

**DEPARTMENT OF LABOR****Occupational Safety and Health Administration****29 CFR Part 1982****[Docket Number OSHA-2008-0027]****RIN 1218-AC36****Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act****AGENCY:** Occupational Safety and Health Administration, Labor.**ACTION:** Interim Final Rule; request for comments.

**SUMMARY:** This document provides the interim final text of regulations governing the employee protection (“whistleblower”) provisions of the National Transit Systems Security Act (“NTSSA”), enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Commission Act”), and the Federal Railroad Safety Act (“FRSA”), as amended by Section 1521 of the 9/11 Commission Act. The 9/11 Commission Act was enacted into law on August 3, 2007. FRSA was amended further by Public Law 110-432, 122 Stat. 4892, Div. A, Title IV, section 419 (Oct. 16, 2008). This rule establishes procedures and time frames for the handling of retaliation complaints under NTSSA and FRSA, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (“OSHA”), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (“ALJ”) for a hearing *de novo*, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (“ARB”) (acting on behalf of the Secretary) and judicial review of the Secretary’s final decision.

**DATES:** This interim final rule is effective on August 31, 2010. Comments and additional materials must be submitted (post-marked, sent or received) by 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-2008-0027, 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-2008-0027). 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**

NTSSA, enacted as Section 1413 of the 9/11 Commission Act, created employee protection provisions for public transportation agency employees who engage in whistleblowing activities pertaining to public transportation safety or security (or, in circumstances covered by the statutes, employees perceived to have engaged or to be about to engage in protected activity). Section 1521 of the 9/11 Commission Act, which amended FRSA, establishes employee protection provisions for

railroad carrier employees who engage in whistleblowing activities pertaining to railroad safety or security (or, in circumstances covered by the statutes, employees perceived to have engaged or to be about to engage in protected activity). The amendments to FRSA also establish whistleblower provisions for railroad carrier employees who are retaliated against for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, 49 U.S.C. 20109(c)(2). In addition, the FRSA amendments prohibit railroad carriers and other covered persons from denying, delaying, or interfering with the medical or first aid treatment of an employee, and require that an injured employee be promptly transported to the nearest hospital upon request, 49 U.S.C. 20109(c)(1). Section (c)(1) is not a whistleblower provision because it prohibits certain conduct by railroad carriers and other covered persons irrespective of any protected activity by an employee. The procedures established in this interim final rule apply only to the remaining provisions of 49 U.S.C. 20109.

The whistleblower provisions of NTSSA and FRSA each provide that an employee may not seek protection under those provisions and another provision of law for the same allegedly unlawful act of the public transportation agency (under NTSSA) or railroad carrier (under FRSA). 6 U.S.C. 1142(e); 49 U.S.C. 20109(f). The whistleblower provisions of NTSSA and FRSA also provide that nothing in those provisions preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law. 6 U.S.C. 1142(f); 49 U.S.C. 20109(g). The whistleblower provisions of NTSSA and FRSA further provide that nothing in those provisions shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement and that the rights and remedies in the whistleblower provisions of NTSSA or FRSA may not be waived by any agreement, policy, form, or condition of employment. 6 U.S.C. 1142(g); 49 U.S.C. 20109(h).

**II. Summary of Statutory Procedures**

Prior to the amendment of FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act (45 U.S.C. 151 *et seq.*), which included

whistleblower proceedings before the National Railroad Adjustment Board, as well as other dispute resolution procedures. The amendment changes the procedures for resolution of such complaints and transfers the authority to implement the whistleblower provisions for railroad carrier employees to the Secretary of Labor (“the Secretary”).

The procedures for filing and adjudicating whistleblower complaints under NTSSA and FRSA, as amended, are generally the same. NTSSA and FRSA whistleblower provisions include procedures that allow a covered employee to file, within 180 days of the alleged retaliation, a complaint with the Secretary. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated NTSSA or FRSA (“respondent”) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

The Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that the employer would have taken the same adverse action in the absence of that activity.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, along with a preliminary order which includes all relief necessary to make the employee whole, including, where appropriate: A requirement that the respondent abate the violation; reinstatement with the same seniority status that the employee would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney’s fees. The preliminary order may also require payment of punitive damages up to \$250,000.

