

**§§ 679.2, 679.5, 679.7, and 679.51 and Table 1b to Part 679 [Amended]**

■ 8. At each of the locations shown in the “Location” column, remove the

phrase indicated in the “Remove” column and replace it with the phrase indicated in the “Add” column for the

number of times indicated in the “Frequency” column.

Location	Remove	Add	Frequency
§ 679.2 “Agent” (1) .....	buying station .....	buying station, tender vessel .....	1
§ 679.2 “Agent” (2) .....	buying station .....	buying station or tender vessel .....	1
§ 679.2 “Associated processor” .....	buying station .....	buying station or tender vessel .....	3
§ 679.2 “Shoreside processor” .....	buying stations .....	buying stations, tender vessels .....	1
§ 679.5(a)(2)(ii) .....	or buying station .....	buying station, or tender vessel .....	1
§ 679.5(a)(3)(ii) .....	catcher vessels and buying stations .....	catcher vessels, buying stations, and tender vessels .....	1
§ 679.5(a)(3)(iii) .....	catcher vessel or buying station .....	catcher vessel, buying station, or tender vessel .....	1
§ 679.5(c)(1)(vi)(B)(4) .....	or buying station .....	buying station, or tender vessel .....	1
§ 679.5(c)(3)(ii)(A)(3) .....	or buying station .....	buying station, or tender vessel .....	1
§ 679.5(c)(3)(viii) .....	buying station .....	buying station, tender vessel .....	1
§ 679.5(c)(3)(x) .....	buying station .....	buying station, tender vessel .....	1
§ 679.5(c)(4)(ii)(A)(3) .....	or buying station .....	buying station, or tender vessel .....	1
§ 679.5(c)(4)(viii) .....	buying station .....	buying station, tender vessel .....	1
§ 679.5(c)(4)(x) .....	buying station .....	buying station, tender vessel .....	1
§ 679.5(c)(6)(ii)(A) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi) introductory text .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi)(A) .....	BS .....	TV .....	1
§ 679.5(c)(6)(vi)(A) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi)(B) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi)(C) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi)(F) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(vi)(H) .....	buying station .....	tender vessel .....	2
§ 679.5(c)(6)(vii) .....	buying station .....	tender vessel .....	1
§ 679.5(c)(6)(viii)(A) .....	buying station .....	tender vessel .....	1
§ 679.5(e)(3)(viii) .....	buying station .....	buying station, tender vessel, .....	1
§ 679.5(e)(5)(i) introductory text .....	buying station .....	buying station or tender vessel .....	1
§ 679.5(e)(5)(i)(A)(6) .....	buying station .....	buying station or tender vessel .....	1
§ 679.5(e)(5)(i)(C)(7) .....	buying station .....	buying station or tender vessel .....	1
§ 679.5(e)(6)(i) introductory text .....	buying station .....	tender vessel .....	1
§ 679.5(e)(6)(i)(B)(7) .....	buying station .....	tender vessel .....	1
§ 679.5(e)(6)(iii) .....	buying station .....	tender vessel .....	1
§ 679.5(f)(1)(v) .....	buying station .....	tender vessel .....	1
§ 679.5(f)(5)(ii) .....	buying station .....	buyer station or tender vessel .....	1
§ 679.5(p)(1) .....	buying station .....	tender vessel .....	1
§ 679.7(d)(4)(i)(C) .....	buying station .....	buying station or tender vessel .....	1
§ 679.51(e)(3) .....	or buying station .....	buying station, or tender vessel .....	1
Table 1b to Part 679 .....	and buying stations .....	buying stations, and tender vessels .....	1

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1984

[Docket Number: OSHA-2011-0193]

RIN 1218-AC79

#### Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act

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

**ACTION:** Final rule.

**SUMMARY:** This document provides the final text of regulations governing employee protection (retaliation or whistleblower) claims under section

1558 of the Affordable Care Act, which added section 18C to the Fair Labor Standards Act to provide protections to employees who may have been subject to retaliation for seeking assistance under certain affordability assistance provisions (for example, health insurance premium tax credits) or for reporting potential violations of the Affordable Care Act’s consumer protections (for example, the prohibition on rescissions). An interim final rule (IFR) governing these provisions and request for comments was published in the **Federal Register** on February 27, 2013. Thirteen comments were received; eleven were responsive to the IFR. This rule responds to those comments and establishes the final procedures and time frames for the handling of retaliation complaints under section 18C, including procedures and time frames for employee complaints to the Occupational Safety and Health

Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary of Labor’s (Secretary’s) final decision. It also sets forth the Secretary’s interpretations of the Affordable Care Act whistleblower provision on certain matters.

