

Krebenstrasse 25, 73230 Kirchheim/Teck, Germany; telephone: +49 7021 7298-0; fax: +49 7021 7298-199; email: [info@schempp-hirth.com](mailto:info@schempp-hirth.com); Internet: <http://www.schempp-hirth.com>.

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Issued in Kansas City, Missouri, on November 2, 2015.

**Melvin Johnson,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1982

[Docket Number: OSHA-2008-0027]

RIN 1218-AC36

#### Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act

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

**ACTION:** Final rule.

**SUMMARY:** This document provides the final text of regulations governing the employee protection provisions of the National Transit Systems Security Act (NTSSA), enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act), and the Federal Railroad Safety Act (FRSA), as amended by Section 1521 of the 9/11 Commission Act. The 9/11 Commission Act was enacted into law on August 3, 2007. FRSA was amended further in 2008. An interim final rule establishing procedures for these provisions and a request for public comment was published in the **Federal Register** on August 31, 2010. Ten comments were received. This rule responds to those comments and establishes the final procedures and time frames for the

handling of retaliation complaints under NTSSA and FRSA, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary of Labor's final decision.

**DATES:** This final rule is effective on November 9, 2015.

**FOR FURTHER INFORMATION CONTACT:** Rob Swick, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-4618, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2199 (this is not a toll-free number); email [OSHA.DWPP@dol.gov](mailto:OSHA.DWPP@dol.gov). This **Federal Register** document is available in alternative formats. The alternative formats available are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

NTSSA, which was enacted by the 9/11 Commission Act, establishes employee protection provisions for public transportation agency employees who engage in whistleblowing activities pertaining to public transportation safety or security (or, in circumstances covered by the statute, employees perceived to have engaged or to be about to engage in protected activity). See Public Law 110-53, Title XIV, § 1413, 121 Stat. 414 (2007) (NTSSA, codified at 6 U.S.C. 1142).

FRSA, which was amended by the 9/11 Commission Act, establishes employee protection provisions for railroad carrier employees who engage in whistleblowing activities pertaining to railroad safety or security (or, in circumstances covered by the statute, employees perceived to have engaged or to be about to engage in protected activity). Public Law 110-53, Title XV, § 1521, 121 Stat. 444 (2007) (FRSA, codified at 49 U.S.C. 20109). FRSA, as further amended in 2008, establishes whistleblower provisions for railroad carrier employees who are retaliated against for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. See Public Law 110-432, Div. A, Title IV, § 419, 122 Stat. 4892 (Oct. 16, 2008)

(FRSA, codified at 49 U.S.C. 20109(c)(2)). The 2008 FRSA amendments also prohibit railroad carriers and other covered persons from denying, delaying, or interfering with the medical or first aid treatment of an employee, and require that an injured employee be promptly transported to the nearest hospital upon request. 49 U.S.C. 20109(c)(1). These rules establish final procedures for the handling of whistleblower complaints under NTSSA and FRSA.

##### II. Summary of Statutory Procedures

Prior to the 9/11 Commission Act amendment of FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act (45 U.S.C. 151 *et seq.*), which included whistleblower proceedings before the National Railroad Adjustment Board, as well as other dispute resolution procedures. The amendment changed the procedures for resolution of such complaints and transferred the authority to implement the whistleblower provisions for railroad carrier employees to the Secretary of Labor (Secretary).

The procedures for filing and adjudicating whistleblower complaints under NTSSA and FRSA, as amended, are generally the same.<sup>1</sup> FRSA provides that the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. 42121(b), govern in FRSA actions, 49 U.S.C. 20109(d)(2). AIR 21's rules and procedures are very similar to the procedures provided in NTSSA, 6 U.S.C. 1142(c). The NTSSA and FRSA whistleblower provisions include procedures that allow a covered employee to file, within 180 days of the alleged retaliation, a complaint with the Secretary. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated NTSSA or FRSA (respondent) of the filing of the complaint, the

<sup>1</sup> The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of NTSSA and FRSA. Responsibility for receiving and investigating complaints under NTSSA and FRSA has been delegated to the Assistant Secretary for Occupational Safety and Health. Secretary's Order 01-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. Secretary of Labor's Order No. 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent during the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

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

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

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

If a hearing is held, NTSSA and FRSA require the hearing to be conducted "expeditiously." The Secretary then has 120 days after the conclusion of a hearing in which to issue a final order, which may provide the relief authorized by the statute or deny the complaint. Until the Secretary's final order is

issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Under NTSSA, the Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith.

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

NTSSA and FRSA permit the employee to seek de novo review of the complaint by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of the complaint, and there is no showing that the delay is due to the bad faith of the complainant. The court will have jurisdiction over the action without regard to the amount in controversy and the case will be tried before a jury at the request of either party. The whistleblower provisions of NTSSA and FRSA each provide that an employee may not seek protection under those respective provisions and another provision of law for the same allegedly unlawful act of the public transportation agency (under NTSSA) or railroad carrier (under FRSA). 6 U.S.C. 1142(e); 49 U.S.C. 20109(f). The whistleblower provisions of NTSSA and FRSA also provide that nothing in their respective provisions preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law. 6 U.S.C. 1142(f); 49 U.S.C. 20109(g). The whistleblower provisions of NTSSA and FRSA further provide that nothing in their respective provisions shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement and that the rights and remedies in the whistleblower provisions of NTSSA or FRSA may not be waived by any agreement, policy, form, or condition of employment. 6 U.S.C. 1142(g); 49 U.S.C. 20109(h).

### III. Summary and Discussion of Rulemaking Proceedings and Regulatory Provisions

On August 31, 2010, OSHA published in the **Federal Register** an interim final rule, promulgating rules governing the

employee protection provisions of NTSSA and FRSA. 75 FR 53522. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by November 1, 2010.

In response, several organizations and individuals filed comments with the agency within the public comment period. Comments were received from the National Whistleblower Center (NWC); the Government Accountability Project (GAP); nine railroad labor organizations (collectively Rail Labor) that submitted one collective set of comments; the AFL-CIO Transportation Trades Department, which represents 32 unions; the Utah Transit Authority FrontRunner Commuter Rail; the American Public Transportation Association; the American Shortline and Regional Railroad Association (ASLRRRA); the Association of American Railroads (AAR); Charles Goetsch; and Todd Miller.

OSHA has reviewed and considered the comments and now adopts this final rule, which has been revised in part in response to the comments. The following discussion addresses the comments and OSHA's responses in the order of the provisions of the rule.

#### *General Comments*

#### *Comments Regarding the Treatment of Complaints Under Section 20109(c)(1)*

In the preamble to the interim final rule, OSHA stated that the procedural rules provided in this part would not apply to complaints under paragraph 20109(c)(1) of FRSA. That paragraph provides:

A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

OSHA stated that section 20109(c)(1) is not a whistleblower provision because it appears to prohibit certain conduct by railroad carriers irrespective of any protected activity by an employee. 75 FR at 53522. Rail Labor, the AFL-CIO Transportation Trades Department, and Charles Goetsch all disagreed and urged the Secretary to apply the procedures in this part to complaints under section 20109(c)(1). These commenters noted that section 20109(d) of FRSA gives the Secretary the authority and duty to enforce the statute when an employee alleges "discharge, discipline, or other

discrimination in violation of subsection (a), (b), or (c)[.]” 49 U.S.C. 20109(d). They noted that the legislative history shows that the prompt medical attention provision was originally drafted as a stand-alone provision, but was transferred to section 20109, which is the only section in FRSA not assigned to the Federal Railroad Administration (FRA). Therefore, they concluded, enforcement of section 20109, including paragraph (c)(1), is assigned to the Secretary. They further asserted that “other discrimination” in section 20109(d)(1) encompasses the denial, delay, or interference with medical treatment prohibited in paragraph (c)(1), and that “other discrimination” is not limited to situations involving protected activity. Consequently, according to these commenters, any denial or infringement of the right under paragraph (c)(1) to prompt medical attention constitutes *per se* discrimination. They also argued that it is wrong to assume that paragraph (c)(1) involves no protected activity. The prohibited conduct in paragraph (c)(1) (*i.e.*, the denial, delay, or interference) only occurs if an employee has requested medical treatment. In other words, the commenters suggest that an employee has to have requested medical treatment for that treatment to be denied, delayed, or interfered with. Thus, they maintained, the protected activity under paragraph (c)(1) is requesting medical treatment. Lastly, they argued that it would be illogical to prohibit a railroad carrier from disciplining an employee for requesting medical treatment as paragraph (c)(2) does, but not to prohibit the railroad carrier from denying, delaying, or interfering with that medical treatment. Treating paragraph (c)(1) as if it were not a whistleblower provision would, they claimed, permit a railroad carrier to use the denial, delay, or interference with an employee’s medical treatment as the means of retaliating against the employee rather than having to discipline the employee, which would violate paragraph (c)(2). They urged OSHA to reconsider its position and to process paragraph (c)(1) complaints under the procedures applicable to all other complaints arising under 49 U.S.C. 20109.

Apart from these comments on paragraph (c)(1), the ARB set out its interpretation of paragraph (c)(1) in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10–147, 2012 WL 3164360 (ARB June 12, 2015), *pet. for review filed*, *Santiago v. U.S. Dep’t of Labor*, Case No. 15–2551 (2d Cir. Aug. 13, 2015). The ARB treated a complaint

under paragraph (c)(1) as a whistleblower claim subject to the same procedures and burdens of proof as a claim under paragraphs (a) or (b). *See id.* at \*5. The ARB reasoned that paragraph (c) implicitly identifies protected activity as requesting or receiving medical treatment or complying with treatment plans for work injuries, and identifies the prohibited discrimination as delaying, denying, or interfering, or imposing or threatening to impose discipline. *See id.* The ARB further reasoned that AIR 21’s procedural burdens of proof govern claims under paragraph (c), but must be tailored to apply to the processing of such claims. *See id.* at \*6. The ARB also outlined how the burdens of proof would apply to complaints under paragraph (c)(1). *See id.* at \*10–12. Because FRSA grants to the Secretary the authority to enforce and adjudicate FRSA claims, 49 U.S.C. 20109(c), and because the Secretary has delegated his adjudicative authority under FRSA to the ARB, Secretary of Labor’s Order No. 2–2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012), the ARB’s decision in *Santiago* constitutes the Secretary’s interpretation of paragraph (c).

Based on the statutory text, the legislative history of paragraph (c)(1), and the ARB’s decision in *Santiago* outlined above, the procedures provided in 49 U.S.C. 20109(d) apply to complaints alleging violations of paragraph (c)(1). The language and structure of the statute, together with the legislative history, show that FRSA provides employees the ability to file complaints regarding violations of paragraph (c)(1) with the Secretary and recover the remedies listed in section 20109(e) in the event of a violation.

