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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1978

[Docket Number OSHA-2008-0026]

RIN 1218-AC36

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is amending the regulations governing employee protection (or “whistleblower”) claims under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105. The amendments clarify and improve procedures for handling STAA whistleblower complaints and implement statutory changes enacted into law on August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act), Public Law 110-53, 121 Stat. 266. These changes to the STAA whistleblower regulations also make the procedures for handling retaliation complaints under STAA more consistent with OSHA’s procedures for handling retaliation complaints under Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851 and other whistleblower provisions.

DATES: This interim final rule is effective on August 31, 2010. Comments on the interim final rule must be submitted (postmarked, sent or received) on or before November 1, 2010.

ADDRESSES: You may submit comments and additional materials by any 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 must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2008-0026, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 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-2008-0026). 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.

FOR FURTHER INFORMATION CONTACT: Nilgun Tolek, Director, Office of the Whistleblower Protection Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3610, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2199. This is not a toll-free number. The alternative formats available are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background

Among other provisions of the 9/11 Commission Act, section 1536 reenacted the whistleblower provision in STAA, 49 U.S.C. 31105 (previously referred to as “Section 405”), with certain amendments. The regulatory revisions described herein reflect these statutory changes and also seek to clarify and

improve OSHA’s procedures for handling STAA whistleblower claims. To the extent possible within the bounds of applicable statutory language, these revised regulations are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA, including the ERA, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, and Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A. Responsibility for receiving and investigating complaints under 49 U.S.C. 31105 has been delegated to the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) (Secretary’s Order 5-2007, 72 FR 31160, June 5, 2007). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Administrative Review Board (ARB) (Secretary’s Order 1-2010 (Jan. 15, 2010), 75 FR 3924-01 (Jan. 25, 2010)).

II. Summary of Statutory Changes to STAA Whistleblower Provisions

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

Expansion of Protected Activity

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

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

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

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

The 9/11 Commission Act added a new paragraph to 49 U.S.C. 31105, (a)(1)(A)(ii), making it unlawful for a person to discharge, discipline or discriminate against an employee regarding pay, terms or privileges of employment because of a perception that the employee has filed or is about to file a complaint or has begun or is about to bring a proceeding concerning a violation of a commercial motor vehicle safety or security regulation, standard, or order. Paragraph (a)(1)(C) of 49 U.S.C. 31105 is also new and makes it unlawful to discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because the employee accurately reports hours on duty pursuant to 49 U.S.C. chapter 315. The recent statutory amendments also added paragraph (a)(1)(D) to 49 U.S.C. 31105. This paragraph prohibits discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment because the employee cooperates, or is perceived as being about to cooperate, with a safety

or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board. Finally, the 9/11 Commission Act inserted paragraph (a)(1)(E) into 49 U.S.C. 31105. This provision prohibits a person from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because the employee furnishes, or is perceived as having furnished or being about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency about the facts concerning any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

Legal Burdens of Proof for STAA Complaints

Prior to the 9/11 Commission Act, the parties' burdens of proof in STAA actions were understood to be analogous to those developed for retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See, e.g., *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21–22 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). The plaintiff's prima facie case could be carried by a sufficient showing that (1) he or she engaged in protected activity; (2) he or she suffered an adverse action; and (3) a causal connection existed between the two events. *Id.* The ARB also required proof that the employer was aware that the employee had engaged in the protected activity. See, e.g., *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05–1505, ALJ No. 2005–STA–005, 2007 WL 3286335, at *3 (Admin. Review Bd. Oct. 31, 2007).

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

of establishing by a preponderance of the evidence that it would have taken the adverse employment action in the absence of the employee's protected activity." *Clean Harbors*, 146 F.3d at 21–22.

The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C. 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b), which contains whistleblower protections for employees in the aviation industry. AIR21 provides that a complaint must be dismissed (and no investigation will be conducted) unless the complainant makes a prima facie showing that a protected activity was a contributing factor in the adverse action described in the complaint. Notwithstanding a finding that the complainant has made the required prima facie showing, AIR21 states that no investigation will be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct. Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. And relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. See *Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 108–09 (1st Cir. 2006) (per curiam) (burdens of proof under AIR21).

Written Notification of Complaints and Findings

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

Expansion of Remedies

Paragraph (b)(3)(A) of 49 U.S.C. 31105 previously compelled the Secretary, upon finding a violation of STAA's whistleblower provision, to order the employer to take affirmative abatement action, reinstate the complainant to his or her former position with the same pay and terms and privileges of employment, and pay compensatory damages, including backpay. The 9/11 Commission Act amended paragraph

(b)(3)(A)(iii) to reflect existing law on damages in STAA whistleblower cases and expressly provide for the award of interest on backpay as well as compensation for any special damages sustained as a result of the unlawful discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. The 2007 amendments also added a new provision to 49 U.S.C. 31105, paragraph (b)(3)(C), authorizing punitive damage awards of up to \$250,000.

