
Investigator’s Desk Aid to the Surface Transportation Assistance Act (STAA) Whistleblower Protection Provision

49 U.S.C. § 31105

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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 the Surface Transportation Assistance Act (STAA) as of the “last revised” date below. This guide 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:

ALJ	Administrative Law Judge
ARB	Administrative Review Board
CFR	Code of Federal Regulations
CMV	Commercial Motor Vehicle
FMCSA	Federal Motor Carrier Safety Administration
OSHA	Occupational Safety and Health Administration
OSC	Office of Special Counsel
RSOL	Regional Solicitor's Office
STAA	Surface Transportation Assistance Act
USC	United States Code

I. STAA in a Nutshell

STAA prohibits employers from discharging or otherwise retaliating against employees who engage in commercial motor vehicle (CMV) safety activity or report on other STAA-related violations. Protected activities include, among others, complaints related to CMV safety and security and work refusals in certain situations. If a covered employee believes he or she has been retaliated against in violation of STAA, he or she may file a complaint with OSHA within 180 calendar days of the adverse action.

Under STAA, no person may discharge or otherwise retaliate against a covered employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee), whether at the employee's initiative or in the ordinary course of the employee's duties, engaged in any STAA protected activity.

Days to File	Respondents Covered	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
			Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days	Venue	
180	Private sector Commercial motor carriers	210	Yes	Yes	Yes	Yes 250K Cap	30	ALJ	Contributing

II. Statute and Regulations

49 U.S.C. § 31105(a) provides:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

(A)

(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

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

(B) the employee refuses to operate a vehicle because—

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

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

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

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

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

Regulations pertaining to the administration of 49 U.S.C. § 31105 are contained in 29 CFR Part 1978.

The safety regulations for CMVs are enforced by the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA). Cooperation between OSHA and FMCSA is primarily governed by a memorandum of understanding. It is available at <https://www.osha.gov/laws-regs/mou/2017-04-14>.

III. Covered Entities

Covered entity:

The protections afforded to employees by STAA apply to private-sector drivers (including independent contractors while personally operating a CMV) and other workers (including mechanics and freight handlers) involved in activities directly affecting CMV safety or security.

A. Employee

Section 31105(j) defines an “employee” as a driver of a CMV (including an independent contractor when personally operating a CMV), a mechanic, a freight handler, or a non-employer individual, who:

1. Directly affects CMV safety or security in the course of their employment by a commercial motor carrier; and
2. Is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

B. Commercial Motor Vehicle (49 U.S.C. § 31101(1))

Any self-propelled or towed vehicle used on the highways in commerce principally to transport cargo or passengers, if the vehicle:

1. Has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; or
2. Is designed to transport more than 10 passengers, including the driver; or
3. Is used in the transportation of material found by the Secretary of Transportation to be hazardous, and in a quantity requiring placarding, under regulations issued pursuant to the Hazardous Materials Transportation Act, as amended (49 U.S.C. § 5103). For a list of hazardous materials and related provisions, see 49 CFR Parts 171 and 172.

C. Commercial Motor Carrier

For the purposes of STAA, a commercial motor carrier is defined as any person engaged in a business affecting commerce between States or between a State and a place outside thereof, who owns or leases a CMV in connection with that business, or assigns an employee to operate a CMV in commerce. The definition, which is consistent with 49 U.S.C. § 31101(3), does not include the United States, including the U.S. Postal Service, a State, or a political subdivision of a State; however, private-sector companies under contract or subcontract with such entities are covered if the other coverage requirements are met.

D. Person

The express language of STAA provides that a “*person* may not discharge an employee” for conduct protected by STAA. 49 U.S.C. § 31105(a)(1)(emphasis added). The corresponding regulation implementing STAA defines a “person” as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of

individuals.” 29 C.F.R. § 1978.101(k). In order to be held individually liable for the adverse action, the individual must exercise control over the employee, which “for [the] purposes of individual liability includes the ability to hire, transfer, promote, reprimand, or discharge the complainant.” *Anderson v. Timex Logistics*, No. 13-016, 2014 WL 1758319, at * 7 (ARB April 30, 2014)(holding that a company’s sole owner was liable because she made the final decision to fire the complainant, but an operations manager and dispatcher was not individually liable under the STAA as he lacked the requisite control over the complainant, not having had the authority to hire, transfer, promote, or reprimand the complainant).

