

routine matter that only affects air traffic procedures an air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order JO 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

#### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

#### ASO GA E5 Griffin, GA [Amended]

Griffin-Spalding County Airport, GA  
(Lat. 33°13'37" N, long. 84°16'30" W)

That airspace extending upward from 700 feet above the surface within a 8.7-mile radius of the Griffin-Spalding County Airport, and within 2 miles either side of a 137° bearing from the airport, extending from the 8.7-mile radius to 10.5 miles southeast of the airport, and within 2 miles either side of a 317° bearing from the airport, extending from the 8.7-mile radius to 10.5 miles northwest of the airport.

Issued in College Park, Georgia, on March 1, 2022.

**Andree C. Davis,**

*Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2022–04707 Filed 3–4–22; 8:45 am]

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1989

[Docket Number: OSHA–2020–0006]

RIN 1218–AD27

### Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act (TFA)

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

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This document provides the interim final text of regulations governing the anti-retaliation (employee protection or whistleblower) provision of the Taxpayer First Act (TFA or the Act). This rule establishes procedures and timeframes for the handling of retaliation complaints under TFA, including procedures and timeframes for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary's final decision. It also sets forth the Secretary's interpretations of the TFA anti-retaliation provision on certain matters.

#### DATES:

**Effective date:** This interim final rule is effective on March 7, 2022.

**Comments due date:** Comments and additional materials must be submitted (post-marked, sent or received) by May 6, 2022.

**ADDRESSES:** Submit comments by any of the following methods:

**Electronically:** You may submit comments and attachments electronically at: <https://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

**Docket:** To read or download comments or other material in the

docket, go to <http://www.regulations.gov>. Documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

**Instructions:** All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2020–0006). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

**Extension of comment period:** Submit requests for an extension of the comment period on or before March 22, 2022 to the Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–4618, Washington, DC 20210, or by fax to (202) 693–2199 or by email to [OSHA.DWPP@dol.gov](mailto:OSHA.DWPP@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Ms. Meghan Smith, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–4618, 200 Constitution Avenue NW, Washington, DC 20210; telephone (202) 693–2199 (this is not a toll-free number) or email: [OSHA.DWPP@dol.gov](mailto:OSHA.DWPP@dol.gov). This **Federal Register** publication is available in alternative formats.

### SUPPLEMENTARY INFORMATION:

#### I. Background

The Taxpayer First Act (TFA or Act), Public Law 116–25, 133 Stat. 981, was enacted on July 1, 2019. Section 1405(b) of the Act, codified at 26 U.S.C. 7623(d) and referred to throughout these interim final rules as the TFA "anti-retaliation," "employee protection," or "whistleblower" provision, prohibits retaliation by an employer, or any officer, employee, contractor, subcontractor, or agent of such employer against an employee in the

terms and conditions of employment in reprisal for the employee having engaged in protected activity. Protected activity under TFA includes any lawful act done by an employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud. To be protected, the information or assistance must be provided to one of the persons or entities listed in the statute, which include the Internal Revenue Service (IRS), the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The Act also protects employees from retaliation in reprisal for any lawful act done to testify, participate in, or otherwise assist in any administrative or judicial action taken by the IRS relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud. These interim final rules establish procedures for the handling of retaliation complaints under the Act.

## II. Summary of Statutory Procedures

TFA incorporates the rules, procedures, and burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121(b), with some exceptions. Under TFA, a person who believes that they have been discharged or otherwise retaliated against in violation of the Act (complainant) may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) and to the complainant's employer (which in most cases will be the respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then conduct an investigation, within 60 days of receipt of the complaint, after affording the respondent an opportunity

to submit a written response and to meet with the investigator to present statements from witnesses.

The Act provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity. (See § 1989.104 for a summary of the investigation process.) OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the complainant and respondent of those findings, and issue a preliminary order providing all relief necessary to make the complainant whole, including, where appropriate: Reinstatement with the same seniority status that the complainant would have had but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

The complainant and the respondent then have 30 days after the date of receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an Administrative Law Judge (ALJ). The filing of objections will not stay any reinstatement order. However, under OSHA's regulations, the filing of objections will stay any other remedy in the preliminary order. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, the Act requires the hearing be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary will order all relief necessary to make

the complainant whole, including, where appropriate, reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit where the complainant resided on the date of the violation.