De Novo Review

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

Preemption and Employee Rights

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

Miscellaneous Provisions

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

OSHA's handling of whistleblower complaints under STAA.

Definition of "Employee"

Definitions applicable to STAA are found at 49 U.S.C. 31101. That section defines "employee" as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (i) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and (ii) is not an employee of the Federal, State or local government acting in the course of employment. The 9/11 Commission Act incorporated this definition into the whistleblower section of STAA, 49 U.S.C. 31105, at paragraph (j), and expanded it to include employees who directly affect commercial motor vehicle security in the course of employment by a commercial motor carrier.

III. Summary and Discussion of Regulatory Provisions

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

These regulatory amendments incorporate two nonsubstantive changes in terminology. First, cases brought under the whistleblower provisions of STAA will now be referred to as actions

alleging "retaliation" rather than "discrimination." This change in terminology, which has already been made in the regulations implementing the ERA and the other whistleblower statutes covered by 29 CFR part 24, is not intended to have substantive effect. It simply reflects the fact that claims brought under these whistleblower provisions are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee's protected activity rather than as a result of an employee's characteristics (e.g., race, gender, or religion).

Second, these regulations previously referred to persons named in STAA whistleblower complaints as "named persons," but in the revised regulations they will be referred to as "respondents." Again, this change is not intended to have any substantive impact on the handling of STAA whistleblower cases. This revision simply reflects a preference for more conventional terminology.

Section 1978.100 Purpose and Scope

This section describes the purpose of the regulations implementing STAA's whistleblower provision and provides an overview of the procedures contained in the regulations. Paragraph (a) of this section is being revised to include an updated citation reference to the correct section of the United States Code where STAA's whistleblower provision is located and to reflect the recent statutory amendments extending coverage to activities pertaining to commercial motor vehicle security matters. Minor editorial edits are being made to paragraph (b) of this section.

Section 1978.101 Definitions

This section includes general definitions applicable to STAA's whistleblower provision. The definitions are being reorganized in alphabetical order and minor edits are being made to cleanup or clarify existing regulatory text.

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

The regulations previously defined "commercial motor carrier" as a person who satisfied the definitions of "motor carrier" and "motor private carrier" in 49

U.S.C. 10102(13) and 10102(16). Those statutory references are out of date and are being replaced with: "Commercial motor carrier means any person engaged in a business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate such a vehicle." The new definition of "commercial motor carrier" reflects the Secretary's longstanding practice of giving that phrase expansive meaning, *i.e.*, including within its reach all motor carriers in or affecting commerce. *See, e.g., Arnold v. Associated Sand and Gravel Co.*, Case No. 92–STA–19, 1992 WL 752791, at *3 (Office Admin. Appeals, Aug. 31, 1992) (appropriate to give the term "commercial" its legal meaning; "legislative history of the STAA * * * additionally militates in favor of construing the term expansively to describe motor carriers 'in' or 'affecting' commerce"). In addition, the revised definition of "commercial motor carrier" is more consistent with the statutory definition of "employer." *See* 49 U.S.C. 31101(3).

The statutory definition of "commercial motor vehicle" is being added to this section at paragraph (e), and the definition of "employee", now at paragraph (h), is being revised to reflect the statutory amendment expanding coverage to individuals whose work directly affects commercial motor vehicle security. In addition, the statutory definitions of "employer" and "State" are being added to this section at paragraphs (i) and (n) respectively, and a new paragraph is being added at the end of this section to clarify that any future statutory amendments will govern in lieu of the definitions contained in section 1978.101. A new definition of "complaint" is being added to this section at paragraph (g) to clarify the scope of activities protected by STAA's whistleblower provisions. *See* discussion of 1978.102 (Obligations and prohibited acts) below.

Section 1978.102 Obligations and Prohibited Acts

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

Among other prohibited acts, it is unlawful under STAA for an employer to retaliate against an employee because the employee, or someone acting pursuant to the employee's request, has filed a complaint related to a violation

of a commercial motor vehicle safety or security regulation, standard or order. 49 U.S.C. 31105(a)(1)(A)(i). STAA's whistleblower provision also protects employees who the employer perceives as having filed or being about to file such a complaint. 49 U.S.C. 31105(a)(1)(A)(ii). The Secretary has long taken the position that these provisions of STAA, as well as similarly worded provisions in other whistleblower statutes enforced by OSHA, cover both written and oral complaints to the employer or a government agency. *See, e.g., Harrison v. Roadway Express, Inc.*, No. 00–048, 2002 WL 31932546, at *4 (Admin. Review Bd. Dec. 31, 2002) ("[C]omplaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial."), *aff'd on other grounds*, 390 F.3d 752 (2d Cir. 2004); *see also, e.g., Calhoun v. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) for the proposition that "written or oral" complaints can be protected under STAA); *Power City Elec., Inc.*, No. C–77–197, 1979 WL 23049, at *2 (E. D. Wash. Oct. 23, 1979) (noting that the term "filed", as used in Section 11(c) of the OSH Act, "is not limited to a written form of complaint."). It is particularly important for STAA to cover oral as well as written complaints because in many cases truck drivers are out on the road and the only way they can communicate immediate concerns about violations of safety and security regulations is via CB radio or phone. For these reasons, sections 1978.102(b)(1) and 1978.102(e)(1) are intended to cover the filing of written and oral complaints with employers or government agencies, and a definition of the term "complaint," reflecting this intent, has been added to section 1978.101.

