



OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 02-03-012 **EFFECTIVE DATE:** September 15, 2022

SUBJECT: Section 11(c), AHERA, and ISCA Request for Review (RFR) Program

ABSTRACT

- Purpose:** The purpose of this instruction is to provide procedures for the processing of Requests for Review (RFR) filed under section 11(c) of the Occupational Safety and Health Act of 1970, the Asbestos Hazard Emergency Response Act (AHERA), and the International Safe Container Act (ISCA).
- Scope:** OSHA-wide.
- References:** OSHA Instruction CPL 02-03-011, Whistleblower Investigations Manual (WIM), April 29, 2022.
- Cancellations:** OSHA Instruction CPL 02-03-004, Section 11(c), AHERA, and ISCA Appeals Program, September 12, 2012.
- State Impact:** Response required; see paragraph VI.
- Action Offices:** National, Regional, Area, and State Plan Offices.
- Originating Office:** Directorate of Whistleblower Protection Programs (DWPP).
- Contact:** Directorate of Whistleblower Protection Programs
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By and Under the Authority of

Douglas L. Parker
Assistant Secretary

Executive Summary

The Occupational Safety and Health Administration (OSHA) is responsible for the enforcement of whistleblower protection (also known as anti-retaliation) provisions for more than 20 statutes that protect workers, consumers, the environment, and the public. All of these whistleblower protection provisions provide complainants with the right to file objections to OSHA's non-merit determinations (i.e., dismissals) and have their claims administratively adjudicated, with three exceptions: section 11(c) of the Occupational Safety and Health Act of 1970 (section 11(c)), [29 U.S.C. § 660\(c\)](#); the Asbestos Hazard Emergency Response Act (AHERA), [15 U.S.C. § 2651](#); and the International Safe Container Act (ISCA), 46 U.S.C. § 80507. It has nevertheless been OSHA's longstanding policy to provide complainants whose section 11(c), AHERA, and ISCA complaints have been dismissed by a Regional Administrator (RA) with the right to request review of the dismissal by DWPP (the request for review (RFR) process).

Significant Changes

This Instruction amends the process terminology and articulates updated procedures to provide greater clarity of the purpose, scope, and functioning of the RFR process.

This Instruction:

- Adds procedures for acknowledging RFRs.
- Adds procedures for informing the parties and the Regional Office of the rejection of an RFR because of its untimeliness.
- Updates procedures requiring the Regional Office to send digital files to DWPP.
- Allows DWPP to request additional information from the Regional Office without formally returning the case to that office for additional investigation.
- Eliminates strict process timelines and deadlines (e.g., requiring DWPP reviews to be completed within 60 days of receiving the request).
- Streamlines the process to require only one staff reviewer (instead of two) and eliminates the step of assembling an "Appeals Committee" prior to making a determination on an RFR.
- Removes the Evaluation and Quality Audit requirements of the prior Directive.
- Removes documents from Appendix, including a flowchart of the former review process, whistleblower database instructions, and template letters.

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I. Purpose

The purpose of this instruction is to provide updated procedures for the processing of RFRs of whistleblower complaints filed under section 11(c), AHERA, and ISCA, and dismissed by an RA. This Instruction supplements the RFR procedures in the Whistleblower Investigations Manual (WIM), Chapter VI.B.2.

II. Scope

This instruction applies to all section 11(c), AHERA, and ISCA whistleblower complaints filed nationwide.

III. References

OSHA Instruction CPL 02-03-011, Whistleblower Investigations Manual (WIM), April 29, 2022.

IV. Cancellations

OSHA Instruction CPL 02-03-004, Section 11(c), AHERA, and ISCA Appeals Program, September 12, 2012.

V. Expiration

This instruction will remain in effect until superseded.

VI. Action

All OSHA personnel must follow the procedures contained in this instruction. All RFRs must be sent to DWPP for processing.

VII. Federal Program Change - Notice of Intent and Equivalency Required

A. Notice of Intent and Equivalency Required

This instruction describes a federal program change, which provides updated procedures for processing RFRs related to complaints filed under section 11(c), AHERA, and ISCA. State Plans must include in their policies and procedures manual, or other implementing documents, a procedure for review of an initial retaliation case determination which is at least as effective as those in this instruction. This may be a process similar to DWPP's review as set out in this instruction, an adjudicatory proceeding, or another equally effective mechanism. However it is accomplished, complainants must be afforded the opportunity for reconsideration of an initial dismissal determination within the state.