**DATES:** This final rule is effective on October 13, 2016.

**FOR FURTHER INFORMATION CONTACT:** Anh-Viet Ly, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-4624, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2199; email: [OSHA.DWPP@dol.gov](mailto:OSHA.DWPP@dol.gov). This is not a toll-free number.

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#### **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Patient Protection and Affordable Care Act, Public Law 111–148, 124 Stat. 119, was signed into law on March 23, 2010 and was amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152, 124 Stat. 1029, that was signed into law on March 30, 2010. The terms “Affordable Care Act,” or “Act,” or “ACA” are used in this rulemaking to refer to the final, amended version of the law.

Section 1558 of the Affordable Care Act amended the Fair Labor Standards Act (FLSA) to add section 18C, 29 U.S.C. 218C (section 18C), which provides protection to employees against retaliation by an employer for engaging in certain protected activities.

Under section 18C, an employer may not retaliate against an employee for receiving a credit under section 36B of the Internal Revenue Code of 1986 (Code) or cost-sharing reductions (referred to as a “subsidy” in section 18C) under the Affordable Care Act. In general, section 36B of the Code allows certain individuals to receive the premium tax credit for coverage under a qualified health plan through an Exchange if they are not eligible for health coverage (other than in the individual market) including an offer from their employer of affordable coverage that provides minimum value and if their household income is between 100% and 400% of the federal poverty line. In addition, individuals eligible for the premium tax credit may also qualify for cost-sharing reductions if certain other qualifications are met.

Individuals may qualify for advance payment of the premium tax credit (APTC), which is payment during the year to an individual’s insurance provider that pays for part or all of the premiums for a qualified health plan through the Exchange covering the individual and his or her family. Eligibility for APTC is based on the Exchange’s estimate of the premium tax credit to which the individual will be entitled on his or her tax return. Filing of an individual’s federal income tax return is the process through which an individual claims the premium tax credit, and if APTC was paid for the individual or a member of his or her family, it is also the process through which the individual must reconcile the APTC with the premium tax credit.

Since 2015, under section 4980H of the Code, certain employers (referred to as applicable large employers) must either offer health coverage that is affordable and that provides minimum value to their full-time employees (and offer coverage to their dependents), or be subject to an assessable payment (referred to as an “employer shared responsibility payment”) payable to the IRS if any full-time employee receives the premium tax credit for coverage through an Exchange. Thus, the relationship between the employee’s receipt of the premium tax credit and the potential employer shared responsibility payment imposed on an applicable large employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.

Section 18C also protects employees against retaliation because they provided or are about to provide to their employer, the federal government or the attorney general of a state, information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of or amendment made by title I of the Affordable Care Act; testified or are about to testify in a proceeding concerning such violation; assisted or participated, or are about to assist or participate, in such a proceeding; or objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any provision of title I of the Act (or amendment), or any order, rule, regulation, standard, or ban under title I of the Act (or amendment). Among other provisions, title I of the Affordable Care Act includes a range of health insurance market reforms such as: The prohibition on lifetime and annual dollar limits on essential health benefits, the requirement for non-grandfathered plans to cover certain recommended preventive services with no cost sharing, and a prohibition on pre-existing condition exclusions.

This final rule revises the procedures for the handling of whistleblower complaints under section 18C of the FLSA and sets forth the Secretary’s interpretations of the ACA whistleblower provision on certain matters. To the extent possible within the bounds of applicable statutory language, these revised rules are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA. Responsibility for receiving and investigating complaints under section 18C has been

delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary). Secretary of Labor’s Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. Secretary of Labor’s Order No. 2–2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

### **II. Summary of Statutory Procedures**

Section 18C(b)(1) adopts the procedures, notifications, burdens of proof, remedies, and statutes of limitation in the Consumer Product Safety Improvement Act of 2008 (CPSIA), 15 U.S.C. 2087(b). Accordingly, a covered employee (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 section 18C (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, within 60 days of receipt of the complaint, afford the complainant and respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

Section 18C, through the incorporation of CPSIA, provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that the employer would have taken the same adverse action in the absence of that activity. (See § 1984.104 for a summary of the investigative 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 that there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of that finding, along with a preliminary order that requires the respondent to, where appropriate: Take

affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The complainant and the respondent then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an ALJ. The filing of objections under section 18C of the FLSA will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing before an ALJ is held, the statute requires the hearing to be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing in which 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 the respondent to, where appropriate: Take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

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

Section 18C permits the employee to seek de novo review of the complaint by a United States District Court in the event that the Secretary has not issued

a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination. The court will have jurisdiction over the action without regard to the amount in controversy, and the case will be tried before a jury at the request of either party.

