



BMWED Officer's Guide to Whistleblower Protections for BMWED Members



A Joint Guide by the
BMWED Safety Department
And
BMWED Education Department



Foreword

While every worker has a right to a safe workplace and our communities have a right to safety and peace of mind regarding the tracks that pass through our neighborhoods, railroads cannot be given carte blanche to regulate themselves in the issue of complying with their safety responsibilities. All too often, the needs of the corporate boardroom or the bottom line have come before the basic principle that we all deserve to get home safe, every day.

Understanding the pressure railroads may apply to their employees regarding compliance with vital safety regulations, our government has put in place protections for our members who suffer retaliation or discriminatory treatment for performing certain protected, safety-related activities. This guide assists our BMWED officers in supporting our members as they exercise their whistleblower rights and protections.

As leaders in our union, our mission is to find creative, aggressive, and effective tactics to preserve and advance our members' rights, advance their quality of life, and their dignity at work. With this guide and the support of our entire BMWED/DLC team, our officers can feel capable of supporting our members whistleblower rights.

Notes on Revision

Initial Version	June 30, 2023
p. 14 - Added references to OSHA's online tools Cover - small graphic changes. Appendices - Added <i>Whistleblower Protection for Railroad Workers</i>	November 15, 2023

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Approved for Unrestricted Release

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Getting Started

Rail workers have rights under several different **Whistleblower Protection** laws and regulations.

49 U.S.C. §20109, also known as **Whistleblower Protection**, amends the **Federal Railroad Safety Act (FRSA)**. This amendment creates worker rights, rail carrier duties, and a set of enforcement procedures.

On August 3, 2007, the FRSA was amended by **The Implementing Recommendations of the 9/11 Commission Act** (Public Law 110-53) to transfer authority for railroad carrier whistleblower protections to the **Occupational Safety and Health Administration (OSHA)**. Also in 2007, the **National Transit Systems Security Act (6 U.S.C. §1142)** established whistleblower protections for workers in Urban Rapid Transit (URT) railways like Chicago's CTA "L" trains or New York's subway system.

On October 16, 2008, the **Rail Safety Improvement Act** (Public Law 110-432) amended FRSA to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

As a BMWED officer, your work is vital to support our members as they navigate their rights under FRSA, §20109, NTSSA, or other protections, and in ensuring they can successfully navigate the procedures laid out to enforce their rights and file whistleblower claims.

Your work in supporting our members is also supported by our **Designated Legal Counsel (DLC)**, BMWED-recommended law firms that have experience with helping our members navigate legal issues and procedures. Your work should "tag team" with our DLC to give our members the best possible support.

This guide will offer you information, references, and other tools to assist your work on behalf of our members.

What's my job here?

As an officer in your System or Federation, you should understand the principles behind Whistleblower Protections so you can effectively communicate about our members' rights, support them in exercising those rights, advocate for greater safety and accountability from the railroads, and empower our members to engage in legally protected activities.

You are part of a team, along with our National Division officers and our BMWED **Designated Legal Counsel**, that offers a full-spectrum of support to our members in navigating their Whistleblower Protections.

As a leader in your System or Federation, you should be able to:

- **Communicate** accurate information regarding Whistleblower Protections, rights, and procedures to our members.
- **Distinguish** between:
 - **Protected Activities** under FRSA §20109.
 - **Complaints** against retaliation for our members performing Protected Activities (Complaints are filed through **OSHA**).
 - Other forms of safety reporting (like **C3RS**), how they may form a Protected Activity, and how they are different from Whistleblower Complaints.
- **Provide Guidance** to members navigating a Whistleblower Complaint process, informing them on timelines, key terms and concepts, and finding resources or information to empower them.
- **Understand** the relationship BMWED and our DLC can have working together to support our members if they suffer **retaliation** or **adverse action** due to their engaging in Protected Activities.
- **Provide Support**, as necessary and appropriate, for our members in filing timely Complaints through OSHA regarding violations of their rights.
- **Educate** members in your local Lodges and your System or Federation regarding the information and resources available to them in understanding their rights under FRSA §20109.

BMWED Designated Legal Counsel (DLC)

BMWED members are **strongly encouraged** to seek the advice of a BMWED Designated Legal Counsel in filing a Whistleblower complaint.

As a System/Federation officer, you should always consider your work supporting members through this process to be a “tag team” with our DLC.

- If the issue involves the violation of a member’s medical rights and/or there may be a parallel claim under FEHA, the member should seek advice from DLC in coordination with their appropriate Union officers.
- Virtually all whistleblower complaints filed without legal counsel are unsuccessful.
- There may be a variety of other legal rights or obligations the member should be advised about in relation to their pursuit of their rights under FRSA. DLC are best equipped to provide that advice.

Local/Regional Designated Legal Counsel (DLC) contacts:

Protected Activities

FRSA §20109 and other whistleblower protections guard workers against retaliation from their employers for various **Protected Activities**. While there are many different types of protected activities, they all generally fall under the concept of “whistle blowing,” hence the term. Protected Activities include:

- **Providing information** regarding any conduct which the employee reasonable believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security.
- **Refusing to violate** or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security.
- **Cooperating** with a safety or security investigation by a government agency.
- **Filing a complaint or testifying** in a proceeding related to the enforcement of FRSA or other railroad safety and security laws.
- **Notifying** or attempting to notify a railroad carrier or the FRA of a work-related personal injury or illness.
- **Accurately reporting** hours of duty or hours of service.
- **Seeking prompt medical attention** for an injury or illness suffered by an employee while at work.
 - **Railroads may not delay medical treatment** because they want to collect a statement from the injured employee before they are treated, because they want to conduct a reenactment, or for any other reason.
- **Refusing** to perform unsafe work or authorize the use of unsafe railroad equipment, track, or structures.
- **Reporting**, in good faith, a hazardous safety condition.

Protected Activities – Refusing to Work

From OSHA's *Investigator's Desk Aid to the Federal Railroad Safety Act Whistleblower Protection Provision*, last revised 12/20/2019.

What conditions must be met for an employee's refusal to work or refusal to authorize the use of safety-related equipment, track or structures to be protected?

For a refusal to work when confronted with a hazardous safety or security condition or a refusal to authorize the use of safety-related equipment, track, or structures to be protected, several statutory conditions must be met:

1. The refusal must be in good faith and the employee must not have a reasonable alternative to the refusal to work or refusal to authorize the use of equipment, track, or structures; and
2. The situation must be such that a reasonable individual, in the circumstances then confronting the employee, would conclude that the hazardous condition presents an imminent danger of death or serious injury, and the urgency of the situation does not allow sufficient time to eliminate the danger without the refusal to work or the refusal to authorize the use of equipment, track, or structures; and
3. The employee, where possible, must have notified the railroad carrier of the existence of the hazard and the intention not to perform further work, or not to authorize the use of the equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced

Protected Activities – Refusing to Work (Examples)

Potential examples of Protected Activity regarding refusal to work:

- An employee is directed to operate a production tamper with properly documented RMMS defects that require the machine be removed from service. An employee's refusal to operate the machine is protected since doing so would violate federal regulations regarding RMMS defects and work equipment safety.
- An employee smells a foul, smoky odor at a work area and verbally reports it to his supervisor. He is concerned about the health risks and asks to be assigned to work away from the smoky area. The employee's report and his request are protected activity as long as he has a good faith, reasonable belief that the conditions present a safety concern.
- An employee is directed to perform work on a railroad bridge using protective equipment or measure that don't provide adequate fall protection (fall restraint or fall arrest) for that bridge's specific conditions. The employee reports this issue by phone to his foreman and requests that the work be postponed until the correct equipment is made available. The employee's report and his request are protected activity as long as he has a good faith, reasonable believe that the conditions present a safety concern.

Protected Activities – Statements and Reports

Statements concerning safety and/or medical issues must be communicated in writing or orally to any of a wide variety of audiences to be considered protected. You can make these protected reports to:

- Railroad managers or supervisors.
- Railroad foremen.
- Officials of the Federal Railroad Administration (FRA).
- State rail inspectors.
- Senators and Congresspeople (or their staff).
- Government agencies like EPA, NRC, DOE, DOT, and others.

NOT ALL REPORTING OF SAFETY OR ACCIDENTS/INJURIES IS PROTECTED!

Telling family or friends, submitting the story to the news media, or telling coworkers who are **not** working foremen or supervision does **not** count as protected reporting under whistleblower protections.