E. In Commerce

The term applies to trade, traffic, commerce, transportation, or communication between any State and any place outside thereof, or affecting the commerce between these places. The test is similar to the commerce test under the Occupational Safety and Health Act. In the context of Section 31105, the “commerce” test is met if the commercial motor carrier’s vehicles traveled out of state, the vehicles used interstate highways or roads connecting with interstate highways, or the carrier purchased or transported goods or supplies manufactured out of state. *Arnold v. Associated Sand and Gravel Co.*, 1992 WL 752791 (Sec’y Aug. 31, 1992). This test is separate from the other criteria mentioned above and the criteria for coverage by the FMCSA.

IV. Protected Activity

Protected Activity:

Activities protected by the STAA whistleblower provision include, but are not limited to, the following:

- A. Filing a complaint related to a violation of a CMV safety or security regulation or standard;
- B. Being perceived to have filed a complaint related to a violation of a CMV safety or security regulation or standard;
- C. Cooperating with a safety or security investigation by the federal government;
- D. Refusing to operate a vehicle in violation of a regulation or standard related to CMV safety, health, or security;
- E. Refusing to operate a vehicle due to reasonable apprehension of serious injury to the employee or the public because of the vehicle’s condition, where the employee sought from the employer and could not obtain correction of the condition;
- F. Reporting accurate hours of service; or
- G. Furnishing information to a Federal, State, or local regulatory authority as to the facts related to an accident or incident occurring in connection with CMV transportation.

Activities protected by the STAA whistleblower provision include the following:

A. Filing a complaint related to a violation of a CMV safety or security regulation or standard

Protected activity includes filing a complaint, beginning a proceeding, or testifying or planning to testify in a proceeding related to a violation of a CMV safety or security regulation, standard, or order. Complaints may be oral or in writing. To qualify for protection, the employee's complaint must be based on a **reasonable belief** that the company was engaging in a violation of a CMV safety regulation. *See also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) (holding that oral as well as written complaints are protected activity under the anti-retaliation provision of the Fair Labor Standards Act).

B. Being perceived to have filed a complaint related to a violation of a CMV safety or security regulation or standard

Being perceived to have filed or to plan to file a complaint or to have begun or to plan to begin a proceeding related to a violation of a CMV safety or security regulation, standard, or order is a protected activity.

C. Cooperating with a safety or security investigation by the federal government

Cooperating, or being perceived as cooperating or being about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board is a protected activity.

D. Refusing to operate a vehicle in violation of a regulation or standard related to CMV safety, health, or security

Another protected activity is refusing to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to CMV safety, health, or security. Under this provision, 49 U.S.C. 31105(a)(1)(B)(i), the employee **may refuse to operate the vehicle only if operation of the vehicle would actually violate a U.S. Department of Transportation regulation, standard, or order**; the employee's **reasonable belief** that operation would be a violation is **insufficient**. *See Koch Foods, Inc. v. U.S. Dept. of Labor*, 712 F.3d 476, 480-86 (11th Cir. 2013). The term "operate" encompasses not only driving, but other uses of a vehicle when it is within the control of the employee. *See TransAm Trucking, Inc. v. Administrative Review Board, United States Department of Labor*, 833 F.3d 1206 (10th Cir. 2016). Common reasons for refusing to operate a vehicle include:

1. Driving a property-carrying CMV in excess of FMCSA "Hours of Service" regulations at 49 CFR §§ 395.1 and .3. (Passenger-carrying carriers or drivers must comply with separate FMCSA regulations at 49 CFR § 395.5.)

Example:

Hours of Service rules prohibit driving more than 11 continuous hours in a 14-hour period and mandate 10-hour breaks between driving periods. A driver is given a load in New York to be delivered to an address in Georgia (a trip that will take about 14 hours total driving time). Driver's employer instructed Driver to complete the delivery within 20 hours. Driver drives 10 hours, takes a 10-hour break, and drives another 4 hours

to complete the delivery within 24 hours. In this example, Driver has engaged in protected activity by refusing to violate Hours of Service rules.

