
Investigator’s Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision

Section 11(c) of the OSH Act of 1970, 29 U.S.C. §660(c)

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This Desk Aid represents the Occupational Safety and Health Administration’s (OSHA’s) summary of the scope of coverage and protected activity and procedures for handling investigations under Section 11(c) of the Occupational Safety and Health Act (OSH Act) as of the “last revised” date below. This Desk Aid is intended for OSHA’s use and the guidance herein is subject to change at any time. This Desk Aid is informational in content. It is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. Furthermore, there may be a delay between the publication of significant decisions or other authority under this statute and modification of the Desk Aid.

Abbreviations Used in this Desk Aid:

CFR	Code of Federal Regulations
EEOC	Equal Employment Opportunity Commission
NIOSH	National Institute for Occupational Safety and Health
OSH Act	Occupational Safety and Health Act (the Act)
OSHA	Occupational Safety and Health Administration
OSC	Office of Special Counsel
PPE	Personal Protective Equipment
RSOL	Regional Solicitor’s Office
USC	United States Code
USPS	United States Postal Service

I. Section 11(c) in a Nutshell

Section 11(c) of the OSH Act provides: *“No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.”*

Section 11(c) prohibits persons from retaliating against employees for engaging in activity related to safety or health in the workplace. When an employee believes that this provision has been violated, he or she may file a complaint with OSHA within 30 calendar days of the adverse action.¹ OSHA investigates and, if merit is found, the Secretary of Labor files suit in federal court to obtain relief. The Secretary is represented by the Regional Solicitor’s Office (RSOL) in any litigation deemed appropriate, and cases are heard in United States District Court.

¹ See the latest edition of the OSHA Whistleblower Investigations Manual regarding how to determine whether an untimely complaint should be equitably tolled.

Days to File	Respondents Covered	Kick-Out Provision	Allowable Remedies			Review			Burden of Proof
			Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days to File	Venue	
30	Private sector U.S. Postal Service	No	Yes	No	Yes	Yes	15	OSHA	But-for

II. Regulations

Regulations pertaining to the administration of Section 11(c) of the OSH Act are contained in 29 CFR Part 1977.

When conducting a Section 11(c) investigation, please note that 29 CFR 1904.35(b)(1)(iv) gives OSHA an additional mechanism to address retaliation against workers for reporting work-related injuries or illnesses (conduct that has always been unlawful under Section 11(c)). For more information on 1904.35(b)(1)(iv), please see the most current memorandum on this provision.

III. Covered Entities

A. Private Sector

Any employee of a private-sector employer engaged in a business affecting interstate commerce is covered by the Act. Employees of the U.S. Postal Service (USPS) are also covered by the Act.

B. Public Sector

With the exception of USPS employees, public-sector employees (federal workers, or those employed by a political subdivision of a State, e.g., a municipality, county, or State (i.e., State of the United States, D.C., or a U.S. territory)) are **not** covered by Section 11(c). A worker is employed by a “political subdivision of a State” if the employing entity meets one of the two main criteria in 29 CFR 1975.5(b):

- a) The entity was created directly by the State, so as to constitute a department or administrative arm of the government, or,
- b) The entity is administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate.

State and local government employees in State Plans are covered by the State’s Section 11(c) analog.

USPS employees **are** covered by Section 11(c). OSH Act coverage was extended to USPS employees on September 29, 1998, by Public Law 105-241. See 29 U.S.C. § 652(5).

Since federal employees (except USPS employees) are not covered by Section 11(c), a federal civilian employee in the Executive Branch who wishes to file a complaint alleging retaliation due to

occupational safety or health activity should be referred to his or her personnel office and OSHA's Office of Federal Agency Programs for assistance in filing a complaint, as well as to the Office of Special Counsel (OSC). Executive Order 12196 and 29 CFR § 1960.46 require all federal agencies to establish procedures to assure that no employee is subject to retaliation or reprisal for the types of activities protected by Section 11(c).

C. Tribal Entities

The OSH Act generally applies to tribal commercial enterprises. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). It does not apply to traditionally governmental matters, like the work of tribal game wardens. *Menominee Tribal Enterprises v. Solis*, 60 F.3d 669 (7th Cir. 2010). Two circuit courts have ruled that the OSH Act did not apply to the tribal commercial enterprises at issue in the cases. *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533 (8th Cir. 2020) (the Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota); *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Circuit 1982) (the Tenth Circuit covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming).