Anonymous reporting **might** be protected, depending on the circumstances.

Retaliation/Adverse Action

If an employee engages in a **Protected Activity**, they are protected from the railroad discriminating against them, punishing them, or otherwise retaliating against them through an **Adverse Action**.

Railroads have all sorts of tactics to pressure their workers and all sorts of rulebooks and policies they can use to provide cover for their using retaliation tactics against workers who do the right thing. Some Adverse Actions can include:

- **Firing** or laying off the worker performing the Protected Activity
- **Abolishing** positions
- **Blacklisting** (preventing an employee from staying in the rail industry by communicating that they are undesirable or to be distrusted).
- **Demotions**
- **Denying overtime or promotions**
- **Discipline**
- **Denying benefits**
- **Failing to hire or rehire**
- **Intimidation**
- **Reassignment** that affects chances for promotion
- **Reducing work hours or pay**
- **Denying, interfering with, or delaying the medical or first aid treatment of an employee injured while on the job.**

The date the adverse action occurs begins a 180-day time limit for filing a Whistleblower complaint with OSHA. Keep your members mindful of this time limit and help ensure they don't miss the chance to exercise their right to file!

When is it Retaliation?

It is important to remember that, as OSHA investigates any allegations that a railroad violating a worker's rights under FRSA and §20109, they will evaluate whether the claimed adverse action or retaliation was related to the worker's engaging in protected activity. Some things to consider:

- FRSA doesn't require safety or security concerns to be reported in any specific way or to a specific person. It can be communicated in person, by phone, email, etc., and reported through a foreman (not just a railroad officer).
- The Department of Labor's **Administrative Review Board (ARB)** and courts have interpreted that an employee's belief that an unsafe or insecure condition exists must be objectively reasonable and made in good faith.
 - An employee must **not** have a reasonable alternative to the refusal to work or refusal to authorize the use of equipment, track, or structures.
 - That means the work they make a good faith refusal to perform must have been the only reasonable option made available to them by their railroad or employer.

Prompt Medical Treatment

A railroad may **NOT** delay medical treatment for any reason. Statements from the injured employee, re-enactments, or other delays are **unacceptable**. There is no reason which justifies any delay in prompt medical treatment for an employee seeking it for an illness or injury.

Opening a Whistleblower Case

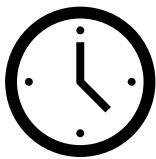
An employee seeking to secure whistleblower protections and open an investigation into their whistleblower complaint **must** file a claim with OSHA.

Claims should be in writing but may be filed by a telephone call to an OSHA office. OSHA offers an *Online Whistleblower Complaint Form* on its website at <https://www.osha.gov/whistleblower/WBComplaint>. Further information on how to use this form, or alternate methods to file a complaint, can be found on their dedicated **whistleblowers.gov** website and its page, *How to File a Whistleblower Complaint*, at https://www.whistleblowers.gov/complaint_page.

Complaints must describe the **adverse action** taken against an employee by their employer after they performed a **protected activity**.

ANY WHISTLEBLOWER COMPLAINTS FILED WITH OSHA SHOULD BE FILED WITH THE ASSISTANCE OF A BMWED DESIGNATED LEGAL COUNSEL (DLC).

Complaints must be filed with OSHA **within 180 days** after the **adverse action** is taken. For instance, a whistleblower claim can be filed up to 180 days after an employee is terminated for reporting a safety issue.



Employee engages in **protected activity**

ex) refusing to operate a machine tagged out of service.

Railroad commits **adverse employment action**

ex) disqualifies employee from operating any machines in retaliation for their earlier refusal.



The **adverse employment action** starts the 180-day clock.

An employee has 180 days from adverse action to file a whistleblower complaint.

Burden of Proof

An employee's complaint will be accepted as a *prima facie* case. That means it will be accepted as correct until proven otherwise.

It is the railroad's burden of proof to demonstrate that their action was not in retaliation for the employee's engaging in protected activity. They need to produce a "clear and convincing" rebuttal.

As a System officer, you already know that railroads will go to extraordinary measures to discredit our employees or to concoct narratives that supposedly justify their actions. It is important that the support you provide your member inoculates them against this sort of behavior from the railroad. It is also important that a BMWED Designated Legal Counsel assist the employee in the investigation process.

Investigation Procedures

The filed complaint will be assigned to a regional investigator within OSHA.

OSHA staff will determine whether case was timely filed (within 180 days of the adverse action).

The OSHA investigator is **supposed to** interview the employee (Complainant) **before** reading the railroad's written response to the complaint.

Be advised that the OSHA investigator may not be trained in whistleblower protections or familiar with rail safety issues.

Any interview may be recorded.

Our members maintain the right to have a BMWED representative and/or their DLC present during the interview.

Investigation Procedures (continued)

The employee and his legal counsel can read the railroad's written response before the OSHA investigation interview.

We should work with the employee and DLC to develop any and all evidence that demonstrates the railroad took an adverse action against the employee based off their protected activity. Any evidence that supports the position that railroads engage in retaliatory behavior should be considered with the employee and their counsel. You can assist them in identifying potential evidence to bring to the investigation and interview.

The OSHA investigator will determine whether there was probable cause or no probable cause. They will also determine if the employee is entitled to any remedies. These findings are submitted to the OSHA regional administrator. If approved, the findings will be sent to both parties and possibly released to the media or made available on public record.

OSHA procedures and guidance are subject to change. It is best to consult with BMWED Designated Legal Counsel and, if appropriate, inform the BMWED Director of Safety to see if there are any new regulations or guidance regarding OSHA's §20109 investigations.

Appeals

Either party may appeal OSHA's findings. Appeals go to the Department of Labor and are heard by an **Administrative Law Judge (ALJ)**.

Appeals must be filed within 30 days of the OSHA ruling.

The ALJ will conduct a full administrative trial *de novo* (starting from scratch).

The decision of the ALJ may be further appealed to the Department of Labor's Administrative Review Board (ARB). This is a highly political body whose members are selected by the Secretary of Labor and may be removed from their positions at will.

If no final decision has been issued by the Secretary of Labor within 210 days, the employee may file a civil action in federal district court.

- Final OSHA decision are rarely issued within the time limit, so this option is important for the employee to consider. Some OSHA decisions may take up to 2 years or more to reach a final decision.
- A federal court will, like the ALJ, hear the case on a *de novo* basis.
- There is a possibility to seek a jury trial.
- Any action at this stage should be supported by BMWED DLC.

Where OSHA does render a final decision, parties may file for review in a US Court of Appeals within 60 days of the final order from the Secretary of Labor.

Other Considerations

If a whistleblower case is filed with OSHA, OSHA approval is required to withdraw or settle the case.

If the railroad requests release, it could be considered to constitute another adverse action.

If your member files a §20109 case, help them understand how it could affect:

- FELA case settlements.
- Section 3, RLA settlements (Claims & Grievances).
- Other legal filings and procedures.

§20109 and FELA Cases

Filing a FELA case does **not** bar the employee filing a §20109 claim for whistleblower protections.

Claims and Grievances

If the employee has a current claim or grievance in handling under RLA Section 3, this does **not** bar them from filing a §20109 claim. However, these cases **must be coordinated!**

State Courts

Pursing a claim in a state court **will** bar later §20109 claims.

Important Issues for your Member

Your member should be aware that witness identities or statements may not be confidential in a §20109 case. This may cause some members to be fearful in supporting or pursuing whistleblower claims. We need to support our members as they exercise their rights.

As a System officer, you know that the railroads will increase their level of surveillance of the Complainant's work area or coworkers. Engaging with all our members who may be involved or affected is important.

As a System officer, you should be comfortable and confident in understanding the "reasonable belief" standard; able to communicate what that standard means to our members.

There is no protection in "about to happen" scenarios. Be sure to inform our members that whistleblower cases require:

- **The employee engaging in a protected activity.**
- **The railroad retaliating against the employee for their engaging in that protected activity (the adverse action).**
- **The employee filing a timely complaint with OSHA, no later than 180 days after the adverse action was suffered by the employee.**

You should help your members understand that exercising our §20109 rights is an important, and possibly game-changing, way to hold railroads accountable and to compel them to improve their behavior. OSHA remedies for whistleblower violations can be substantial and OSHA will not tolerate "business as usual" from the railroads. However, OSHA cannot enforce its expectations without timely whistleblower claims filed by affected employees. Our members are key to enabling OSHA to use its power to check the railroad's misbehavior.