Section 1978.103 Filing of Retaliation Complaints

This section (formerly section 1978.102) is being revised to make it more consistent with the regulatory procedures for other OSHA-administered whistleblower laws.

Complaints filed under STAA's whistleblower provision need not be in any particular form. Complainants have always been permitted to file STAA whistleblower complaints either orally or in writing. In light of this longstanding practice, OSHA will continue to accept STAA whistleblower complaints in either oral or written form. Allowing STAA whistleblower complaints to be filed orally is also consistent with OSHA's practice in whistleblower cases under Section 11(c)

of the OSH Act, 29 U.S.C. 660(c); Section 211 of the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. 2651; and Section 7 of the International Safe Container Act (ISCA), 46 U.S.C. 80507. And the final regulations implementing the ERA and the other whistleblower statutes covered by 29 CFR part 24 permit the filing of oral as well as written complaints. Language has been added to paragraph (b) to clarify that when a complaint is made orally, OSHA will reduce the complaint to writing. In addition, paragraph (b) is being updated to provide that if an employee is not able to file a complaint in English, OSHA will accept the complaint in any language.

Language has been added to paragraph (d) to clarify the date on which a complaint will be considered "filed," *i.e.*, the date of postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office.

Provisions in former paragraph (d) dealing with tolling of the 180-day period for the filing of STAA whistleblower complaints have been deleted for consistency with other OSHA whistleblower regulations, which do not contain this language. This revision is not intended to change the way OSHA handles untimely complaints under any whistleblower laws. A new sentence in the regulatory text clarifies that filing deadlines may still be tolled based on principles developed in applicable case law. *See, e.g., Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1423–29 (10th Cir. 1984).

Finally, paragraph (e), "Relationship to Section 11(c) complaints," has been revised to conform to similar provisions implementing other OSHA whistleblower programs and to more clearly describe the relationship between Section 11(c) complaints and STAA whistleblower complaints. Section 11(c) of the OSH Act generally prohibits employers from retaliating against employees for filing safety or health complaints or otherwise initiating or participating in proceedings under the OSH Act. In some circumstances an employee covered by STAA may engage in activities that are protected under both STAA and Section 11(c) of the OSH Act. For example, a freight handler loading cargo onto a commercial motor vehicle may complain about both the overloading of that vehicle (a safety complaint protected by STAA) and also about an unsafe forklift (a safety complaint

covered by the OSH Act). In practice, OSHA would investigate whether either or both of these protected activities caused the firing. Paragraph (e) now clarifies that STAA whistleblower complaints that also allege facts constituting an 11(c) violation will be deemed to have been filed under both statutes. Similarly, Section 11(c) complaints that allege facts constituting a violation of STAA's whistleblower provision will also be deemed to have been filed under both laws. In these cases, normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

Section 1978.104 Investigation

This section (formerly section 1978.103) has been revised to more closely conform to the regulations implementing other whistleblower provisions administered by OSHA. Former paragraph (f) in section 1978.102, which deals with the notice sent to employers when complaints are filed against them, is being moved to paragraph (a) in section 1978.104, where it more appropriately appears under the "Investigation" heading. In addition, minor revisions are being made to that paragraph to be more consistent with similar provisions in other OSHA whistleblower regulations. Of particular note, new language is being added requiring OSHA to send the Federal Motor Carrier Safety Administration (FMCSA) a copy of the notice that goes to the employer. This has been standard practice in any event.

Former section 1978.103(a), which simply stated that OSHA would investigate and gather data as it deemed appropriate, is being deleted as unnecessary. Paragraph (b) is being revised to conform to other OSHA whistleblower regulations. Language describing the persons who can be present and the issues that can be addressed at OSHA's meetings with respondents is being deleted, but this is not intended to change the manner in which OSHA conducts these meetings.

A new paragraph (c) specifies that throughout the investigation the agency will provide to the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws. The agency expects that sharing

information with complainants in accordance with this new provision will enhance OSHA's ability to conduct full and fair investigations and permit the Assistant Secretary to more thoroughly assess defenses raised by respondents.