IV. Protected Activity

Protected Activity:

Activities protected by Section 11(c) include, but are not limited to, the following:

- A. Filing occupational safety or health complaints with OSHA or other agencies;
- B. Filing occupational safety or health complaints with management;
- C. Instituting or causing to be instituted any proceeding under or related to the OSH Act;
- D. Providing testimony relating to occupational safety or health;
- E. Exercising any right afforded by the OSH Act;
- F. Refusing to perform a dangerous assigned task under certain circumstances;
- G. Complying with and obtaining benefits of OSHA standards and regulations;
- H. Participating in an OSHA inspection;
- I. Requesting information from OSHA;
- J. Refusing to inform an employer of the identity of the person who complained to or contacted OSHA;
- K. Refusing to reimburse an employer for OSHA penalties; or
- L. Complaining about employers' requirements that employees reimburse them for OSHA penalties.

Activities protected by Section 11(c) include, but are not limited to, the following:

A. Filing Occupational Safety or Health Complaints with OSHA or Other Agencies

Protected activity includes occupational safety or health complaints filed orally or in writing with OSHA, a State agency operating under an OSHA-approved State plan (State OSHA), the National Institute for Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department, health department, or police department. Investigations of employee complaints focus on both (a) the time at which the safety or health complaint was filed, or OSHA's response to it, in relation to the alleged retaliation and (b) employer knowledge. The employee filing a signed safety or health complaint with OSHA (a **Section 8(f) complaint**) has a right to request review if the agency determines that an inspection is not warranted. 29 CFR § 1903.12.

B. Filing Occupational Safety or Health Complaints with Management

Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel is also a protected activity. Expressing occupational safety and health concerns with management is a protected activity even when the complainant is a manager or other employee with occupational safety or health responsibilities as part of his or her duties.

C. Instituting or Causing to be Instituted Any Proceeding Under or Related to the OSH Act

Examples of such proceedings include, but are not limited to:

- Workplace inspections
- Review sought by a safety/health complainant of a determination not to issue a citation after an OSHA inspection
- Employee contests of abatement dates
- Employee initiation of proceedings for the promulgation of OSHA standards
- Employee application for modification or revocation of a variance
- An employee's judicial challenge to an OSHA standard
- Employee petition for judicial review of an order of the Occupational Safety and Health Review Commission and analogous proceedings in OSHA-approved State Plans
- Filing an occupational safety or health grievance under a collective bargaining agreement
- Communicating with the news media about an unsafe or unhealthful workplace condition. Donovan v. R.D. Andersen Construction Company, Inc., 552 F. Supp. 249 (D. Kansas, 1982)

D. Providing Testimony Relating to Occupational Safety or Health

Providing testimony or preparing to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, statements or depositions during inspections and investigations is also protected activity.

Refusing to give a false statement to OSHA is also protected activity. *Cf. Donovan on behalf of Anderson v. Stafford Const. Co.*, 732 F.2d 954, 959-60 (D.C. Cir. 1984) (employee's refusal to give false statement to MSHA investigators was protected activity under the analogous provision of the Federal Mine Safety and Health Act of 1977).

E. Exercising Any Right Afforded by the OSH Act

The following is not an exhaustive list. This broad category includes:

- Communicating orally or in writing with the employee's supervisor or other management personnel about occupational safety or health matters, including reporting by managers or others with occupational safety or health responsibilities as part of their duties;
- Asking occupational safety or health questions and expressing concerns about these matters;
- Reporting a work-related fatality, injury, or illness;
- Requesting a safety data sheet (SDS); and
- Requesting access to records, copies of the OSH Act, OSHA regulations, applicable OSHA standards, or plans for compliance (such as the hazard communication program or the bloodborne pathogens exposure control plan), as allowed by pertinent standards and regulations.

These rights are derived both from the employer's obligation to comply with OSHA standards (29 U.S.C. § 654(a)(2)) and regulations (29 U.S.C. § 666) and to keep the workplace free from recognized hazards causing or likely to cause death or serious physical harm (29 U.S.C. § 654(a)(1) (general duty clause)), as well as the employee's obligation to comply with OSHA standards and regulations (29 U.S.C. § 654(b)). Such communication is essential to the effectuation of these provisions. *Cf. Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980) (regulation promulgated by the Secretary of Labor affording an employee the right to refuse work was a valid exercise of authority under the OSH Act given the Act's language, structure, and history). This communication also carries out methods noted by the Act to implement its goal of assuring safe and healthful working conditions, i.e. "...encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions..., providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions..., [and] ...encouraging joint labor-management efforts to reduce injuries and disease arising out of employment." 29 U.S.C. § 651(b)(1), (2), and (13). Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with officials of the authorized employee representative at the workplace or co-workers. This right is derived from the employer and employee obligations and 29 U.S.C. §

651(b)(1), (2), and (13) noted in the paragraph above. Such communication is vital to the fulfillment of those provisions. *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1424 (E. D. N. Y. 1984), *aff'd*, 760 F.2d 253 (2nd Cir. 1985) (table).