Key Laws and Regulations

Federal Railroad Safety Act (FRSA) (2007) 49 U.S.C. §20109

Also known as **Whistleblower Protection**, amends the FRSA of 1970. This amendment protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a workplace injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public fund appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition. (OSHA, 2021)

Implementing Recommendations of the 9/11 Commission Act

On August 3, 2007, the FRSA was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for railroad carrier whistleblower protections to the **Occupational Safety and Health Administration (OSHA)**.

Rail Safety Improvement Act (RSIA)

On October 16, 2008, the RSIA (Public Law 110-432) amended FRSA to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

National Transit Systems Security Act (NTSSA)

Workers on railroads designated as **Urban Rapid Transit (URT)** operations are NOT governed under FRSA's whistleblower protections. These workers gain whistleblower protections under the NTSSA, is also known as **6 U.S.C. § 1142**. Urban Rapid Transit operations include Chicago's CTA "L" trains, New York's subway system, and other urban rail transit. Commuter railroads like Metra, Amtrak, and NICTD ARE covered under FRSA.

29 CFR Part 1982

The regulation laying out OSHA's procedure for handling FRSA Complaints

Key Terms

Covered Employee

Under FRSA, an employee of a railroad carrier, or a contractor or subcontractor (such as a manufacturer or repairer of operational equipment for a railroad carrier) is protected from retaliation for reporting certain safety and security violations.

Protected Activity

Under FRSA, employers may not discharge a covered employee or retaliate in any other manner against them for performing a Protected Activity. A full list of these Protected Activities is found later in this Guide.

Retaliation or Adverse Action

An action against an employee because of activity protected by the FRSA. Can include several different types of actions, with a representative list found later in this Guide.

OSHA

The Occupational Safety and Health Administration, which investigates claims that an employer violated FRSA Whistleblower Protections.

Complaint

The official communication filed by an employee or their representative indicating their belief they have been retaliated against for a Protected Activity in violation of FRSA . Complaints are filed with OSHA. They need not be in any particular form or language but are subject to timing requirements and are NOT anonymous.

Complainant

The employee indicating they suffered retaliation or adverse action from their employer for engaging in Protected Activity.

Key Terms

Respondent

The employer indicated by the Complaint. An OSHA Investigation evaluates the knowledge of the Respondent regarding the employee's engaging in Protected Activity, their suffering an adverse action, and whether the Protected Activity was a contributing factor in the adverse action.

Administrative Law Judge (ALJ)

Legal pathway for appeals to OSHA's findings from a Whistleblower Protection violation.

Whistleblower Protection for Railroad Workers

Individuals working for railroad carriers and their contractors and subcontractors are protected from retaliation for reporting potential safety or security violations to their employers or to the government.

On August 3, 2007, the *Federal Railroad Safety Act* (FRSA), 49 U.S.C. § 20109, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to transfer authority for railroad carrier worker whistleblower protections to OSHA and to include new rights, remedies, and procedures. On October 16, 2008, the *Rail Safety Improvement Act* (Public Law 110-432) amended FRSA, to specifically prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

Covered Employees

Under FRSA, an employee of a railroad carrier or a contractor or subcontractor (such as a manufacturer or repairer of operational equipment for a railroad carrier) is protected from retaliation for reporting certain safety and security violations.

Protected Activity

If your employer is covered under FRSA, it may not discharge you or in any other manner retaliate against you because you:

- Provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or your employer about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste, or abuse of federal grants or other public funds intended for railroad safety or security.
- Refused to violate or assist in a violation of any federal law, rule, or regulation relating to railroad safety or security.
- Filed a complaint, caused a proceeding to be brought, cooperated with an investigation

or testified in a proceeding under federal laws or regulations relating to railroad safety and security.

- Reported a hazardous safety or security condition.
- Reported a work-related injury or illness.
- Accurately reported hours of duty.
- Refused to work when confronted with an imminent hazardous safety or security condition.
- Refused to authorize the use of any safety- or security-related equipment, track, or structures if those structures present an imminent hazardous safety or security condition.
- Requested medical or first-aid treatment or followed orders or a treatment plan of a treating physician.

You may also be protected if you were perceived as having engaged in the activities described above.

What Is Retaliation?

Retaliation is an adverse action against an employee because of activity protected by the FRSA. Retaliation can include several types of actions, such as:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Making threats
- Denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured during the course of employment

Deadline for Filing Complaints

Complaints must be filed within 180 days after the alleged retaliatory action (that is, when the employee is notified of the retaliatory action).

How to File a FRSA Complaint

An employee, or his or her representative, can file a FRSA complaint with OSHA by visiting or calling his or her local OSHA office, sending a written complaint to the closest OSHA office, or filing a complaint online. No particular form is required and complaints may be submitted in any language.

Written complaints may be filed by fax, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

The date of the postmark, fax, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is considered the date filed.

To file a complaint electronically, please visit: www.osha.gov/whistleblower/WBComplaint.html.

To contact an OSHA area office, please call 1-800-321-OSHA (6742) to be connected to the closest area office. Or visit our website at www.osha.gov/html/RAMap.html and click on your state to find your local OSHA office address and contact information.

When OSHA receives a complaint, the agency will first review it to determine whether certain basic requirements are met, such as whether the complaint was filed on time. If so, the complaint will then be investigated according to the procedures required by 29 CFR Part 1982.

Results of the Investigation

If the evidence supports an employee's complaint of retaliation, OSHA will issue an order requiring the employer to, as appropriate, put the employee

back to work, pay lost wages, restore benefits, and other possible relief. The exact requirements will depend on the facts of the case. If the evidence does not support the employee's complaint, OSHA will dismiss the complaint.

After OSHA issues a decision, the employer and/or the employee may request a full hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision may be appealed to the Department's Administrative Review Board. The employee may also file a complaint in federal court if the Department does not issue a final decision within 210 days. See 49 U.S.C. § 20109.

To Get Further Information

For a copy of FRSA, 49 U.S.C. § 20109, the regulations (29 CFR 1982), and other information, go to www.whistleblowers.gov.

OSHA's Whistleblower Protection Programs enforces the whistleblower provisions of more than twenty federal whistleblower laws. To learn more about the whistleblower statutes which OSHA enforces, view our "Whistleblower

Statutes Desk Aid" at www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf.

For information on the Office of Administrative Law Judges procedures and case law research materials, go to www.oalj.dol.gov and click on the link for "Whistleblower."

For information on railroad safety laws and regulations, visit the Federal Railroad Administration's website at www.fra.dot.gov.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education, and assistance. For more information, visit www.osha.gov.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.



U.S. Department of Labor



DWPP FS-3945 05/2018

OSHA's Whistleblower Protection Program

OSHA's Whistleblower Protection Program enforces the provisions of more than 20 federal laws protecting employees from retaliation for, among other things, raising or reporting concerns about hazards or violations of various workplace safety and health, aviation safety, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, securities, tax, antitrust, and anti-money laundering laws. Employees who believe that they have experienced retaliation in violation of one of these laws may file a complaint with OSHA.

Whistleblower Laws Enforced by OSHA

Following is a list of statutes which OSHA enforces. Each statute has a different time frame in which a complaint can be filed.

- *Anti-Money Laundering Act (90 days)*
- *Asbestos Hazard Emergency Response Act (90 days)*
- *Clean Air Act (30 days)*
- *Comprehensive Environmental Response, Compensation and Liability Act (30 days)*
- *Consumer Financial Protection Act of 2010 (180 days)*
- *Consumer Product Safety Improvement Act (180 days)*
- *Criminal Antitrust Anti-Retaliation Act (180 days)*
- *Energy Reorganization Act (180 days)*
- *Federal Railroad Safety Act (180 days)*
- *Federal Water Pollution Control Act (30 days)*
- *International Safe Container Act (60 days)*
- *Moving Ahead for Progress in the 21st Century Act (motor vehicle safety) (180 days)*
- *National Transit Systems Security Act (180 days)*
- *Occupational Safety and Health Act (OSH Act) (30 days)*
- *Pipeline Safety Improvement Act (180 days)*
- *Safe Drinking Water Act (30 days)*
- *Sarbanes-Oxley Act (180 days)*
- *Seaman's Protection Act (180 days)*
- *Section 402 of the FDA Food Safety Modernization Act (180 days)*
- *Section 1558 of the Affordable Care Act (180 days)*
- *Solid Waste Disposal Act (30 days)*
- *Surface Transportation Assistance Act (180 days)*
- *Taxpayer First Act (180 days)*
- *Toxic Substances Control Act (30 days)*
- *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (90 days)*

What Is Retaliation?