The complainant and the respondent then have 30 days after receipt of the

Secretary’s notification in which to file objections to the findings and/or preliminary order and request a hearing on the record. The filing of objections under NTSSA or FRSA will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, NTSSA and FRSA require the hearing to be conducted “expeditiously.” The Secretary then has 120 days after the conclusion of a hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary’s final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement which terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney’s and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. Under NTSSA, the Secretary also may award a prevailing employer a reasonable attorney’s fee, not exceeding \$1,000, if she finds that the complaint is frivolous or has been brought in bad faith.

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

NTSSA and FRSA permit the employee to seek *de novo* review of the complaint by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of the complaint, and there is no showing that the delay is due to the bad faith of the complainant. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

### III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of

the statutory language of NTSSA and FRSA. Responsibility for receiving and investigating complaints under NTSSA and FRSA has been delegated to the 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 ALJs are decided by the ARB (Secretary’s Order 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010)).

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

##### Section 1982.100 Purpose and Scope

This section describes the purpose of the regulations implementing NTSSA and FRSA and provides an overview of the procedures covered by these regulations.

##### Section 1982.101 Definitions

This section includes general definitions applicable to the employee protection provisions of NTSSA and FRSA.

The definition section of NTSSA, 6 U.S.C. 1131(5), defines “public transportation agency” as “a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of title 49.” Chapter 53 of title 49, 49 U.S.C. 5302(a)(10), defines “public transportation” as “transportation by a conveyance that provides regular and continuous general or special transportation to the public, but does not include school buses, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity).” Chapter 243, 49 U.S.C. 24301, governs Amtrak.

The definition section of FRSA, 49 U.S.C. 20102(2), defines “railroad carrier” as “a person providing railroad transportation.” The definition section of FRSA, 49 U.S.C. 20102(1), defines “railroad” as “any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the

general railroad system of transportation.”

#### Section 1982.102 Obligations and Prohibited Acts

This section describes the activities that are protected under NTSSA and FRSA, and the conduct that is prohibited in response to any protected activities.

#### Section 1982.103 Filing of Retaliation Complaints

This section explains the requirements for filing a retaliation complaint under NTSSA and FRSA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561–62 (6th Cir. 2001). Complaints filed under NTSSA or FRSA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

#### Section 1982.104 Investigation.

This section describes the procedures that apply to the investigation of NTSSA and FRSA complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and appropriate Federal agencies of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) addresses disclosure to the complainant of respondent's submissions to the agency that are responsive to the complaint. Paragraph (d) of this section discusses confidentiality of information provided during investigations. Paragraph (e) of this section sets forth NTSSA's and FRSA's statutory burdens of proof. FRSA adopts the burdens of proof provided under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. 42121, which are the same as those provided under NTSSA. Therefore, this paragraph generally conforms to the similar provision in the regulations implementing AIR21. Paragraph (f) describes the procedures the Assistant

Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred.

All these statutes require that a complainant make an initial prima facie showing that the complainant engaged in protected activity that 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, *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 statutes, that the respondent perceived the employee to have engaged or to be about to engage 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 complaint 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 complainant does not make the 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 whistleblower provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, (“ERA”), 42 U.S.C. 5851, which is the same as that under AIR21 and the Surface Transportation Assistance Act of 1982 (“STAA”), 49 U.S.C. 31105, 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, the Secretary must dismiss a complaint under NTSSA or FRSA and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that 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.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statutory burdens of proof require an employee to prove that the alleged protected activity was a “contributing factor” to the alleged adverse action. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (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 the complainant's protected activity. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04–149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (discussing contributing factor test under the whistleblower provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. 1514A) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

The NTSSA burdens of proof, and the AIR21 burdens of proof which the FRSA now incorporates, do not address the evidentiary standard that applies to a complainant's proof that protected activity was a contributing factor in an adverse action. NTSSA and AIR21 simply provide that the Secretary may find a violation only “if the complainant demonstrates” that protected activity was a contributing factor in the alleged adverse action. See 6 U.S.C. 1142(c)(2)(B)(iii) and 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 contributed to the adverse action; 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 ‘demonstrate’ [under 42121(b)(2)(B)(iii)] means to prove by a preponderance of the evidence.”). Once the complainant establishes that the protected activity was a contributing factor in the 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 prohibited rationale. The “clear and convincing evidence” standard is a higher burden of proof than the “preponderance of the evidence” standard.