Paragraph (d)(1) states that “[a]n employee who alleges discharge, discipline or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the [Secretary].” 49 U.S.C. 20109(d)(1). The plain language of paragraph (d)(1) does not distinguish between complaints alleging violations of paragraph (c)(1) or (c)(2) in prescribing the treatment of complaints, but rather broadly applies to “any petition or request for relief under this section.” (Emphasis added.) Further, no other provision in 49 U.S.C. 20109 contains an alternative mechanism for adjudication of complaints under paragraph (c)(1). Therefore, the “other discrimination” for which an employee may seek relief under paragraph (d)(1) necessarily

includes a denial, delay, or interference with medical or first aid treatment, or failing to promptly transport an injured employee to the nearest hospital upon the employee’s request. *See Delgado v. Union Pacific R.R. Co.*, 12 C 2596, 2012 WL 4854588, at \*3 (N.D. Ill.) (“[T]he obstruction of an injured employee seeking medical attention is itself discrimination against an employee and therefore provides a basis for private enforcement under subsection (d)(1).”).

The legislative history also supports the conclusion that the Secretary has the authority to enforce paragraph (c)(1) and that the procedures outlined elsewhere in section 20109 also apply to complaints alleging violations of paragraph (c)(1). As the commenters and the ARB in *Santiago* noted, Congress originally proposed to prohibit the denial, delay, or interference with medical or first aid treatment in a freestanding section of FRSA, over which the Secretary of Labor would not have enforcement authority, but made a conscious decision to move that prohibition to paragraph (c)(1) of section 20109. *See Federal Railroad Safety Improvement Act of 2007*, H.R. 2095, 110th Cong. Title VI, § 606 (2007) (proposed bill, which would have included the provision at 49 U.S.C. 20162); *Rail Safety Improvement Act of 2008*, H.R. Res. 1492 110th Cong. § 419 (2008) (reconciling H.R. 2095 with Senate amendments and moving the prohibition on the denial, delay, or interference with medical or first aid treatment from section 20162 to section 20109). Moving the provision to section 20109 indicates that Congress intended employees to have the same right to file a complaint with the Secretary of Labor seeking damages and other remedies following an unlawful denial, delay or interference with medical or first aid treatment that employees have for other violations of section 20109. *Santiago*, 2012 WL 3255136, at \*9 (describing this history as “a progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting”). For all of these reasons, and in light of the ARB’s decision in *Santiago*, the procedures established in 29 CFR part 1982 apply to complaints alleging violations of 49 U.S.C. 20109(c)(1), and OSHA has accordingly revised sections 1982.100 and 1982.102 to reflect this protection.

*Comments Regarding the Proper Interpretation of the Election of Remedies, No Preemption, and Rights Retained by Employees Provisions*

The whistleblower provisions of NTSSA and FRSA each provide that an

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

Several commenters addressed the provisions in FRSA regarding election of remedies, no preemption, and rights retained by employees, 49 U.S.C. 20109(f), (g), and (h). (NTSSA contains these same provisions, 6 U.S.C. 1142(e), (f), and (g), but the comments specifically referenced FRSA.) The AFL-CIO Transportation Trades Department asserted that railroad employees have the right to seek relief under both collective bargaining agreements and the whistleblower provision in 49 U.S.C. 20109, and that a claim or grievance filed by a railroad employee for an alleged violation of the collective bargaining agreement should not bar the employee from seeking remedies available under FRSA. This commenter stated that the rights to organize, to bargain collectively, and to file grievances for collective bargaining agreement violations provided for in the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, which governs labor-management relations in the railroad industry, “are essential to maintaining decent wages, and health and retirement benefits, as well as providing a legal remedy for workers who have been wronged by their employers.” According to this commenter, it would make no sense for Congress to have intended “to strip rail employees of contractual rights” when it provided whistleblower railroad employees a statutory remedy against retaliation. Rail Labor urged OSHA to interpret

paragraph (f) of FRSA, the election of remedies provision, as not barring claims made by an employee under the Federal Employers’ Liability Act (FELA), 45 U.S.C. 51 *et seq.*, or a collective bargaining agreement, when a FRSA claim has been filed, or vice versa. Rather, Rail Labor suggested, the election of remedies provision could apply to state public policy doctrines or state whistleblower statutes or regulations. Rail Labor urged OSHA to interpret section 20109(g) of FRSA, the no-preemption provision, to mean that FRSA has no bearing on FRA’s jurisdiction under 49 CFR part 225 to investigate, make findings, and levy and enforce penalties against railroad carriers for prohibited conduct. Also referencing the FRA regulation at 49 CFR part 225, the Utah Transit Authority FrontRunner Commuter Rail commented that all railroad carriers are already governed by 49 CFR 225.33(a)(1) and (2), and suggested that OSHA should cross-reference these regulations to avoid regulatory duplication. Rail Labor also urged OSHA to interpret paragraph (h) of FRSA, the rights retained by an employee provision, to mean that section 20109 has no bearing on matters under the RLA or collective bargaining agreements, and that the rights provided for in FRSA are not a proper subject of collective bargaining and not subject to waiver. Lastly, Rail Labor urged OSHA to state that the RLA and railroad collective bargaining agreements do not provide whistleblower protection, that a railroad carrier’s pre-disciplinary investigations and disciplinary decisions do not address an employee’s whistleblower claims, and that the National Railroad Adjustment Board has no jurisdiction to adjudicate whistleblower claims under FRSA.

OSHA does not believe that the changes to the text of these procedural rules suggested by these commenters are necessary. However, OSHA notes that the specific issue of the applicability of FRSA’s election of remedies provision to an arbitration brought pursuant to the employee’s collective bargaining agreement under the RLA was decided by the ARB in the consolidated cases of *Koger v. Norfolk Southern Railway Co.* and *Mercier v. Union Pacific Railroad*, ARB Nos. 09–101 and 09–121, 2011 WL 4889278 (ARB Sept. 29, 2011). The ARB concluded that FRSA’s election of remedies provision permits a whistleblower claim to proceed notwithstanding the employee’s pursuit of a grievance or arbitration under a collective bargaining agreement. *Id.* at \*8. The ARB’s decision constitutes the

Secretary’s interpretation of the election of remedies provision on this issue and nothing in these final rules alters the ARB’s conclusion. Three circuit courts of appeals and numerous district courts have agreed with the Secretary’s conclusion. *See Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507 (6th Cir. 2015); *Grimes v. BNSF Ry. Co.*, 746 F.3d 184 (5th Cir. 2014); *Reed v. Norfolk S. Ry. Co.*, 740 F.3d 420 (7th Cir. 2014); *Koger v. Norfolk S. Ry. Co.*, No. 1:13–12030, 2014 WL 2778793 (S.D.W. Va. June 19, 2014); *Pfeiffer v. Union Pacific R.R. Co.*, No. 12–cv–2485, 2014 WL 2573326 (D. Kan. June 9, 2014); *Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Ratledge v. Norfolk S. Ry. Co.*, No. 1:12–cv–402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013); *cf. Battenfield v. BNSF Ry. Co.*, No. 12–cv–213, 2013 WL 1309439 (N.D. Okla. Mar. 26, 2013) (examining section 20109(f) and permitting plaintiff to add FRSA retaliation claim despite having challenged his termination under his CBA); *Norfolk S. Ry. Co. v. Solis*, 915 F. Supp. 2d 32, 43–45 (D.D.C. 2013) (concluding that court did not have jurisdiction to review ARB’s *Mercier* decision because the ARB’s statutory interpretation was, at a minimum, a colorable interpretation of FRSA’s election of remedies provision).

Furthermore, FRSA’s election of remedies provision generally does not bar complainants from bringing both a FRSA retaliation claim and a complaint for compensation for a workplace injury under FELA. A worker who files a claim under FRSA and separately under FELA generally is not seeking “protection under both [FRSA] and another provision of law for the same allegedly unlawful act of the railroad carrier.” Under FRSA, a worker may seek reinstatement, back pay, and damages resulting from an act of retaliation by the railroad because of the worker’s protected activity. Under FELA, a worker may seek damages for a workplace injury that was due in whole or part to the railroad’s negligence. The conduct that gives rise to a retaliation claim under FRSA generally differs from the conduct that causes a worker’s injury, which is the subject of a FELA claim. The latter involves a general standard of care that a railroad owes a worker while the former is akin to an intentional tort. OSHA notes that employees routinely pursue a FRSA claim and a FELA claim concurrently in district court. *See, e.g., Davis v. Union Pacific R.R. Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 3499228 (W.D. La. Jul. 14, 2014); *Barati v. Metro-North R.R.*, 939 F. Supp. 2d 153 (D. Conn. 2013); *Cook v. Union*

*Pacific R.R. Co.*, No. 10–6339–TC, 2011 WL 5842795 (D. Or. Nov. 18, 2011).

Additionally, in response to Rail Labor's and Utah Transit Authority FrontRunner Commuter Rail's comments concerning FRA's regulation at 49 CFR part 225, OSHA notes that an employee's ability to pursue a retaliation claim under FRSA seeking reinstatement and a monetary remedy is separate from and is not limited by FRA's authority to investigate, make findings, levy and enforce penalties, or take other enforcement action against railroads for conduct prohibited by 49 CFR part 225, including violations of 49 CFR 225.33. Likewise, an employee's ability to pursue a retaliation claim under FRSA does not limit FRA's authority to enforce 49 CFR part 225. As previously explained, 49 CFR 225.33(a)(1) requires that each railroad carrier adopt and comply with an internal control plan that includes a policy statement declaring the railroad carrier's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad carrier. The policy statement must also declare the railroad carrier's commitment to prohibiting harassment or intimidation of any person that is intended to discourage or prevent such person from receiving proper medical treatment for or from reporting such accident, incident, injury, and illness. In addition, 49 CFR 225.33(a)(2) requires that each railroad carrier disseminate such policy statement to all employees, have procedures to process complaints that the policy statement has been violated, and impose discipline on the individual(s) violating the policy statement. While an act of intimidation and harassment, such as a threat of discipline, may run afoul of both 49 CFR 225.33 and 49 U.S.C. 20109, this overlap does not lead to regulatory duplication. FRA's ability to utilize its enforcement tools to cite a railroad for a violation of its policy statement against harassment and intimidation calculated to prevent an employee from reporting a casualty or accident or receiving proper medical treatment, and FRA's ability to discipline an individual such as a manager for violation of such policy, is not a remedy for the individual railroad employee who may have suffered retaliation as result of reporting an injury or requesting medical treatment. By contrast, FRSA gives employees the right to obtain reinstatement, back pay and appropriate damages resulting from a railroad's

retaliation because the employee reports an injury or requests medical treatment.