Under this provision, an employee has the right to refuse to drive at any time that driving violates or would violate these regulations. For example, if an assigned trip would require a driver to exceed the allowed hours (taking into consideration the speed limits and the distance), the driver may refuse to begin the trip. See also 49 CFR § 392.6 (no operation if it would necessitate violating the speed limit).

2. Driving if driver's ability is impaired, such as by illness, fatigue, drugs, or alcohol. Related regulations are:
 - a. 49 CFR § 392.3 (no driving if driver's ability is so impaired or is likely to be so impaired by illness or fatigue as to make driving unsafe),
 - b. 49 CFR § 392.4 (no driving under the influence of drugs), and
 - c. 49 CFR § 392.5 (no driving under the influence of alcohol).
3. Driving in violation of state or local laws, such as weight limits, is a violation of 49 CFR § 392.2.
4. Driving a CMV that fails to meet the equipment requirements in 49 CFR Part 393 is a violation of 49 CFR § 393.1.
5. Driving a vehicle in violation of the hazardous materials regulations in 49 CFR Subchapter C, issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the U.S. Department of Transportation, is a violation of 49 CFR § 171.2(f). The table of hazardous materials is in 49 CFR Part 172.

E. Refusing to operate a vehicle due to reasonable apprehension of serious injury to the employee or the public because of the vehicle's condition

An employee has the right to refuse to operate a vehicle because the employee has a **reasonable apprehension** of serious injury to the employee or to the public because of the vehicle's hazardous safety or security condition.

Section 31105(a)(2) provides that, for purposes of this refusal-to-operate provision ("reasonable apprehension"), an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

Example:

A driver is asked to transport a load of gravel using a dump truck. The driver has difficulty steering the vehicle because the truck's steering mechanism had a defective kingpin. The kingpin is the primary bolt in the front steering that holds the tire straight with the road. The driver tells the company's owner about this problem. The owner orders the driver to drive the truck. The driver refuses to operate the vehicle because he is afraid that he or others could be seriously injured if there were an accident. This refusal is protected activity under the "reasonable apprehension" clause.

F. Reporting accurate hours of service

Protected activity includes reporting accurate hours on duty pursuant to Chapters 311 and 315 of Title 49 of the United States Code (the corresponding regulation for reporting hours on duty is 49 C.F.R. § 395.8).

G. Furnishing information to a Federal, State, or local regulatory authority as to the facts related to an accident occurring in connection with CMV transportation

Another protected activity is furnishing, or being perceived to have furnished, or to plan to furnish, information to 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 CMV transportation.

H. Protected activity considerations

Common protected activities include complaints to management, FMCSA, or state equivalents about: vehicle safety, overweight trucks, hours of service, exposure to fumes, driving conditions due to bad weather, and refusals to drive because of illness or fatigue.

In cases of improper refusals to operate a vehicle (i.e., unprotected work refusals), be sure to determine whether a complainant alleging a work refusal engaged in additional protected activities. Complainants frequently raise safety concerns before engaging in a work refusal, which may have precipitated the work refusal. Any protected activity that occurred after a work refusal but before the adverse action occurs should also be considered. If a respondent alleges that it terminated a complainant because of an unprotected work refusal, the respondent's defense should still be tested for pretext if the complainant alleges a *prima facie* case based on other protected activities.

Findings in STAA cases involving the protected activities of complaining (see subparagraphs IV. A and B above), refusing to operate a vehicle in violation of CMV safety regulations (subparagraph IV.D), and reporting hours of duty accurately (subparagraph IV.F), should cite the particular regulation involved. This is especially important in cases involving refusals to operate in violation of a regulation (subparagraph D). FMCSA and PHMSA regulations can be accessed at <https://www.fmcsa.dot.gov/regulations> and <https://www.phmsa.dot.gov/regulations>. More information is available from local FMCSA offices, listed in Appendix B to the FMCSA/OSHA MOU noted at the end of paragraph II above.

V. Case Law

A digest of STAA decisions issued by the Department of Labor's Administrative Review Board (ARB) is available at www.oalj.dol.gov. The decisions are hyperlinked. Decisions of the federal courts under STAA are available on publicly available legal databases.