Retaliation is an adverse action against an employee because of activity protected by one of these whistleblower laws. Retaliation can involve several types of actions, such as:

- Firing or laying off
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation or harassment
- Making threats
- Reassignment to a less desirable position or affecting promotion prospects
- Reducing pay or hours
- More subtle actions, such as isolating, ostracizing, mocking, or falsely accusing the employee of poor performance
- Blacklisting (intentionally interfering with an employee's ability to obtain future employment)
- Constructive discharge (quitting when an employer makes working conditions intolerable due to the employee's protected activity)
- Reporting the employee to the police or immigration authorities

Filing a Complaint

Employees who believe that their employers retaliated against them because they engaged in protected activity should contact OSHA as soon as possible because they must file any complaint within the legal time limits.

An employee can file a complaint with OSHA by visiting or calling their local OSHA office, sending a written complaint to the closest OSHA office, or filing a complaint online. No particular form is required and complaints may be submitted in any language.

Written complaints may be filed by fax, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

The date of the postmark, fax, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is considered the date filed.

To file a complaint electronically, please visit: www.osha.gov/whistleblower/WBComplaint.

To contact an OSHA area office, employees should call 1-800-321-OSHA (6742) to be connected to the closest area office or visit www.osha.gov/contactus/bystate to find local OSHA office address and contact information.

When OSHA receives a complaint, OSHA will first review it to determine whether certain basic requirements are met, such as whether the complaint was filed on time. If so, the complaint will be investigated in order to determine whether the employer retaliated against the employee for engaging in activity protected under one of OSHA's whistleblower laws. OSHA may also attempt to assist the employer and employee in reaching a settlement of the case.

Private-sector employees throughout the United States and its territories and employees of the United States Postal Service (USPS) who suffer retaliation because of occupational safety or health activity are covered by section 11(c) of the OSH Act. In addition, private-sector employees are also covered by laws in States which operate their own comprehensive occupational safety and health programs approved by Federal OSHA ("State Plans"). For information on the whistleblower provisions of the 22 State Plan States which cover private-sector employees, visit www.osha.gov/stateplans.

With the exception of employees of the USPS, public-sector employees (those employed as municipal, county, state, territorial, or federal workers) are not covered by the OSH Act. State and local government employees are covered by the whistleblower provisions of all the States with State Plans, including six States which cover only State and local government employees.

A federal employee who is not a USPS employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving a violation of an occupational safety or health standard or regulation should contact the Office of Special Counsel (www.osc.gov). Such federal employees are also covered by their own agency's procedures for remedying such retaliation.

Public-sector employees who are unsure whether they are covered under a whistleblower law should call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

Results of the Investigation

If OSHA determines that retaliation in violation of the OSH Act, *Asbestos Hazard Emergency Response Act*, or the *International Safe Container Act* has occurred, the Secretary of Labor may sue in federal district court to obtain relief. If OSHA determines that no retaliation has occurred, it will dismiss the complaint.

Under the other whistleblower laws, if the evidence supports an employee's complaint of retaliation, OSHA will issue an order requiring the employer, as appropriate, to put the employee back to work, pay lost wages, and provide other possible relief. If the evidence does not support the employee's complaint, OSHA will dismiss the complaint. After OSHA issues a decision, the employer and/or the employee may request a full hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision may be appealed to the Department's Administrative Review Board (ARB); in significant cases the Secretary of Labor may review the ARB decision. Aggrieved parties may seek review of final DOL decisions by the courts of appeals.

Under some of the laws, an employee may file the retaliation complaint in federal district court if the Department has not issued a final decision within a specified number of days (180, 210 or 365 depending on the law).

To Get Further Information

To obtain more information on whistleblower laws, go to www.whistleblowers.gov.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.



RAILROAD WORKERS HAVE RIGHTS!



U.S. Department of Labor



Occupational Safety
and Health Administration

The law says that employers cannot retaliate against railroad workers for exercising their rights under the *Federal Railroad Safety Act*. For example, workers have a lawful right to:

- Notify a supervisor or employer about a hazardous safety or security condition
- Report a workplace injury or illness
- Refuse to violate laws or rules relating to railroad safety or security
- Report violations of Federal Railroad Administration regulations to authorities
- Request medical or first-aid treatment
- Follow orders or a treatment plan of a treating physician

If an employer has retaliated against you, *act quickly!* Workers must file a retaliation complaint with OSHA **within 180 days after the alleged adverse action occurred or you became aware of it.**

www.whistleblowers.gov • 1-800-321-OSHA (6742) • TTY 1-877-889-5627



1. What is considered a close call?

A close call is any condition or event that may have the potential for more serious safety consequences. Some examples of close calls could be, but are not limited to, a train missing a temporary speed restriction, a train striking a derail without derailing, a blue flag not removed after releasing equipment, or proper track protection not provided during track maintenance.

2. Who can report close calls?

Employees whose carrier and craft are covered by a signed Implementing Memorandum of Understanding (IMOU) can participate in NASA C³RS and receive a waiver from discipline. Anyone submitting a report to NASA C³RS will receive confidential treatment.

Managers can submit a report confidentially, but each carrier's IMOU indicates whether or not managers receive a waiver from discipline.

3. When should I file a report?

File a report if you are involved in or witness an event that meets the close call definition. Submit the form to NASA within the timeline specified in your carrier's IMOU. Most current IMOUs either require 48 hours or three business days, not counting weekends and Federal Holidays, from the date of the incident to receive a waiver from discipline and some IMOUs describe boundary limits.

4. How do I report a close call?

Complete the report form either through secure electronic report submission or fill out the paper form and send by U.S. mail. Postage-paid NASA C³RS reporting forms can be found at your on-duty location or download and print a pdf form from the website.

5. How often can I submit a report to NASA C³RS?

There is no limit to the number of times that you can file a report, but some carriers may limit the number of times you may be eligible for a waiver.

6. What is the PRT and do they see my report?

The PRT is the Peer Review Team that your company may have if your carrier's IMOU establishes a PRT. The PRT consists of local representatives from the carrier and FRA at the carrier site. The PRT receives your de-identified report for review. The PRT may recommend corrective actions to the carrier after their independent analysis of the report.

7. Where can I find more about the conditions for receiving a waiver?

Participating carrier employees and managers who are covered by an Implementing Memorandum of Understanding (IMOU) may be eligible to receive a waiver from carrier discipline and FRA enforcement in exchange for sharing valuable safety information with C³RS.

The IMOUs, developed for each specific site by FRA, rail carriers, and labor representatives, outline how C³RS works at each site; defines the rights, roles, and responsibilities of all stakeholders; and

describes how the system will operate. The conditions for receiving a waiver are defined in each carriers' IMOU.

For further information on waiver conditions and what is outside the scope of NASA C³RS, please see a member of your carrier's C³RS Peer Review Team (PRT) or refer to your company's governing IMOU.

To learn more about reporting, participating railroads, and protection, you may also visit the FRA's website: <https://railroads.dot.gov/human-performance/c3rs/confidential-close-call-reporting-system-c3rs>

8. Does C³RS replace or modify safety processes currently operating at your carrier?

No. NASA C³RS is in addition and complementary to existing safety programs currently at your carrier.

9. How will my C³RS report be used?

C³RS de-identified reports may be used by the railroad community and/or government agencies to develop corrective actions and safety improvements. By sharing your lessons learned, you might prevent others from making the same mistake. De-identified reports are available in the C³RS searchable database - DBQT. In addition, your de-identified reports are sent to your carrier's Peer Review Team (PRT) which consists of local representatives from the carrier and FRA. The PRT reviews reports and recommends corrective actions.

10. What is the DataBase Query Tool (DBQT)?

The DataBase Query Tool (DBQT) is a searchable database of de-identified Confidential Close Call Reports submitted to NASA through the C³RS program. DBQT contains reports from all participating carriers across the USA. New reports are added every month.

11. What can DBQT be used for?

DBQT will be used to increase rail safety throughout the entire industry. For example, reports in the DBQT may be used to:

- Proactively identify and address safety vulnerabilities discovered through close call reporting
- Develop and prioritize safety enhancements and corrective actions
- Understand complex safety issues
- Develop training and educational programs

12. Who can access DBQT?

DBQT is publicly available on the NASA C³RS website. Go to DBQT: <https://c3rs.arc.nasa.gov/dbqt.html>

Federal Railroad Safety Act (FRSA) 49 U.S.C. §20109

§20109. Employee Protections.