The Act permits the employee to bring an action for de novo review of a TFA retaliation claim in the appropriate United States district court in the event that the Secretary has not issued a final decision within 180 days after the filing of the complaint. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that either party is entitled to request a trial by jury. The Act also states that the rights and remedies provided in the TFA anti-retaliation provision may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. No predispute arbitration agreement is valid or enforceable, if the agreement requires arbitration of a dispute arising under the TFA anti-retaliation provision. Finally, under the Act, nothing in the TFA anti-retaliation provision 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.

## III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of the Act. Responsibility for receiving and investigating complaints under the Act has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) by Secretary of Labor's Order No. 08–2020 (May 15, 2020), 85 FR 58393 (September

18, 2020). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. See Secretary of Labor's Order 01–2020 (Feb. 21, 2020), 85 FR 13024–01 (Mar. 6, 2020) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board).

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

##### Section 1989.100 Purpose and Scope

This section describes the purpose of the regulations implementing the anti-retaliation provisions of TFA and provides an overview of the procedures covered by these regulations.

##### Section 1989.101 Definitions

This section includes the general definitions of certain terms used in § 1405(b) of TFA, 26 U.S.C. 7623(d), which are applicable to the Act's anti-retaliation provision. Consistent with the approach that OSHA has taken in implementing other whistleblower protection provisions and with applicable ARB case law, the interim final rule defines "employee" as "an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person." See, e.g., 29 CFR 1979.101 (AIR21 definition of employee); 29 CFR 1980.101(g) (Sarbanes-Oxley Act of 2002 (SOX) definition of employee). In OSHA's view, consistent with TFA's language protecting employees from retaliation for providing information regarding "any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws," the definition of "employee" in the interim final rule encompasses individuals who allege that they are employees, can show some evidence that the respondent exercises control over the terms and conditions of their employment or other factors tending to demonstrate that an employer-employee relationship exists, and allege that they have suffered retaliation for having reported that their employers have violated tax laws by failing or refusing to make required withholdings, deductions, and/or contributions on their behalf. See *Green v. OPGON, Inc.*, ARB Case No. 2018–0007, 2020 WL 2319031, at \*3 (Apr. 9, 2020) (explaining the ARB's case law applying a "right-to-control" test and the common law test in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–23 (1992)).

The interim final rule defines "person" as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate," based on the definition found in the Internal Revenue Code. See 26 U.S.C. 7701(a)(1).

##### Section 1989.102 Obligations and Prohibited Acts

This section describes the activities that are protected under the Act and the conduct that is prohibited in response to any protected activities. The Act prohibits an employer, or any officer, employee, contractor, subcontractor, or agent of such employer from discharging, demoting, suspending, threatening, harassing or in any other manner retaliating against an employee in the terms and conditions of employment in reprisal for the employee having engaged in protected activity. Protected activity under TFA includes any lawful act by an employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud. To be protected, the information or assistance must be provided to one of the persons or entities listed in the statute, which include the IRS, the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The Act also protects employees from discharge or other actions in reprisal for any lawful act done to testify, participate in, or otherwise assist in any administrative or judicial action taken by the IRS relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud. More information regarding Federal tax laws and the IRS's regulations can be found at [www.irs.gov](http://www.irs.gov).

Under the Act, an employee who provides information, causes information to be provided, or assists in an investigation is protected as long as the employee reasonably believes that the conduct at issue violates internal revenue laws or any provision of Federal law relating to tax fraud. To have a reasonable belief that there is a violation of relevant law, the employee

must subjectively believe that the conduct is a violation and that belief must be objectively reasonable. See, e.g., *Rhinehimer v. U.S. Bancorp. Invs., Inc.*, 787 F.3d 797, 811 (6th Cir. 2015) (discussing the reasonable belief standard under analogous language in the SOX whistleblower provision, 18 U.S.C. 1514A) (citations omitted); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (agreeing with First, Fourth, Fifth, and Ninth Circuits that determining reasonable belief under the SOX whistleblower provision requires analysis of the complainant's subjective belief and the objective reasonableness of that belief); *Sylvester v. Parexel Int'l LLC*, ARB No. 07–123, 2011 WL 2165854, at \*11–12 (ARB May 25, 2011) (same). The requirement that the complainant have a subjective, good faith belief is satisfied so long as the complainant actually believed that the conduct at issue violated the relevant law or regulation. See *Sylvester*, 2011 WL 2165854, at \*11–12 (citing *Harp*, 558 F.3d at 723; *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009)). The objective reasonableness of a complainant's belief is typically determined "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp*, 558 F.3d at 723 (quoting *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)). However, the complainant need not show the conduct constituted an actual violation of law. Pursuant to this standard, an employee's whistleblower activity is protected when it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. See *Van Asdale v. Int'l Game Techs.*, 577 F.3d 989, 1001 (9th Cir. 2009); *Allen*, 514 F.3d at 477.