#### Section 1982.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including preliminary reinstatement. The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, preliminary order, also advise the respondent of the right under NTSSA to request attorney’s fees from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such “economic reinstatement” frequently 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 employees be preliminarily reinstated to their positions if OSHA finds reasonable cause that they were discharged in violation of NTSSA or FRSA. 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 employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

#### Subpart B—Litigation

##### Section 1982.106 Objections to the Findings and the Preliminary Order and Request for a Hearing

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001 within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, 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 considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, the failure to serve copies of the objections on the other parties of record does not affect the ALJ’s jurisdiction to hear and decide the merits of the case. *See Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, No. 04–101, 2005 WL 2865915, at \*7 (ARB Oct. 31, 2005).

##### Section 1982.107 Hearings

This section adopts the rules of practice and evidence of the Office of Administrative Law Judges at 29 CFR part 18. The section specifically provides for consolidation of hearings if both the complainant and respondent object to the findings and/or order of the Assistant Secretary. Otherwise, this section does not address procedural issues, *e.g.*, place of hearing, right to counsel, procedures, evidence and record of hearing, oral arguments and briefs, and dismissal for cause, because

the Office of Administrative Law Judges has adopted its own rules of practice that cover these matters.

#### Section 1982.108 Role of Federal Agencies

Under NTSSA and FRSA, it is not expected that the Secretary ordinarily will appear as a party in the proceeding. The Secretary has found that in most whistleblower cases, parties have been ably represented and the public interest has not required the Department’s participation. Nevertheless, the Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Department of Transportation and the Department of Homeland Security, at those agencies’ discretion, also may participate as amicus curiae at any time in the proceedings.

#### Section 1982.109 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 standard for finding a violation under NTSSA or FRSA. The section further provides that the Assistant Secretary’s determination to dismiss the complaint without an investigation or without a complete investigation pursuant to section 1982.104 is not subject to review. Thus, paragraph (c) of section 1982.109 clarifies that the Assistant Secretary’s determinations on whether to proceed with an investigation under NTSSA or FRSA and whether to make particular investigative findings under either of the statutes subject to this part 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. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is set forth above in the discussion of section 1982.104.

#### Section 1982.110 Decision and Orders of the Administrative Review Board

Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing of the petition; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

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

#### Subpart C—Miscellaneous Provisions

##### Section 1982.111 Withdrawal of Complaints, Objections, and Petitions for Review; Settlement

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

##### Section 1982.112 Judicial Review

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

##### Section 1982.113 Judicial Enforcement

This section describes the Secretary's power under NTSSA and FRSA to obtain judicial enforcement of orders and the terms of a settlement agreement.

FRSA expressly authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under 49 U.S.C. 20109(d)(2)(A) (adopting the rules and procedures set forth in AIR21, 49 U.S.C. 42121(b)). *See* 49 U.S.C. 20109(d)(2)(A)(iii) ("If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121."). FRSA permits the Secretary to bring an action to obtain such enforcement. *See* 49 U.S.C. 20109(d)(2)(A)(iii). However, there is no provision in FRSA permitting the person on whose behalf the order was issued to bring such an action.

NTSSA gives district courts authority to enforce orders, including preliminary reinstatement orders, issued by the Secretary. Specifically, reinstatement orders issued under subsection (c)(3) are immediately enforceable in district court under 6 U.S.C. 1142(c)(5) and (6). Subsections 1142(c)(3)(B)(ii) and (d)(2)(A) provide that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. Subsection 1142(c)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a