(a) In general.--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 discriminate against an employee if such discrimination 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--

(1) 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;

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

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) 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;

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

(6) 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

(7) to accurately report hours on duty pursuant to chapter 211.

(b) Hazardous safety or security conditions.--

(1) 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 discriminate against 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 (2) 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 (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) 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--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) 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.

(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

(c) Prompt medical attention.--

(1) Prohibition.--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.

(2) Discipline.--A railroad carrier or person covered under this section may not 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 railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section 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. 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.

(d) Enforcement action.--

(1) In general.--An 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 of Labor.

(2) Procedure.--

(A) In general.--Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b), including:

(i) Burdens of proof.--Any action brought under (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b).

(ii) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b) or (c) of this section occurs.

(iii) Civil actions to enforce.--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.

(B) Exception.--Notification made under section 42121(b)(1) shall be made to the person named in the complaint and the person's employer.

(3) De novo review.--With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

(4) Appeals.--Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b), may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

(e) Remedies.--

(1) In general.--An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.--Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) 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.

(3) Possible relief.--Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

(f) Election of remedies.--An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

(g) No preemption.--Nothing in this section 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.

(h) Rights retained by employee.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(i) Disclosure of identity.--

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions.

(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosures shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

(j) Process for reporting security problems to the Department of Homeland Security.--

(1) Establishment of process.--The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities.

(2) Acknowledgment of receipt.--If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

(3) Steps to address problem.--The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 867, and amended Pub.L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct. 16, 2008, 122 Stat. 4892.)

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UNITED STATES DEPARTMENT OF LABOR

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(<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/resports/notification-and-federal-employee-antidiscrimination-retaliation-act-of-2002>)

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Investigator’s Desk Aid to the Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision

49 U.S.C. § 20109

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This Desk Aid represents the Occupational Safety and Health Administration’s (OSHA’s) summary of the scope of coverage and protected activity and the procedures for investigating and adjudicating retaliation complaints under FRSA as of the “last revised” date listed below. This Desk Aid is internal guidance directed to OSHA personnel and is subject to change at any time. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. This document is intended only to provide clarity for OSHA personnel regarding existing requirements under the law or agency policies. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Code of Federal Regulations; documents issued in compliance with Executive Orders 13891 and 13892 and the Administrative Procedure Act, as applicable; and decisions of the Department of Labor’s Administrative Review Board remain the official source for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.

Abbreviations Used in this Desk Aid:

FRSA	Federal Railroad Safety Act (typically used in this Desk Aid to refer just to the Act’s whistleblower protection provision)
FRA	Federal Railroad Administration
NTSSA	National Transit Systems Security Act whistleblower protection provision (6 U.S.C. § 1142)
URT	Urban Rapid Transit
OSHA	Occupational Safety and Health Administration

I. FRSA in a Nutshell

FRSA promotes safety in railroad operations and reduces railroad-related accidents by protecting employees from retaliation for engaging in protected activities including reporting alleged violations of federal law relating to railroad safety or security and reporting work-related injuries or hazardous safety or security conditions.

FRSA’s whistleblower protection provision can be found at 49 U.S.C. § 20109. The procedures for OSHA’s investigation and resolution of FRSA whistleblower complaints can be found at 29 CFR Part 1982. Most of the definitions relevant to FRSA whistleblower complaints can be found at 49 U.S.C. § 20102 and 29 CFR 1982.101.

A. Covered Entity

FRSA generally prohibits retaliation by any railroad carrier engaged in interstate or foreign commerce, as well as the railroad carrier’s officers or employees. In many instances, FRSA also prohibits retaliation by railroad contractors and subcontractors. Coverage under FRSA varies slightly depending on the category of protected activity that is at issue in the complaint.¹

1. Railroad Carriers

FRSA defines a “railroad carrier” as a person providing railroad transportation. “Railroad” is defined as any form of non-highway ground transportation that runs on rails or electromagnetic guideways. This includes commuter or short-haul railroad passenger service in a metropolitan or suburban area and high speed ground transportation systems that connect metropolitan areas, regardless of whether those systems use new technologies not associated with traditional railroads. However, the definition of “railroad” does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

¹ Coverage for complaints under 20109(a) differs from coverage of complaints under 20109(b) or (c) if the respondent is contractor or subcontractor of a railroad carrier.

Covered railroad carriers generally include:

- Freight railroads
- Long-distance, intercity passenger railroads
- Commuter railroads
- Short-haul passenger service (e.g., airport to downtown or to resort)
- High speed ground transportation systems that connect metropolitan areas, regardless of technology used
- Most tourist, scenic, and excursion railroads

The discussion below provides more information regarding coverage issues that may arise regarding different types of railroad carriers. When coverage questions arise, consult with the Regional Solicitor of Labor (RSOL), the Directorate of Whistleblower Protection Programs (DWPP), or the Federal Railroad Administration (FRA), as needed.

Commuter Railroads

The FRSA whistleblower protection provision applies to commuter railroads. Sometimes, questions arise regarding whether an employer is a commuter railroad covered by FRSA or an Urban Rapid Transit (URT) employer excluded from FRSA's definition of a railroad. OSHA generally will consult the FRA's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, [49 CFR Part 209, Appendix A](#), for guidance in determining whether the employer is a covered commuter railroad.

Generally, an employer is a commuter railroad covered by the FRSA whistleblower protection provision if:

- (1) it serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area;
- (2) its primary function is moving passengers between jobs in the city and homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function; and
- (3) the vast bulk of the system's trains operate in morning and evening peak periods, with few trains at other hours.

Examples of covered commuter railroads include:

- Metra and Northern Indiana Commuter Transportation District (NICTD) (Chicago area)
- Virginia Railway Express (VRE) and Maryland Area Regional Commuter (MARC) (Washington, D.C. area)
- Metro-North, the Long Island Railroad (LIRR), New Jersey Transit (NJ Transit), and the Port Authority Trans-Hudson (PATH) (New York area)

Note that commuter railroads do not necessarily need to connect to the general railroad system and may be operated by state, local, or regional authorities, corporations, or other entities. When

a commuter railroad is operated by a public transportation agency, it is also covered under the National Transit Systems Security Act (NTSSA) whistleblower protection provision.

Urban Rapid Transit Operations

The FRSA whistleblower protection provision does not cover URT operations (such as street railways, trolleys, subways, and elevated railways) that are not connected to the general railroad system of transportation. To determine whether a URT is connected to the general system and therefore covered under the FRSA whistleblower protection provision, it is necessary to consider whether the URT has a portion of operation conducted as part of or over the lines of the general system, shares track with another railroad, crosses another railroad's tracks at grade, or connects to the general system by operating in a shared right-of-way. If any of these criteria are satisfied, the URT may qualify as a covered railroad.

Generally, a URT *is not* likely to be covered, if it is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area (which may include the suburbs), moves passengers from station to station within the urban area as one of its major functions, and provides frequent service even outside of morning and evening peak periods.

Examples of URTs that are not covered under FRSA include:

- Metrorail (also known as Metro) (Washington, D.C. area)
- Chicago Transit Authority (CTA) Rail (also known as the "L") (Chicago area)
- Subway systems in New York, Boston, and Philadelphia

URT operated by public transportation agencies are covered under the NTSSA whistleblower protection provision regardless of whether they are connected or unconnected to the general railroad system of transportation.

Intercity Passenger Railroad Operations

All intercity passenger railroad operations are covered under FRSA. This would include, for example, any intercity high speed rail with its own right of way but that is not physically connected to the general railroad system. Examples of intercity passenger railroad operations include Amtrak (also known as National Railroad Passenger Corporation) and Alaska Railroad.

Short-Haul Passenger Railroad Operations

Short-haul passenger railroad operations are generally covered under FRSA even if they do not connect to other railroads. These operations might include, for example, a railroad designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area. When a short-haul passenger railroad is operated by a public transportation agency, it is also covered under the NTSSA whistleblower protection provision.