Complainants will be required to exhaust this remedy before federal OSHA will accept a "request for federal review" of a dually filed complaint or a Complaint About State Program Administration (CASPA) regarding a retaliation case filed only with the state.

B. Action

State Plans are required to submit notice of intent to adopt within 60 days of the issuance of this instruction, and must indicate whether their policies and procedures will be identical to, or different from, the provisions in this instruction. State Plans must complete adoption within six months. If a State Plan adopts identical policies and procedures, the State Plan must provide the date of adoption to OSHA within 60 days of adoption. If the State Plan adopts or maintains policies and procedures that differ from those in this instruction, the State Plan must either post its different policies and procedures on its State Plan website and provide a link to OSHA, or provide OSHA with an electronic copy of the policies and procedures. This action must occur within 60 days of the date of adoption.

VIII. Significant Changes

This Instruction:

- Adds procedures for acknowledging RFRs.
- Adds procedures for informing the parties and the Regional Office of the rejection of an RFR because of its untimeliness.
- Updates procedures requiring the Regional Office to send digital files to DWPP.
- Allows DWPP to request additional information from the Regional Office without formally returning the case to that office for additional investigation.
- Eliminates strict process timelines and deadlines (e.g., requiring DWPP reviews to be completed within 60 days of receiving the request).
- Streamlines the process to require only one staff reviewer (instead of two) and eliminates the step of assembling an “Appeals Committee” prior to making a determination on an RFR.
- Removes the Evaluation and Quality Audit requirements of the prior Directive.
- Removes documents from Appendix, including a flowchart of the former review process, whistleblower database instructions, and template letters.

IX. Background

OSHA is responsible for the enforcement of whistleblower protection provisions under more than 20 statutes. Most of these statutes allow complainants to challenge an unfavorable OSHA determination by requesting a hearing before a Department of Labor (DOL) Administrative Law Judge. However, three of these statutes – section 11(c), [29 U.S.C. § 660\(c\)](#); AHERA, [15 U.S.C. § 2651](#); and ISCA, [46 U.S.C. § 80507](#) – do not. Nevertheless, as a matter of Agency discretion, OSHA allows complainants to request National Office review (by DWPP) of the RAs' decisions to dismiss complaints filed under these statutes. This instruction supplements the RFR procedures in the WIM, Chapter 5.VI.B.2.

X. Procedures

All complainants whose docketed complaints are dismissed as non-merit under section

11(c), AHERA, and ISCA are afforded RFR rights.

A. Intake/Screening

1. When a section 11(c), AHERA, or ISCA complaint is dismissed by the RA (or by the supervisor delegated to by the RA), the complainant is afforded 15 calendar days from receipt of the Secretary's Findings to file a written RFR of the decision with the Director of DWPP.
2. The first day of the request period is the day after complainant's receipt of the RA's Secretary's Findings. Generally, the request date is the date of the postmark, facsimile transmittal, or email communication. If the last day of the request period falls on a weekend or a federal holiday, or if the relevant OSHA office is closed, then the next business day will count as the final day.
3. The RFR **must be made in writing**. Verbal RFRs are not accepted.
4. The RFR should be sent to DWPP within 15 calendar days of complainant's receipt of the RA's Secretary's Findings, via mail or electronic means. The request may be mailed, faxed, or emailed to rfr@dol.gov. If an RFR is filed with a Regional Office, the RFR will be forwarded to DWPP for processing.
5. Upon receipt of an RFR, DWPP will note the date it was received by DWPP. If an RFR is received by a Regional Office, the Regional Office will immediately email the RFR to DWPP at rfr@dol.gov and note the date that the RFR was received by the Regional Office. If that RFR was not previously received by DWPP, the date that the RFR was received by the Regional Office will be considered the date of filing.
6. If the RFR is not filed within the 15-day timeframe noted above, DWPP will consider the principles of equitable tolling, as set forth in the WIM, Chapter 3.III.D.4 with respect to the timeliness of a complaint, in determining whether the RFR should be accepted. If review will not be conducted because the RFR was untimely, DWPP will issue a determination letter informing the complainant that the RFR was untimely, and that the decision rendered by the RA is final. A copy of the letter will be sent to the respondent and the Regional Office, and DWPP will update the whistleblower database accordingly. When a complainant or respondent has designated a representative, a copy of the letter will also be sent to the designated representative in addition to the named parties.
7. For all timely-filed RFRs, DWPP will issue an acknowledgement letter to the complainant and will send a copy of that letter to the respondent and applicable Regional Office. Where a complainant or respondent has designated a representative, a copy of the letter will also be sent to the designated representative in addition to the named parties.

