time prior to the issuance of an initial agency decision. The Employee Concerns Program office, the DOE Alternative Dispute Resolution Office, or another servicing organization may provide alternative dispute resolution services.

(c) Any relevant deadline in this part, including the deadline for filing a complaint under § 708.15(a), may be tolled for up to 90 days by the Head of Field Element, the ECP Director, or the Office of Hearings and Appeals (as applicable) should the parties provide written notice that they have jointly requested to participate, or continue to participate, in alternative dispute resolution. The time to meet the deadline begins to run again on the earlier of:

(1) The day after the tolling period expires; or

(2) The day after a party informs the Head of Field Element, the ECP Director, or the Office of Hearings and Appeals that the alternative dispute resolution efforts have ended.

(d) If the parties resolve the complaint, the parties must give the Head of Field Element or the ECP Director and the Office of Hearings and Appeals (as applicable) a copy of any settlement agreement or a written statement from the employee that indicates his or her withdrawal of the complaint.

11. Amend § 708.13 by revising paragraphs (c) and (d) to read as follows:

§ 708.13 Requirements for the form and content of a complaint.

* * * * *

(c) A statement that all of the facts that the complainant has included in the complaint are true and correct to the best of the complainant's knowledge and belief; and

(d) An affirmation, as described in § 708.14 of this subpart, that the complainant has exhausted all applicable union-negotiated grievance-arbitration procedures.

12. Revise § 708.14 to read as follows:

§ 708.14 Exhaustion of union-negotiated grievance-arbitration procedures.

(a) To show that all applicable union-negotiated grievance-arbitration procedures have been exhausted, the complainant must:

(1) State that all available opportunities for resolution through an applicable union-negotiated grievance-arbitration procedure have been exhausted, and provide the date on which the union-negotiated grievance-arbitration procedure was terminated and the reasons for termination; or

(2) State that the complainant filed a grievance under applicable union-negotiated grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that the grievance was filed; or

(3) State that the employer has established no union-negotiated grievance-arbitration procedures that are applicable to the complainant.

(b) If the complainant does not provide the information specified in § 708.14(a), the complaint may be dismissed for lack of jurisdiction as provided in § 708.18 of this, subpart.

13. Revise § 708.15 to read as follows:

§ 708.15 Time to file a complaint.

(a) A complaint must be filed by the 90th day after the date the employee knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through any internal company grievance-arbitration procedure. The time for filing stops running on the day the above-listed grievance is filed. The time begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) If a union-negotiated grievance-arbitration procedure, 150 days after the grievance was filed if a final decision has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint the employee files under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If the complaint is filed on a date later than the applicable deadline, the Head of Field Element or ECP Director (as applicable) will give the complainant an opportunity to show any good reason he or she may have for not meeting that deadline, and that official may, in his or her discretion, accept the complaint for processing.

14. Revise § 708.16 to read as follows:

§ 708.16 Duplicative actions under State or other law.

(a) An employee may not file a complaint under this part if, with respect to the same facts, the employee chooses to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) The complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) The complaint was filed under 48 CFR part 3, Subpart 3.9, or 41 U.S.C. 4712, and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or

(3) The employee has exhausted union-negotiated grievance-arbitration procedures pursuant to § 708.14, and issues related to alleged retaliation for conduct protected under § 708.5 remain.

(b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent an employee from filing a complaint under this part.

(c) An employee is considered to have filed a complaint under State or other applicable law if the employee files a complaint, or other pleading, with respect to the same facts in a proceeding

established or mandated by State or other applicable law, whether such a complaint is filed before, concurrently with, or after a complaint is filed under this part.

(d) If an employee files a complaint under State or other applicable law after filing a complaint under this part, the complaint under this regulation will be dismissed under § 708.18(c)(3).

15. Revise § 708.17 to read as follows:

§ 708.17 Notification of complaints and opportunities to respond.