A new paragraph (d) addresses confidentiality in investigations. In addition, a new paragraph is being added to this section at paragraph (e), which incorporates the AIR21 burdens of proof that were carried over to STAA's whistleblower provision by the 9/11 Commission Act. This paragraph generally conforms to similar provisions in the regulations implementing the AIR21 and ERA whistleblower laws. All of these statutes now require that a complainant make an initial prima facie showing that protected activity was "a contributing factor" in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. Complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action. Language from some of OSHA's other whistleblower regulations, including those implementing AIR21 and ERA, setting forth specific elements of the complainant's prima facie case has been carried over into these regulations, although it has been modified slightly to reflect the new provisions in STAA specifically protecting employees who are "perceived" as having engaged in certain conduct. *See Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368 (8th Cir. 1994) ("Construing § 11(c), the OSH Act's anti-retaliation provision, to protect employees from adverse employment actions because they are suspected of having engaged in protected activity is consistent with * * * the specific purposes of the anti-retaliation provisions.").

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same framework now found in the AIR21 law and STAA, served a "gatekeeping function" that

"stemm[ed] frivolous complaints"). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under STAA and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that protected activity or, where covered by STAA, the perception of protected activity, was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity or the perception thereof.

Former section 1978.103(c) is being moved to paragraph (f) of this section. Minor revisions are being made to this paragraph to conform to similar paragraphs in the regulations implementing the AIR21 and SOX whistleblower provisions. This includes allowing ten business days (rather than five days) for the respondent to present evidence in support of its position against an order of preliminary reinstatement.

Section 1978.105 Issuance of Findings and Preliminary Orders

Former paragraph (a) in section 1978.104, now at paragraph (a) in this section, is being updated to reflect the recent amendments to STAA expanding available remedies. If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will order appropriate relief, including preliminary reinstatement. In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he or she received prior to his or her termination, but not actually return to work. Such "economic reinstatement" is employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977. *See, e.g., Secretary of Labor on behalf of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at *1 (June 26, 2001). Congress intended that complainants be preliminarily reinstated to their positions if OSHA finds reasonable cause that they were discharged in violation of STAA's whistleblower provision. When a violation is found, the norm is for OSHA to order immediate, preliminary reinstatement. An employer does not have a statutory right to choose

economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA's satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the complainant. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the complainant continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating a complainant should the employer ultimately prevail in the whistleblower litigation.

A new provision is being added at paragraph (a)(2) of this section requiring the Assistant Secretary to notify the parties if it finds that a violation has not occurred. Former section 1978.104(c), which provided for the suspension of 11(c) complaints pending the outcome of STAA proceedings, is being deleted. As described above, section 1978.103(e) now adequately describes the relationship between STAA and 11(c) complaints.

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

Subpart B—Litigation

Section 1978.106 Objections to the Findings and the Preliminary Order and Request for a Hearing

Minor revisions are being made to paragraph (a), formerly section 1978.105(a), to conform to other OSHA whistleblower regulations. The new paragraph now clarifies that with respect to objections to the findings and preliminary order, the date of the postmark, fax, or e-mail communication is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is

filed upon receipt. The filing of objections is also considered a request for a hearing before an ALJ. The amended language also clarifies that in addition to filing objections with the Chief Administrative Law Judge, the parties must serve a copy of their objections on the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health. A failure to serve copies of the objections on the appropriate parties does not affect the ALJ's jurisdiction to hear and decide the merits of the case. See *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 2004-ERA-9, 2005 WL 2865915, at *7 (Admin. Review Bd. Oct. 31, 2005).

The title to former section 1978.105(b) is being deleted because it is unnecessary. In addition, as previously mentioned, former paragraph (b)(1) in section 1978.105 is being moved to new paragraph (c) in section 1978.105. Finally, some minor, nonsubstantive revisions are being made to former 1978.105(b)(2), now at 1978.106(b), and additional language is being added to that paragraph to clarify that all provisions of the ALJ's order, with the exception of any order for preliminary reinstatement, will be stayed upon the filing of a timely objection. The respondent may file a motion for a stay of a preliminary reinstatement order.

Section 1978.107 Hearings

Former section 1978.106, which has become section 1978.107, was titled "Scope of rules; applicability of other rules; notice of hearing." The title is being changed to "Hearings," the title assigned to similar sections in other OSHA whistleblower regulations.

Minor revisions are being made to paragraph (a), which adopts the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at 29 CFR part 18. Changes are also being made to paragraph (b) to conform to other OSHA whistleblower regulations. The requirements for the ALJ to set a hearing date within seven days, and to commence a hearing within 30 days, have been deleted, and new language is being added to clarify that hearings will commence expeditiously and be conducted *de novo* and on the record. The new language is not intended to change current case-handling practices.

Paragraph (c), which deals with situations in which both the complainant and the respondent object to the findings and/or preliminary order, is being revised, consistent with

the changes made to paragraph (b), to remove language stating that hearings shall commence within 30 days of the last objection received.

Former paragraph (d), dealing with the ALJ's discretion to order the filing of prehearing statements, is being deleted as unnecessary.

Section 1978.108 Role of Federal Agencies

Former section 1978.107, titled "Parties," is now at section 1978.108 with the new title "Role of Federal agencies." This conforms to the terminology used in OSHA's other whistleblower regulations.