##### Section 1989.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under TFA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), an alleged violation occurs when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision to take an adverse action. *EEOC v. United Parcel Serv., Inc.*, 249 F.3d 557, 561–62 (6th Cir. 2001). The time for filing a complaint under TFA may be tolled for reasons warranted by applicable case law. For

example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action. *Xanthopoulos v. U.S. Dep't of Labor*, 991 F.3d 823, 832 (7th Cir. 2021) (affirming ARB's refusal to toll the statute of limitations under SOX and explaining the limited circumstances in which tolling is appropriate for a timely filing in the wrong forum).

Complaints filed under TFA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

#### Section 1989.104 Investigation

This section describes the procedures that apply to the investigation of TFA complaints. Paragraph (a) of this section outlines the procedures for notifying the respondent, the employer (if different from the respondent), and the IRS of the complaint and notifying the respondent of the rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit the response to the complaint. Paragraph (c) specifies that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA generally will do so at a time permitting the other party an opportunity to respond to those submissions. Before providing such materials, OSHA will redact them consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. TFA incorporates the burdens of proof in AIR21. Thus, in order for OSHA to conduct an investigation, TFA requires that a complainant make an initial prima facie showing that a protected activity was "a contributing factor" in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The complainant will be considered to have met the required burden for OSHA to commence an investigation if the complaint on its face, supplemented as appropriate through interviews of the

complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant's burden at this stage may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974, as amended, (ERA) which is the same as that under TFA, serves a "gatekeeping function" intended to "stem [ ] frivolous complaints"). Even in cases where the complainant successfully makes a prima facie showing, TFA requires that the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss the complaint and not investigate further if either: (1) The complainant fails to make the prima facie showing that protected activity was a contributing factor in the alleged adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Wiest v. Tyco Elec. Corp.*, 812 F.3d 319, 330 (3d Cir. 2016) (discussing "contributing factor standard" under SOX); *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (same); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013) (same). A conclusion that protected activity was a contributing factor in an adverse action can be based on direct evidence or circumstantial evidence "such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence [or absence] of intervening events that independently justify" the adverse

action. *Hess v. Union Pac. R.R. Co.*, 898 F.3d 852, 858 (8th Cir. 2018) (quoted source omitted) (discussing the contributing factor standard under the Federal Railroad Safety Act).

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

Paragraph (f) describes the procedures OSHA will follow prior to the issuance of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred and reinstatement is required. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (requiring OSHA to give a Surface Transportation Assistance Act respondent the opportunity to review the substance of the evidence and respond prior to ordering preliminary reinstatement).

#### Section 1989.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The findings and, where appropriate, preliminary order, will also advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings

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

The remedies provided under TFA aim to make the complainant whole by restoring the complainant to the position that the complainant would have occupied absent the retaliation and to counteract the chilling effect of retaliation on protected whistleblowing in the complainant's workplace. The back pay, benefits, and other remedies appropriate in each case will depend on the individual facts of the case and the evidence submitted, and the complainant's interim earnings must be taken into account in determining the appropriate back pay award. When there is evidence to determine these figures, a back pay award under TFA might include, for example, amounts that the complainant would have earned in commissions, bonuses, overtime, or raises had the complainant not been discharged in retaliation for engaging in protected activity under TFA. A benefits award under TFA might include amounts that the employer would have contributed to a 401(k) plan, insurance plan, profit-sharing plan, or retirement plan on the complainant's behalf had the complainant not been discharged in retaliation for engaging in protected activity under TFA. Other damages, including non-pecuniary damages, such as damages for emotional distress due to the retaliation, are also available under TFA. See, e.g., *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 670–71 (4th Cir. 2015) (holding that emotional distress damages are available under identical remedial provision in SOX); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 264–66 (5th Cir. 2014) (same). Consistent with the rules under other whistleblower statutes enforced by the Department of Labor, in ordering interest on back pay under TFA, OSHA will compute interest due by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621(a)(2) is the Federal short-

term rate plus three percentage points, against back pay. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (Federal Railroad Safety Act (FRSA)); 29 CFR 1988.105(a) (Moving Ahead for Progress in the 21st Century Act (MAP-21)).