F. Right to Refuse to Perform an Assigned Task

This category (exercising any right afforded by the Act) also includes refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury. The OSHA regulation regarding work refusals can be found at 29 CFR § 1977.12(b)(2). An employee has the right to refuse to perform an assigned task if he or she:

1. Has a reasonable apprehension of death or serious injury, and
2. Refuses in good faith, and
3. Has no reasonable alternative, and
4. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., to contact OSHA or a State OSHA, and to have an inspection
5. Where possible, sought from his or her employer, and was unable to obtain, a correction of the dangerous condition.

All elements listed above must be satisfied. Please note that 29 CFR 1977.12(b)(2) is a test only to determine whether the work refusal was valid. Failure to meet the work refusal test, therefore, does not necessarily render a complaint unmeritorious. OSHA staff may administratively close with the complainant's consent or docket and dismiss cases in which a complainant engaged in an unprotected work refusal if (1) the complainant is not alleging that he engaged in additional protected activities, and (2) the work refusal does not meet the requirements of 29 CFR 1977.12(b)(2).

For examples and background information, please see the memorandum, Clarification of the Work Refusal Standard under 29 CFR 1977.12(b)(2), issued January 11, 2016.

G. Right to Comply with and Obtain Benefits of OSHA Standards and Regulations

An employee also has the right to comply with, and to obtain the benefits of, OSHA standards and rules, regulations, and orders applicable to his or her own actions or conduct. This right is derived from 29 U.S.C. § 654(a)(2), which requires employers to comply with OSHA standards, and from 29 U.S.C. § 654(b), which provides: "(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders which are applicable to his own actions and conduct." Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by an OSHA standard, to refuse to purchase PPE (except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work. See 29 CFR § 1977.12(b)(1). To be protected activity, a refusal to work must meet the criteria set forth in 29 CFR § 1977.12(b)(2), as explained above.

H. Right to Participate in an OSHA Inspection

An employee has the right to both (a) participate in an OSHA inspection and (b) to communicate with an OSHA compliance officer, orally or in writing. 29 U.S.C. § 657(a)(2), (e), and (f)(2); 29 CFR §§ 1977.12(a), 1903.11(c). Subject to 29 CFR § 1903.8, an authorized representative of employees has a right to accompany the OSHA compliance officer during the walkaround inspection. 29 U.S.C. § 657(e). He or she must not suffer retaliation because of the exercise of this right, but a denial of pay for walkaround time is not a violation of Section 11(c). *Chamber of Commerce of U.S. v. Occupational Safety and Health Administration*, 636 F.2d 464 (D.C. Cir. 1980)(rendering OSHA’s interpretive rule and general statement of policy requiring employers to compensate employees for walkaround inspections a binding legislative rule and vacating the same for failure to comply with the notice-and comment provisions of the Administrative Procedure Act). An employee representative has the right to participate in an informal conference, subject to OSHA’s discretion, as specified in 29 CFR § 1903.20.

I. Right to Request Information from OSHA

An employee has a right to request information from OSHA. 29 CFR § 1977.12(a).

J. Right to Refuse to Inform an Employer of the Identity of the Person Who Complained to or Contacted OSHA

An employee has the right to refuse to give this information to the employer.

K. Right to Refuse to Reimburse an Employer for OSHA Penalties

Employers do not have the right to require employees to reimburse them for OSHA penalties. If employers do that, the ability of penalties to deter employer violations of the Act is negated. Therefore, employees have the right to refuse to reimburse employers for OSHA penalties.

L. Right to Complain about Employers’ Requirements that Employees Reimburse Them for OSHA Penalties

Because employers have no right to require employees to reimburse them for OSHA penalties, employees have the right to complain about such demands.

