
Investigator’s Desk Aid to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) Whistleblower Protection Provision

49 U.S.C. 42121

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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 the procedures for investigating and adjudicating retaliation complaints under AIR21 as of the “last revised” date listed 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 not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Federal Register, the Code of Federal Regulations, and decisions of the Department of Labor’s Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.

Abbreviations Used in this Desk Aid:

AIR21	The Wendell H. Ford Aviation Investment Reform Act for the 21st Century (used in this Desk Aid to refer just to the Act’s whistleblower protection provision)
FAA	Federal Aviation Administration
OSHA	Occupational Safety and Health Administration

I. AIR21 in a Nutshell

AIR21 protects aviation industry employees from retaliation for reporting alleged violations of federal aviation safety requirements. The provision also protects employees against retaliation for filing, testifying, or assisting in a proceeding relating to any alleged violation of federal aviation safety requirements.

AIR21's whistleblower provision can be found at 49 U.S.C. 42121. The procedures for the investigation and resolution of AIR21 whistleblower complaints can be found at 29 CFR Part 1979. Most of the definitions relevant to AIR21 whistleblower complaints can be found at 49 U.S.C. 40102 and 29 CFR 1979.101.

A. Covered Entity

AIR21 prohibits retaliation by **air carriers, contractors, and subcontractors** against employees.

Air carriers are citizens of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Contractor is defined in AIR21 as a company that performs safety-sensitive functions by contract for an air carrier.

Subcontractor has not been defined by statute, regulation, or case law (see discussion below).

1. Air Carrier Coverage:

What does citizen of the United States mean under AIR21?

A **citizen of the United States** is:

1. An individual who is a citizen of the United States;
 - This means a person holding U.S. citizenship
2. A partnership, each of whose partners is an individual who is a U.S. citizen; or
 - This means two or more U.S. citizens working together
3. A corporation or association organized under U.S. law, of which:
 - i. The president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, and
 - ii. Which is under the actual control of U.S. citizens, and
 - iii. In which at least 75% of the voting interests are owned or controlled by persons who are U.S. citizens

Neither foreign companies nor non-U.S. citizens can meet the statutory elements necessary to be categorized as a covered entity. However, a foreign company *may* be covered as a contractor or subcontractor, as those terms do not have a U.S. citizenship requirement.

Examples:

- A North Carolina corporation that is wholly owned by a foreign company provides flight services to the general public for a fee. It is not an air carrier covered under AIR21 because it is not a U.S. corporation in which 75% of the voting interests are owned or controlled by U.S. citizens.
- Two individuals, both United States citizens, jointly own and operate a jet in partnership and provide chartered flight services for business executives from Washington, D.C. to New York City. This business operation is an air carrier covered under AIR21 because it is a partnership in which both partners are United States citizens that provides air transportation.

What is air transportation?

To be covered by AIR21 as an air carrier, a citizen of the United States must provide **air transportation, directly or indirectly**, by any means. Under AIR21, air transportation is defined as (1) **foreign air transportation**, (2) **interstate air transportation**, or the (3) **transportation of mail by aircraft**. Each of these terms is further defined, as follows:

1. **Foreign air transportation** is defined as:

- Transportation of passengers or property by aircraft as a common carrier for compensation between a place in the U.S. and a place outside the U.S., when any part of the transportation is by aircraft, or
- Transportation of mail by aircraft between a place in the U.S. and a place outside the U.S., when any part of the transportation is by aircraft.
 - Examples: An airline that charges people a fee to be transported between Miami, FL and Mexico City, Mexico is providing foreign air transportation. A private-sector United States Postal Service (USPS) contractor operating a plane that carries U.S. mail from Philadelphia, PA to Toronto, Canada is providing foreign air transportation.

2. **Interstate air transportation** is defined as:

- Transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft between a place in:
 - i. a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States;
 - ii. Hawaii and another place in Hawaii through the airspace over a place outside Hawaii;
 - iii. the District of Columbia and another place in the District of Columbia; or
 - iv. a territory or possession of the United States and another place in the same territory or possession
- When any part of the transportation is by aircraft.

- Examples: A company that transports members of the public by aircraft for a fee between Colorado and New Mexico is providing interstate air transportation. A company that charges members of the public a fee to transport goods between Guam and California by aircraft is providing interstate air transportation. A company that transports members of the public by aircraft for a fee between San Juan, Puerto Rico and Ponce, Puerto Rico is providing interstate air transportation.