Consistent with the rules governing other Department of Labor-enforced whistleblower protection statutes, where appropriate, in ordering back pay, OSHA will require the respondent to submit the appropriate documentation to the Social Security Administration (SSA) allocating the back pay to the appropriate periods. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (FRSA); 29 CFR 1988.105(a) (MAP-21)).

The statute permits OSHA to preliminarily reinstate employees to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of TFA. See 49 U.S.C. 42121(b)(2)(A). When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that the complainant received prior to termination but not actually return to work. Such “economic reinstatement” is akin to an order of front pay and is sometimes employed in cases arising under § 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., *Sec’y of Labor, MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589, 2011 WL 1455831, at \*4 (FMSHRC Mar. 25, 2011) (explaining economic reinstatement in lieu of temporary reinstatement in the context of § 105(c)). Front pay has been recognized as an appropriate remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., *Deltek, Inc. v. Dep’t of Labor, Admin. Rev Bd.*, 649 Fed. App’x. 320, 333 (4th Cir. 2016) (affirming award of front pay in SOX case due to “pronounced animosity between the parties;” explaining that “front pay ‘is designed to place the complainant in the identical financial position’ that she would have occupied had she remained employed or been reinstated.”); *Continental Airlines, Inc. v. Admin. Review Bd.*, 638 Fed. App’x. 283, 289–90 at \*4 (5th Cir. 2016) (affirming front pay award under AIR21, and explaining that “front-pay is available when reinstatement is not possible”), aff’g *Luder v. Cont’l Airlines, Inc.*, ARB No. 10–026, 2012 WL 376755, at \*11 (ARB Jan. 31, 2012); see also

*Brown v. Lockheed Martin Corp.*, ALJ No. 2008–SOX–00049, 2010 WL 2054426, at \*55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under SOX whistleblower provision, front pay may be awarded as a substitute when reinstatement is inappropriate), aff’d *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013) (noting availability of all relief necessary to make the employee whole in SOX case but remanding for DOL to quantify remedies); *Indiana Michigan Power Co. v. U.S. Dep’t of Labor*, 278 Fed. App’x. 597, 606 (6th Cir. 2008) (affirming front pay award under ERA). Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that immediate reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee.

#### Subpart B—Litigation

Section 1989.106 Objections to the Findings and the Preliminary Order and Requests for a Hearing

Objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, in accordance with 29 CFR part 18, as applicable, within 30 days of the receipt of the findings. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as on the OSHA official who issued the findings and order, the Assistant Secretary, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards, the failure to serve copies of the objections on the other parties of record does not affect the ALJ’s jurisdiction to hear and decide the merits of the case. See *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04–101, 2005 WL 2865915, at \*7 (ARB Oct. 31, 2005). OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, to serve them with copies of objections to OSHA’s findings.

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary's preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement under TFA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and that the public interest favors a stay. If no timely objection to the Assistant Secretary's findings and/or preliminary order is filed, then the Assistant Secretary's findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

#### Section 1989.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted *de novo*, on the record. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

#### Section 1989.108 Role of Federal Agencies

The Assistant Secretary may participate as a party or *amicus curiae* at any time in the administrative proceedings under TFA. For example, the Assistant Secretary may exercise discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or the ARB. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, multiple employees, alleged

violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The IRS, if interested in a proceeding, also may participate as *amicus curiae* at any time in the proceedings.

#### Section 1989.109 Decisions and Orders of the Administrative Law Judge

This section sets forth the requirements for the content of the decisions and orders of the ALJ, and includes the standard for finding a violation under TFA. Specifically, because TFA incorporates the burdens of proof in AIR21, the complainant must demonstrate (*i.e.*, prove by a preponderance of the evidence) that the protected activity was a "contributing factor" in the adverse action. See 49 U.S.C. 42121(b)(2)(B)(iii); see, *e.g.*, *Allen*, 514 F.3d at 475 n.1 ("The term 'demonstrates' [under identical burden-shifting scheme in the SOX whistleblower provision] means to prove by a preponderance of the evidence."). If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, then the employer must demonstrate by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 42121(b)(2)(B)(iv).