#### *Comment Regarding the Secretary's Compliance With Statutory Timelines*

Mr. Todd Miller commented generally that the regulations do not provide a means for redress where OSHA does not meet the timelines provided for in the statute. Courts and the ARB have long recognized that failure to complete the investigation or issue a final decision within the statutory time frame does not deprive the Secretary of jurisdiction over a whistleblower complaint. *See, e.g., Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 477 n.7 (3d Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Lewis v. Metro. Transp. Auth.*, ARB No. 11–070, 2011 WL 3882486, at \*2 (ARB Aug. 8, 2011); *Welch v. Cardinal Bankshares*, ARB No. 04–054, 2004 WL 5030301 (ARB May 13, 2004). The Secretary is cognizant of NTSSA and FRSA's statutory directives regarding completion of the OSHA investigation and administrative proceedings and the need to resolve whistleblower complaints expeditiously. However, in those instances where the agency cannot complete the administrative proceedings within the statutory timeframes, NTSSA's and FRSA's "kick-out" provisions, which allow a complainant to file a complaint for de novo review in federal district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint, allow the complainant an alternative avenue for resolution of the whistleblower complaint.

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

##### *Section 1982.100 Purpose and Scope*

This section describes the purpose of the regulations implementing NTSSA and FRSA and provides an overview of the procedures covered by these regulations. No comments were received on this section. However, OSHA has added a statement in subparagraph (a) noting that FRSA protects employees against delay, denial or interference with first aid or medical treatment for workplace injuries. OSHA has also added a statement in subparagraph (b) noting that these rules set forth the Secretary's interpretations of NTSSA and FRSA on certain statutory issues.

##### *Section 1982.101 Definitions*

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

The definition section of NTSSA, 6 U.S.C. 1131(5), defines "public transportation agency" as "a publicly owned operator of public transportation eligible to receive federal assistance under chapter 53 of title 49." Chapter 53 of title 49, 49 U.S.C. 5302(14), defines "public transportation" as "regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income; and does not include: Intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity); intercity bus service; charter bus service; school bus service; sightseeing service; courtesy shuttle service for patrons of one or more specific establishments; or intra-terminal or intra-facility shuttle services." Chapter 243, 49 U.S.C. 24301 *et seq.*, governs Amtrak. The definition of "public transportation" has been updated as needed to be consistent with 2012 amendments to 49 U.S.C. 5302.

In the interim final rule, OSHA stated that the definition section of FRSA, 49 U.S.C. 20102(2), defined "railroad carrier" as "a person providing railroad transportation," and that section 20102(1) defined "railroad" as "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation." 75 FR at 53523–24. It has come to OSHA's attention that these citations were incorrect. Section 20102 of FRSA was amended such that the definition of "railroad carrier" is now in paragraph (3), not (2), and that the definition of "railroad" is now in paragraph (2), not (1). Public Law 110–432, 122 Stat. 4850, 4886 (Oct. 16, 2008). In addition, the definition of "railroad carrier" was modified: It is defined as "a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary [of Transportation] determines is operating within the United States as a single, integrated rail system, the

Secretary [of Transportation] may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of [ ] title [49] and implementing regulations and order, subject to any appropriate conditions that the Secretary [of Transportation] may impose.” 49 U.S.C. 20102(3). The regulatory text in section 1982.101(k) is modified accordingly in the final rule. The definition of “railroad” remains the same as in the interim final rule.

The AFL–CIO Transportation Trades Department suggested that OSHA define “public transportation agency” and “railroad carrier” to include explicitly as covered employers owners, as well as contractors and subcontractors acting as operators. Rail Labor suggested that OSHA supplement these definitions by clarifying coverage over joint employers because, according to Rail Labor, the current regulatory definition does not address retaliation by railroad owners who are not operators. Under NTSSA, a covered employer is a “public transportation agency,” which the statute defines in relevant part as “a publicly owned operator of public transportation.” Similarly, under FRSA, a covered employer is a “railroad carrier,” which the statute defines in relevant part as “a person providing railroad transportation.” Thus, these statutes contain specific definitions of a covered employer. The determination of whether an “operator” (in the case of NTSSA) or “a person providing” (in the case of FRSA) includes owners who are not operators may turn on the facts of a given case and is better addressed through the adjudication of cases under NTSSA and FRSA rather than in these procedural rules. OSHA notes that NTSSA prohibits a contractor or subcontractor of a public transportation agency from engaging in the retaliatory conduct prohibited under the statute. 6 U.S.C. 1142(a) and (b). Similarly, FRSA prohibits a contractor or subcontractor of a railroad carrier from engaging in certain retaliatory conduct prohibited under the statute. 49 U.S.C. 20109(a). Therefore, OSHA declines to make the changes to this section suggested by AFL–CIO Transportation Trades Department and Rail Labor.

#### *Section 1982.102 Obligations and Prohibited Acts*

This section describes the activities that are protected under NTSSA and FRSA, and the conduct that is prohibited in response to any protected activities. Minor corrections have been made throughout this section to more closely parallel NTSSA and FRSA and OSHA’s procedural rules under other

whistleblower statutes and the section has been renumbered to better comply with the drafting requirements of the **Federal Register**.

In light of OSHA’s revised position regarding 49 U.S.C. 20109(c)(1) discussed above, the regulatory text for this section of FRSA has been modified to more closely mirror the statutory text of section 20109(c) and to include the (c)(1) provision as 29 CFR 1982.102(b)(3)(i).

Rail Labor and the AFL–CIO Transportation Trades Department each commented on the exception to FRSA’s prompt medical attention provision in 49 U.S.C. 20109(c)(2) permitting a railroad carrier to refuse to allow an employee to return to work when that refusal is pursuant to FRA’s medical standards for fitness of duty, or, if no such standards exist, then pursuant to the railroad carrier’s own medical standards for fitness of duty. They argued that this exception gives railroad carriers the ability to use groundless medical refusals as a substitute for retaliatory discipline or other forms of retaliation. Therefore, they urged OSHA to include a statement in the regulation that a railroad carrier’s refusal must be done in good faith and with a reasonable basis of medical fact, and that when the railroad carrier is relying on its own standards, those standards must be established in the carrier’s official policies, be medically reasonable, and uniformly applied. By contrast, the American Public Transportation Association commented that the protection against discipline for requesting medical treatment or following a treatment plan ignores management’s right to discipline employees whose injuries are directly caused by a violation of work rules or procedures. This commenter suggested that this rule should recognize management’s right to discipline employees in such situations, and that this right is independent of management’s obligation not to discipline an employee for requesting medical treatment.

OSHA declines to change the text of these regulations in response to these comments but notes that these commenters raise legitimate concerns regarding the adjudication of cases under FRSA. For example, the question of whether a railroad’s discipline of an employee is in retaliation for requesting medical treatment or results from the legitimate application of a work rule or procedure is often the central question in a FRSA complaint. In each complaint, that question should be resolved based on the specific facts of the case and the applicable case law.

Similarly, OSHA believes that the safe-harbor in 49 U.S.C. 20109(c)(2) requires that the railroad’s refusal to allow an employee to return to work be in good faith. A retaliatory refusal to permit an employee to return to work cannot properly be regarded as made “pursuant to” FRA’s or the carrier’s own medical standards for fitness for duty under the statute. Any other interpretation of the provision would permit a railroad carrier to refuse to allow an employee to return to work in retaliation against the employee for reporting the injury (which would violate 20109(a)(4)) or as a means for extending retaliatory discipline prohibited by 20109(c)(2). However, OSHA declines to incorporate the language proposed by the commenters into the rule, which mirrors the statutory language. Evidence that a railroad carrier’s refusal to allow an employee to return to work is not reasonable based on the employee’s medical condition may be important to show that the refusal is not in good faith and constitutes retaliation. Evidence that a refusal is based on carrier standards that are not recorded in the carrier’s official policies, not uniformly applied or not medically reasonable likewise may help to demonstrate that the refusal is due not to a legitimate safety concern of the railroad carrier but rather is motivated by retaliatory intent. However, the question of whether a particular refusal to permit an employee to return to work falls outside 20109(c)(2)’s safe harbor turns on the facts of the case and should be adjudicated in accordance with the applicable case law.

Finally, in a change that is not intended to have substantive effect, the terms “retaliate” and “retaliation” have been substituted for the terms “discriminate” and “discrimination,” which were used in the interim final rule. This change makes the terminology used in this rule consistent with the terminology in OSHA’s more recently promulgated whistleblower rules. Subheadings have been added to more clearly indicate which activities are protected under NTSSA and which are protected under FRSA and the paragraphs have been renumbered as needed to comply with **Federal Register** drafting requirements and to reflect that the protections in 49 U.S.C. 20109(c)(1) have been added.

#### *Section 1982.103 Filing of Retaliation Complaints*

This section explains the requirements for filing a retaliation complaint under NTSSA and FRSA. To be timely, a complaint must be filed

within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision to take an adverse action, not when the employee learns of the retaliatory nature of the action. See *Equal Emp't Opportunity Comm'n v. United Parcel Serv., Inc.*, 249 F.3d 557, 561–62 (6th Cir. 2001). Complaints filed under NTSSA or FRSA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

GAP expressed support for Sections 1982.103(b) (nature of filing) and (d) (time for filing), which outline the form of filing and the time for filing, respectively, and commented that they improved protection for whistleblowers. GAP also asked that the text of section 1982.103(d) clarify that the 180-day statute of limitations for filing a complaint under FRSA and NTSSA does not begin to run until an employee becomes aware of an alleged retaliatory act. OSHA believes that the rule as drafted properly states the statute of limitations but has added a sentence to further explain that because OSHA may consider the statute of limitations tolled for reasons warranted by applicable case law. OSHA may, for example, consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

AAR asserted that complaints should be accepted only in writing, not orally as well. AAR argued that permitting oral complaints is not consistent with the regulations in AIR 21, which section 20109(d)(2) of FRSA requires the Secretary to follow in administering FRSA actions. AAR further argues that FRSA's use of the word "filing" in section 20109(d)(1) contemplates a writing. According to AAR, requiring written complaints is better from a policy perspective because written complaints are clearer and less burdensome and inefficient for both OSHA and employers. ASLRRRA similarly urged OSHA to require that all complaints must be in writing, for much the same reasons that AAR expressed. In addition, ASLRRRA suggested that written complaints must include a statement of the acts and omissions,

with pertinent dates, that are believed to have created the statutory violation.