(a) By the 15th day after receiving a complaint, the Head of Field Element or ECP Director (as applicable) will provide the employer with a copy of the complaint. The employer has 15 days from receipt of the complaint to submit any response it wishes to make regarding the allegations in the complaint. The Head of Field Element or ECP Director (as applicable) will provide the complainant with a copy of the employer's response upon its receipt. The complainant has 10 days from receipt of the response to submit any additional comments regarding the complaint or the response. The Head of Field Element or ECP Director (as applicable) will provide the employer with a copy of those additional comments upon receipt. The deadlines set forth in this subsection may be extended by the Head of Field Element or ECP Director (as applicable) for good reason.

(b) If the complainant is part of a bargaining unit represented for purposes of collective bargaining by a labor organization, the Head of Field Element or ECP Director (as applicable) will provide the representative with a copy of the complaint by the 15th day after receiving it. The labor organization will be advised that it has 10 days from the receipt of the complaint to submit any comments it wishes to make regarding the allegations in the complaint. The Head of Field Element or the ECP Director (as applicable) will provide the comments to the complainant and employer upon receipt.

(c) The Head of Field Element or the ECP Director (as applicable) must provide the contact information for the DOE's Alternative Dispute Resolution Office to the parties as soon as is practicable after receiving the complaint.

16. Revise § 708.18 to read as follows:

§ 708.18 Dismissal for lack of jurisdiction or other good cause.

(a) The Head of Field Element or the ECP Director (as applicable) may dismiss a complaint for lack of jurisdiction or for other good cause after receiving the complaint, either on his or her own initiative or at the request of a party named in the complaint. If the employer does not file a response, such decisions are issued by the 20th day after the employer's period to respond under § 708.17(a) has elapsed. If the employer files a timely response, such decisions are issued by the 20th day after the complainant files additional comments under § 708.17(a), or the 20th day after the period to file additional comments has elapsed, whichever is soonest.

(b) The Head of Field Element or the ECP Director (as applicable) will notify the complainant by verified email or certified mail (return receipt requested) if the complaint is dismissed for lack of jurisdiction or other good cause, will give specific reasons for the dismissal, will provide the contact information for the DOE's Alternative Dispute Resolution Office, and will notify other parties of the dismissal.

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

(1) The complaint is untimely;

(2) The facts, as alleged in the complaint, do not present issues for which relief can be granted under this part;

(3) The complainant filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part;

(4) The complaint is frivolous or without merit on its face;

(5) The issues presented in the complaint have been rendered moot by subsequent events or substantially resolved; or

(6) The employer has made a formal offer to provide the remedy requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

17. Revise § 708.19 to read as follows:

§ 708.19 Appealing the dismissal of a complaint by the Head of Field Element or ECP Director for lack of jurisdiction or other good cause.

(a) If a complaint is dismissed by the Head of Field Element or ECP Director, the administrative process is terminated unless the complainant appeals the dismissal to the OHA Director by the 10th day after receipt of the notice of dismissal. Decisions not to dismiss may not be appealed.

(b) If the complainant appeals a dismissal to the OHA Director, the complainant must send copies of the appeal to the Head of Field Element or the ECP Director (as applicable) and all parties. The appeal must include a copy of the notice of dismissal and state the reasons the dismissal was erroneous.

(c) The OHA Director has all powers necessary to adjudicate the appeal. The OHA Director will issue a decision on the appeal and notify the parties of the decision by the 30th day after the appeal is received. The OHA Director will review findings of fact for clear error and conclusions of law de novo.

(d) The OHA Director's decision, either upholding the dismissal by the Head of Field Element or ECP Director or ordering further processing of the complaint, is the final decision on the appeal, unless the complainant files a petition for Secretarial review by the 30th day after receiving the appeal decision.

18. Revise and republish § 708.20 to read as follows:

§ 708.20 Review by the Secretary of Energy of a decision on appeal of a dismissal.

(a) By the 30th day after receiving a decision on an appeal under § 708.19 from the OHA Director, the complainant may file with the Office of Hearings and Appeals a notice indicating he or she is petitioning for Secretarial review. A decision by the OHA Director to reverse a dismissal may not be the subject of a petition for Secretarial review.