Paragraph (c) of this section further provides that OSHA's determination to dismiss the complaint without an investigation or without a complete investigation under § 1989.104 is not subject to review. Thus, § 1989.109(c) clarifies that OSHA's determinations on whether to proceed with an investigation under TFA and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or make further factual findings. Paragraph (d) notes the remedies that the ALJ may order under TFA and, as discussed under § 1989.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily, and that the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. OSHA and the Associate Solicitor for

Fair Labor Standards may specify the means, including electronic means, for service of the ALJ's decision on them. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the ARB. If a timely petition for review is not filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review.

#### Section 1989.110 Decisions and Orders of the Administrative Review Board

Upon the issuance of the ALJ's decision, the parties have 30 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is only accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under TFA (which otherwise would be effective immediately), while the ARB reviews the order. The Secretary believes that a stay of an ALJ's preliminary order of reinstatement under TFA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the

parties, and that the public interest favors a stay.

If the ARB concludes that the respondent has violated the law, it will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: Reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes pursuant to 26 U.S.C. 6621(a)(2) and will be compounded daily, and the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding a total of \$1,000. The decision of the ARB is subject to discretionary review by the Secretary of Labor. See Secretary of Labor's Order, 01–2020 (Feb. 21, 2020), 85 FR 13024–01 (Mar. 6, 2020).

As provided in that Secretary's Order, a party may petition the ARB to refer a decision to the Secretary for further review, after which the Secretary may accept review, decline review, or take no action. If no such petition is filed, the ARB's decision shall become the final action of the Department 28 calendar days after the date on which the decision was issued. If such a petition is filed and the ARB declines to refer the case to the Secretary, the ARB's decision shall become final 28 calendar days after the date on which the petition for review was filed. If the ARB refers a decision to the Secretary for further review, and the Secretary takes no action in response to the ARB's referral, or declines to accept the case for review, the ARB's decision shall become final either 28 calendar days from the date of the referral, or on the date on which the Secretary declines review, whichever comes first.

In the alternative, under the Secretary's Order, at any point during the first 28 calendar days after the date on which an ARB decision was issued, the Secretary may direct the ARB to refer the decision to the Secretary for

review. If the Secretary directs the ARB to refer a case to the Secretary, or notifies the parties that the case has been accepted for review, the ARB's decision shall not become the final action of the Department and shall have no legal force or effect, unless and until the Secretary adopts the ARB's decision.

Under the Secretary's Order, any final decision made by the Secretary shall be made solely based on the administrative record, the petition and briefs filed with the ARB, and any amicus briefs permitted by the Secretary. The decision shall be in writing and shall be transmitted to the ARB, who will publish the decision and transmit it to the parties to the case. The Secretary's decision shall constitute final action by the Department and shall serve as binding precedent in all Department proceedings involving the same issue or issues.

#### *Subpart C—Miscellaneous Provisions*

##### **Section 1989.111 Withdrawal of Complaints, Findings, Objections, and Petitions for Review; Settlement**

This section provides the procedures and time periods for withdrawal of complaints, withdrawal of findings and/or preliminary orders by the Assistant Secretary, and withdrawal of objections to findings and/or orders. It permits complainants to withdraw their complaints orally, and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and adjudicatory stages of the case.

##### **Section 1989.112 Judicial Review**

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ARB or the ALJ to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

##### **Section 1989.113 Judicial Enforcement**

This section describes the ability of the Secretary, the complainant, and the respondent under TFA to obtain judicial enforcement of orders and terms of settlement agreements. Through the incorporation of the rules and procedures in AIR21, TFA authorizes district courts to enforce orders issued by the Secretary under the provisions of 49 U.S.C. 42121(b). Specifically, 49 U.S.C. 42121(b)(5) provides that “[w]henver any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in

which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory damages.” 49 U.S.C. 42121(b)(5). Similarly, 49 U.S.C. 42121(b)(6), provides that a person on whose behalf an order was issued “may commence a civil action against the person to whom such order was issued to required compliance with such order” in the appropriate United States district court, which will have jurisdiction without regard to the amount in controversy or the citizenship of the parties, to enforce such order. The Secretary views these provisions as permitting district courts to enforce both final orders of the Secretary and preliminary orders of reinstatement for the same reasons that the Secretary has expressed with regard to SOX, which incorporates the rules and procedures of AIR21 using identical language to that in TFA. See Procedures for the Handling of Retaliation Complaints Under § 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865–02, 11,877 (Mar. 5, 2015) (discussing district court enforcement of preliminary reinstatement orders under SOX); see also Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp., Inc.*, No. 10–5602 (6th Cir. 2010); *Solis v. Tenn. Commerce Bancorp., Inc.*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010); but see *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), decision vacated, appeal dismissed, No. 06–2295 (4th Cir. Feb. 20, 2008)).