Tourist, Scenic, and Excursion Railroads

Tourist, scenic, and excursion railroads are generally covered. However, note that the FRA does not exercise jurisdiction over tourist, scenic, and excursion railroads if they run either: (1) on smaller than 24-inch gauge (which, historically, have never been considered railroads under federal railroad safety laws); or (2) off the general system and are considered “insular” (which means that the railroad is limited to a separate enclave in such a way that there is no reasonable expectation that public safety—except safety of a business guest, a licensee of the tourist operations, or a trespasser—would be affected by the operation). Thus, coverage questions may arise with respect to these entities, and the Regional Solicitor of Labor (RSOL) and Directorate of Whistleblower Protection Programs (DWPP) should be consulted in these circumstances.

Plant Railroads

In some circumstances, a railroad operates only within a single industrial operation with no or minimal connection to the general railroad system of transportation. FRA rules generally do not apply to “plant railroads” unconnected to the general railroad system. Coverage under the FRSA whistleblower protection provision in these cases will depend on the presence and degree of connection between the railroad and the general railroad system.

2. Officers and Employees of Railroad Carriers

Officers and employees of railroad carriers may be individually liable for violations of the FRSA whistleblower protection provision. However, the complainant must name these individuals in the complaint or make it clear to OSHA that the complainant wants to hold the individuals liable.

3. Contractors and Subcontractors of Railroad Carriers

Section 20109(a) prohibits contractors and subcontractors of railroad carriers from discharging or otherwise retaliating against an employee for engaging in any of the protected activities listed in that subsection. For example, a contractor of a railroad carrier is prohibited from retaliating against an employee of the contractor for providing information to the employer regarding conduct that the employee reasonably believes violates FRA rules or for providing information to the National Transportation Safety Board regarding facts related to a railroad accident.

For a contractor or subcontractor to be covered under FRSA, the facts of the case must relate to the contractor or subcontractor’s work in its capacity as a contractor or subcontractor of a railroad carrier. Contractors and subcontractors covered under section 20109(a)(1) may include, but are not limited to:

- Manufacturers of railroad equipment
- Repair shops
- Track maintenance contractors
- Staffing firms
- Medical contractors

Section 20109(b) does not cover contractors and subcontractors. Section 20109(c) is interpreted to apply only to railroad carriers and officers and employees of railroad carriers.

4. Employee Coverage

The Department of Labor’s regulations define an employee under FRSA as an individual presently or formerly working for a railroad carrier or for a contractor or subcontractor of a railroad carrier, an individual applying to work for a railroad carrier or for a contractor or subcontractor of a railroad carrier, or an individual whose employment could be affected by a railroad carrier or a contractor or subcontractor of a railroad carrier. FRSA coverage is **not** limited to any particular category of employee such as “employees who perform safety sensitive functions” or “operating employees.”

B. Protected Activity

FRSA identifies approximately a dozen different kinds of protected activity, divided into three separate sections: (a) “general” protected activity; (b) “hazardous safety or security conditions;” and (c) “prompt medical attention.” Although there is overlap in the three sections, there are also some notable differences. Attachment 2 to this Desk Aid (Optional Worksheet: FRSA Protected Activity Checklist) outlines the specific protected activities identified in the statute.

1. General Protections (20109(a))

Who is prohibited from engaging in retaliation under this subsection?

49 U.S.C. § 20109(a) prohibits retaliation by railroad carriers, contractors, subcontractors, officers, and employees of railroad carriers.

What conduct is protected?

Under this first subsection, FRSA identifies seven different kinds of protected activity paraphrased below and on Attachment 2. These general protected activities are:

1. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation regarding conduct that the employee reasonably believes is a violation of any federal law, rule, or regulation related 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 (20109(a)(1));

Note that under this subsection, the information must be provided to or the investigation must be conducted by: (1) a federal, state, or local regulatory or law enforcement agency (including an office of Inspector General under the Inspector General Act of 1978); (2) any member or committee of Congress or the Government Accountability Office; or (3) a person with supervisory authority over the employee or authority to investigate, discover, or address the misconduct.

2. Refusing to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security (20109(a)(2));
3. Filing a complaint, directly causing a proceeding to be brought, or testifying in a proceeding related to the enforcement of the FRSA and other railroad safety and security laws listed in the statute (20109(a)(3));
4. Notifying or attempting to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or illness of an employee (20109(a)(4));
5. Cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board (20109(a)(5));
6. Providing 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 regarding 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 (20109(a)(6)); and
7. Accurately reporting hours on duty (20109(a)(7)).

FRSA explicitly provides protection in this category for acts that the employee has done or is about to do, as well as acts that the railroad perceives the employee to have done or to be about to do.² For each of the activities under this section, the employee's conduct is protected if it was lawful and done in good faith.

Examples of Protected Activity:

- A train conductor reports to his supervisor and the dispatcher that, because of delays earlier in the day, his time will expire under federal hours of service rules if a relief conductor is not provided by a certain time. The relief conductor is not provided. The supervisor instructs the conductor that he expects no further delays in the train reaching its destination, and the conductor continues working for an additional hour after his hours of service expire. When the conductor arrives at the train's destination, he accurately records his time and complains to the railroad's safety hotline that he has been forced to violate hours of service requirements. Subsequently, the FRA investigates his hours of service violation, after learning about it through reports required of the railroad. The conductor provides information to FRA investigators. The conductor engaged in activity protected under section 20109(a)(1) by reporting the imminent hours of service violation to his supervisor and to the dispatcher and by reporting to the hotline that he had been forced to violate hours of service rules. The conductor's cooperation with FRA

² Based on case law under analogous OSHA-enforced whistleblower statutes, employees who are about to engage in activity protected under sections 20109(b) and (c), or are perceived to have engaged in activities protected under those sections, also would be protected from retaliation.

investigators is protected under sections 20109(a)(1) and (6). The conductor's accurate recording of his hours of service is protected under section 20109(a)(7).

- An employee slips on loose ballast, which shifts underneath his feet, causing his right ankle to turn outward, while walking along the track to reach a switch. He finishes his shift with no impairment to walking or other duties, but notices that the ankle is slightly sore. When he awakens the next morning, the ankle is swollen and painful. Realizing that he has sustained a work-related injury, he calls his supervisor to report the injured ankle and supplies the railroad's investigators with information regarding the accident. His initial report and his cooperation with the investigators are both protected activities under section 20109(a)(4).
- An employee is instructed not to run an air brake test on a train car. The employee genuinely and reasonably believes the test is required by federal safety law and it would be a violation not to run it. She runs the test despite her instructions not to. Her conduct is protected under section 20109(a)(2).
- After an employee reports a workplace injury, the railroad issues a notice of disciplinary investigation to the employee in connection with the injury. Believing that the disciplinary investigation is in retaliation for the injury report, the employee files a FRSA whistleblower complaint. The employee's filing of a FRSA whistleblower complaint is protected activity under section 20109(a)(3) and may also be protected under section 20109(a)(1).

2. Hazardous Safety or Security Conditions (20109(b))

Who is prohibited from engaging in retaliation under this subsection?

49 U.S.C. § 20109(b) prohibits retaliation by railroad carriers, officers, and employees of railroad carriers.

What conduct is protected?

Under this second subsection, employees are protected from retaliation for:

1. Reporting, in good faith, a hazardous safety or security condition (20109(b)(1)(A));
2. Refusing to work when confronted with a hazardous safety or security condition related to performance of the employee's duties, if certain conditions exist (20109(b)(1)(B)); and
3. Refusing to authorize the use of safety-related equipment, track, or structures, that the employee is responsible for inspecting or repairing, when the employee believes that the equipment, track, or structures present a safety or security hazard, if certain conditions exist (20109(b)(1)(C)).

This subsection applies both to concerns regarding the safe and secure operation of the railroad as well as occupational safety concerns faced by the employees themselves.

What requirements must be met for a report of a hazardous safety or security condition to be protected?

This subsection of FRSA does not mandate that safety or security concerns be reported in any specific way or to any specific person. An employee's complaint can take any form - it can be in person, on the phone, in an email, etc., and it need not be made through any formal channels. This section also does not require that the employee believe that the hazardous safety or security condition relates to a specific violation of railroad safety laws, rules, or regulations to be protected. Nor does it require that the employee believe that the safety or security concern presents an imminent danger of death or serious injury.

The Department of Labor's Administrative Review Board (ARB) and most courts have interpreted this subsection to require that the employee's belief that there is a hazardous safety or security condition be objectively reasonable in addition to requiring that the report be made in good faith. Objective reasonableness is evaluated based on the standards described below. Thus, subsection 20109(b)(1)(A) broadly protects an employee who reports a hazardous safety or security condition in the workplace so long as the employee has a good faith, reasonable belief that the workplace condition presents a safety or security hazard related to the railroad carrier's operations or employees' ability to perform work safely.