VI. Procedures for Handling STAA Complaints

Procedures for handling STAA complaints are contained in 29 CFR Part 1978. 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 a Whistleblower Investigation” section of OSHA’s website, the OSHA Whistleblower Investigations Manual, and the Whistleblower Protection for Commercial Motor Vehicle Workers Fact Sheet.

A. Complaints

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

Form: Complaints may be made **orally or in writing**. It is particularly important for STAA to cover oral as well as written filings because, in many cases, truck drivers are out on the road and the only way they can communicate immediate concerns about violations of safety and security regulations is by CB radio or phone. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

Timing: The complaint must be filed within **180 days** of the time when the alleged adverse action is communicated to the employee. 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 STAA cases must be sent to the FMCSA.

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 STAA protected activity;
2. The respondent knew or suspected that the employee engaged in STAA protected activity;
3. The employee suffered an adverse action;¹ 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 complaint, OSHA will dismiss the

¹ An adverse action is an action that might dissuade a reasonable employee from engaging in STAA protected activity. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

complaint with notice to the complainant and the respondent of their right to request a hearing before a Department of Labor administrative law judge (ALJ).

STAA 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 STAA 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 specifying the relief to be provided. The relief may include an order requiring abatement of the violation, reinstatement, back pay, compensatory damages, punitive damages up to \$250,000, 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 into the hearing record. OSHA does not typically participate in the ALJ proceeding, unless it has issued merit findings. In the latter situation, the Regional Solicitor’s Office (RSOL) represents OSHA. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence into the ALJ proceeding that they obtained or used during OSHA’s investigation. The ALJ may hold a hearing in the case or dismiss a case without a hearing if appropriate. OSHA, the complainant, or 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. Review by the ARB is discretionary. An aggrieved complainant or respondent may obtain review of an ARB decision or an ALJ decision that the ARB has declined to review by the appropriate U.S. court of appeals.

D. Kick-Out

STAA permits a complainant to bring a *de novo* STAA action in federal district court if the Department of Labor has not reached a final decision on the complainant’s STAA claim, 210 days have passed since the filing of the complaint with OSHA, and the delay is not due to the bad faith of the complainant.

Attachment 1: Optional Worksheet: Analyzing STAA Whistleblower Cases

<i>In order to issue merit findings, answers 1 to 8 must be "yes" and answer 9 must be "no."</i>	Yes	No
Timeliness		
1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
Coverage		
2. Is respondent a person, as defined in 29 CFR § 1978.101(k)? (See STAA Desk Aid, section III.D.)	<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of STAA? Employee means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who:	<input type="checkbox"/>	<input type="checkbox"/>
a. Directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and		
b. Is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.		
4. Does the vehicle meet any of the following criteria:	<input type="checkbox"/>	<input type="checkbox"/>
c. Has a gross vehicle weight rating or a gross vehicle weight of at least 10,001 pounds, whichever is greater, or		
d. Designed to transport more than 10 passengers, including the driver, or		
e. Used in transporting hazardous material, as defined by DOT in 49 CFR Parts 171 and 172, in a quantity requiring placarding according to those regulations?		
Protected Activity		
5. Has complainant (pick at least one):	<input type="checkbox"/>	<input type="checkbox"/>
f. Filed a complaint or begun a proceeding related to a violation of a CMV safety or security regulation, standard, or order or testified or was about to testify in such a proceeding?		
g. Been perceived to have filed or to have been about to file a complaint or to have begun or to have been about to begin a proceeding related to a violation of a CMV safety or security regulation, standard, or order?		
h. Refused to operate a vehicle because -		
i. The operation would have actually violated a regulation, standard, or order of the United States related to CMV safety, health, or security? or,		
ii. The employee had a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition, and sought but has been unable to obtain, from the employer correction of the hazardous safety or security condition?	<input type="checkbox"/>	<input type="checkbox"/>
i. Has the employee accurately reported hours on duty pursuant to chapter 315?		
j. Has the employee cooperated, or been perceived to have been about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board?		
k. Has the employee furnished, or been perceived to have furnished or to have been about to furnish, information to any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation?		

Employer Knowledge			
6.	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			
7.	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 STAA protected activity. Common examples include firing, demoting, or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
Nexus (Contributing Factor)			
8.	Was complainant's STAA 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 toward 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			
9.	Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	No <input type="checkbox"/>	Yes <input type="checkbox"/>