3. **Transportation of mail by aircraft** is defined as:

- The transportation of United States mail and foreign transit mail by aircraft.
- A citizen of the United States performing solely *intrastate* (within one state) transportation of United States mail by aircraft will qualify as an air carrier.
 - Example: A private sector USPS contractor transporting mail only within the state of Alaska is providing transportation of mail by aircraft.

What does it mean to be a common carrier for compensation?

Unless providing transportation of U.S. mail, an entity needs to provide foreign or interstate air transportation as a common carrier for compensation to be covered under AIR21. AIR21 does not define a common carrier for compensation, but FAA guidance and case law have interpreted a common carrier to be a service that holds itself out as willing to transport persons or property from place to place for compensation. That is, the service represents to the public, or to a segment of the public, that it is willing to furnish transportation within the limits of its facilities to any person who wants it.

Typically, there is no dispute in AIR21 whistleblower protection cases regarding whether the respondent is a common carrier for compensation. However, the issue sometimes arises, particularly in cases involving indirect air transportation or unusual arrangements. For example, private pilots participating in a web-based service that allowed them to publicize their itineraries to potential passengers willing to share their flight expenses were found in one case to be acting as common carriers because they received compensation and their services were offered to the public via the website.

What does it mean to provide air transportation directly or indirectly?

Under AIR21, a citizen of the United States providing air transportation *directly or indirectly* is an air carrier. An entity that holds an air carrier certificate and operates flights is generally understood to be providing air transportation directly.

However, the fact that an entity does not hold an air carrier certificate, does not employ pilots, or neither owns nor operates air craft does not necessarily mean that the entity is not an air carrier, as it may provide air transportation indirectly depending on the circumstances. Whether an entity indirectly provides air transportation is a fact-specific question.

For example, an entity may indirectly provide air transportation if it holds itself out as providing air transportation to the public by using the services of a direct carrier for the actual transportation by air. An entity may also be an indirect air carrier if it provides services that are integral to the ability of a direct air carrier to provide air transportation.

Examples of Indirect Air Carriers:

- A hospital that maintained an air ambulance service, which it described as designed to provide rapid transport of highly skilled nurses to critically ill and injured patients and rapid transport of patients and medical crew to care centers, that flew 1,900 helicopter flights a year, owned three helicopters, and contracted with a company to furnish pilots to fly the helicopters was indirectly providing air transportation.
- A sister company of a direct air carrier that provided package delivery services was an indirect air carrier because the sister company provided services that were integral to the air transportation provided by the direct air carrier including data management and package tracking services that were essential to the safety and security of the direct air carrier's transportation of cargo by air.

Do air carriers need to be certified by the Federal Aviation Administration (FAA) to be covered by AIR21?

No. An entity does not need to hold an FAA air carrier certificate to be covered by AIR21. If the entity meets the definition of air carrier, it is covered. AIR21 applies to those conducting operations that would require an air carrier certificate. So if the entity has been issued an air carrier certificate by the FAA (under either Part 121 or Part 135 described below), it is an air carrier covered by AIR21. However, simply because the entity does not have an air carrier certificate issued by the FAA does not mean it is not an air carrier under AIR21. An entity could still meet the air carrier definition under AIR21 even without an air carrier certificate.

The key inquiry is whether the entity holds itself out as providing air transportation. For example, certification is not required for some indirect air carriers. Therefore, it is important to find out from the complainant and the respondent as many details as possible about what the entity does and, if it does not own or operate aircraft directly, what its relationships are with entities that may provide the pilots and aircraft involved in its operations.

How can I find out if a respondent holds an air carrier certificate?

The FAA certification website search function, <http://av-info.faa.gov/OpCert.asp>, is a valuable resource to determine whether an entity holds an air carrier certificate. In addition, the FAA will easily be able to tell whether the entity has an air carrier certificate.

There are two FAA air carrier certifications: Part 121 Air Carrier Certification and Part 135 Air Carrier and Operator Certification. These names are a reference to where the regulations governing each type of air carrier are found in the Code of Federal Regulations: 14 CFR Parts 121 and 135. The differences between the two certifications involve how many passengers the air carrier's aircraft can hold, where the aircraft are travelling, the type of aircraft, and the aircraft's purpose.