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

A new paragraph (a)(2) clarifies that if the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1), he or she may, upon written notice to the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ will issue appropriate orders to regulate the course of future proceedings. Section 1978.111(d)(3) (discussed below) retains language clarifying that the Assistant Secretary may decline the role of

prosecuting party if the complainant rejects a reasonable settlement offer.

New paragraphs (a)(3) and (b) are being added to this section. Paragraph (a)(3) simply provides that in all cases in which the Assistant Secretary is participating in the proceeding, copies of documents must be sent to the Assistant Secretary and the Associate Solicitor for Occupational Safety and Health, as well as to all other parties. In cases in which the Assistant Secretary is not a party, copies of documents must be sent to the Assistant Secretary and all parties, but not to the Associate Solicitor.

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

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

Section 1978.109 Decision and Orders of the Administrative Law Judge

This section sets forth the content of the decision and order of the ALJ, and includes the standards for finding a violation under STAA's whistleblower provision. The title of this section is being revised to conform to the title assigned to similar provisions in other OSHA whistleblower regulations. Previously, section 1978.109 addressed decisions of both the ALJs and the ARB. In conformance with other OSHA whistleblower regulations, these two topics are now being separated into individual sections. Section 1978.109 now covers only ALJ decisions and section 1978.110 addresses ARB decisions.

Former paragraph (a) is being divided among multiple paragraphs in this section and otherwise revised to reflect the parties' new burdens of proof and to conform more closely to the regulations implementing other OSHA-administered whistleblower laws. In litigation, the statutory burdens of proof require a complainant to prove that the alleged protected activity or, when covered by STAA, the perception of protected activity, was a "contributing factor" in the alleged adverse action. If the complainant satisfies his or her burden, the employer, to escape liability, must prove by "clear and

convincing evidence" that it would have taken the same action in the absence of the protected activity or the perception thereof.

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) (Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). In proving that protected activity was 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 a prohibited one. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, 2006 WL 3246904, at *13 (Admin. Review Bd. May 31, 2006) (discussing contributing factor test under SOX) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

The AIR21 burdens of proof, now incorporated in STAA, do not address the evidentiary standard that applies to a complainant's proof that protected activity was a contributing factor in an adverse action. AIR 21 simply provides that the Secretary may find a violation only "if the complainant demonstrates" that protected activity was a contributing factor in the alleged adverse action. 49 U.S.C. 42121(b)(2)(B)(iii). It is the Secretary's position that the complainant must prove by a "preponderance of the evidence" that his or her protected activity or, when covered by STAA, the perception of protected activity, contributed to the adverse action at issue; otherwise, the burden never shifts to the employer to establish its defense by clear and convincing evidence. See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) ("The term 'demonstrates' means to prove by a preponderance of the evidence."). Once the complainant establishes that protected activity was a contributing factor in an adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the protected activity. The clear and convincing evidence standard is a higher burden of proof than a preponderance of the evidence standard.

The requirement that the ALJ issue a decision within 30 days after the close of the record, and the related provision

requiring the ALJ to close the record within 30 days after the filing of the objection, have been eliminated because procedures for issuing decisions, including their timeliness, are addressed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR 18.57.

New section 1978.109(c), which is similar to provisions in other OSHA whistleblower regulations, provides that the Assistant Secretary's determinations about when to proceed with an investigation and when to dismiss a complaint without completing an investigation are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. If there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if warranted by the facts and circumstances.

1978.109(d)(1) now describes the relief the ALJ can award upon finding a violation and reflects the recent statutory amendments. (See earlier discussion of section 1978.105(a).) In addition, new paragraph (d)(2) in this section requires the ALJ to issue an order denying the complaint if he or she determines that the respondent has not violated STAA.

Previously under these regulations, ALJs' decisions and orders were subject to automatic review by the ARB. These procedures were unique to STAA whistleblower cases and resulted in a heavy STAA caseload for the ARB. This has made it more difficult for the ARB to promptly resolve the cases on its docket and has delayed the resolution of STAA cases in which the parties are mutually satisfied with the ALJ's decision and order. Overall, requiring mandatory ARB review of every STAA whistleblower case is an inefficient use of limited resources. In conformance with the procedures used under the other whistleblower provisions administered by OSHA and adjudicated by ALJs, these regulations are being revised to provide for ARB review of an ALJ's decision only if one or more of the parties to the case files a petition requesting such review. These new procedures for review of ALJ decisions will apply to all ALJ decisions issued on or after the effective date of these regulations.

Former section 1978.109(b) is being deleted, although much of its content is being moved to paragraph (e). New section 1978.109(e), which borrows

language from similar provisions in other OSHA whistleblower regulations, gives parties ten business days after the date of the ALJ's decision to file a petition for review with the ARB. If no petition for review is filed within that timeframe, the ALJ's decision is final and all portions of the order become effective. New paragraph (e), in addition to giving parties ten business days to seek review before the ARB, clarifies that any orders relating to reinstatement will be effective immediately upon receipt of the decision by the respondent.