Finally, section 18C(b)(2) of the FLSA provides that nothing in section 18C 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, and the rights and remedies in section 18C may not be waived by any agreement, policy, form, or condition of employment.

### III. Summary and Discussion of Regulatory Provisions

On February 27, 2013, OSHA published in the **Federal Register** an IFR promulgating rules governing the employee protection provisions of section 1558 of the Affordable Care Act, which added section 18C of the FLSA. 78 FR 13222. OSHA included a request for public comment on the interim final rule by April 29, 2013.

Seven organizations and four individuals filed responsive comments with OSHA within the public comment period. OSHA received comments from Tate and Renner (Renner); the Blue Cross Blue Shield Association (BCBS); the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); America's Health Insurance Plans (AHIP); the Service Employees International Union (SEIU); the National Federation of Independent Business (NFIB); the United States Chamber of Commerce (Chamber); Thomas O'Grady; DeAnna Beckner; J.I.M. Choate; and N. Menold.

OSHA has reviewed and considered the comments and now adopts this final rule with minor revisions. The following discussion addresses the comments, OSHA's responses, and any other changes to the provisions of the rule. The provisions in the IFR are adopted and continued in this final rule, unless otherwise noted below.

#### General Comments

##### Comments Related to Section 2706(b) of the Public Health Service Act

As OSHA explained in the preamble to the IFR (78 FR 13223), section 18C became effective on the date the health care law was enacted, March 23, 2010. The Affordable Care Act also added section 2706(b) to the Public Health Service Act (PHSA), 42 U.S.C. 300gg *et seq.*, as amended by section 1201 of the Affordable Care Act, and section 2706 of

the PHSA first became effective for plan years beginning on or after January 1, 2014. The Affordable Care Act added Code section 9815(a) and Employee Retirement Income Security Act (ERISA) section 715(a) to incorporate the provisions of part A of title XXVII of the PHS Act (which includes PHSA section 2706) into the Code and ERISA.

Accordingly, PHSA section 2706 is subject to shared interpretive jurisdiction by the Departments of Health and Human Services (HHS), the Treasury (Treasury), and Labor (DOL). Section 2706 of the PHSA is titled "Non-Discrimination in Health Care" and provides, in relevant part: "(b) INDIVIDUALS.—The provisions of section 1558 of the Patient Protection and Affordable Care Act (relating to non-discrimination) shall apply with respect to a group health plan or health insurance issuer offering group or individual health insurance coverage."

Four commenters (BCBS, AHIP, the Chamber, and AFL-CIO) commented on the discussion in the IFR of the relationship between section 18C and section 2706(b) of the PHSA. OSHA has reviewed these comments and referred them to HHS, Treasury and the DOL's Employee Benefits Security Administration, which share interpretive jurisdiction over section 2706. The IFR included a discussion on PHSA section 2706(b) in the preamble to the rule solely to put the public on notice that section PHSA section 2706(b) includes a reference to section 1558 of the Affordable Care Act. However, the IFR did not include any regulatory provisions aimed at implementing PHSA section 2706(b), nor do these final regulations. Accordingly, interpretive guidance regarding PHSA section 2706(b) is outside to the scope of these regulations.

#### Comments Regarding OSHA's Compliance With Notice and Comment Rulemaking Procedures

NFIB commented that OSHA should re-issue the rule as a Notice of Proposed Rulemaking (NPRM), complete with an initial regulatory flexibility analysis and that OSHA should also examine whether a Small Business Advocacy Review panel is necessary. The Chamber likewise commented that OSHA has not sufficiently demonstrated that this rulemaking is interpretative and procedural and should have provided an economic analysis under Executive Orders 12866 and 13563, and an initial regulatory flexibility analysis under the Regulatory Flexibility Act (RFA). OSHA disagrees, and as explained below, OSHA continues to believe that this rule is procedural and

interpretative, and that it has complied with the applicable requirements for promulgating this rule.

#### Other General Comments

OSHA received additional general comments from several commenters. Menold expressed general support for the IFR. Choate commented that the final rule should use the word “judge” instead of “ALJ” when referring to administrative law judges. After consideration, the use of the abbreviation “ALJ” has been retained in the final rule as consistent with agency practice.

NFIB expressed general concern that section 18C would lead to an increase in whistleblower complaints that would impair small businesses and expressed the hope that OSHA would work to ensure that its procedures allow an opportunity at the outset for the small business and the employee to resolve a complaint without having to go through a formal investigation and adjudication.