preliminary order containing the relief prescribed by subsection (c)(3)(B), which includes reinstatement. *See* 6 U.S.C. 1142(c)(3)(B)(ii) and (d)(2)(A). Subsection (c)(2)(A) also declares that the subsection (c)(3)(B)'s relief of reinstatement contained in a preliminary order is not stayed upon the filing of objections. 6 U.S.C. 1142(c)(2)(A) ("The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.") Thus, under the statute, enforceable orders issued under subsection (c)(3)(B) include preliminary orders that contain the relief of reinstatement prescribed by subsection (c)(3)(B) and (d)(2)(A). This statutory interpretation is consistent with the Secretary's interpretation of similar language in AIR21 and SOX. *But see Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006) (decision vacated, appeal dismissed, No. 06–2995 (4th Cir. Feb. 20, 2008)). NTSSA also permits the person on whose behalf the order was issued under NTSSA to obtain judicial enforcement of orders and the terms of a settlement agreement.

##### Section 1982.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth NTSSA's and FRSA's respective provisions allowing a complainant to bring an original *de novo* action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 210 days of the filing of the complaint and there is no delay due to the complainant's bad faith. It requires complainants to provide notice 15 days in advance of their intent to file a complaint in district court.

It is the Secretary's position that complainants may not initiate an action in Federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the complaint. The purpose of the "kick-out" provisions 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.

#### Section 1982.115 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of NTSSA or FRSA requires.

#### 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 for these regulations, which provide procedures for the handling of retaliation complaints. 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 Department 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. The Assistant Secretary also finds good cause to provide an immediate effective date for this interim final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

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

The Department has concluded that this rule should be treated as a “significant regulatory action” within the meaning of Section 3(f)(4) of Executive Order 12866 because the NTSSA and FRSA whistleblower provisions are new or substantially new programs. Executive Order 12866

requires a full economic impact analysis only for “economically significant” rules, which are defined in Section 3(f)(1) as rules that may “have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Because the rule is procedural in nature, it is not expected to have a significant economic impact; therefore no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). 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 Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of NTSSA and amendments of FRSA. 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 1982

Administrative practice and procedure, Employment, Homeland security, Investigations, Mass transportation, Reporting and recordkeeping requirements, Public transportation, Railroads, Safety, Transportation, Whistleblowing.

Signed at 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, 29 CFR part 1982 is added to read as follows:

#### **PART 1982—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE NATIONAL TRANSIT SYSTEMS SECURITY ACT OF 2007, ENACTED AS SECTION 1413 OF THE IMPLEMENTING RECOMMENDATIONS OF THE 9/11 COMMISSION ACT OF 2007, AND THE FEDERAL RAILROAD SAFETY ACT, AS AMENDED BY SECTION 1521 OF THE IMPLEMENTING RECOMMENDATIONS OF THE 9/11 COMMISSION ACT OF 2007**

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

Sec.

- 1982.100 Purpose and scope.
- 1982.101 Definitions.
- 1982.102 Obligations and prohibited acts.
- 1982.103 Filing of retaliation complaints.
- 1982.104 Investigation.
- 1982.105 Issuance of findings and preliminary orders.

##### **Subpart B—Litigation**

- 1982.106 Objections to the findings and the preliminary order and request for a hearing.
- 1982.107 Hearings.
- 1982.108 Role of Federal agencies.
- 1982.109 Decision and orders of the administrative law judge.
- 1982.110 Decision and orders of the Administrative Review Board.

##### **Subpart C—Miscellaneous Provisions**

- 1982.111 Withdrawal of complaints, objections, and petitions for review; settlement.
- 1982.112 Judicial review.
- 1982.113 Judicial enforcement.
- 1982.114 District court jurisdiction of retaliation complaints.
- 1982.115 Special circumstances; waiver of rules.

**Authority:** 6 U.S.C. 1142 and 49 U.S.C. 20109; Secretary of Labor’s Order No. 5–2007, 72 FR 31160 (June 5, 2007); Secretary of Labor’s Order No. 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010).

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

###### **§ 1982.100 Purpose and scope.**

(a) This part implements procedures of NTSSA, 6 U.S.C. 1142, and FRSA, 49 U.S.C. 20109, as amended. NTSSA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to public transportation safety or

security (or, in circumstances covered by the statutes, the employee is perceived to have engaged or to be about to engage in protected activity). FRSA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to railroad safety or security (or, in circumstances covered by the statutes, the employee is perceived to have engaged or to be about to engage in protected activity), has requested medical or first aid treatment, or has followed orders or a treatment plan of a treating physician.