All of the provisions in former section 1978.109, which codified the automatic review process, primarily former paragraphs (c)(1) and (c)(2), are being deleted. The content of former paragraph (c)(3), regarding the standard for ARB review of ALJ decisions, is being moved to new section 1978.110(b). The content of former paragraph (c)(4), which required the ARB to issue an order denying the complaint if it determined that the respondent had not violated the law, is now at section 1978.110(e). Former paragraph (c)(5), which required service of the ARB decision on all parties, has become a part of new section 1978.110(c).

Section 1978.110 Decision and Orders of the Administrative Review Board

This is a new section, borrowed largely from existing regulations implementing other OSHA whistleblower laws. In accordance with the decision to discontinue automatic ARB review of ALJ decisions, paragraph (a) of this section gives the parties ten business days from the date of the ALJ's decision to file a petition for review with the ARB. The decision of the ALJ becomes the final decision of the Secretary, and is not subject to judicial review, if no timely petition for review is filed. Paragraph (a) also clarifies that the date of the postmark, fax, e-mail communication, or hand-delivery will be deemed the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

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

whistleblower cases discretionary may assist in furthering that goal. The parties should identify in their petitions for review the conclusions and orders to which they object, or the objections will ordinarily be deemed waived. The ARB has 30 days to decide whether to grant a petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. This section further provides that when the ARB accepts a petition for review, it will review the ALJ's factual determinations under the substantial evidence standard, a standard previously set forth in section 1978.109(c)(3). If a timely petition for review is filed with the ARB, relief ordered by the ALJ is inoperative while the matter is pending before the ARB, except that orders of reinstatement will be effective pending review. Paragraph (b) does provide that in exceptional circumstances the ARB may grant a motion to stay an ALJ's order of reinstatement. The Secretary believes that a stay of a reinstatement order is only appropriate when the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favoring a stay.

Paragraph (c) of section 1978.110 incorporates the statutory requirement that the Secretary's final decision be issued within 120 days of the conclusion of the hearing. The hearing is deemed concluded ten business days after the date of the ALJ's decision unless a motion for reconsideration has been filed with the ALJ, in which case the hearing is concluded on the date the motion for reconsideration is denied or ten business days after a new ALJ decision is issued. (Previously, section 1978.109(a) provided that the issuance of the ALJ's decision would be deemed the conclusion of the hearing. The new provision is more consistent with procedures used under other OSHA-administered whistleblower provisions and the new procedures for seeking ARB review of ALJ decisions in STAA whistleblower cases.) This paragraph further provides for the ARB's decision in all cases to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health.

Paragraph (d) describes the remedies the ARB can award if it concludes that the respondent has violated STAA's whistleblower provision. In addition, under paragraph (e), if the ARB determines that the respondent has not violated STAA, it will issue an order

denying the complaint. Paragraph (f) clarifies that the new procedures for seeking review before the ARB apply to all cases in which ALJ decisions are issued on or after the effective date of these regulations.

Subpart C—Miscellaneous Provisions

Section 1978.111 Withdrawal of STAA Complaints, Objections, and Petitions for Review; Settlement

This section provides procedures and time periods for the withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, the withdrawal of objections to findings and/or preliminary orders, and the withdrawal of petitions for review of ALJ decisions. It also provides for the approval of settlements at the investigative and adjudicative stages of the case.

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

decision will become the final order of the Secretary. Finally, paragraph (c) provides that if objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d).

Paragraph (d)(1) states that a case may be settled at the investigative stage if the Assistant Secretary, the complainant, and the respondent agree. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties. Minor, nonsubstantive changes are being made to paragraphs (d)(2) and (d)(3). Paragraph (d)(3), which addresses the Assistant Secretary's authority to withdraw as the prosecuting party if the complainant refuses to accept a fair and equitable settlement, is being retained in these revised regulations. *See supra* (discussion of section 1978.108).

A new paragraph (e) is being added to this section. Borrowing language from similar provisions in other OSHA whistleblower regulations, this paragraph simply clarifies that settlements approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to 49 U.S.C. 31105(e) and section 1978.113 (judicial enforcement).

Section 1978.112 Judicial Review

This section, formerly section 1978.110, describes the statutory provisions for judicial review of decisions of the Secretary and, in cases where judicial review is sought, requires the ARB to submit the record of proceedings to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court. Nonsubstantive revisions are being made to paragraphs (a), (b), and (c).

Former section 1978.112, which addressed deference to other forums, including grievance arbitration proceedings under collective bargaining agreements, has been deleted to conform to other OSHA whistleblower regulations, which do not contain similar provisions.

Section 1978.113 Judicial Enforcement

Nonsubstantive revisions are being made to this section, which describes the Secretary's power under STAA's whistleblower provision to obtain judicial enforcement of orders, including orders approving settlement agreements.