1. Part 121 Air Carrier Certification applies to domestic, flag, and supplemental operations, which are usually large airlines with at least 9 passenger seats operating within the United States and its territories and possessions. A flag operation entails operations involving

only Alaska, Hawaii, and U.S. territories and possessions, while a domestic operation entails operations only involving the 48 contiguous states and D.C. Supplemental operations involve domestic and flag operations with additional criteria.

2. Part 135 Air Carrier and Operator Certification applies to commuter and on-demand operations, which include small aircraft and all helicopters. Commuter operations involve operations with a maximum of 9 passenger seats that make at least 5 round trips per week on at least 1 route between 2 points. On-demand operations involve public chartered, common carriage operations, and private operations, among others.

In addition, there is a Part 145 Repair Station (Air Agency) Certification for maintenance facilities that are engaged in the maintenance, preventive maintenance, inspection, and alteration of aircraft and aircraft products. They are commonly called “MROs” in the industry, referring to the stations as maintenance, repair, and overhaul facilities. Part 145 repair stations can be categorized as covered entities under AIR21 when they are contractors or subcontractors that perform safety-sensitive functions.

2. Contractor and Subcontractor Coverage

Contractor is defined in AIR21 as a company that performs **safety-sensitive functions** by contract for an air carrier. This may include aircraft or aircraft parts manufacturers, drug testing labs, repair stations, and training centers, among others. An individual cannot be considered a contractor under AIR21 because the definition requires that a contractor be a company.

Subcontractor is not defined in AIR21 or its regulations. Dictionary definitions of the term generally define “subcontractor” as, for example, “an individual or business firm contracting to perform part or all of another’s contract” (per the Merriam-Webster Dictionary, <https://www.merriam-webster.com/>). In the context of AIR21, OSHA’s view is that subcontractors, like contractors, must perform safety-sensitive functions. Also, there may be several subcontractors or layers of subcontractors working for a contractor (as defined above) to perform safety-sensitive work. An individual could be considered a subcontractor under AIR21 using the general definition above.

Note: a foreign company could be considered a contractor or subcontractor, as these terms do not have a U.S. citizenship requirement.

What are safety-sensitive functions?

Safety-sensitive functions are not defined in AIR21 or its implementing regulations. The list of safety sensitive functions covered by FAA’s drug and alcohol testing requirements is a useful starting point for evaluating whether a particular employer is a contractor that performs safety-sensitive functions. Safety-sensitive functions in the drug and alcohol testing provision include:

- Flight crew member duties
- Flight attendant duties
- Flight instruction duties
- Aircraft dispatcher duties

- Aircraft maintenance and preventive maintenance duties
- Ground security coordinator duties
- Aviation screening duties
- Air traffic control duties
- Operations control specialist duties

However, the above list is not an exhaustive list of the functions that can be considered safety-sensitive under AIR21. Contractors performing other functions have been found to be covered because they perform safety-sensitive functions within the meaning of AIR21. For example, a company that produced aircraft parts under an FAA-issued Parts Manufacturer Approval certificate was found to be a contractor to air carriers that performed safety-sensitive functions. This determination was made based on the FAA's extensive regulation of its operations and the fact that its compliance with FAA rules was integral to the safety of the air carriers that purchased its parts.

3. Employee Coverage

A complainant must meet the definition of "employee" to be covered under AIR21. The Department of Labor's regulations define an employee under AIR21 as an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

4. Extraterritoriality

The application of the AIR21 whistleblower protection provision to employees of AIR21-covered air carriers, contractors, and subcontractors abroad is an evolving area of the law. Investigators should not presume that a complainant is not protected by AIR21 simply because the complainant was located abroad at the time of the events relevant to the complaint. In some instances, conduct abroad may have a sufficient connection to the United States to fall within AIR21's protections.

For example, an employee of an AIR21-covered air carrier who is based in the U.S. and is fired after raising aviation safety concerns on an international flight will not lose the protection of AIR21 simply because the protected activity occurred during an international flight.

On the other hand, an administrative law judge found that a Chinese national working in China for a Chinese subsidiary of a U.S. company, who was fired in China after raising concerns about a Chinese subcontractor's manufacture of aircraft parts allegedly used by U.S. air carriers, did not have a sufficient connection to the U.S. for AIR21 to apply.