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

#### § 1982.101 Definitions.

(a) *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 NTSSA or FRSA.

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

(c) *Complainant* means the employee who filed a NTSSA or FRSA complaint or on whose behalf a complaint was filed.

(d) *Employee* means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a public transportation agency or a railroad carrier, or a contractor or subcontractor of a public transportation agency or a railroad carrier.

(e) *FRSA* means Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-053, August 3, 2007, as further amended by Public Law 110-432, October, 16, 2008, codified at 49 U.S.C. 20109.

(f) *NTSSA* means Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-053, August 3, 2007, codified at 49 U.S.C. 1142.

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

(h) *Public transportation* means transportation by a conveyance that provides regular and continuous general or special transportation to the public, but does not include school buses, charter, or intercity bus transportation or intercity passenger rail transportation provided by Amtrak.

(i) *Public transportation agency* means a publicly owned operator of public transportation eligible to receive Federal assistance under 49 U.S.C. chapter 53.

(j) *Railroad* means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979 and high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(k) *Railroad carrier* means a person providing railroad transportation.

(l) *Respondent* means the person alleged to have violated NTSSA or FRSA.

(m) *Secretary* means the Secretary of Labor or person to whom authority under NTSSA or FRSA has been delegated.

(n) 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.

#### § 1982.102 Obligations and prohibited acts.

(a) *National Transit Systems Security Act*. (1) A public transportation agency, contractor, or subcontractor of such agency, or officer or employee of such agency shall not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(i) To provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public

transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to, or an investigation stemming from the provided information is conducted by—

(A) A Federal, State or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Pub. L. 95-452));

(B) Any Member of Congress, any Committee of Congress, or the Government Accountability Office; or

(C) A person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(ii) To refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security;

(iii) To file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

(iv) 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

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

(2)(i) A public transportation agency, contractor, or subcontractor of such agency, or officer or employee of such agency shall not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee for—

(A) Reporting a hazardous safety or security condition;

(B) Refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (a)(2)(ii) of this section exist; or

(C) Refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or

structures are in a hazardous safety or security condition, if the conditions described in paragraph (a)(2)(ii) of this section exist.

(ii) A refusal is protected under paragraph (a)(2)(i)(B) and (C) of this section if—

(A) The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) A reasonable individual in the circumstances then confronting the employee would conclude that—

(1) The hazardous condition presents an imminent danger of death or serious injury; and

(2) The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

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

(iii) In paragraph (a)(2)(ii) of this section, only paragraph (a)(2)(ii)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities.

(b) *Federal Railroad Safety Act.* (1) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(i) To provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) A Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector

General under the Inspector General Act of 1978 (5 U.S.C. App.; Pub. L. 95-452));

(B) Any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) A person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(ii) To refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(iii) To file a complaint, or directly cause to be brought a proceeding related to the enforcement of 49 U.S.C. part A of subtitle V or, as applicable to railroad safety or security, 49 U.S.C. chapter 51 or 57, or to testify in that proceeding;

(iv) To notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

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

(vi) To furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(vii) To accurately report hours on duty pursuant to 49 U.S.C. chapter 211.

(2)(i) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee for—

(A) Reporting, in good faith, a hazardous safety or security condition;

(B) Refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (b)(2)(ii) of this section exist; or

(C) Refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition,

if the conditions described in paragraph (b)(2)(ii) of this section exist.

(ii) A refusal is protected under paragraphs (b)(2)(i)(B) and (C) of this section if—

(A) The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) A reasonable individual in the circumstances then confronting the employee would conclude that—

(1) The hazardous condition presents an imminent danger of death or serious injury; and

(2) The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

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

(iii) In paragraph (b)(2)(ii) of this section, only paragraph (b)(2)(ii)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

(3) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that—

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

(ii) For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

### § 1982.103 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 NTSSA or FRSA 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 a complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA 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 of NTSSA or FRSA occurs, an employee who believes that he or she has been retaliated against in violation of NTSSA or FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, 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.