Section 1978.114 District Court Jurisdiction of Retaliation Complaints Under STAA

This new section incorporates into the regulations the recent amendment to STAA allowing a complainant in a whistleblower case to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 210 days of the filing of the complaint and the delay was not due to the complainant's bad faith. Section 1978.114 has been drafted to reflect the Secretary's position that it would not be reasonable to construe the statute to permit a complainant to initiate an action in Federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the administrative complaint. In the Secretary's view, the purpose of the "kick out" provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. The regulations have been drafted in accordance with this position.

Paragraph (b) provides that complainants must give notice fifteen days in advance of their intent to file a complaint in district court. This is borrowed from some of OSHA's other regulations implementing similar "kick out" provisions. In addition, under paragraph (b), the complainant must file and serve the district court complaint on all parties to the proceeding as well as OSHA's Regional Administrator, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health.

Section 1978.115 Special Circumstances; Waiver of Rules

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

OSHA has deleted former section 1978.114, which provided that the time requirements imposed on the Secretary by these regulations are directory in nature and that a failure to meet those requirements did not invalidate any action by the Assistant Secretary or

Secretary under STAA. These principles are well-established in the case law, *see, e.g., Roadway Express v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991), and this provision, which was unique to OSHA's STAA regulations, is unnecessary. The Secretary views the deletion of this provision as a nonsubstantive amendment. No significant change in STAA practices or procedures is intended.

IV. Paperwork Reduction Act

This rule does not contain a reporting provision that is subject to review by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

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 and practice within the meaning of that section. Therefore publication in the **Federal Register** of a notice of proposed rulemaking and request for comments is not required. Although this is a procedural rule not subject to the notice and comment procedures of the APA, we are providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the agency receives and carefully reviews the public's comments.

Furthermore, because this rule is procedural 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. In addition to this authority, the Assistant Secretary also finds good cause to provide an immediate effective date for this rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The agency has concluded that this rule is not a "significant regulatory action" within the meaning of Executive Order 12866 because it is not likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of

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

Because this rulemaking is procedural in nature it is not expected to have a significant economic impact; therefore no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995. Furthermore, because this is a rule of agency procedure or practice, it is not a "rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)) and does not require congressional review. 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 agency has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation primarily implements procedures necessitated by statutory amendments enacted by Congress. Additionally, the regulatory revisions are necessary for the sake of consistency with the regulatory provisions governing procedures under other whistleblower statutes administered by OSHA. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

Document Preparation: This document was prepared under the direction and control of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 1978

Administrative practice and procedure, Employment, Highway safety, Investigations, Motor carriers, Motor vehicle safety, Reporting and

recordkeeping requirements, Safety, Transportation, Whistleblowing.

Signed in Washington, DC August 19, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

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

PART 1978—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

Sec.

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

Subpart B—Litigation

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

Subpart C—Miscellaneous Provisions

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

Authority: 49 U.S.C. 31101 and 31105; Secretary of Labor's Order No. 5–2007, 72 FR 31160 (June 5, 2007); Secretary of Labor's Order 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

§ 1978.100 Purpose and scope.

(a) This part implements the procedures of the employee protection (whistleblower) provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105, as amended, which protects employees from retaliation because the employee has engaged in, or, in some circumstances is perceived to have engaged in, protected activity pertaining to commercial motor

vehicle safety, health, or security matters.

(b) This part establishes procedures pursuant to the statutory provision set forth above for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings, litigation before administrative law judges (ALJs), post-hearing administrative review, withdrawals and settlements, and judicial review and enforcement.

§ 1978.101 Definitions.

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

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

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

(d) *Commercial motor carrier* means any person engaged in a business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate such a vehicle.

(e) *Commercial motor vehicle* means a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle:

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

(2) Is designed to transport more than ten passengers including the driver; or

(3) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed under 49 U.S.C. 5103.

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

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

(h) *Employee* means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight

handler, or an individual not an employer, who:

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

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

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

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

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

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

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

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

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

§ 1978.102 Obligations and prohibited acts.

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

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

(1) Filed a complaint or begun a proceeding related to a violation of a

commercial motor vehicle safety or security regulation, standard, or order; or

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

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

(1) Refuses to operate a vehicle because:

(i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

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

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

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

(4) Furnishes information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

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

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

(1) The employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard or order;

(2) The employee is about to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(3) The employee has furnished or is about to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

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

§ 1978.103 Filing of retaliation complaints.

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

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

(c) *Place of Filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, 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 occurs, an employee who believes that he or she has been retaliated against in violation of STAA 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, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

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

§ 1978.104 Investigation.

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

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

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

(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 title 29 of the Code of Federal Regulations.

(e)(1) A complaint of alleged violation will be dismissed unless the complainant has made a prima facie showing that protected activity or, in circumstances covered by the Act, a perception of 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 or, in circumstances covered by the Act, was perceived to have engaged in a protected activity;

(ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity, or, in circumstances covered by the Act, perceived the employee to have 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 or, in circumstances covered by the Act, the perception of 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 (or, in circumstances covered by the Act, perceived the employee to have engaged in protected activity) and that the protected activity (or the perception thereof) was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

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

the respondent, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity or, when applicable, the perception thereof.