Beckner supported the “implementation of ‘economic reinstatement’ or ‘front pay’ instead of preliminary reinstatement in situations w[h]ere the employer and employee relationship has deteriorated beyond repair” and the definition of employee to include former employees and applicants.

She also commented that the period of time that must transpire prior to a complainant filing for de novo review in district court is too long, as did O’Grady who suggested that the alternative procedural time periods that precede an employee’s right to file a complaint to federal district court should be streamlined in the interest of the complainant who may be in a “precarious situation” during those times. He also commented that if the process cannot be streamlined, then once OSHA makes an initial determination that there is a valid complaint the employee should receive an injunction barring further retaliation.

SEIU and the AFL–CIO commented that the rules should include specific provisions requiring employers to post notices regarding whistleblower rights under section 18C.

Finally, Renner noted that section 1558 of the ACA, like other whistleblower laws, is a remedial law and should be construed and applied to further its remedial purposes. Renner also noted there may be some overlap between the protections provided in ERISA section 510 and FLSA section 18C and asked that the Department’s comments on the final rule address this issue.

OSHA has not made any changes to the rule in response to these comments. The 90-day and 210-day time periods for filing a complaint in district court are established in the statute, and OSHA cannot change them by regulation. 15 U.S.C. 2087(b)(4). With regard to O’Grady’s proposal for injunctive relief, OSHA notes that the statute already provides for the type of relief requested. If it finds reasonable cause to believe that retaliation occurred, the statute requires OSHA to issue findings and an order containing relief including, where appropriate, reinstatement. 15 U.S.C. 2087(b)(2). Under the statute, OSHA’s order of reinstatement is not stayed by the employer’s request for a hearing. *Id.* In addition, OSHA notes that it is unlawful for an employer to engage in further retaliation against employees who pursue whistleblower complaints under the ACA. *See Benjamin v. Citationshares Mgmt.*, ARB No. 12–029, 2013 WL 6385831, at \*6 (ARB Nov. 5, 2013) (noting “an employee engages in protected activity if he attempts to provide information of retaliation that violates [a whistleblower statute]” and holding that employee’s recording of information in support of his retaliation claim was protected); *Diaz-Robianas v. Fla. Power & Light Co.*, DOL No. 92–ERA–10, 1996 WL 171408, at \*5 (Off. Admin. App. Jan. 19, 1996) (noting under prior version of Energy Reorganization Act that the statute “requires employers to refrain from unlawfully motivated employment discrimination, and a complaint that an employer has violated this requirement is protected”); *McClendon v. Hewlett Packard, Inc.*, 2006–SOX–00029, 2006 WL 6577175 at \*76 (ALJ Oct. 5, 2006) (holding that filing a Sarbanes–Oxley Act whistleblower complaint is in itself a protected activity); *cf. Young v. CSX Transp., Inc.*, 42 F. Supp. 3d 388, 2014 WL 4367461, at \*5 (N.D.N.Y. Sept. 4, 2014) (acknowledging employer’s concession that filing a retaliation claim with OSHA is protected under the Federal Railroad Safety Act). If an employee believes an employer is retaliating against him for pursuing an ACA whistleblower complaint, the employee should contact OSHA.

With regard to NFIB’s comments regarding the impact on small employers and the opportunities available for early resolution of whistleblower complaints, OSHA agrees that resolution of whistleblower complaints as early in the investigation process as possible is often the best outcome for both parties. Accordingly, OSHA’s Whistleblower Investigations Manual encourages whistleblower

investigators to actively assist parties in reaching an agreement, where possible. *See* OSHA Whistleblower Investigations Manual, at 6–12 (Jan. 28, 2016), available at [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-007.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-007.pdf). Additionally, in August 2015, OSHA issued a directive allowing its regional offices to implement Early Resolution Programs in which, at the parties’ request, OSHA would make a neutral ADR coordinator, unconnected with the investigation, available to assist the parties in achieving an early resolution to the whistleblower case either upon the filing of the whistleblower complaint or at any time up to the completion of OSHA’s investigation. Alternative Dispute Resolution (ADR) Processes for Whistleblower Protection Program (Aug. 18, 2015), available at [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-006.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-006.pdf).

With respect to SEIU and AFL–CIO’s comment that OSHA should require employers to post notices regarding section 18C’s protections, OSHA is not adding such a requirement to these rules. However, OSHA notes that posting of a notice regarding whistleblower rights is one of the common non-monetary remedies that OSHA orders in meritorious whistleblower cases. OSHA believes that such notices can play a significant role in ameliorating the chilling effect that retaliation has on employees who might otherwise report violations of the law. Additionally, OSHA has worked with other agencies that implement the Affordable Care Act to ensure that information about the whistleblower provision is included in notices and public information that those agencies provide to employees and employers.