#### § 1982.104 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 a copy of the complaint, redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws, and will also notify the respondent of its rights under paragraphs (b) and (f) of this section and paragraph (e) of § 1982.110. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or to the complainant's legal counsel, if complainant is represented by counsel), and to the Federal Railroad Administration, the Federal Transit Administration, or the Transportation Security Administration as appropriate.

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

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *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 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 statutes, was perceived to have engaged or to be about to engage in 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 statutes, perceived the employee to have engaged or to be about to engage in protected activity);

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity (or perception thereof) 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 statutes, perceived the employee to have engaged or to be about to engage in protected activity), and that the protected activity (or perception thereof) was a contributing factor in the adverse action. The burden may be satisfied, for

example, if the complaint shows that the adverse action took place 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.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set for 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 § 1982.105, 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 NTSSA or FRSA 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 will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

**§ 1982.105 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 filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of NTSSA or FRSA.

(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 relief to the complainant. The preliminary 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 (including back pay), terms, conditions and privileges of the complainant's employment; payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred. It may also include 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, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent under NTSSA to request attorney's fees not exceeding \$1,000 from the administrative law judge ("ALJ") regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith, and will also 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 original complaint and a copy of the findings and/or order.

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

provided at § 1982.106. 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****§ 1982.106 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, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees up to \$1,000 under NTSSA, 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 paragraph (b) of § 1982.105. The objections, request for a hearing, and/or request for attorney's fees must in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. 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 must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 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, Division of Fair Labor Standards, U.S. Department of Labor.

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

**§ 1982.107 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 a judge 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.

**§ 1982.108 Role of Federal agencies.**

(a)(1) The complainant and the respondent will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) Copies of documents in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, as well as all other parties.

(b) The Department of Homeland Security or the Department of Transportation, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the agency's discretion. At the request of the interested Federal agency, copies of all pleadings in a case must be sent to the Federal agency, whether or not the agency is participating in the proceeding.

**§ 1982.109 Decision and orders of the administrative law judge.**

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

protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1982.104(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 will direct the respondent to take appropriate affirmative action to make the employee whole, including, where appropriate: a requirement that the respondent abate the violation; reinstatement with the same seniority status that the employee would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. The order may also include 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. If, upon the request of the respondent, the ALJ determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board ("ARB").

#### **§ 1982.110 Decision and orders of the Administrative Review Board.**

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint under NTSSA was frivolous or brought in bad faith who seeks an award of attorney's fees up to \$1,000, must file a written petition for review with the ARB, U.S. Department of Labor (200 Constitution Avenue, NW., Washington, DC 20210), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the ALJ will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the ARB and the ARB accepts the petition 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 10 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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that a preliminary 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 10 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, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to make the employee whole, including, where appropriate: a requirement that the respondent abate the violation; reinstatement with the same seniority status that the employee would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. The order also may include 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. If, upon the request of the respondent, the ARB determines that a complaint under NTSSA was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

#### **Subpart C—Miscellaneous Provisions**

##### **§ 1982.111 Withdrawal of 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 complaint under NTSSA or FRSA 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. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and preliminary order.

(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 § 1982.106, 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 or order will begin a new 30-day objection period.

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

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, 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.

(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 § 1982.113.

#### § 1982.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1982.109 and 1982.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

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

#### § 1982.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. Whenever a person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under FRSA, 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. In such civil actions under NTSSA and FRSA, the district court will have jurisdiction to grant all appropriate relief, including, but not limited to, injunctive relief and compensatory damages, including:

(1) Reinstatement with the same seniority status that the employee would have had, but for the retaliation;

(2) The amount of back pay, with interest; and

(3) Compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.

#### § 1982.114 District Court jurisdiction of retaliation complaints.

(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 the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. The complainant shall 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.

#### § 1982.115 Special circumstances; waiver of rules.

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

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1983

[Docket Number OSHA-2010-0006]

RIN 1218-AC47

#### Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008

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

**ACTION:** Interim Final rule; request for comments.

**SUMMARY:** This document provides the interim final text of regulations