OSHA declines to adopt AAR's and ASLRRRA's suggestion and will permit complaints to be made orally or in writing. Submission of a complaint in writing is not a statutory requirement of NTSSA, FRSA, or AIR 21. Cf. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 2011 WL 977061, at \*2 (2011) (the statutory term "filed any complaint" in the Fair Labor Standards Act includes oral as well as written complaints). OSHA is generally updating its whistleblower procedures to allow oral complaints. Permitting oral complaints is consistent with decisions of the ARB permitting oral complaints. See, e.g., *Roberts v. Rivas Env't Consultants, Inc.*, ARB No. 97–026, 1997 WL 578330, at \*3 n.6 (ARB Sept. 17, 1997) (complainant's oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the "in writing" requirement of Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610(b), and the Department's accompanying regulations in 29 CFR part 24); *Dartey v. Zack Co. of Chicago*, No. 82–ERA–2, 1983 WL 189787, at \*3 n.1 (Office of Admin. App. Apr. 25, 1983) (adopting ALJ's findings that complainant's filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency's memorandum of the complaint satisfied the "in writing" requirement of the Energy Reorganization Act of 1974, as amended, (ERA), 42 U.S.C. 5851, and the Department's accompanying regulations in 29 CFR part 24). Moreover, this is consistent with OSHA's longstanding practice of accepting oral complaints filed under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c); Section 211 of the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651; Section 7 of the International Safe Container Act of 1977, 46 U.S.C. 80507; and the Surface Transportation Assistance Act of 1982, 49 U.S.C. 31105.

OSHA notes that a complaint of retaliation filed with OSHA under NTSSA and FRSA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Sylvester v. Parexel Int'l, Inc.*, ARB No. 07–123, 2011 WL 2165854, at \*9–10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions

in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts the agency to the existence of the alleged retaliation and the complainant's desire that the agency investigate the complaint. Upon the filing of a complaint with OSHA, OSHA is to determine whether "the complaint, supplemented as appropriate by interviews of the complainant" alleges "the existence of facts and evidence to make a prima facie showing," 29 CFR 1982.104(e). As explained in section 1982.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. See 6 U.S.C. 1142(c)(2)(B) (providing burdens of proof applicable to complaints under NTSSA); 49 U.S.C. 42121(b)(2)(B) (providing the burdens of proof applicable to complaints under FRSA).

In the final rule, OSHA has deleted the phrase "by an employer" from paragraph (a) of this section in order to better reflect NTSSA's and FRSA's statutory provisions prohibiting retaliation by officers and employees as well as railroad carriers, public transportation agencies and those entities' contractors and subcontractors, and has made other minor changes as needed to clarify the provision without changing its meaning.

#### Section 1982.104 Investigation

This section describes the procedures that apply to the investigation of complaints under NTSSA and FRSA. Paragraph (a) of this section outlines the procedures for notifying the parties and appropriate federal agencies of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. As explained below, paragraph (c) has been revised in response to the comments to state that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA will do so at a time permitting the other party an opportunity to respond to those submissions. Before providing such materials, OSHA will redact them in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, et seq., and other

applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth NTSSA's and FRSA's statutory burdens of proof. FRSA adopts the burdens of proof provided under AIR 21, 49 U.S.C. 42121(b)(2), which are the same as those provided under NTSSA. Therefore, this paragraph generally conforms to the similar provision in the regulations implementing AIR 21.

The statutes require that a complainant make an initial prima facie showing that a protected activity was "a contributing factor" in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. *See, e.g., Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005) (years between the protected activity and the retaliatory actions did not defeat a finding of a causal connection where the defendant did not have the opportunity to retaliate until he was given responsibility for making personnel decisions).

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974 (ERA), which is the same as those under NTSSA and FRSA, serves a "gatekeeping function" that "stem[s] frivolous complaints"). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under NTSSA or FRSA and not investigate further if either: (1) The complainant fails to meet the prima facie showing

that protected activity was a contributing factor in the alleged adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo v. New Jersey Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). For protected activity to be a contributing factor in the adverse action, "a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail," because a complainant alternatively can prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct," and that another reason was the complainant's protected activity. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley Act whistleblower provision), *aff'd sub nom. Klopfenstein v. Admin. Review Bd., U.S. Dep't of Labor*, 402 F. App'x 936, 2010 WL 4746668 (5th Cir. 2010).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. *See* 6 U.S.C. 1142(c)(2)(B)(iv); 49 U.S.C. 42121(b)(2)(B)(iv). The "clear and convincing evidence" standard is a higher burden of proof than a "preponderance of the evidence" standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. *Clarke v. Navajo Express*, ARB No. 09-114, 2011 WL 2614326, at \*3 (ARB June 29, 2011); *see also Araujo*, 708 F.3d at 159.

Paragraph (f) describes the procedures OSHA will follow prior to the issuance

of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred and that preliminary reinstatement is warranted.

NWC, GAP, AAR, and ASLRRR commented on the provisions in section 1982.104. NWC suggested that the phrase "other applicable confidentiality laws" in 1982.104(c) be replaced with more specific language describing the confidentiality laws that might apply to a respondent's answer. NWC also suggested that OSHA provide a copy of the response to the complainant, and give the complainant an opportunity to respond. NWC noted that to conduct a full and fair investigation, OSHA needs to obtain the available, responsive information from both parties. If one party does not have the information submitted by the other, NWC explained, that party cannot help the investigation by providing available information to shed light on the matter.

GAP commented that while it was pleased with the provisions in section 1982.104 providing copies of respondent's submissions to complainants and protecting witness confidentiality, it was concerned that the procedures under section 1982.104(f) "disenfranchise[d] the victim, giving only one side of the dispute the chance to participate in the most significant step of the process" and that "[a]t a minimum, this procedural favoritism means there will not be an even playing field in the administrative hearing." GAP advocated removing section 1982.104(f).

AAR commented that a complainant should not have access to a railroad carrier's confidential and/or privileged information, including internal business records, and investigative materials. According to AAR, it would be unfair for OSHA to provide such information to the complainant when a railroad carrier would be able to protect itself from the disclosure of such information in the context of litigation. AAR proposed that OSHA amend the language in 1982.104(c) to state that OSHA will not provide the complainant with any information the railroad carrier marks "confidential," and that if OSHA disagrees with the railroad carrier's determination, OSHA will afford the railroad carrier an opportunity to justify its position before disclosure.

AAR also proposed that OSHA should allow railroad carriers access to all of OSHA's interview notes, submissions, testimony, and other evidence (redacted if necessary). It also suggested that OSHA broaden the language in paragraph (f) to require OSHA to provide the employer with the



allegations and evidence relied upon by the complainant as OSHA processes a complaint, and that the employer should receive this information regardless of whether reinstatement is an issue. AAR argued that, overall, section 1982.104 puts the railroad carrier and the complainant on unequal footing, with the complainant having more timely access to information than the railroad carrier. AAR further noted that the comparable regulation under AIR 21, 29 CFR 1979.104(a), requires OSHA to provide the respondent “the substance of the evidence supporting the complaint” upon receipt of the complaint, rather than waiting until the Secretary believes preliminary reinstatement is warranted as in section 1982.104(f). According to AAR, providing the respondent with the evidence supporting the complaint at that late stage in the proceeding, as is contemplated by section 1982.104, is inconsistent with the statutory directive that AIR 21 procedures apply. AAR suggested that the respondent be provided with all of the evidence at the outset of a case, as well as throughout the course of a case.

Lastly, ASLRRRA expressed concern with the statement in section 1982.104(e)(3) that a complainant may satisfy his prima facie showing requirement by showing that the adverse action took place shortly after the protected activity. According to ASLRRRA, timing alone is insufficient to establish a prima facie case of retaliation as timing is only one of many factors to consider. Further, according to ASLRRRA, relying on timing is particularly problematic in a unionized workplace, where employers are contractually obligated to follow certain disciplinary procedures with short time limits.

Regarding NWC’s suggestion that OSHA provide more specific information about the confidentiality laws that may protect portions of the information submitted by a respondent and AAR’s concern regarding protection of information that would not otherwise be discoverable, OSHA believes that the vast majority of respondent submissions will not be subject to any confidentiality laws. However, OSHA recognizes that, in addition to the Privacy Act, a variety of confidentiality provisions may protect information submitted during the course of an investigation. For example, a respondent may submit information that the respondent identifies as confidential commercial or financial information exempt from disclosure under the Freedom of Information Act (FOIA). OSHA’s procedures for handling information

identified as confidential during an investigation are explained in OSHA’s Whistleblower Investigations Manual, available at: [http://www.whistleblowers.gov/regulations\\_page.html](http://www.whistleblowers.gov/regulations_page.html). As the investigation manual illustrates, OSHA is cognizant of the protections available to employers and therefore believes there is no need to modify the regulatory text to ensure that employers’ confidential information is protected.

With regard to NWC and GAP’s comments seeking more opportunities for the complainant to be involved in the investigation of the complainant’s whistleblower complaint, OSHA agrees with NWC and GAP that the input of both parties in the investigation is important to ensuring that OSHA reaches the proper outcome during its investigation and has made two changes in response to these comments. Section 1982.104(c) of the IFR provided that, throughout the investigation, the agency would provide the complainant (or the complainant’s legal counsel if the complainant is represented by counsel) a copy of all of respondent’s submissions to the agency that are responsive to the complainant’s whistleblower complaint, redacted of confidential information as necessary. In response to the commenters, the final rule has been revised to state that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA will do so at a time permitting the other party an opportunity to respond to those submissions. Also, section 1982.104(f) provides that the complainant will receive a copy of the materials that must be provided to the respondent under that paragraph.

With regard to GAP’s comment that section 1982.104(f) should be removed and AAR’s comment that this provision should be expanded to all cases regardless of whether reinstatement is at issue, OSHA notes that the purpose of 1982.104(f) is to ensure compliance with the Supreme Court’s ruling in *Brock v. Roadway Express*, 481 U.S. 252, 264 (1987). In that decision, the Court upheld the facial constitutionality of the analogous provisions providing for preliminary reinstatement under STAA, 49 U.S.C. 31105, and the procedures adopted by OSHA to protect the respondent’s rights under the Due Process Clause of the Fifth Amendment, but ruled that the record failed to show that OSHA investigators had informed the respondent of the substance of the evidence to support reinstatement of the discharged employee. In so finding, the

Court noted that although a formal hearing was not required before OSHA ordered preliminary reinstatement “minimum due process for the employer in this context requires notice of the employee’s allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.” *Roadway Express*, 481 U.S. at 264; see *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 480–81 (Leval, J., concurring) (finding OSHA’s preliminary reinstatement order under Sarbanes-Oxley unenforceable because the information provided to the respondent did not meet the requirements of *Roadway Express*). Thus, OSHA declines to remove the language providing the respondent notice and opportunity to respond under section 1982.104(f). Also, because in cases not involving preliminary reinstatement all of the remedies in the Secretary’s preliminary order are stayed if the respondent files objections and requests a hearing, OSHA believes that the hearing procedures provided by these rules adequately protect respondents’ due process rights in those cases. Expanding the application of section 1982.104(f) to cases not involving preliminary reinstatement would significantly delay investigations of FRSA and NTSSA cases but would not ensure any additional due process rights for respondents.