##### **Section 1989.114 District Court Jurisdiction of Retaliation Complaints**

This section sets forth TFA's provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 180 days after the date of the filing of the complaint. See 26 U.S.C. 7623(d)(2)(A)(ii). This section also incorporates the statutory provisions that allow for a jury trial at the request of either party in a district court action and that specify the burdens of proof in a district court action. 26 U.S.C. 7623(d)(2)(B)(iii), (v).

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the



ARB, depending on where the proceeding is pending. If the ARB has issued a decision that has not yet become final under Secretary of Labor's Order 01–2020, the case is regarded as pending before the ARB for purposes of this section and a copy of any district court complaint should be sent to the ARB. A copy of the district court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

Finally, it should be noted that although a complainant may file an action in district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint with OSHA, it is the Department of Labor's position that complainants may not initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 180 days after the filing of the complaint. Thus, for example, after the ARB has issued a decision that has become final denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. See *Soo Line R.R., Inc. v. Admin. Review Bd.*, 990 F.3d 596, 598 n.1 (8th Cir. 2021). The purpose of the “kick-out” provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. See 49 U.S.C. 42121(b)(4)(B) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

#### Section 1989.115 Special Circumstances; Waiver of Rules

This section provides that, in circumstances not contemplated by these rules or for good cause, the ALJ or

the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of TFA requires.

#### IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1989.103) which was previously reviewed as a statutory requirement of TFA and approved for use by the Office of Management and Budget (OMB), as part of the Information Collection Request (ICR) assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (PRA). See Public Law 104–13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

#### V. Administrative Procedure Act

The notice and comment rulemaking procedures of § 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section, because it provides the procedures for the handling of retaliation complaints. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for this rule. Although this is a procedural and interpretative rule not subject to the notice and comment procedures of the APA, OSHA is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after OSHA receives and reviews the public's comments.

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

#### VI. Executive Orders 12866, 13563, and 13771; Unfunded Mandates Reform Act of 1995; Executive Order 13132

The Office of Information and Regulatory Affairs has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no economic impact analysis under § 6(a)(3)(C) of Executive Order 12866 has been prepared.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Also, because this rule is not significant under Executive Order 12866, and because no notice of proposed rulemaking has been published, no statement is required under § 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretative in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government[.]” and therefore, is not subject to Executive Order 13132 (Federalism).

#### VII. Regulatory Flexibility Analysis

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



APA and the requirements under the RFA.

#### List of Subjects in 29 CFR Part 1989

Administrative practice and procedure, Employment, Taxation, Whistleblower.

#### Authority and Signature

This document was prepared under the direction and control of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC.

**Douglas L. Parker,**

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

■ Accordingly, for the reasons set out in the preamble, 29 CFR part 1989 is added to read as follows:

### PART 1989—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE TAXPAYER FIRST ACT (TFA)

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

Sec.

- 1989.100 Purpose and scope.
- 1989.101 Definitions.
- 1989.102 Obligations and prohibited acts.
- 1989.103 Filing of retaliation complaint.
- 1989.104 Investigation.
- 1989.105 Issuance of findings and preliminary orders.

#### Subpart B—Litigation

- 1989.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1989.107 Hearings.
- 1989.108 Role of Federal agencies.
- 1989.109 Decisions and orders of the administrative law judge.
- 1989.110 Decisions and orders of the Administrative Review Board.

#### Subpart C—Miscellaneous Provisions

- 1989.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1989.112 Judicial review.
- 1989.113 Judicial enforcement.
- 1989.114 District court jurisdiction of retaliation complaints.
- 1989.115 Special circumstances; waiver of rules.

**Authority:** 26 U.S.C. 7623(d); Secretary of Labor's Order 08–2020 (May 15, 2020), 85 FR 58393 (September 18, 2020); Secretary of Labor's Order 01–2020 (Feb. 21, 2020), 85 FR 13024–01 (Mar. 6, 2020).