What conditions must be met for an employee's refusal to work or refusal to authorize the use of safety-related equipment, track, or structures to be protected?

For a refusal to work when confronted with a hazardous safety or security condition or a refusal to authorize the use of safety-related equipment, track, or structures to be protected, several statutory conditions must be met:

1. The refusal must be in good faith and the employee must not have a reasonable alternative to the refusal to work or refusal to authorize the use of equipment, track, or structures; and
2. The situation must be such that a reasonable individual, in the circumstances then confronting the employee, would conclude that the hazardous condition presents an imminent danger of death or serious injury and the urgency of the situation does not allow sufficient time to eliminate the danger without the refusal to work or the refusal to authorize the use of equipment, track, or structures; and
3. The employee, where possible, must have notified the railroad carrier of the existence of the hazard and the intention not to perform further work, or not to authorize the use of the equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

Note that these work refusal protections do not apply to security personnel employed by a railroad carrier to protect individuals or property transported by the railroad.

Attachment 3 to this Desk Aid (Optional Worksheet: Protected Work Refusals Under Section 20109(b)) provides more information regarding how to analyze cases in which the complainant alleged that he or she suffered retaliation for refusing to work when confronted with a hazardous safety or security condition or refusing to authorize the use of safety-related equipment, track, or structures because of a safety or security hazard.

Examples of protected activity:

- An employee is directed to walk over a bridge with no walkway, side rails, or lighting while conducting a crew change. The employee is concerned about falling from the bridge. She complains verbally to her supervisor and in a written statement to a trainmaster regarding the instructions. The employee's reports are protected assuming that she has a good faith, reasonable belief that walking over the bridge is unsafe.
- An employee smells a foul, smoky odor at his worksite and verbally reports it to his supervisor. He is concerned about the health risks and asks to be assigned to a smoke-free area. The employee's report and request are protected activity as long as he has a good faith, reasonable belief that the conditions present a safety concern.
- A train engineer is involved in an altercation with the train's conductor and fears for his safety. The employee believes that communication between an engineer and a conductor is essential for safe train operation and that the altercation threatens his safety and prevents adequate communication. The employee calls his manager and files a written report regarding the incident, both of which are protected if the employee has a good faith, reasonable belief that the conductor's behavior presents a safety hazard.
- An employee responsible for cleaning cars on a passenger train reports that he believes he sees bed bugs in a sleeper car recently treated for bed bug infestation. His report is protected as long as he has a good faith, reasonable belief that he observed bugs.

3. Prompt Medical Attention (20109(c))

What conduct is prohibited?

Under this subsection, a railroad carrier, or an officer or employee of a railroad carrier is prohibited from:

1. Denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured during the course of employment. If an employee who is injured during the course of employment requests transportation to a hospital, the railroad must promptly arrange to have the injured employee transported to the

nearest hospital where the employee can receive safe and appropriate medical care (20109(c)(1)); and

2. Disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following a treatment plan of a treating physician for an injury that occurred during the course of employment. Discipline is defined for purposes of this subsection as to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of a reprimand on an employee's record (20109(c)(2)).

This subsection includes an exception to the prohibition on discipline stating it is not a violation for a railroad carrier to refuse to allow an employee to return to work following medical treatment if that refusal is pursuant to FRA medical standards for fitness for duty. Or, if there are no pertinent FRA standards, a carrier's own standards for fitness for duty.

Examples of Unlawful Conduct:

- A railroad carrier's manager attempts to influence the medical treatment of an employee injured on the job by pressuring the treating doctor not to prescribe medication.
- Railroad carrier personnel delay taking an employee to the hospital following a workplace injury so that they can complete a reconstruction of how the employee's injury occurred.
- An employee requests to be taken to the hospital following a workplace injury and the railroad carrier takes the employee to a hospital of the railroad carrier's choice when other open facilities are closer.
- Railroad carrier managers pressure an employee to return to work earlier than the treating doctor has permitted following a work-related injury by implying that the employee will be suspended if he does not return to work immediately.

4. Good Faith and Reasonable Belief under the FRSA Whistleblower Protection Provision

Several of the categories of protected activity under FRSA explicitly require that the employee's conduct be in good faith and that the employee have a reasonable belief that there is a violation of the law (20109(a)(1)), or a safety or security hazard that presents an imminent risk of death or serious injury (20109(b)(2) & (3)). Other categories of FRSA-protected activity have been interpreted by the ARB or courts to include a reasonable belief requirement. For instance, the employee must have a reasonable belief that a safety hazard (20109(b)(1)), potential violation of the law (20109(a)(2)), or work-related injury (20109(a)(4)) exists to be protected under FRSA.

The good faith requirement is met if the employee has a subjective belief (i.e., actually believes) that there is a violation of law, a safety or security hazard, or a work-related injury. Good faith is generally presumed unless the respondent provides evidence of bad faith.

The reasonableness requirement is met if, in addition to being held in good faith, the employee's belief is objectively reasonable. In other words, it must be possible that a reasonable person in the employee's circumstances would share the employee's belief. A report or work refusal based on a reasonable but mistaken belief is protected. In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. A report will meet the reasonable belief requirement so long as a reasonable person in the same circumstances with the same training and experience could also believe that there is a violation of federal railroad safety or security law, a safety or security hazard, or a work-related injury. If the employee is refusing to work or refusing to authorize the use of safety-related equipment, track, or structures (20109(b)(2) & (3)), the statute requires that a reasonable person in the employee's position would agree that there is an imminent danger of death or serious injury and insufficient time to eliminate that danger.

C. Adverse Action

FRSA provides that an employer may not "discharge, demote, suspend, reprimand, or *in any other way discriminate*" against an employee for engaging in protected activity. An adverse action under FRSA includes any action that might dissuade a reasonable employee from engaging in FRSA-protected activity. Examples of adverse actions include, but are not limited to, firing, demoting, denying overtime or a promotion, or disciplining the employee.

Under ARB precedent, notices of investigation, warnings, and safety counseling sessions are considered presumptively adverse if they are considered discipline by policy or practice, they are routinely used as the first step in a progressive discipline policy, or they implicitly or expressly reference potential discipline.

II. Procedures for Handling FRSA Complaints

Procedures for handling FRSA complaints are set forth in [29 CFR Part 1982](#). Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the "[What to expect during an OSHA Whistleblower Investigation](#)" section of OSHA's website, in [OSHA's FRSA Fact Sheet](#), and in the [OSHA Whistleblower Investigations Manual](#).

A. Complaint

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

Form: The complaint need not be in any particular form. Oral or written complaints are acceptable, including OSHA’s [Online Complaint form](#). If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

Timing: The complaint must be filed within 180 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA’s Whistleblower Investigations Manual.

Distribution of complaints and findings to partner agencies: Complaints and findings in FRSA cases must be sent electronically to the FRA.

B. Investigation

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

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

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

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

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), punitive damages not to exceed \$250,000, and reasonable attorney fees and costs.

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

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

C. Administrative and Judicial Review

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

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA's investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ's decision in the case to the Department of Labor's ARB, which may either accept or reject the case for review. A complainant or respondent may obtain review of an ARB decision or an ALJ decision which the ARB has declined to review by the appropriate U.S. Court of Appeals.

D. Kick-Out Provision

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

E. Election of Remedies

FRSA contains an "election of remedies" provision that provides that an employee may not seek protection under FRSA's whistleblower provision and another provision of law for the same allegedly unlawful act of the railroad carrier. Election of remedies issues may arise if the railroad is covered by both FRSA and NTSSA or if the protected activity alleged in the complaint implicates both FRSA and Section 11(c) of the OSH Act.³ Election of remedies issues

³ The legislative history of FRSA's election of remedies provision indicates that it was aimed at clarifying the relationship between the anti-retaliation protections provided in FRSA and a possible separate remedy for some railroad employees under Section 11(c) of the OSH Act. Floor debate regarding the FRSA election of remedies provision noted certain railroad employees, such as employees working in shops, could qualify for both FRSA anti-retaliation protections and the existing remedy under Section 11(c) of the OSH Act. The intention was that an employee could pursue a claim under FRSA or Section 11(c) of the OSH Act, but not both. *See* 126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio).

also may arise if the employee has filed a FRSA complaint with OSHA and a complaint against the railroad under another statute in another forum.