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

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1978.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within ten business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

§ 1978.105 Issuance of findings and preliminary orders.

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

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings

with a preliminary order providing the relief prescribed in 49 U.S.C. 31105(b)(3). Such order will include, where appropriate, a requirement that the respondent abate the violation; reinstatement of the complainant to his or her former position, together with the compensation, terms, conditions and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred); and payment of punitive damages up to \$250,000.

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

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

Subpart B—Litigation

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

(a) Any party who desires review, including judicial review, of the findings and preliminary order 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 § 1978.105. The objections and request for a hearing

must be in writing and state whether the objections are to the findings and/or the preliminary order. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections will be filed with the Chief Administrative Law Judge, U.S. Department of Labor (800 K Street, NW., Washington, DC 20001), 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 for Occupational Safety and Health.

(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 preliminary order of reinstatement. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1978.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations.

(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* and on the record.

(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.

§ 1978.108 Role of Federal agencies.

(a) (1) The complainant and the respondent will be parties in every proceeding. In any case in which the respondent objects to the findings or the

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

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

(3) Copies of documents in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, as well as all other parties. In all cases in which the Assistant Secretary is participating in the proceeding, copies of documents must also be sent to the Associate Solicitor for Occupational Safety and Health.

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

§ 1978.109 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 only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity, or, in circumstances covered by the Act, the perception of protected activity, was a contributing factor in the adverse action alleged in the complaint.

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

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

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

(d)(1) If the ALJ concludes that the respondent has violated the law, the order must order the respondent to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to his or her former position, together with the compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000.

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

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. For ALJ decisions issued on or after the effective date of these rules, all other portions of the ALJ's order will be effective ten business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB).

§ 1978.110 Decision and orders of the Administrative Review Board.

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, U.S. Department of Labor (200 Constitution Ave., NW., Washington, DC 20210), to

which the Secretary has delegated the authority to act and issue final decisions under this part. Any ALJ decision issued on or after the effective date of these rules will become the final order of the Secretary unless, pursuant to this section, a timely petition for review is filed with the ARB and the ARB accepts the decision for review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived. A petition must be filed within ten business days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health.

(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 30 days after the filing of the petition unless the ARB, within that time, 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 an 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 ten business days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim, in which case the conclusion of the hearing is the date the motion for reconsideration is denied or ten

business days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary and on the Associate Solicitor for Occupational Safety and Health, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to his or her former position, together with the compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees the complainant may have incurred); and payment of punitive damages up to \$250,000.

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

(f) Paragraphs (a) and (b) of this section apply to all cases in which the decision of the ALJ is issued on or after the effective date of these regulations.

Subpart C—Miscellaneous Provisions

§ 1978.111 Withdrawal of STAA complaints, 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 STAA complaint by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary then will determine whether to approve the withdrawal. The Assistant Secretary will notify the respondent (or the respondent's legal counsel if respondent 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. After the filing of objections to the Assistant Secretary's findings and/or preliminary order, the complainant may not withdraw his or her complaint.

(b) The Assistant Secretary may withdraw his or her findings and/or a preliminary order at any time before the expiration of the 30-day objection period described in § 1978.106, provided that no objection yet has been

filed, and substitute new findings and/or a preliminary order. The date of the receipt of the substituted findings and/or order will begin a new 30-day objection period.

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

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

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before

the ALJ or by the ARB, if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB as the case may be.

(3) If, under paragraph (d)(1) or (d)(2) of this section, the respondent makes an offer to settle the case which the Assistant Secretary, when acting as the prosecuting party, deems to be a fair and equitable settlement of all matters at issue and the complainant refuses to accept the offer, the Assistant Secretary may decline to assume the role of prosecuting party. In such circumstances, the Assistant Secretary will immediately notify the complainant (or the complainant's legal counsel if complainant is represented by counsel) that review of the settlement offer may cause the Assistant Secretary to decline the role of prosecuting party. After the Assistant Secretary has reviewed the offer and when he or she has decided to decline the role of prosecuting party, the Assistant Secretary will immediately notify all parties of his or her decision in writing and, if the case is before the ALJ or the ARB, a copy of the notice will be sent to the appropriate official in accordance with § 1978.108(a)(2).

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to § 1978.113.

§ 1978.112 Judicial review.

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

(b) A final order of the ARB will not be 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 to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§ 1978.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order, including one approving a settlement agreement as provided in § 1978.111, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1978.114 District court jurisdiction of retaliation complaints under STAA.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a notice of his or her intention to file such complaint. The notice must be served on all parties to the proceeding. A copy of the notice must be served on OSHA's Regional Administrator, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health. The complainant must file and serve a copy of the district court complaint on the above as soon as possible after the district court complaint has been filed with the court.

§ 1978.115 Special circumstances; waiver of rules.

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

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