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

##### § 1989.100 Purpose and scope.

(a) This part sets forth procedures for, and interpretations of, section 1405(b) of the Taxpayer First Act (TFA), Public

Law 116–25, 133 Stat. 981 (July 1, 2019) (codified at 26 U.S.C. 7623(d)). TFA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

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

##### § 1989.101 Definitions.

As used in this part:

*Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom the Assistant Secretary delegates authority under TFA.

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

*Complainant* means the person who filed a TFA complaint or on whose behalf a complaint was filed.

*Employee* means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.

*IRS* means the Internal Revenue Service of the United States Department of the Treasury.

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

*Person* means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate.

*Respondent* means the person named in the complaint who is alleged to have violated TFA.

*Secretary* means the Secretary of Labor.

*TFA* means section 1405(b) of the Taxpayer First Act (TFA), Public Law 116–25, 133 Stat. 981 (July 1, 2019) (codified at 26 U.S.C. 7623(d)).

##### § 1989.102 Obligations and prohibited acts.

(a) No employer or any officer, employee, contractor, subcontractor, or

agent of such employer may discharge, demote, suspend, threaten, harass, or in any other manner retaliate against, including, but not limited to, intimidating, restraining, coercing, blacklisting, or disciplining, an employee in the terms and conditions of employment in reprisal for the employee having engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by an employer or any officer, employee, contractor, subcontractor, or agent of such employer in reprisal for any lawful act done by the employee:

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, when the information or assistance is provided to the Internal Revenue Service, the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct; or

(2) To testify, participate in, or otherwise assist in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

##### § 1989.103 Filing of retaliation complaint.

(a) *Who may file.* A person who believes that they have been discharged or otherwise retaliated against by any person in violation of TFA may file, or have filed by any person on their behalf, a complaint alleging such retaliation.

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

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the complainant resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone

numbers for these officials are set forth in local directories and at the following internet address: <http://www.osha.gov>. Complaints may also be filed online at <https://www.osha.gov/whistleblower/WBComplaint.html>.

(d) *Time for filing.* Within 180 days after an alleged violation of TFA occurs, any person who believes that they have been retaliated against in violation of TFA may file, or have filed by any person on their behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic filing or transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

#### **§ 1989.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent and the complainant's employer (if different) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1989.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the IRS.

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

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA generally will provide them to the other party (or the party's legal counsel if the party is represented by

counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

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

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

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

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

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

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

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

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

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1989.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated TFA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigator, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

#### **§ 1989.105 Issuance of findings and preliminary orders.**

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of TFA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order

providing relief to the complainant. The preliminary order will include all relief necessary to make the complainant whole including, where appropriate: Reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. Where appropriate, the preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

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

(b) The findings and, where appropriate, the preliminary order will be sent by physical or electronic means that allow OSHA to confirm delivery to all parties of record (or each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order, also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor, or appropriate information regarding filing objections electronically with the Office of Administrative Law Judges if electronic filing is available. The findings also may specify the means, including electronic means, for serving OSHA and the Associate Solicitor for Fair Labor Standards with documents in the administrative litigation as required under this Part. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in

the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1989.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

### Subpart B—Litigation

#### § 1989.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under TFA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1989.105. The objections and request for hearing and/or request for attorney fees must be in writing and must state whether the objections are to the findings, the preliminary order, or both, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing; if the objection is filed in person, by hand delivery, or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, in accordance with 29 CFR part 18, and copies of the objections must be served at the same time on the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving then with copies of the objections.

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

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

#### § 1989.107 Hearings.

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

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

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

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

#### § 1989.108 Role of Federal agencies.

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

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

required by these rules. Except as otherwise provided in rules of practice and/or procedure before the OALJ or the ARB, OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving them with documents under this section.

(b) The IRS, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the IRS's discretion. At the request of the IRS, copies of all documents in a case must be sent to the IRS, whether or not it is participating in the proceeding.