If questions arise regarding whether AIR21 applies in a particular case to conduct abroad, contact the Directorate of Whistleblower Protection Programs (DWPP) or the Regional Office of the Solicitor (RSOL).

B. Protected Activity

An employee is protected from retaliation under AIR21 because the employee:

1. Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 U.S. Code or any other law of the United States;

OR

2. Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 U.S. Code or any other law of the United States;

OR

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

OR

4. Assisted or participated or is about to assist or participate in such a proceeding.

Must the employee report an actual violation of aviation safety law?

AIR21 protects an employee who provides information related to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under subtitle VII of Title 49 U.S. Code or any other law of the United States. The employee need not provide information regarding conduct that actually violates aviation safety laws, regulations, standards, or orders. If the employee **reasonably believes** that the reported conduct is a violation, then the employee is protected. A report based on a reasonable but mistaken belief that conduct violates aviation safety law is protected.

To have a **reasonable belief**, an employee must have a **subjective belief** (i.e., actually believe that a violation has occurred, is occurring, or is likely to occur), and the belief must be **objectively reasonable** (i.e., it must be possible that a reasonable person in the employee's position would share this belief). In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. The report will be protected so long as a **reasonable person with the same training and experience** would also believe that the relevant activity constitutes a violation.

How specific does the employee's report of a violation or alleged violation need to be?

The information that the employee provides to the employer or the federal government must be specific enough in relation to a given practice, condition, directive, or event that affects aviation safety for the employer or the federal government to investigate it. However, the employee does not have to specifically identify the safety law or regulation that he or she believes is being violated.

What are some commonly alleged protected activities under AIR21?

Common AIR21 protected activities include:

- Internal safety complaints to management
- Safety complaints to an FAA Flight Standards District Office (FSDO) or an FAA inspector
- Complaints to the FAA Safety Hotline
- Complaints to the TSA hotline

Examples of air safety concerns that may give rise to AIR21 protected activity include, but are not limited to, allegations of: falsification of records, violations of flight and rest requirements, inadequate required training, improper manufacturing procedures, failure to comply with crewmember medical qualification requirements, security breaches, defects in aircraft parts production, improper repairs, inadequate maintenance practices, instructions not to write up discrepancies, and improper fueling practices.

Does AIR21 protect work refusals?

The Department of Labor's Administrative Review Board has held that AIR21 protects employees who **refuse to perform work assignments** that they **reasonably believe would cause them to violate aviation safety regulations**.

Of particular relevance for the protection of work refusals under AIR21, FAA regulations give the "pilot in command" of an aircraft "full control and authority in the operation of aircraft." *See* 14 CFR 1.1; 14 CFR 91.3 (general aviation); 14 CFR 121.533-121.537 (domestic, flag, and supplemental operations). A pilot in command must restrict and suspend operations after learning of conditions that are a hazard to safe operations. *See, e.g.*, 14 CFR 121.551, 121.553 (domestic, flag and supplemental operations). This is a broad authority and includes a pilot's responsibility to refrain from flying if the pilot **reasonably believes that the aircraft is not airworthy or that the pilot or the crew are unfit for flight because of illness or fatigue**. *See, e.g.*, 14 CFR 91.7(b) ("The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur"); 14 CFR 61.53 (prohibiting pilots from engaging in operations during periods of medical deficiency). Additionally, FAA regulations detail rest requirements for pilots, hours of service limitations and rest requirements for flight attendants, and requirements for the number of flight attendants that must be assigned for each flight. *See generally* 14 CFR Part 117.

Examples of AIR21-protected work refusals:

- A pilot reasonably believed that his airplane had flown through severe turbulence on an earlier flight that day based on information told to him by a crew member from the prior flight. Thus, the pilot engaged in AIR21-protected activity when he refused to fly unless the air carrier performed a mandatory inspection following his entry in the log book documenting his suspicion that the airplane had flown through severe turbulence.
- A pilot engaged in AIR21-protected activity when he refused to authorize a flight because he reasonably believed that he and the crew would be too fatigued to make the flight safely.

When should OSHA investigate a case under both AIR21 and Section 11(c) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 660(c)?

Many of the whistleblower complaints that OSHA receives under AIR21 only allege that the employee suffered retaliation for having raised concerns related to aviation safety or violations of FAA rules and do not allege protected activity that would relate to any other OSHA-enforced whistleblower protection statute. However, in some cases, the allegations in the employee's complaint may implicate both AIR21 and another OSHA-enforced whistleblower protection statute. Such overlap most often occurs between AIR21 and Section 11(c) of the OSH Act.