Also in response to AAR’s comments regarding the information to be provided to respondents during the investigation, OSHA agrees, in part, with AAR’s comments. NTSAA and FRSA, through its incorporation of AIR 21’s rules and procedures, both indicate that the Secretary, upon receipt of a complaint, shall notify the respondent not only of the filing of the complaint, but also of the allegations contained in the complaint and of the substance of the evidence supporting the complaint. See 6 U.S.C. 1142(c)(1); 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(1). Accordingly, the Department has revised section 1982.104(a) to reflect this statutory language and to be consistent with AIR 21’s regulation at section 1979.104(a).

Lastly, OSHA rejects ASLRRRA’s comment that 1982.104(e) should be revised to state that the timing of an adverse action alone is insufficient to establish a causal connection between the complainant’s protected activity and the adverse action. At the gatekeeping phase, where OSHA is simply determining whether to conduct an investigation, the timing of the adverse

action may be sufficient to give rise to an inference that the protected activity was a contributing factor in the adverse action so that the investigation may proceed. *See Taylor v. Wells Fargo Bank*, ARB No. 05-062, 2007 WL 7143176, at \*3 n.12 (ARB June 28, 2007) (temporal proximity may establish the causal connection component of the prima facie case under Sarbanes-Oxley); *see also Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1320 (10th Cir. 1999) (the causal connection necessary to show a prima facie case under Title VII or the ADEA may be inferred by protected conduct closely followed by adverse action); *Davis v. Union Pacific R.R. Co.*, Civ. A. No. 5:12-CV-2738, 2014 WL 3499228, at \*9 (W.D. La. July 14, 2014) (finding temporal proximity between protected injury report and adverse action sufficient to create a genuine issue of material fact precluding summary judgment for railroad). This approach is consistent with the approach that OSHA has taken under other whistleblower statutes employing the same burdens of proof as FRSA and NTSSA. *See, e.g.*, 29 CFR 1979.104(e) (AIR 21); 29 CFR 1980.104(e) (Sarbanes-Oxley); Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes, 63 FR 6614-01, 6618 (Feb. 9, 1998) (explaining that under ERA temporal proximity is normally sufficient to establish causation at the gatekeeping phase). OSHA believes that it would be overly restrictive to require a complainant to provide evidence of retaliation (as distinguished from a showing) when the only purpose is to trigger an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. Complainants in many cases do not have the knowledge or the resources to submit “evidence” of retaliation other than temporal proximity at the outset of OSHA’s investigation.

In addition to the revisions noted above, minor changes were made as needed in this section to clarify the provision without changing its meaning.

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

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order

appropriate relief, including preliminary reinstatement and back pay with interest and compensatory damages. To reflect the statutory language of FRSA and NTSSA and the agency’s current practice, OSHA modified paragraph (a)(1) in the final rule to mirror the remedies listed in the statutes, including adding “interest” to the description of compensation that can be included in the preliminary order.

In ordering interest on back pay under FRSA and NTSSA, the Secretary has determined that interest due will be computed by compounding daily the Internal Revenue Service (IRS) interest rate for the underpayment of taxes which, under 26 U.S.C. 6621, is generally the Federal short-term rate plus three percentage points.

In the Secretary’s view, 26 U.S.C. 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation under FRSA and NTSSA are made whole. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases. *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at \*14-15, 17 (ARB May 17, 2000); *see also Cefalu v. Roadway Express, Inc.*, ARB No. 09-070, 2011 WL 1247212, at \*2 (ARB Mar. 17, 2011); *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051, 2010 WL 1776974, at \*8 (ARB Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000). Section 6621 provides the appropriate measure of compensation under NTSSA, FRSA and other DOL-administered whistleblower statutes because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. *See Ass’t Sec’y v. Double R. Trucking, Inc.*, ARB Case No. 99-061, slip op. at 5 (ARB July 16, 1999) (interest awards pursuant to § 6621 are mandatory elements of complainant’s make-whole remedy). Section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer’s benefit from use of the withheld money) and thus provides the complainant with appropriate make-whole relief. *See EEOC v. Erie Cnty.*, 751 F.2d 79, 82 (2d Cir. 1984) (“[s]ince the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [§ 6621] has been adopted as a good indicator of the value of the use of money, it was well within” the district court’s discretion to calculate

prejudgment interest under § 6621); *New Horizons for the Retarded*, 283 N.L.R.B. No. 181, 1987 WL 89652, at \*2 (May 28, 1987) (observing that “the short-term Federal rate [used by § 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces”).

The Secretary also believes that daily compounding of interest achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board. *See Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, 356 N.L.R.B. No. 8, 2010 WL 4318371, at \*3-4 (Oct. 22, 2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a). Thus, paragraph (a)(1) of this section now states that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

In ordering back pay, OSHA also will require the respondent to submit the appropriate documentation to the Railroad Retirement Board or the Social Security Administration, as appropriate, allocating the back pay to the appropriate months (for employees who may be entitled to benefits under the Railroad Retirement Act) or calendar quarters (for employees who may be entitled to Social Security benefits). Requiring the reporting of back pay allocation to the Railroad Retirement Board or Social Security Administration serves the remedial purposes of FRSA and NTSSA by ensuring that employees subjected to retaliation are truly made whole. *See Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, 2014 WL 3897178, at \*4-5 (NLRB Aug. 8, 2014). As the NLRB has explained, when back pay is not properly allocated to the years covered by the award, a complainant may be disadvantaged in several ways. First, improper allocation may interfere with a complainant’s ability to qualify for any old-age Social Security benefit. *Id.* at \*4 (“Unless a [complainant’s] multiyear backpay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age social security benefit.”). Second, improper allocation may reduce the complainant’s eventual monthly benefit. *Id.* As the NLRB

explained, “if a backpay award covering a multi-year period is posted as income for 1 year, it may result in SSA treating the [complainant] as having received wages in that year in excess of the annual contribution and benefit base.” *Id.* Wages above this base are not subject to Social Security taxes, which reduces the amount paid on the employee’s behalf. “As a result, the [complainant’s] eventual monthly benefit will be reduced because participants receive a greater benefit when they have paid more into the system.” *Id.* Finally, “social security benefits are calculated using a progressive formula: Although a participant receives more in benefits when she pays more into the system, the rate of return diminishes at higher annual incomes.” Therefore, a complainant may “receive a smaller monthly benefit when a multiyear award is posted to 1 year rather than being allocated to the appropriate periods, even if social security taxes were paid on the entire amount.” *Id.* The purpose of a make-whole remedy such as back pay is to put the complainant in the same position the complainant would have been absent the prohibited retaliation. That purpose is not achieved when the complainant suffers the disadvantages described above. Therefore, OSHA has revised section (a)(1) of this paragraph to state that a preliminary order containing an award of back pay will also require the respondent to submit documentation to the Railroad Retirement Board or Social Security Administration to properly allocate back pay to the appropriate months or calendar quarters.

The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, preliminary order, also advise the respondent of the right under NTSSA to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he

received prior to his termination, but not actually return to work. Such “economic reinstatement” frequently is employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation (30 U.S.C. 815(c)). *See, e.g., Sec’y of Labor on behalf of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at \* 1 (ALJ June 26, 2001).

AAR and ASLRRRA commented on the language in the preamble regarding economic reinstatement and urged OSHA to delete any reference to economic reinstatement. ASLRRRA argued that OSHA does not have the authority under FRSA to require this remedy because it is not discussed in the statute and reliance on the Federal Mine Safety and Health Act is insufficient. AAR similarly argued that section 20109(d) of FRSA specifies the exclusive remedies available, and economic reinstatement is not listed as one of those remedies. In addition, both ASLRRRA and AAR maintained that it is unfair to order economic reinstatement given the fact that it may take many months before the preliminary order requiring economic reinstatement is fully adjudicated and reviewed and that the employer cannot recover the costs of economic reinstatement if the employer ultimately prevails. AAR asserted that the only instance in which economic reinstatement is appropriate is when the railroad carrier voluntarily agrees to such a remedy.

OSHA declines to revise the rule in response to these comments. OSHA believes that it has the authority to order economic reinstatement. Economic reinstatement is akin to an order of front pay. Front pay has been recognized as a possible remedy under whistleblower statutes in limited circumstances where actual reinstatement would not be possible. *See, e.g., Moder v. Vill. of Jackson*, ARB Nos. 01–095, 02–039, 2003 WL 21499864, at \* 10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”); *Hobby v. Georgia Power Co.*, ARB No. 98–166, 2001 WL 168898, at \* 6–10 (ARB Feb. 9, 2001), *aff’d sub nom. Hobby v. U.S. Dep’t of Labor*, No. 01–10916 (11th Cir. Sept. 30, 2002) (unpublished) (noting circumstances where front pay may be available in lieu of reinstatement but ordering reinstatement); *Michaud v. BSP Transp., Inc.*, ARB Nos. 97–113, 1997 WL 626849, at \* 4 (ARB Oct. 9, 1997)

(under STAA, front pay appropriate where employee was unable to work due to major depression resulting from the retaliation); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99–041, 99–042, 00–012, 1996 WL 518592, at \* 6 (ARB Sept. 6, 1996) (under ERA, front pay appropriate where employer had eliminated the employee’s position); *Brown v. Lockheed Martin Corp.*, ALJ No. 2008–SOX–49, 2010 WL 2054426, at \* 55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under Sarbanes-Oxley, front pay may be awarded as a substitute when reinstatement is inappropriate).