DWPP will ask the Regional Office to signal when the digital file is ready for review as well as provide password(s) for any password-protected information contained in the digital file.

B. DWPP Review

1. DWPP will conduct a review of the digital file. The review will include an examination of the digital file in order to determine whether the RA's decision is supported by the evidence and is consistent with the law.
2. If the reviewer concludes that the RA's determination is supported by the evidence and is consistent with the law, a recommendation will be submitted to the Director of DWPP to affirm the RA's determination. If the Director agrees, the affirmance will be made in DWPP's determination response, which will be a final determination of the Secretary of Labor.
3. If the reviewer determines that the RA's determination cannot be affirmed based on their review of the case file and the Director agrees, DWPP will contact the Regional Office to discuss the case. Any additional information received as part of this discussion from the Regional Office will be evaluated so that an appropriate recommendation can be presented to the Director.
4. The Director may, as needed, seek legal advice from the Office of the Solicitor's Division of Occupational Safety and Health (NSOL-OSH) during the review process.

C. Determination

1. Affirm Dismissal

If DWPP determines to affirm the RA's dismissal, the Director will notify the parties and the Regional Office in writing of the decision, and DWPP will update the whistleblower database accordingly.

2. Untimely

If DWPP determines that the RFR was untimely filed, the Director will notify the parties and the Regional Office in writing of the decision, and DWPP will update the whistleblower database accordingly.

3. Withdrawal

If the complainant submits a request to withdraw the RFR and the Director approves it, the Director will notify the parties and the Regional Office in writing of the approval, and DWPP will update the whistleblower database accordingly.

4. Return the Case for Additional Investigation

- a. If DWPP determines that additional investigation is warranted, the case will be returned to the Regional Office. In such cases, DWPP will notify the parties, in writing, that the case was returned to the Regional Office for additional investigation and close the RFR.
- b. After additional investigation is completed and, if the original determination (e.g., dismissal) does not change, the Regional Office will send a written report of its findings, accompanied by any new evidence it obtained during the reinvestigation, to DWPP for further review and analysis. DWPP will

reopen the RFR, review the additional information, and then determine if it will affirm or not affirm the original Regional Office determination.

- c. If the Regional Office makes another determination (e.g., merit referral to the Regional Solicitor of Labor (RSOL), settlement, withdrawal, etc.), the Region will notify DWPP of this outcome.

5. **Merit Found**

Alternatively, if DWPP, after consultation with NSOL-OSH, RSOL, and the RA, determines that the case has merit, it will return the case to the Region with instructions to refer the case to RSOL for litigation consideration.

- a. If RSOL, after consultation with NSOL-OSH, declines to file suit, the RA will dismiss the case. No further RFR of that dismissal will be permitted.
- b. If the Department of Justice¹ determines that suit should not be filed, the RA will generally dismiss the case. No further RFR of that dismissal is permitted. However, on a case-by-case basis, the RA, in consultation with RSOL, may delay the dismissal of an individual case to permit SOL to consult with the Department of Justice. Next steps, e.g., dismissal or litigation, will be based on the results of that consultation.

6. **Other Outcomes**

- a. If the parties reach a settlement while an RFR is pending, and the OSHA Regional Office approves the settlement, DWPP will close the RFR, update the whistleblower database accordingly, and return the case to the Regional Office.
- b. If the case is accepted for litigation by the RSOL, DWPP will close the RFR, update the whistleblower database accordingly, and return the case to the Regional Office, who in turn will forward it to the RSOL.

XI. **Reporting**

The Director must provide the Assistant Secretary, Deputy Assistant Secretaries, Regional Administrators, and NSOL-OSH with a quarterly report that includes the following information:

- Number of RFRs received and completed
- Determinations (e.g., untimely, withdrawn, affirmed, returned)
- Average processing times

¹ Litigation in federal district courts under the OSH Act may be conducted by the Solicitor of Labor, but it is "... subject to the direction and control of the Attorney General." 29 U.S.C. § 663.