Aviation industry employees, including aircraft cabin crewmembers, may complain to OSHA regarding retaliation for raising concerns related to safety or health in the workplace. Such complaints should be investigated, as appropriate, under Section 11(c) of the OSH Act. OSHA and the FAA have entered into a memorandum of understanding concerning occupational safety and health standards for aircraft cabin crewmembers that recognizes OSHA's authority to conduct investigations under Section 11(c) of the OSH Act when an employee who is an aircraft cabin crewmember complains of retaliation for engaging in protected activity related to safety or health in the workplace.¹ Thus, OSHA should docket a case under both AIR21 and Section 11(c) of the OSH Act if the complaint alleges retaliation for having engaged in activity that would be protected under both statutes.

Example of a case that may require investigation under both AIR21 and Section 11(c):

- Pilots and other flight crew of an air ambulance facility were required to use the office/bunkhouse located at an airport while on shift. Water leaks in the office/bunkhouse resulted in mold growth causing the pilots and crew to become ill. Pilots and crew complained to their employer about the mold and complained to their employer that they might not be able to safely fly if they felt too ill and fatigued because of the mold. The pilots and crew who complained were issued written warnings and filed a retaliation complaint with OSHA. The employees' complaints to the employer about

¹ See Memorandum of Understanding between the Federal Aviation Administration, U.S. Department of Transportation and the Occupational Safety and Health Administration, U.S. Department of Labor Concerning Occupational Safety and Health Standards for Aircraft Cabin Crewmembers (Aug. 26, 2014), available at: <https://www.osha.gov/laws-regs/mou/2014-08-26>.

the mold could be protected under Section 11(c) and the complaints to the employer that the employees would be too ill or fatigued to safely fly as required under FAA rules could be protected under AIR21. Therefore, if the retaliation complaint was timely filed with OSHA under both statutes, OSHA should docket and investigate this case, as appropriate, under both AIR21 and Section 11(c).

Does AIR21 contain any explicit exceptions to protection?

AIR21 does not protect employees who, acting on their own, without express or implied direction from the employer (or the employer's agent), deliberately violate any requirement of U.S. law related to air carrier safety. This exception to protection is an affirmative defense that the employer must raise and requires an element of willfulness. In other words, for the exception to apply, the evidence must show that the employee knew or acted with reckless disregard for whether his or her conduct violated the law.

II. Procedures for Handling AIR21 Complaints

Procedures for handling AIR21 complaints are set forth in [29 C.F.R. Part 1979](#). Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the "[What to expect during an OSHA Whistleblower Investigation](#)" section of OSHA's website, in [OSHA's AIR21 Fact Sheet](#), and in the [OSHA Whistleblower Investigations Manual](#).

A. Complaint

Who may file: An employee who believes that he or she has been retaliated against in violation of AIR21 may file a complaint with OSHA. The employee may also have a representative file on the employee's behalf.

Form: The complaint need not be in any particular form. Oral or written complaints are acceptable. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

Timing: The complaint must be filed within 90 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA's Whistleblower Investigations Manual.

Distribution of complaints and findings to partner agencies: Complaints and findings in AIR21 cases must be sent electronically to the FAA at FAA-AIR21@faa.gov.

B. Investigation

Upon receiving a complaint, OSHA will evaluate the complaint to determine whether the complaint contains a *prima facie* allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, must allege that:

1. The employee engaged in AIR21-protected activity;
2. The respondent knew or suspected that the employee engaged in AIR21-protected activity;
3. The employee suffered an adverse action;² and
4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not meet these requirements, and the complainant does not agree to administrative closure of the case, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a Department of Labor administrative law judge (ALJ).

AIR21 uses a “contributing factor” standard of causation. Thus, following the investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that AIR21-protected activity was a contributing factor in the decision to take adverse action against the complainant and the respondent has not shown by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. A contributing factor is a factor which, alone or with other factors, in any way affects the outcome of a decision.

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), and reasonable attorney fees and costs.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

If the complainant and respondent agree to settle their case during the investigation, they must submit the settlement agreement for OSHA’s review and approval.