However, OSHA emphasizes that Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of NTSSA or FRSA. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

Two commenters addressed OSHA’s authority to order reinstatement under FRSA in situations in which the railroad carrier asserts that such reinstatement will endanger the public, its property, and/or other employees. ASLRRRA suggested that OSHA include an exception to the requirement that an employee be preliminarily reinstated immediately when a party has filed objections to OSHA’s findings and/or order for situations in which the railroad carrier establishes that the employee poses a direct threat to the health or safety of himself or others. As support for this suggestion, ASLRRRA pointed to a similar provision in the regulations under AIR 21 in which a preliminary reinstatement order is not appropriate when the employer establishes that the employee is a

security risk, 29 CFR 1979.105(a)(1). Rail Labor suggested that OSHA respond to any arguments by railroad carriers that preliminary reinstatement is inappropriate when such reinstatement will endanger the public, the railroad carrier's property, or other employees by supplementing the regulatory language to state that the Assistant Secretary has sufficient discretion pursuant to section 1982.105 to balance the competing interests of the public, all employees, and the railroad carrier, and that the full range of remedies is available.

OSHA does not believe that it is necessary to include such an exception in the regulation as ASLRRRA suggested or to supplement the language in the regulation as Rail Labor suggested because such cases may be adequately determined based on applicable case law. Also, the ALJ and the ARB each have sufficient discretion to stay a reinstatement order for exceptional circumstances, which may include the types of situations discussed by ASLRRRA. *See* 1982.106(b); 1982.110(b).

AAR commented on the reference to "abatement" in section 1982.105(a)(1), and suggested that abatement under FRSA should be limited to relief for the individual employee. AAR asserted that, while section 20109 incorporates AIR 21's rules and procedures and AIR 21 provides for abatement as a remedy, 49 U.S.C. 42121(b)(3)(B)(i), section 20109 of FRSA contains its own remedy provision, 49 U.S.C. 20109(e), and nothing in section 20109(e) provides for abatement orders directed at an employer's practices and procedures. As an initial matter, OSHA notes that this comment addresses FRSA only. NTSSA, like AIR 21, explicitly permits the Secretary to order the respondent to "take affirmative action to abate the violation." 6 U.S.C. 1142(c)(3)(B)(i).

As AAR notes, FRSA contains its own remedies provision, apart from AIR 21's remedies provision. FRSA prescribes remedies to make the employee whole, 49 U.S.C. 20109(e), notwithstanding FRSA's incorporation of the "rules and procedures" of AIR 21, 49 U.S.C. 20109(d)(2)(A). OSHA believes that injunctive relief to abate a violation of a specific employee's rights can be an important element of making the employee whole. Such relief could include, for example, an order requiring a railroad carrier to expunge certain records from an employee's personnel file or an order requiring that a particular company policy not be applied to an employee where application of the policy would penalize the employee for having engaged in protected activity. The posting of a

notice to employees regarding the resolution of a whistleblower complaint can be important to remedying the reputational harm an employee has suffered as a result of retaliation. In some instances, an order to provide training to managers or notice to employees regarding the rights protected by the statute at issue can assist in making the employee whole by ensuring that the circumstances that led to retaliation do not persist, thus remedying the employee's fear of future retaliation for having engaged in the protected activity that gave rise to employee's whistleblower complaint. Therefore, while OSHA is cognizant of the textual differences between NTSSA and FRSA, it has made no change in response to this comment to the text of 1982.105, which permits an order of abatement where appropriate.

In addition to the revisions noted above, which clarify the provision of interest on back pay awards and the allocation of back pay to the appropriate calendar quarters or months, minor changes were made as needed to clarify the provision without changing its meaning.

#### *Subpart B—Litigation*

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

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

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a

motion to stay OSHA's preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. Language was added to paragraph (b) of this section to make this point clear. A stay of the Assistant Secretary's preliminary order of reinstatement under FRSA or NTSSA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. *See Bailey v. Consol. Rail Corp.*, ARB Nos. 13–030 13–033, 2013 WL 1385563, at \*2 (ARB Mar. 27, 2013) (discussing the factors for obtaining a stay of reinstatement under FRSA). If no timely objection to OSHA's findings and/or preliminary order is filed, then OSHA's findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

No comments were received on this section. The term "electronic communication transmittal" was substituted for "email communication" and other minor changes were made as needed to clarify the provision without changing its meaning.

##### *Section 1982.107 Hearings*

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18 subpart A. It specifically provides for hearings to be consolidated where both the complainant and respondent object to the findings and/or order of the Assistant Secretary. This section further provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted *de novo*, on the record.

In a revision from the interim final rule, paragraph (b) now notes the broad authority of ALJs to limit discovery in order to expedite the hearing. This change was made for consistency with OSHA's rules under other whistleblower statutes, which similarly note that the ALJ has broad authority to limit discovery. *See, e.g.*, 29 CFR 1979.107 (AIR 21); 29 CFR 1980.107 (Sarbanes-Oxley). As with other whistleblower statutes administered by OSHA, FRSA, and NTSSA dictate that hearings "shall be conducted expeditiously" and allow complainants to seek *de novo* review of the complaint in federal court if the Secretary has not issued a final decision within 210 days

after the filing of the complaint. See 6 U.S.C. 1142(c)(7) and 49 U.S.C. 20109(d)(3). The ALJ's broad discretion to limit discovery, for example by limiting the number of interrogatories, requests for production of documents, or depositions allowed, furthers Congress's intent to provide for expeditious hearings under FRSA and NTSSA.

Finally, this section has been revised to add paragraph (d), which specifies that the formal rules of evidence will not apply to proceedings before an ALJ under section 1982.107, but rules or principles designed to assure the production of the most probative evidence will be applied. The Department has taken the same approach under the other whistleblower statutes administered by OSHA. See, e.g., 29 CFR 1979.107 (AIR 21); 29 CFR 1980.107 (Sarbanes-Oxley). This approach is also consistent with the Administrative Procedure Act, which provides at 5 U.S.C. 556(d): "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." See also *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 805-06 (1948) (administrative agencies not restricted by rigid rules of evidence). The Secretary believes that it is inappropriate to apply the rules of evidence at 29 CFR part 18 subpart B because whistleblowers often appear pro se and may be disadvantaged by strict adherence to formal rules of evidence. Furthermore, hearsay evidence is often appropriate in whistleblower cases, as there often are no relevant documents or witnesses other than hearsay to prove retaliation. ALJs have the responsibility to determine the appropriate weight to be given such evidence. For these reasons, the interests of determining all of the relevant facts are best served by not requiring strict evidentiary rules.

No comments were received on this section, but, as explained above, this section was revised to specify that the formal rules of evidence will not apply to proceedings before an ALJ under this section.

#### *Section 1982.108 Role of Federal Agencies*

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under NTSSA or FRSA. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of

an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Department of Transportation or the Department of Homeland Security, at each agency's discretion, also may participate as amicus curiae at any time in the proceedings. No comments were received on this section; however, it has been revised to specify that parties need only send documents to OSHA and the Department of Labor's Associate Solicitor for Fair Labor Standards when OSHA requests that documents be sent, OSHA is participating in the proceeding, or service on OSHA is otherwise required by these rules. Other minor changes were made as needed to clarify this provision without changing its meaning.

#### *Section 1982.109 Decision and Orders of the Administrative Law Judge*

This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under NTSSA or FRSA. Paragraphs (a) and (b) set forth the burdens of proof that apply to claims under NTSSA and FRSA. Specifically, the complainant must demonstrate (*i.e.* prove by a preponderance of the evidence) that the protected activity was a "contributing factor" in the adverse action. See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) ("The term 'demonstrates' [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provision] means to prove by a preponderance of the evidence."). If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. See 6 U.S.C. 1142(c)(2)(B)(iv); 49 U.S.C. 42121(b)(2)(B)(iv). The section further provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or without a

complete investigation pursuant to section 1982.104 is not subject to review. Thus, paragraph (c) of section 1982.109 clarifies that the Assistant Secretary's determinations on whether to proceed with an investigation under NTSSA or FRSA and whether to make particular investigative findings under either of the statutes subject to this part are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, as a general matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. A full discussion of the burdens of proof used by the Department to resolve whistleblower cases under this part is set forth above in the discussion of section 1982.104.

Paragraph (d) notes the remedies that the ALJ may order under NTSSA or FRSA and, as discussed under section 1982.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Paragraph (d) has also been revised to provide that the respondent will be required to submit appropriate documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate calendar quarters or months.

Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

OSHA has revised the period for filing a timely petition for review with the ARB to 14 days rather than 10 business days. With this change, the final rule expresses the time for a petition for review in a way that is consistent with the other deadlines for filings before the ALJs and the ARB in the rule, which are also expressed in days rather than business days. This change also makes the final rule congruent with the 2009 amendments to Rule 6(a) of the Federal Rules of Civil Procedure and Rule 26(a) of the Federal Rules of Appellate Procedure, which govern computation of time before those tribunals and express filing deadlines as days rather

than business days. Accordingly, the ALJ's order will become the final order of the Secretary 14 days after the date of the decision, rather than after 10 business days, unless a timely petition for review is filed. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

AAR urged OSHA to include in this section a provision permitting an ALJ in a FRSA case to award the employer up to \$1,000 in reasonable attorney fees if the ALJ determines that the complaint was frivolous or brought in bad faith. AAR pointed out that FRSA requires that AIR 21 rules and procedures be used in FRSA actions, and that the AIR 21 statute and regulations provide for attorney fees in such circumstances. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(3)(C); 29 CFR 1979.109(b). OSHA does not believe that such a provision is warranted under FRSA. FRSA incorporates only the rules and procedures of AIR 21. It does not incorporate the attorney-fee provision from AIR 21. *See Vason v. Port Auth. Trans Hudson*, ALJ No. 2010-FRS-00038, at 3-4 (ALJ Dec. 20, 2010) (concluding that AIR 21's attorney fee provision for cases that are frivolous or brought in bad faith is not a "rule" or "procedure" and therefore FRSA's incorporation of AIR 21's rules and procedures does not incorporate AIR 21's attorney fee provision).

Modifications were made to this section to match the language regarding remedies in 1982.105(a)(1). The statement that the decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review was deleted from section 1982.110(a) and moved to paragraph (e) of this section. Additional minor changes were made to clarify this provision without changing its meaning.

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

Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered to be the date of filing of the petition; if the petition is filed in person, by hand-delivery or other

means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard. In order to be consistent with the practices and procedures followed in OSHA's other whistleblower programs, and to provide further clarification of the regulatory text, OSHA has modified the language of section 1982.110(c) to clarify when the ALJ proceedings conclude and when the final decision of the ARB will be issued.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under NTSSA or FRSA, which otherwise would be effective, while review is conducted by the ARB. A stay of an ALJ's preliminary order of reinstatement under NTSSA or FRSA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. *See Bailey*, 2013 WL 1385563, at \* 2 (discussing the factors for obtaining a stay of reinstatement under FRSA).

If the ARB concludes that the respondent has violated the law, it will order the remedies listed in paragraph (d). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. In addition, when back pay is ordered, the respondent will be required to submit appropriate documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar

quarters. If, upon the request of the respondent, the ARB determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ARB may award to the respondent reasonable attorney fees, not exceeding \$1,000.