Because an OSHA investigation is an informal proceeding and coverage and protected activity may not always be clear at the outset of the investigation, OSHA may docket a case and commence an investigation under FRSA and any other potentially-applicable OSHA whistleblower protection statute. However, at an appropriate time during the investigation, and after consulting with the complainant or, if applicable, the complainant’s attorney, OSHA should limit the investigation to FRSA or the other potentially applicable statute.

For example, if a complainant’s counsel indicates that the complainant wishes to pursue the complaint as a FRSA case even though Section 11(c) of the OSH Act may also apply, OSHA should close the case under Section 11(c) and continue investigating under FRSA after documenting the communication with the complainant’s counsel in the case file.

In cases in which the complainant is pursuing employment-related claims under another provision of law in a forum outside of OSHA (for example, the complainant has filed a complaint for wrongful termination in state court under a state law and has filed a FRSA complaint with OSHA), the employer may argue that OSHA must dismiss the FRSA complaint based on FRSA’s election of remedies provision. If this occurs, OSHA should request documentation, such as a copy of the complaint filed in the other proceeding, and should review the subject matter of the complaint, consulting with RSOL as needed, to determine whether the other proceeding alleges retaliation for the same protected activity that is alleged in the FRSA complaint. The chart below provides examples of the types of situations in which the election of remedies provision most often requires or does not require dismissal of a FRSA whistleblower complaint.

<i>Election of remedies may apply to retaliation claims based on the same protected activity as the FRSA complaint, including:</i>	<i>Election of remedies generally will not apply:</i>
<ul style="list-style-type: none"> • OSH Act Section 11(c) claims • NTSSA claims • Claims under other whistleblower statutes • Whistleblower claims under state statutes for same protected activity 	<ul style="list-style-type: none"> • CBA⁴ grievance/arbitration • FELA⁵ worker’s compensation claims • Title VII race, gender, national origin discrimination claims and retaliation claims • ADEA⁶ age discrimination claims • State common law claims (e.g., termination against public policy)

⁴ Collective Bargaining Agreement

⁵ Federal Employees Liability Act

⁶ The Age Discrimination in Employment Act

Investigator’s Desk Aid to the Federal Railroad Safety Act Whistleblower Protection Provision

OSHA Whistleblower Protection Program

Last Revised: 12/20/2019

III. Resources and Relevant FRA Regulations

The [FRA website](#) contains a wealth of information that can be helpful to OSHA investigators in FRSA whistleblower cases, including railroad safety information, advisories, compliance guides, and FRA regulations, as well as many other materials. The FRA's [Office of Safety Analysis](#) webpage is a valuable resource for railroad safety information, including accidents and incidents, inventory and highway-rail crossing data.

The OALJ maintains both a FRSA Whistleblower Digest and FRSA Whistleblower Digest Supplement. These resources may be found at the OALJ [Whistleblower Collection](#) page.

The following chart lists some of the FRA regulations that are most frequently relevant to OSHA's FRSA whistleblower investigations:

Regulation	Title
49 CFR Part 213	Track Safety Standards
49 CFR Part 214	Railroad Workplace Safety
49 CFR Part 217	Railroad Operating Rules
49 CFR Part 218	Railroad Operating Practices
49 CFR Part 219	Control of Alcohol and Drug Use
49 CFR Part 220	Railroad Communications
49 CFR Part 220 Subpart C	Electronic Devices
49 CFR Part 221	Rear End Marking Device – Passenger, Commuter and Freight Trains
49 CFR Part 222	Use of Locomotive Horns at Public Highway-Rail Grade Crossings
49 CFR Part 225	Railroad Accidents/Incidents: Reports Classification, and Investigations
49 CFR 228	Passenger Train Employee Hours of Service; Recordkeeping and Reporting; Sleeping Quarters

Attachment 1: Optional Worksheet: Analyzing FRSA Whistleblower Complaints

<i>In order to issue merit findings, answers 1 to 7 must be "Yes" and answer 8 must be "No."</i>		Yes	No
Timeliness			
1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)?		<input type="checkbox"/>	<input type="checkbox"/>
Coverage (See Desk Aid, pp. 2-6)			
2. Is respondent FRSA-covered? (check one coverage category)			
<input type="checkbox"/> Railroad carrier <input type="checkbox"/> Contractor or subcontractor of a railroad carrier <input type="checkbox"/> Officer of a railroad carrier <input type="checkbox"/> Employee of a railroad carrier		<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of FRSA?		<input type="checkbox"/>	<input type="checkbox"/>
Protected Activity (See Attachment 2: Optional Worksheet: FRSA Protected Activity Checklist)			
4. Has complainant engaged in FRSA-protected activity?		<input type="checkbox"/>	<input type="checkbox"/>
Employer Knowledge			
5. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)		<input type="checkbox"/>	<input type="checkbox"/>
Adverse Action			
6. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in FRSA-protected activity. Common examples include firing, demoting, or disciplining the employee.)		<input type="checkbox"/>	<input type="checkbox"/>
Nexus (Contributing Factor)			
7. Was complainant's FRSA-protected activity a <i>contributing factor</i> in respondent's decision to take adverse action against the complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to:			
<ul style="list-style-type: none"> • Close timing (temporal proximity) between the protected activity and the adverse action. • Evidence of hostility towards the protected activity. • Disparate treatment of complainant as compared to other employees following the protected activity. • Changes in respondent's treatment of complainant after the protected activity. • Indicators that respondent's stated reasons for the adverse action are pretext. 		<input type="checkbox"/>	<input type="checkbox"/>
Affirmative Defense			
8. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?		<input type="checkbox"/> No	<input type="checkbox"/> Yes

Attachment 2: Optional Worksheet: FRSA Protected Activity Checklist

Check all that apply. If any box on this sheet is checked, also check "yes" on Attachment 1 item 4. Note that railroad contractors and subcontractors are specifically listed as covered employers only under section 20109(a).

General — 49 U.S.C. 20109(a) (Coverage--railroad carriers, contractors, subcontractors, officers, and employees)

Has the complainant lawfully and in good faith (or has the employer perceived that the complainant is about to or has):

- Provided information, directly caused information to be provided, or otherwise directly assisted in any investigation regarding conduct that the employee reasonably believes is a violation of any federal railroad safety or security law, rule, or regulation or gross fraud, waste, or abuse of federal grants or other public funds intended for railroad safety or security? (20109(a)(1))

Note that under this subsection, the information must be provided to or the investigation must be conducted by:

- (1) a federal, state, or local regulatory or law enforcement agency (including an office of Inspector General under the Inspector General Act of 1978);
- (2) any member or committee of Congress or the Government Accountability Office; or
- (3) a person with supervisory authority over the employee or authority to investigate, discover, or address the misconduct.

- Refused to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security? (20109(a)(2))
- Filed a complaint, directly caused a proceeding to be brought, or testified in a proceeding related to the enforcement of the FRSA and other railroad safety and security laws listed in the statute. (20109(a)(3))
- Notified or attempted to notify the railroad or the Secretary of Transportation of a work-related personal injury or illness of an employee? (20109(a)(4))
- Cooperated with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board? (20109(a)(5))
- Provided 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 regarding 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? (20109(a)(6))
- Accurately reported hours on duty? (20109(a)(7))

Hazardous Safety or Security Conditions — 49 U.S.C. 20109(b) (Coverage--railroad carriers, officers, and employees)

Has the complainant:

- Reported, in good faith, a hazardous safety or security condition? (20109(b)(1)(A))
- Engaged in a protected work refusal? (20109(b)(1)(B)) (See Attachment 3)
- Engaged in a protected refusal to authorize use of any safety-related equipment, track, or structures that the complainant is responsible for inspecting or repairing? (20109(b)(1)(C)) (See Attachment 3)

Prompt Medical Attention — 49 U.S.C. 20109(c) (Coverage--railroad carriers, officers, and employees)

Has the complainant:

- Experienced a delay, denial, or interference with medical or first aid treatment by the railroad or railroad personnel or experienced a failure by the railroad or railroad personnel to transport the complainant to the nearest, appropriate hospital upon request following a work-related injury? (20109(c)(1)) (**NOTE:** If this box is checked, OSHA should find a violation and order appropriate remedies for the delay, denial, or interference with medical or first aid treatment.)
- Requested or received medical or first aid treatment for a work-related injury or followed a treating physician's orders or treatment plan for a work-related injury? (20109(c)(2))

Attachment 3: Optional Worksheet: Protected Work Refusals Under Section 20109(b)