(b) By the 15th day after filing the notice of intent to petition for Secretarial review, the complainant must file a statement setting forth the arguments in support of its position. A copy

of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) The Secretary (or the Secretary's designee) will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. Upon consideration of the petition for Secretarial review, the Secretary will direct the OHA Director to issue an order either upholding the dismissal by the Head of Field Element or ECP Director or ordering further processing of the complaint. If the dismissal is upheld, it is a final agency action.

19. Revise § 708.21 to read as follows:

§ 708.21 Referral to the Office of Hearings and Appeals.

(a) If a complaint is not dismissed for lack of jurisdiction or other good cause, the Head of Field Element or the ECP Director (as applicable) will forward the complaint to the OHA Director by:

(1) The 25th day after receipt of the final submission permitted by § 708.17;

(2) If the employer does not respond to the complaint, the 25th day after the period for responses permitted by § 708.17 ends;

(3) If the complainant does not submit additional comments regarding the response, the 25th day after the period for additional comments permitted by § 708.17 ends; or

(4) The 5th day after receipt of an order to continue processing the complaint following an appeal of dismissal.

(b) The Head of Field Element or ECP Director (as applicable) will notify all parties that the complaint has been referred to the Office of Hearings and Appeals.

(c) Where the Head of Field Element or the ECP Director (as applicable) found the complaint to be untimely filed, but nonetheless accepted the complaint for processing as a matter of discretion in accordance with § 708.15(d), he or she must indicate upon referring the complaint to the

Office of Hearings and Appeals that good reason was found to accept the complaint for processing.

(d) The OHA Director and an Administrative Judge appointed to preside over any aspect of a part 708 proceeding are prohibited, beginning with the complaint's referral to the Office of Hearings and Appeals and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* discussions with any party on the merits of the complaint.

(e) In all proceedings under this subpart:

(1) The parties have the right to be represented by a person of their choosing or to proceed without representation. The parties are responsible for producing witnesses on their behalf, including requesting the issuance of subpoenas, if necessary; and

(2) Formal rules of evidence do not apply, but the Office of Hearings and Appeals may use the Federal Rules of Evidence as a guide.

20. Revise and republish § 708.22 to read as follows:

§ 708.22 Investigation of complaints.

(a) The OHA Director will appoint a person to investigate. The investigator may not participate or advise in any proceedings in the case subsequent to the investigation's completion.

(b) The investigator will determine the appropriate scope of investigation based on the circumstances of the complaint. The investigator may enter and inspect places and records; make copies of records; interview people alleged to have been involved in retaliation and other individuals who may have relevant information; take sworn statements; and require the production of any documents or other evidence. Documents containing trade secrets or confidential commercial or financial information must be marked as such when submitted. A copy of the document with the protected information redacted must be submitted with the original document.

(c) All parties must cooperate fully with the investigator by making all pertinent evidence available. The contractor must make employees available upon request.

(d) A person being interviewed in an investigation has the right to be represented by a person of his or her choosing.

(e) Parties to the complaint are not entitled to be present at interviews conducted by an investigator.

(f) If a person other than the complainant requests that his or her identity be kept confidential, the investigator may grant confidentiality, but he or she must advise such person that confidentiality means that the Office of Hearings and Appeals will not identify the person as a source of information to anyone outside the Office of Hearings and Appeals, except as required by statute or other law, or as determined by the OHA Director to be unavoidable.

(g) At any point during the investigation, the investigator may request that the OHA Director appoint an Administrative Judge to whom the complaint will be referred for a decision on whether dismissal is appropriate. The investigator will serve the parties with notice of the referral. The investigator will submit a written statement to the Administrative Judge explaining why dismissal may be appropriate and providing factual support. The Administrative Judge will then decide whether to dismiss the complaint. In making such decision, the Administrative Judge will have access to the entire investigative file. The Administrative Judge's decision, regardless of outcome, will be served on all the parties. A complaint may be dismissed prior to the completion of the investigation for:

(1) Any reason listed in § 708.18(c); or

(2) Lack of merit, provided the facts obtained by the investigator indicate there is no genuine dispute of material fact.