With regard to section 1982.110(a), NWC urged deletion of the provision in the interim final rule that "[a]ny exception not specifically urged will ordinarily be deemed waived by the parties." NWC commented that parties should be allowed to add additional grounds for review in subsequent briefs and that allowing parties to do so would further the goal of deciding cases on the merits. In response, OSHA notes that its inclusion of this provision is not intended to limit the circumstances in which parties can add additional grounds for review as a case progresses before the ARB; rather, the rules include this provision to put the public on notice of the possible consequences of failing to specify the basis of an appeal to the ARB. OSHA recognizes that while the ARB has held in some instances that an exception not specifically urged may be deemed waived, the ARB also has found that the rules provide for exceptions to this general rule. *See, e.g., Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, 2011 WL 3413364, at \* 10, n.5 (ARB July 27, 2011) (where complainant consistently made an argument throughout the administrative proceedings the argument was not waived simply because it appeared in complainant's reply brief to the ARB rather than in the petition for review); *Avlon v. American Express Co.*, ARB No. 09-089, 2011 WL 4915756, at \* 4, \* 5, n.1 (ARB Sept. 14, 2011) (consideration of an argument not specifically raised in complainant's petition for review is within the authority of the ARB, and parallel provisions in the Sarbanes-Oxley Act whistleblower regulations do not mandate the ARB limit its review to ALJ conclusions assigned as error in the petition for review). However, recognizing that the interim final rule may have suggested too stringent a standard, OSHA has replaced the phrase "ordinarily will" with "may." NWC also suggested that the review period be extended from ten to thirty days to make this section parallel to the provision in 1982.105(c), which allows for thirty days within which to file an objection. OSHA declines to extend the review period to 30 days because a shorter review period is consistent with the practices and procedures followed in OSHA's other whistleblower programs. Furthermore, parties may file a motion

for extension of time to appeal an ALJ's decision, and the ARB has discretion to grant such extensions. However, as explained above, OSHA has revised the period to petition for review of an ALJ decision to 14 days rather than 10 business days. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

Similarly, section 192.110(c), which provides that the ARB will issue a final decision within 120 days of the conclusion of the ALJ hearing, was similarly revised to state that the conclusion of the ALJ hearing will be deemed to be 14 days after the date of the decision of the ALJ, rather than after 10 business days, unless a motion for reconsideration has been filed with the ALJ in the interim. Like the revision to section 192.110(a), this revision does not substantively alter the length of time before the ALJ hearing will be deemed to have been concluded.

In addition to the changes noted above, OSHA moved the statement in paragraph (a) that if no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review to section 192.109(e) for clarity. Modifications were made paragraph (d) of this section to match the language regarding remedies in section 192.105(a)(1). Lastly, OSHA has revised this section slightly to clarify that interest on back pay awards will be compounded daily and to make several minor changes to clarify the provision and more closely mirror the language used in the statutes.

#### *Subpart C—Miscellaneous Provisions*

##### *Section 192.111 Withdrawal of Complaints, Findings, Objections, and Petitions for Review; Settlement*

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

AAR and Rail Labor both submitted comments relating to settlements. AAR stated that OSHA should not be overly involved in settlements as such involvement could frustrate the parties' ability to reach settlements. In addition, AAR noted that an employee often files a collective bargaining or statutory claim, such as a FELA claim, simultaneously with a FRSA claim.

According to AAR, a settlement may resolve all of the employee's claims. OSHA has jurisdiction only over the FRSA claim and therefore cannot review the aspects of the settlement that do not involve the FRSA claim. Rail Labor similarly commented that it is possible that an employee may pursue multiple claims simultaneously. Rail Labor suggested modifying the language in section 192.111(d) to clarify how a settlement will affect other pending cases and other parties involved in a particular case.

While OSHA recognizes that, in whistleblower cases generally, an employee may have more than one cause of action against the employer, OSHA does not believe that any change in the procedures for handling whistleblower complaints is necessary to accommodate this possibility. NTSSA and FRSA both provide that, at any time before the issuance of a final order of the Secretary, a proceeding before the agency may be terminated on the basis of a settlement "entered into" by the Secretary, the complainant, and the respondent. 6 U.S.C. 1142(c)(3)(A); 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(3)(A). The procedures for submission of settlements to the agency under section 192.111 implement these statutory requirements to ensure that settlements of whistleblower claims under NTSSA and FRSA are fair, adequate, and reasonable, in the public interest, and that the employee's consent was knowing and voluntary.

The final rule adopts a revision to section 192.111(a) that permits complainants to withdraw their complaints orally. In such circumstances, OSHA will, in writing, confirm a complainant's desire to withdraw. This revision will reduce burdens on complainants who no longer want to pursue their claims. Other minor changes were made as needed to clarify the provision without changing its meaning.

##### *Section 192.112 Judicial Review*

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ALJ or the ARB to submit the record of proceedings to the appropriate court pursuant to the rules of such court. This section also states that a final order is not subject to judicial review in any criminal or other civil proceeding. NTSSA explicitly provides that "[a]n order of the Secretary of Labor with respect to which review could have been obtained [in the court of appeals] shall not be subject to judicial review in any criminal or other civil proceeding."

6 U.S.C. 1142(c)(4)(B). In addition, the Secretary interprets FRSA as also prohibiting collateral attack on a final order of the Secretary. This interpretation is consistent with well-established case law that, where "a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action[.]" district courts do not have federal question jurisdiction. *Watts v. Securities and Exchange Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007); see *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) (district court did not have jurisdiction over an action by mine operators challenging an administrative order because the statute only expressly authorized district court jurisdiction in actions by the Secretary and provided for judicial review in the court of appeals); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 873 (D.C. Cir. 2002) (dismissing action claiming that Secretary lacked statutory authority to conduct a survey because the action was not one of those over which district courts had jurisdiction under the statute and statute provided for judicial review of agency action in the court of appeals); *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 491 (D.C. Cir. 1988) (district court did not have jurisdiction because, while the statute explicitly authorized district court review of some types of actions, it did not authorize review of the particular action at issue and judicial review was available in the court of appeals). No comments were received on this section. However, minor changes have been made to clarify it.

##### *Section 192.113 Judicial Enforcement*

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

FRSA expressly authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under 49 U.S.C. 20109(d)(2)(A) (adopting the rules and procedures set forth in AIR 21, 49 U.S.C. 42121(b)). 49 U.S.C. 20109(d)(2)(A)(iii) ("If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121."). FRSA permits the Secretary to bring an action to obtain such enforcement. 49 U.S.C. 20109(d)(2)(A)(iii). However, there is no provision in FRSA permitting the

person on whose behalf the order was issued to bring such an action.

NTSSA gives district courts authority to enforce orders, including preliminary reinstatement orders, issued by the Secretary. Specifically, reinstatement orders issued under subsection (c)(3) are immediately enforceable in district court under 6 U.S.C. 1142(c)(5) and (6). Subsections (c)(3)(B)(ii) and (d)(2)(A) provide that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. Subsection (c)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed by subsection (c)(3)(B), which includes reinstatement. 6 U.S.C. 1142(c)(3)(B)(ii) and (d)(2)(A). Subsection (c)(2)(A) also declares that the subsection (c)(3)(B)'s relief of reinstatement contained in a preliminary order is not stayed upon the filing of objections. 6 U.S.C. 1142(c)(2)(A) ("The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.") Thus, under the statute, enforceable orders issued under subsection (c)(3)(B) include preliminary orders that contain the relief of reinstatement prescribed by subsection (c)(3)(B) and (d)(2)(A). This statutory interpretation of FRSA and NTSSA is consistent with the Secretary's interpretation of similar language in AIR 21 and Sarbanes-Oxley. See Brief for the Secretary of Labor, *Solis v. Union Pacific R.R. Co.*, No. 4:12-cv-00304 BLW (D. Id. 2012); Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10-5602 (6th Cir. 2010); *Solis v. Tenn. Commerce Bancorp, Inc.*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010); but see *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006); *Solis v. Union Pacific R.R. Co.*, No. 4:12-cv-00304 BLW, 2013 WL 440707 (D. Id. Jan. 11, 2013); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006) (*decision vacated, appeal dismissed*, No. 06-2995 (4th Cir. Feb. 20, 2008)). NTSSA also permits the person on whose behalf the order was issued under NTSSA to obtain judicial enforcement of orders and the terms of a settlement agreement.

Rail Labor commented on this provision (it labeled its comment as related to section 1982.112, which addresses judicial review, but it is clear from the substance of the comment that it is related to section 1982.113, which addresses judicial enforcement). Rail Labor disagreed with the statement in the proposal that, under FRSA, the

person on whose behalf an order was issued cannot bring an action to enforce such order (only the Secretary can). However, if OSHA's interpretation is correct, Rail Labor expressed concern that the language in section 1982.113 gives unrestricted discretion to OSHA to enforce an order. Therefore, Rail Labor suggested that this section should be modified to clarify that the Secretary will, in all but the most extraordinary circumstances, enforce an order.

OSHA declines to change this section as suggested. FRSA provides that the Secretary may bring an action to enforce an order, such as a preliminary reinstatement order. FRSA also states that an order of preliminary reinstatement will not be stayed during the administrative proceedings, making clear that preliminary reinstatement is the presumptive remedy for retaliation. OSHA does not believe any further explanation of the circumstances in which the Secretary will seek enforcement of an order, such as a preliminary reinstatement order, is necessary in these rules.

OSHA has made two changes to this section that are not intended to have substantive effects. First, OSHA has revised this section to more closely parallel the differing provisions of NTSSA and FRSA regarding the proper venue for enforcement actions. Second, the list of remedies that formerly appeared in this section has been moved to section 1982.114. This revision does not reflect a change in the Secretary's views regarding the remedies that are available under NTSSA and FRSA in an action to enforce an order of the Secretary. The revision has been made to better parallel the statutory structure of NTSSA and FRSA which both contemplate enforcement of a Secretary's order and specify the remedies that are available in an action for de novo review of a retaliation complaint in district court.

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

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

In the Secretary's view, the right to seek de novo review in district court under these provisions terminates when the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the

complaint. The purpose of these "kick-out" provisions is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, as previously discussed with regard to § 1982.112 above, permitting the complainant to file a new case in district court in such circumstances would be a collateral attack on the Secretary's final order and, as such, is inconsistent with the provisions providing parties the right to seek judicial review of the Secretary's final decision in the court of appeals.

