

Federal Transit Administration
Washington, DC,
November 9, 2022

Whistleblower Protection for Transit Workers

Meghan Smith

Program Analyst

Jared Klein

Regional Investigator

**Occupational Safety and Health
Administration**

Objectives

- Provide Information on OSHA's Whistleblower Program
- Discuss Coverage Issues
- Identify Pertinent NTSSA and FRSA Statutory and Regulatory Provisions
- Explain OSHA's Whistleblower Investigation Process

Overview of OSHA's Whistleblower Program

- 1970 – OSH Act – Section 11(c) – Worker Safety/Health
- 2022 – 25 Different Statutes
 - Transportation Services
 - Fraud and Financial Services
 - Environmental and Nuclear Safety
 - Consumer Product/Motor Vehicle/Food Safety
 - Healthcare

Who is covered by the statutes OSHA Administers?

- Federal whistleblower statutes generally protect private sector workers against retaliation by their employers
 - United States Postal Service employees and some federal, state, local employees are covered under some statutes

How does OSHA protect whistleblowers?

- Investigate complaints
- Conduct outreach for employers and employees
- Work with Partner Agencies, such as FTA, FRA & FMCSA

National Office – Directorate of Whistleblower Protection Programs (DWPP)

- Administers the Request for Review Program (RFR)
- Develops policy documents (i.e., WIM)
- Conducts rulemaking
- Coordinates with partner agencies – such as FTA, FRA, FMCSA
- Implements an outreach strategy and conducts outreach for employers and employees
- Responds to FOIA requests & public inquiries
- Compiles & analyzes data
- Reviews significant cases developed by the Regions
- Develops & delivers training to field staff

Regional Offices

- OSHA has 10 regional offices which conduct whistleblower investigations.
- A full list of OSHA offices can be found here - <https://www.osha.gov/contactus/bystate>
- State Plan States conduct their own investigations for retaliation relating to health and safety issues under the State's equivalent Section 11(c) analog.

How Can Employees File Complaints?

Employees or their representatives (family members, union representatives, or attorneys) can file a complaint of retaliation in the following ways:

- Online at <http://www.whistleblowers.gov>
- By calling an OSHA Regional or Area Office
- By writing a letter to OSHA
- In person by visiting a local OSHA Regional or Area Office

Complaints can be in any language and do not need to be in a particular format.

Purpose of NTSSA, 6 U.S.C. 1142

NTSSA prohibits a public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency from retaliating against an employee for having engaged in protected activity.

What Employees Are Covered under NTSSA?

- Employees of a public transportation agency or its contractors or subcontractors (such as employees of manufacturers of operational equipment for public transportation agencies).
- Employees of providers of other passenger transportation, such as school bus, charter, or sightseeing transportation are not covered.

Purpose of FRSA, 49 U.S.C. 20109

FRSA prohibits railroad carriers, including publicly-funded commuter railroads, a contractor or a subcontractor of such railroad, or an officer or employee of such railroad from retaliating against an employee for having engaged in protected activity.

What Employees Are Covered under FRSA?

- Employees of a railroad carrier, including a publicly-funded commuter railroad, or its contractors or subcontractors.
- Employees of urban rapid transit are not covered.

Activities Protected under NTSSA and FRSA

- Providing information to or assisting in investigation by:
 - Federal, state, or local regulatory or law enforcement agency
 - A member or committee of Congress/GAO
 - A supervisor or other person with authority to investigate, discover, or terminate misconduct
- Information or investigation must relate to:
 - violation of any federal law, rule, or regulation related to railroad/public transportation safety or security
 - fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad/public transportation safety or security

Activities Protected under NTSSA and FRSA, cont.

- Refusing to violate or assist in a violation of any federal law, rule, or regulation relating to public transportation/railroad safety or security.
- Filing a complaint, caused a proceeding to be brought or testified in a proceeding under one of these laws, rules or regulations.
- Reporting a hazardous safety or security condition.

Activities Protected under NTSSA and FRSA, cont.

- 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.

FRSA Protected Activity

- Notifying or attempting to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or illness of an employee
- Accurately reporting hours on duty
- Requesting medical or first aid treatment for a work-related injury

NTSSA & FRSA Whistleblower Resources

- OSHA's regulations for NTSSA and FRSA are available at 29 CFR Part 1982
- Fact sheets and a variety of other resources on NTSSA, FRSA and OSHA's other whistleblower statutes are available at: <https://www.whistleblowers.gov/>

Timeframes

- 180 days to file complaint with OSHA
- 60 days for OSHA to investigate
- 30 days after receipt of Secretary's Findings to request Administrative Law Judge (ALJ) hearing
- 14 days after ALJ's decision to file petition for review with the Administrative Review Board (ARB)
- 120 days for ARB to issue final order
- 60 days after final order to file petition for review in U.S. Court of Appeals

Available Remedies

- Affirmative action to abate a violation
- Preliminary reinstatement
- Back pay with interest
- Compensatory damages, including attorney's fees
- Punitive damages not to exceed \$250,000

Election of Remedies

- Complainants may have to choose among:
 - Federal Railroad Safety Act, NTSSA, 11(c), or a state whistleblower statute
 - Complainants do not have to choose between pursuing a remedy under a collective bargaining agreement or a NTSSA/FRSA claim
 - Complainants do not have to choose between a NTSSA/FRSA claim and another type of discrimination claim, such as a Title VII claim

What to Expect in an OSHA Retaliation Investigation

- Filing a Complaint
- Evidence
- Timeline
- Resolution

Filing a Complaint

- How to file:
 - An employee, or his or her representative, can file a whistleblower complaint with OSHA
 - via mail,
 - telephone,
 - in person, or
 - online at www.whistleblowers.gov

Cooperation

Parties must:

- provide OSHA with current contact information
- respond to requests for interviews
- respond to requests for information

Intake and Screening

- Regions may conduct intakes and screenings in one or two steps
 - OSHA will interview the Complainant to obtain information about the alleged retaliation and will determine whether the allegation is sufficient to initiate an investigation.
 - Investigators evaluate which statutes may be applicable to Complainant's case

Investigative Process

- Assignment to an investigator
 - OSHA investigators are neutral
- The Complainant, Respondent, and the appropriate federal agency partner, such as the FTA, will be notified of the open investigation and provided a copy of the complaint of retaliation

Evidence

- all pertinent emails
- letters
- notes
- text messages
- voicemails
- phone logs
- personnel files
- contracts
- work products
- meeting minutes
- Hours of Service logs
- videos and photos

Respondent's Defense

- Respondent will submit a written defense
 - Referred to as a position statement
- Complainant will receive a copy of the position statement
- Complainant will be provided an opportunity to provide a rebuttal

Timeline of an Investigation

- First contact – generally within 1-2 weeks
- First interview – generally within 2-3 weeks
- Position Statement due in 20 days
- Rebuttal - generally within 4 weeks from receipt of the Position Statement

Case Disposition

- Merit
- Dismissal
- Settlement
 - Alternative Dispute Resolution (ADR)
- Expedited Case Processing Program
- “Kick-out” to U.S. District Court
- Withdrawal
- Deferral

Conclusion of Investigation

- Merit
 - Preliminary Reinstatement
 - Back Pay / lost wages
 - Compensatory Damages
 - pain and suffering, lost monies due to incurred fees, reasonable attorney fees
 - Punitive Damages
- Dismissal – No merit

Appeal

- U.S. Department of Labor, Office of the administrative Law Judge (ALJ)
- U.S. Department of Labor, Administrative Review Board (ARB)
- U.S. Court of Appeals



Questions?



www.osha.gov

800-321-OSHA (6742)