(h) If the Administrative Judge decides to dismiss the complaint, the Administrative Judge will issue an initial agency decision that includes the factual and legal bases for the dismissal. The investigator's written statement will be attached to the Administrative Judge's initial agency decision and served on all the parties. No report of investigation will issue for a complaint dismissed by the Administrative Judge following a referral for dismissal by the investigator.

(i) If the Administrative Judge decides not to dismiss the complaint, the Administrative Judge will issue a written statement to that effect, which will include the factual and legal basis for the decision. The investigation will then continue. The OHA Director may, at his or her discretion, appoint a new investigator.

(j) Dismissals under paragraph (h) of this section may be appealed in accordance with the procedures set forth in §§ 708.32, 708.33, 708.34, and 708.35. Decisions not to dismiss under paragraph (i) of this section may not be appealed.

21. Amend § 708.23 by revising paragraph (a) to read as follows:

§ 708.23 Time to issue a report of investigation.

(a) If the complaint is not dismissed prior to the completion of the investigation, the investigator will complete the investigation and issue a report of investigation by the 90th day after the complaint is received by the Office of Hearings and Appeals. If a case is referred for dismissal by an investigator, the time to issue the report of investigation stops running on the day of referral and, if the Administrative Judge decides against dismissal, begins to run again on the day after the Administrative Judge's decision issues.

* * * * *

22. Amend § 708.26 by revising paragraph (b) to read as follows:

§ 708.26 Time and location of hearings.

* * * * *

(b) The Administrative Judge will schedule the hearing at a time and place that is appropriate considering the circumstances of a particular case. Hearings may be conducted by video teleconference or other remote means, at the Administrative Judge's discretion.

23. Revise § 708.28 to read as follows:

§ 708.28 Hearing Procedures.

(a) In all hearings under this part:

(1) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 18 U.S.C. 1621, dealing with the criminal penalties associated with false statements and perjury;

(2) Witnesses are subject to cross-examination; and

(3) A court reporter will make a transcript of the hearing.

(b) The Administrative Judge has all powers necessary to regulate the conduct of proceedings, including the following:

(1) The Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint or defense raised in the contractor's response.

(2) The Administrative Judge will permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission.

(3) The period for discovery shall be established by the presiding Administrative Judge. A party may seek discovery anytime during the discovery period.

(4) The Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence.

(5) The Administrative Judge may rule on any motions filed by the parties, with or without oral argument. The Administrative Judge may set deadlines for the filing of motions and responses.

(6) The Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written documents or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that

documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing.

(7) The Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party. The Administrative Judge may also make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge or, without good cause, to attend a hearing. If the Administrative Judge's rulings result in termination of the proceeding prior to the completion of the hearing, the Administrative Judge will issue an initial agency decision pursuant to § 708.31 of this subpart.

(8) The Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge.

(9) The parties are entitled to make closing arguments, but post-hearing submissions are only permitted by direction of the Administrative Judge.

(10) Parties allowed to file written submissions must serve copies upon the other parties within the time prescribed by the Administrative Judge.

(c) The hearing record consists of all documents and exhibits filed with the Office of Hearings and Appeals under the hearing case number; the report of investigation, including any exhibits or attachments to the report of investigation except as ordered by the Administrative Judge; the hearing transcript; and all motions, rulings, and orders.

24. Revise § 708.29 to read as follows:

§ 708.29 Burdens of Proof.

(a) The complainant has the burden of establishing by a preponderance of the evidence that the complainant made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the complainant by the contractor. A complainant can demonstrate that a

protected activity was a contributing factor to an alleged act of retaliation by establishing, among other things:

(1) That the person taking the adverse action had actual or constructive knowledge of the protected activity; and

(2) That the alleged retaliatory act had sufficient temporal proximity to the protected activity to give rise to a reasonable inference of a causal connection.

(b) Once the complainant has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the complainant's disclosure, participation, or refusal.

25. Revise § 708.30 to read as follows:

§ 708.30 Timing for issuing an initial agency decision.