OSHA has revised paragraph (a) of this section to incorporate the statutory provision allowing a jury trial at the request of either party in a district court action under NTSSA and FRSA. OSHA also has added paragraph (b) to specify the burdens of proof applicable to "kick out" actions under this section and the statutory remedies available in those actions. For both NTSSA and FRSA complaints, the same burdens of proof that apply in proceedings before the ALJ, as outlined in section 1982.109, apply to "kick out" actions. See 6 U.S.C. 1142(c)(7); *Araujo*, 708 F.3d at 157-58 (holding that the burdens of proof in 49 U.S.C. 42121 apply to "kick out" actions under FRSA). Paragraph (b) also notes the remedies available to an employee who prevails in an action in district court, which are the same under NTSSA and FRSA. Both NTSSA and FRSA provide that an employee who prevails in an action in district court shall be entitled to all relief necessary to make the employee whole and that remedies shall include reinstatement with the same seniority status that the employee would have had, but for the retaliation, any back pay with interest, and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The relief for an employee who prevails in an action in district court under NTSSA or FRSA may also include punitive damages in an amount not to exceed \$250,000. See 6 U.S.C. 1142 (d); 49 U.S.C. 20109(e).

In paragraph (c) of this section, OSHA eliminated the requirement in the interim final rule that complainants provide the agency 15 days advance notice before filing a de novo complaint in district court. Instead, this section now provides that within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to the Assistant Secretary, the ALJ, or the ARB,



depending on where the proceeding is pending. In all cases a copy of the district court complaint also must be provided to the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

This change responds to NWC's comment that the 15-day advance notice requirement for filing a suit in district court should be eliminated because it inhibits complainants' access to federal courts. OSHA believes that a provision for notifying the agency of the district court complaint is necessary to avoid unnecessary expenditure of agency resources once a complainant has decided to remove the complaint to federal district court. OSHA believes that the revised provision adequately balances the complainant's interest in ready access to federal court and the agency's interest in receiving prompt notice that the complainant no longer wishes to continue with the administrative proceeding. Other minor changes were made as needed to clarify the provision without changing its meaning.

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

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

Rail Labor commented that the waiver provision raises due process concerns and should therefore be deleted. According to Rail Labor, any waiver works to the disadvantage of one party and the advantage of the other party, and it creates a drain on limited agency resources.

OSHA believes that, because these procedural rules cannot cover every conceivable contingency, there may be occasions where certain exceptions to the rules are necessary. OSHA notes that a similar section appears in the regulations for handling complaints under the whistleblower provisions of AIR 21 and Sarbanes-Oxley and that both the ALJs and the ARB have relied

upon the rule on occasion. *See, e.g., Haefling v. United Parcel Serv.*, ALJ No. 98–STA–6 (ALJ Mar. 23, 1998); *Caimano v. Brink's Inc.*, ARB No 97–041, 1997 WL 24368 (ARB Jan 22, 1997). Thus, OSHA has made no changes to this section.

#### **IV. Paperwork Reduction Act**

This rule contains a reporting provision (filing a retaliation complaint, section 1982.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995, (Pub. L. 104–13). The assigned OMB control number is 1218–0236.

#### **V. Administrative Procedure Act**

The notice and comment rulemaking procedures of section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” (5 U.S.C. 553(b)(A)). This is a rule of agency procedure, practice and interpretation within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments were not required for these regulations, which provide the procedures for the handling of retaliation complaints and set forth the Secretary's interpretations on certain statutory issues. The Assistant Secretary, however, sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

#### **VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132**

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and because no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretive in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

#### **VII. Regulatory Flexibility Analysis**

The notice and comment rulemaking procedures of Section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See SBA Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, at 9; also found at <https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act>. This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and therefore the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

*Document Preparation:* This document was prepared under the direction and control of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

**List of Subjects in 29 CFR Part 1982**

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

**Authority and Signature**

This document was prepared under the direction and control of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC, on October 28, 2015.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, for the reasons set out in the preamble, 29 CFR part 1982 is revised to read as follows:

**PART 1982—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE NATIONAL TRANSIT SYSTEMS SECURITY ACT AND THE FEDERAL RAILROAD SAFETY ACT**

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

Sec.

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

**Subpart B—Litigation**

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

**Subpart C—Miscellaneous Provisions**

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

**Authority:** 6 U.S.C. 1142 and 49 U.S.C. 20109; Secretary of Labor's Order 01–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor's Order No. 2–2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

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

**§ 1982.100 Purpose and scope.**

(a) This part implements procedures of the National Transit Systems Security Act (NTSSA), 6 U.S.C. 1142, and the Federal Railroad Safety Act (FRSA), 49 U.S.C. 20109, as amended. NTSSA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to public transportation safety or security (or, in circumstances covered by the statute, the employee is perceived to have engaged or to be about to engage in protected activity). FRSA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to railroad safety or security (or, in circumstances covered by the statute, the employee is perceived to have engaged or to be about to engage in protected activity), has requested medical or first aid treatment, or has followed orders or a treatment plan of a treating physician. It also protects an employee against delay, denial or interference with first aid or medical treatment for a workplace injury.

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

**§ 1982.101 Definitions.**

As used in this part:

(a) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under NTSSA or FRSA.

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

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

(d) *Employee* means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be

affected by a public transportation agency or a railroad carrier, or a contractor or subcontractor of a public transportation agency or a railroad carrier.

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

(f) *NTSSA* means Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–053, August 3, 2007, codified at 6 U.S.C. 1142.

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

(h) *Public transportation* means regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income; and does not include: Intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity); intercity bus service; charter bus service; school bus service; sightseeing service; courtesy shuttle service for patrons of one or more specific establishments; or intra-terminal or intra-facility shuttle services.

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

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

(k) *Railroad carrier* means a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary of Transportation determines is operating within the United States as a single, integrated rail system, the Secretary of Transportation may by order treat the group of railroad carriers as a single railroad carrier for

purposes of one or more provisions of part A, subtitle V of title 49 and implementing regulations and order, subject to any appropriate conditions that the Secretary of Transportation may impose.

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

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

(n) Any future statutory amendments that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

#### § 1982.102 Obligations and prohibited acts.

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

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

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

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

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

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

(iii) To file a complaint or directly cause to be brought a proceeding related

to the enforcement of this section or to testify in that proceeding;

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

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

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

(A) Reporting a hazardous safety or security condition;

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

(C) Refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (a)(2)(ii) of this section exist.

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

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

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

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

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

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

or the equipment, track, or structures are repaired properly or replaced.

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

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

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

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

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

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

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

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

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

(v) To cooperate with a safety or security investigation by the Secretary

of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

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

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

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

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

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

(C) Refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (b)(2)(ii) of this section exist.

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

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

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

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

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

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

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

(3) A railroad carrier or person covered under this section may not:

(i) Deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(ii) Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that—

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

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

#### § 1982.103 Filing of retaliation complaints.

(a) *Who may file.* An employee who believes that he or she has been retaliated against in violation of NTSSA or FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>.

(d) *Time for Filing.* Within 180 days after an alleged violation of NTSSA or

FRSA occurs, any employee who believes that he or she has been retaliated against in violation of NTSSA or FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

#### § 1982.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1982.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel), and to the Federal Railroad Administration, the Federal Transit Administration, or the Transportation Security Administration as appropriate.

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

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if

necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity (or, in circumstances covered by NTSSA and FRSA, was perceived to have engaged or to be about to engage in protected activity);

(ii) The respondent knew or suspected that the employee engaged in the protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity);

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity), and that the protected activity (or perception thereof) was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse action took place shortly after the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel)

will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, OSHA will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1982.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated NTSSA or FRSA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon afterwards as OSHA and the respondent can agree, if the interests of justice so require.

#### **§ 1982.105 Issuance of findings and preliminary orders.**

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary

will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of NTSSA or FRSA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The preliminary order may also require the respondent to pay punitive damages up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent under NTSSA to request award of attorney fees not exceeding \$1,000 from the administrative law judge (ALJ) regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after

receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for a hearing has been timely filed as provided at § 1982.106.

However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and of the preliminary order, regardless of any objections to the findings and/or the order.

### Subpart B—Litigation

#### § 1982.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under NTSSA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1982.105. The objections, request for a hearing, and/or request for attorney fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional

circumstances. If no timely objection is filed with respect to either the findings and/or the preliminary order, the findings or preliminary order will become the final decision of the Secretary, not subject to judicial review.

#### § 1982.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. Administrative Law Judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

#### § 1982.108 Role of Federal agencies.

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

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

(b) The Department of Homeland Security or the Department of

Transportation, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at those agencies' discretion. At the request of the interested federal agency, copies of all documents in a case must be sent to the federal agency, whether or not the agency is participating in the proceeding.

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

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

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

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1982.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the

appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to \$250,000.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

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

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint under NTSSA was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review must be served on the Assistant Secretary, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is denied or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or

the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to \$250,000.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint under NTSSA was frivolous or was brought in bad faith, the ARB may award to the respondent reasonable attorney fees, not exceeding \$1,000.

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

##### **§ 1982.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.**

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying OSHA, orally or in writing, of his or her withdrawal. OSHA then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. OSHA will notify the parties (or each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1982.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the

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

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's approval of a settlement reached by the respondent and the complainant demonstrates OSHA's consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1982.113.

#### § 1982.112 Judicial review.

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

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

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

#### § 1982.113 Judicial enforcement.

(a) Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate United States district court.

(b) Whenever a person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under FRSA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

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

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. At the request of either party, the action shall be tried by the court with a jury.

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1982.109. An employee prevailing in a proceeding under paragraph (a) shall be entitled to all relief necessary to make the employee whole, including, where appropriate: Reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The court may also order punitive damages in an amount not to exceed \$250,000.

(c) Within 7 days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a copy of the file-stamped complaint. In all cases, a copy of the

complaint must also be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

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

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 150721634-5999-02]

RIN 0648-BF11

#### Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Process for Divestiture of Excess Quota Shares in the Individual Fishing Quota Fishery

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** In January 2011, NMFS implemented the trawl rationalization program (a catch share program) for the Pacific coast groundfish limited entry trawl fishery. The program was implemented through Amendment 20 to the Pacific Coast Groundfish Fishery Management Plan (FMP) and the corresponding implementing regulations. Amendment 20 established the trawl rationalization program, which includes an Individual Fishing Quota program for limited entry trawl participants. Under current regulations, quota share permit owners must divest quota share holdings that exceed accumulation limits by November 30, 2015. This final rule makes narrow procedural additions to regulations to clarify how divestiture and revocation of excess quota share will occur in November 2015, and establishes procedures for the future if divestiture becomes necessary.

**DATES:** Effective November 4, 2015.