**§ 1989.109 Decisions and orders of the administrative law judge.**

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

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

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1989.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order providing all relief necessary to make the complainant whole, including, where appropriate: Reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment

of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

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

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of decisions on them under this section. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review ARB (ARB), U.S. Department of Labor. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

**§ 1989.110 Decisions and orders of the Administrative Review Board.**

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the Administrative Review Board (ARB or Board), which has been delegated the authority to act for the Secretary and issue decisions under this part subject to the Secretary's discretionary review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 30 days of the date of the decision of the ALJ. All petitions and documents submitted to the ARB must be filed electronically, in accordance with Part 26, unless another filing method has been authorized by the ARB for good cause. The date of the postmark, facsimile transmittal, or electronic

transmittal will be considered to be the date of filing; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. The petition for review also must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of petitions for review on them under this section.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If a timely petition for review is not filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If a timely petition for review is not filed, the resulting final order is not subject to judicial review.

(c) The decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 30 days after the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 30 days after a new decision is issued. The ARB's decision will be served upon all parties and the Chief Administrative Law Judge. The decision will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of ARB decisions on them under this section.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: Reinstatement with the same seniority status that the complainant would have had, but for the retaliation; the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods. Such order is subject to discretionary review by the Secretary (as provided in Secretary's Order 01–2020 or any successor to that order).

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000. An order under this section is subject to discretionary review by the Secretary (as provided in Secretary's Order 01–2020 or any successor to that order).

### Subpart C—Miscellaneous Provisions

#### **§ 1989.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.**

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

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1989.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

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

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

settlement will be filed with the ALJ or the ARB, as appropriate.

(e) Any settlement approved by OSHA, the ALJ, the ARB or the Secretary will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1989.113.

#### **§ 1989.112 Judicial review.**

(a) Within 60 days after the issuance of a final order for which judicial review is available (including a decision issued by the Secretary upon discretionary review), any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

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

#### **§ 1989.113 Judicial enforcement.**

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

#### **§ 1989.114 District court jurisdiction of retaliation complaints.**

(a) If the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. Either party shall be entitled to a trial by jury.

(b) A proceeding under paragraph (a) of this section shall be governed by the

same legal burdens of proof specified in § 1989.109.

(c) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

**§ 1989.115 Special circumstances; waiver of rules.**

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

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket Number USCG-2022-0032]

RIN 1625-AA08

#### Special Local Regulation; Lake Havasu, Lake Havasu City, AZ

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary special local regulation (SLR) in the navigable waters of Lake Havasu, Arizona during the Lake Havasu Triathlon marine event. This regulation is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway during the event, which will be held on March 19, 2022. This special local regulation will temporarily prohibit persons and vessels from entering into, transiting through, anchoring, blocking, or loitering within the event area unless authorized by the Captain of the Port San Diego or a designated representative.

**DATES:** This rule is effective from 8 a.m. to 9 a.m. on March 19, 2022.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2022-

0032 in the search box and click "Search." Next, in the Document Type column, select "Supporting & Related Material."

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Commander John Santorum, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278-7656, email [D11MarineEventsSD@uscg.mil](mailto:D11MarineEventsSD@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this special local regulation by March 19, 2022. Therefore, it is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule. This regulation is necessary to ensure the safety of life on the navigable waters of Lake Havasu during the marine event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because action is needed to ensure the safety of life on the navigable waters of Lake Havasu during the marine event on March 19, 2022.

##### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041 (previously 33 U.S.C. 1236). The Captain of the Port Sector San Diego (COTP) has determined that the large number of swimmers associated with the Lake Havasu Triathlon marine event on March 19, 2022, poses a potential

safety concern in the regulated area. This rule is needed to protect persons, vessels, and the marine environment in the navigable waters of Lake Havasu during the marine event.

##### IV. Discussion of Comments, Changes, and the Rule

This rule establishes a special local regulation from 8 a.m. to 9 a.m. on March 19, 2022. This special local regulation will cover all navigable waters, from surface to bottom, on a pre-determined course within Lake Havasu, Arizona beginning at the starting point of the event at Lake Havasu State Park South Beach and proceeding south to the southern entrance to the Bridgewater Channel. The duration of the temporary special local regulation is intended to ensure the safety of participants, vessels, and the marine environment in these navigable waters during the scheduled marine event. No vessel or person will be permitted to enter the regulated area without obtaining permission from the COTP or a designated representative. The regulatory text provides information on how to contact the COTP or a designated representative for permission to transit the area. When in the regulated area, persons must comply with all lawful orders or directions given to them by the COTP or designated representative. Additionally, the COTP will provide notice of the regulated area through advanced notice via Local Notice to Mariners or by on-scene designated representatives.

##### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

###### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the regulated area. The affected portion of the navigable waterway in Lake Havasu will be of very limited duration, and is necessary for