The Administrative Judge will issue an initial agency decision on the complaint by the 60th day after the later of:

(a) The date the Administrative Judge approves the parties' agreement not to hold a hearing;

(b) The date the Administrative Judge receives the transcript of the hearing; or

(c) The date the Administrative Judge receives post-hearing submissions permitted under § 708.28(b)(9) of this subpart.

26. Amend § 708.31 by revising paragraph (c) to read as follows:

§ 708.31 Procedure for issuing an initial agency decision.

* * * * *

(c) If the Administrative Judge determines that an act of retaliation has occurred, the initial agency decision will, as appropriate, order any form of relief as permitted under § 708.36, or the Administrative Judge will initiate a second proceeding for the purpose of determining the appropriate form of relief. If the Administrative Judge does not determine that an act of retaliation has occurred, the initial agency decision will state that the complaint is denied.

27. Amend § 708.32 by revising paragraph (a) to read as follows:

§ 708.32 Appealing an initial agency decision.

(a) By the 15th day after receiving an initial agency decision from the Administrative Judge, or a supplemental decision with regard to remedy if the Administrative Judge initiated a second proceeding, any party may file a notice of appeal with the OHA Director requesting review of the initial agency decision.

* * * * *

28. Revise and republish § 708.33 to read as follows:

§ 708.33 Procedure for appeals.

(a) By the 15th day after filing a notice of appeal under § 708.32, the appellant must file a statement identifying the issues that it wishes the OHA Director to review. The appellant must serve a copy of the statement on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(b) In considering the appeal, the OHA Director:

(1) Will possess all powers necessary to adjudicate the appeal;

(2) Will review findings of fact for clear error and conclusions of law de novo; and

(3) Will close the record on appeal after receiving the last submission permitted under this section.

29. Amend § 708.34 revising paragraph (b)(2) to read as follows:

§ 708.34 Procedure for issuing an appeal decision.

* * * * *

(b) * * *

(2) If the OHA Director determines that an act of retaliation has occurred, the appeal decision will include an order for any form of relief permitted under § 708.36, or it will remand the matter to the Administrative Judge for further proceedings regarding the appropriate relief.

(c) The OHA Director will send an appeal decision to all parties and to the Head of Field Element or ECP Director having jurisdiction over the contract under which the complainant was employed when the alleged retaliation occurred.

* * * * *

30. Revise § 708.35 to read as follows:

§ 708.35 Review by the Secretary of Energy of an appeal decision.

(a) By the 30th day after receiving an appeal decision from the OHA Director, any party may file a notice indicating he or she is petitioning for Secretarial review with the Office of Hearings and Appeals, subject to the limitations set forth in § 708.34(d).

(b) By the 15th day after filing a notice of intent to petition for Secretarial review, the petitioner must file a statement identifying the issues that the petitioner wishes the Secretary to consider. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) The Secretary (or the Secretary's designee) will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event the Secretary determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue a revised decision, which is the final agency action on the complaint. In the event the Secretary determines to reverse an appeal decision dismissing the complaint, the Secretary may, as appropriate, direct the OHA Director to issue a revised decision ordering further processing of the complaint. If no further processing is ordered, the Secretary’s decision is the final agency action on the complaint.

31. Amend § 708.36 by revising paragraph (a)(4) to read as follows:

§ 708.36 Remedies.

(a) * * *

(4) Reimbursement of the complainant's reasonable costs and expenses incurred in pursuing the complaint, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

* * * * *

32. Revise § 708.40 to read as follows:

§ 708.40 Notice of program requirements.

Employers who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name, address, telephone number, and website or email address of the DOE office where employees can obtain information about filing and file complaints under this part.

33. Revise § 708.42 to read as follows:

§ 708.42 Extension of deadlines.

The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and appeal process). Failure by DOE to comply with timing requirements does not create a substantive right for any party to overturn a DOE decision on a complaint.

34. Revise § 708.43 to read as follows:

§ 708.43 Affirmative duty not to retaliate.

DOE contractors will not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in § 708.5.

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