C. Administrative and Judicial Review

Either the complainant or the respondent may object to OSHA’s findings within 30 days and request a hearing before an ALJ. Filing objections will stay OSHA’s order for all relief except reinstatement, which is *not* automatically stayed. If no objections are filed, OSHA’s findings become the final order of the Secretary of Labor, not subject to review.

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during

² An adverse action is an action that might dissuade a reasonable employee from engaging in AIR21-protected activity. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA’s investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ’s decision in the case to the Department of Labor’s Administrative Review Board (ARB), which may either accept or reject the case for review. A complainant or respondent may obtain review of an ARB decision or an ALJ decision that the ARB has declined to review by appealing to the appropriate U.S. court of appeals.

D. Kick-Out

AIR21 does not include a “kick-out” provision, and therefore does not permit a complainant to file his or her claim in federal district court if the Department of Labor has not made a final decision in the case within a specified number of days.

III. Resources and Relevant FAA Regulations

The [FAA website](#) contains a wealth of information that can be helpful to OSHA investigators in AIR21 whistleblower cases, including FAA regulations and advisory circulars, as well as many other materials. The FAA’s airline certification database is a valuable resource to help investigators determine whether an entity holds an air carrier certificate: <http://av-info.faa.gov/OpCert.asp>.

The following chart lists some of the FAA regulations that are most frequently relevant to OSHA’s AIR21 whistleblower investigations:

Regulation	Title
14 CFR Part 21	Certification Procedures for Products and Articles
14 CFR Part 43	Maintenance, Preventive Maintenance, Rebuilding, and Alteration
14 CFR Part 61	Certification: Pilots, Instructors, and Ground Instructors
14 CFR Part 63	Certification: Flight Crew Members Other Than Pilots
14 CFR Part 65	Certification: Airmen Other Than Flight Crew Members
14 CFR Part 67	Medical Standards and Certification
14 CFR Part 91	General Operating and Flight Rules
14 CFR Part 117	Flight and Duty Limitations and Rest Requirements: Flight Crew Members
14 CFR Part 119	Certification: Air Carriers and Commercial Operators
14 CFR Part 120	Drug and Alcohol Testing Program
14 CFR Part 121	Operating Requirements: Domestic, Flag, and Supplemental Operations
14 CFR Part 135	Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons on Board Such Aircraft

Attachment 1: Optional Worksheet: Analyzing AIR21 Whistleblower Complaints

In order to issue merit findings, answers 1 to 9 must be “yes” and answer 10 must be “no.”

	Yes	No
Timeliness		
1. Was the complaint filed within 90 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
Coverage		
2. Is respondent an air carrier or a contractor or subcontractor to an air carrier? <ul style="list-style-type: none"> • An air carrier is a citizen of the United States undertaking by any means, directly, or indirectly, to provide air transportation. (See Desk Aid pp. 2-6.) • Contractors and subcontractors must perform safety-sensitive functions by contract (or subcontract) for an air carrier. (See Desk Aid pp. 6-7.) 	<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of AIR21?	<input type="checkbox"/>	<input type="checkbox"/>
Protected Activity		
4. Has complainant (pick at least one) (See Desk Aid pp. 8-11): <ol style="list-style-type: none"> a. Provided, caused to be provided, or is about to provide or cause to be provided (with any knowledge of the employer) to the employer or the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of federal law relating to air carrier safety? b. Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of federal law relating to air carrier safety? c. Testified or is about to testify in such a proceeding? d. Assisted or participated or is about to assist or participate in such a proceeding? 	<input type="checkbox"/>	<input type="checkbox"/>
5. For items 4a. or 4b., did the complainant have a subjective, good faith belief that the conduct complained of violated the law?	<input type="checkbox"/>	<input type="checkbox"/>
6. For items 4a. or 4b., could a reasonable person with similar training, knowledge, and experience believe that a violation occurred, is occurring, or is likely to occur?	<input type="checkbox"/>	<input type="checkbox"/>
Employer Knowledge		
7. Did respondent know or suspect that 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		
8. 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 AIR21-protected activity. Common examples include firing, demoting, or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
Nexus (Contributing Factor)		
9. Was complainant's AIR21-protected activity a <i>contributing factor</i> in respondent's decision to take adverse action against the complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to: <ul style="list-style-type: none"> • Close timing (temporal proximity) between 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"/>
Affirmative Defense		
10. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	<input type="checkbox"/> No	<input type="checkbox"/> Yes