V. Other Circumstances

An employee may be covered in these other circumstances:

- A. Being perceived as having engaged in protected activity.
- B. Association with someone who engaged in protected activity.
- C. Engaging in protected activity regarding the working conditions of employees other than respondent's employees.

A. Being Perceived as Having Engaged in Protected Activity

An employee may be covered by Section 11(c) if he or she was *perceived as* having engaged in any of the protected activities described above.

Example:

OSHA notifies a manufacturing plant that an employee has filed a health and safety complaint about a lack of personal protective equipment in the welding area. Since there is only one welder currently employed at the plant, the plant manager assumes he must have filed the complaint and terminates him the next day. Even if the welder did not file the complaint and did not engage in any other forms of protected activity, he may still be protected by Section 11(c) because he was retaliated against based on the employer's perception that he engaged in protected activity.

B. Association with Someone Who Engaged in Protected Activity

An employee is regarded as engaging in activity protected by Section 11(c) if he or she *has a close association with* a person who engaged in a protected activity. Reich v. Cambridgeport Air Systems, Inc., 26 F.3d 1187, 1188-1189 (1st Cir. 1994). Cf. Thompson v. North American Stainless, LP, 562 U.S. 170 (2011) (termination of employee because his fiancée filed a charge with the EEOC violates Title VII anti-retaliation provision).

Example:

An employee informs her supervisor that a leak in the ceiling of the breakroom is creating a slip-and-fall hazard. When the problem is not fixed after weeks of reminding him, she calls OSHA and files a safety complaint. When her supervisor is informed of the safety complaint, he terminates both the employee and her spouse, who also works in the same division. Although her spouse did not file the safety complaint, he is protected by Section 11(c) because he was retaliated against due to his *association with* an employee who engaged in protected activity.

C. Protected Activity Regarding the Working Conditions of Employees other than Respondent's Employees

Protected activity includes activity of the types above related to the working conditions of employees other than respondent's employees. For example, protected activity includes, but is not limited to, an expression of concern by: 1) a safety consultant about hazards facing his or her company's client, 2) a general contractor's safety manager about hazards facing a subcontractor's employees, or 3) a chemical manufacturer's toxicologist about the manufacturer's failure to provide required information on a label or material safety data sheet for a hazardous chemical.

Attachment 1: Optional Worksheet: Analyzing Section 11(c) Whistleblower Complaints

In order to recommend the filing of a Section 11(c) suit, answers 1 to 6 must be “yes.”

	Yes	No
Timeliness		
1. Was the complaint filed within 30 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
Coverage – (See Desk Aid pp. 3-4.)		
2. Is the complainant an employee of a private-sector employer engaged in a business affecting interstate commerce, or an employee of the USPS, or an employee of a tribal commercial enterprise?	<input type="checkbox"/>	<input type="checkbox"/>
Protected Activity (See Desk Aid pp. 4-10.)		
3. Has complainant (pick at least one): a. Filed an occupational safety or health complaint with OSHA or another agency? b. Filed an occupational safety or health complaint with management? c. Instituted or caused to be instituted any proceeding under or related to the OSH Act? d. Provided testimony relating to occupational safety or health? e. Exercised a right afforded by the OSH Act? f. Refused to perform an assigned task? (See pp.6-7 for required elements.) g. Complied with or obtained benefits of OSHA standards and regulations? h. Participated in an OSHA inspection? i. Requested information from OSHA? j. Refused to inform an employer of the identity of the person who complained to or contacted OSHA? k. Refused to reimburse an employer for OSHA penalties? l. Complained about employers' requirements that employees reimburse them for OSHA penalties?	<input type="checkbox"/>	<input type="checkbox"/>
Employer Knowledge		
4. Did respondent know or suspect that complainant or someone associated with complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)	<input type="checkbox"/>	<input type="checkbox"/>
Adverse Action		
5. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in OSH Act-protected activity. Common examples include demoting or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
Nexus (But-for)		
6. Was complainant's OSH Act-protected activity a <i>but-for reason</i> for respondent's decision to take adverse action against complainant? Evidence that an adverse action occurred because of the protected activity includes, but is not limited to: <ul style="list-style-type: none"> Close timing (temporal proximity) between the protected activity or OSHA's response to the protected activity and the adverse action. Evidence of hostility towards the protected activity. Disparate treatment of complainant as compared to other employees following the protected activity. Changes in respondent's treatment of complainant after the protected activity. Indicators that respondent's stated reasons for the adverse action are pretext. 	<input type="checkbox"/>	<input type="checkbox"/>