Finally, OSHA generally agrees with Renner’s observation that section 1558 of the ACA, like other whistleblower laws, is a remedial law and should be construed and applied to further its remedial purposes. With regard to Renner’s comment regarding the potential overlap between ERISA section 510 and FLSA section 18C, OSHA notes that Renner is correct that some complainants may have claims under both ERISA section 510 and FLSA section 18C. Section 18C’s whistleblower protections do not replace any protections that a whistleblower may have under ERISA section 510. Whistleblowers may bring claims under either or both statutes if their whistleblowing is protected under both. However, in order to pursue a claim under section 18C either in district court or before the Department of Labor (DOL), the complainant must

file a complaint with OSHA within 180 days of the alleged adverse action. See 29 CFR 1984.103(d).

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

##### Section 1984.100 Purpose and Scope

This section describes the purpose and scope of the regulations implementing FLSA section 18C and provides an overview of the procedures covered by these regulations. OSHA has added a statement in subparagraph (b) noting that these rules set forth the Secretary's interpretations of section 18C on certain statutory issues. AFL-CIO commented that OSHA should add a discussion of PHSA section 2706(b) to this section. However for the reasons previously explained, OSHA declines to add such a discussion.

##### Section 1984.101 Definitions

This section includes general definitions applicable to FLSA section 18C. The definitions of the terms “employer,” “employee,” and “person” from section 3 of the FLSA, 29 U.S.C. 203, apply to these rules and are included here.

Consistent with the Secretary's interpretation of the term “employee” in the other whistleblower statutes administered by OSHA<sup>1</sup> and with the Secretary's interpretation of the term “employee” under the anti-retaliation provision found at section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3),<sup>2</sup> the definition of the term “employee” in section 1984.101 also includes former employees and applicants for employment. This interpretation is supported by section 18C's plain language which prohibits retaliation against “any employee” and provides

that “[a]n employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of this section” may file a complaint with the Secretary of Labor, (emphasis added). Section 18C's broad protection of “any employee” from retaliation and provision of a cause of action against “any employer” for retaliation makes clear that the parties need not have a current employment relationship. Section 18C's broad protections, like the protections in section 15(a)(3), contrast with the narrower protections of sections 6 and 7 of the FLSA. Sections 6 and 7 provide respectively that an employer must pay at least the minimum wage to “each of his employees” and must pay overtime to “any of his employees,” and thus require a current employment relationship. See 29 U.S.C. 206(a) and (b), 29 U.S.C. 207(a)(1) and (2). Congress chose to use the broad term “any” to modify employee and employer in sections 18C(a) and (b), rather than providing more restrictively that, for example, “no employer shall discharge or in any manner discriminate against any of his employees” or “an employee who believes that he or she has been discharged or otherwise discriminated against by his employer” may file a complaint with the Secretary of Labor. The Supreme Court has made clear that “any” has an expansive meaning that does not limit the word it modifies. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) (noting that the use of “any” in the phrase “filed any complaint” in section 15(a)(3) of the FLSA “suggests a broad interpretation that would include an oral complaint”); *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (“any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind”) (internal citations omitted). In addition, the explicit inclusion of reinstatement and preliminary reinstatement (both of which can only be awarded to former employees) among the remedies available for whistleblowers under section 18C, which incorporates 15 U.S.C. 2087(b), confirms that the complainant and the respondent need not have a current employment relationship in order for the complainant to have a claim under section 18C. See *Dellinger v. Science Applications Int'l Corp.*, 649 F.3d at 230 n.2 (section 15(a)(3) of the FLSA protects former employees); cf. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (term “employees” in anti-retaliation provision of Title VII of the

Civil Rights Act of 1964 includes former employees).

No comments were made on this section, other than those discussed in the general comments suggesting additional definitions. OSHA made a minor clarification to the definition of “respondent” and added definitions of Exchange and advance payments of the premium tax credit or APTC but has made no other substantive changes to this section.

##### Section 1984.102 Obligations and Prohibited Acts

This section describes the activities that are protected under section 18C of the FLSA, and the conduct that is prohibited in response to any protected activities. Section 18C(a)(1) protects any employee from retaliation because the employee has “received a credit under section 36B of the Internal Revenue Code of 1986 or a subsidy under section 1402 of this Act.” The reference to “a subsidy under section 1402 of this Act” in section 18C(a)(1) refers to receipt of a cost-sharing reduction under the Affordable Care Act.

Under section 18C(a)(2), an employer may not retaliate against an employee because the employee “provided, caused to be provided, or is about to provide or cause to be provided to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title).” Section 18C also protects employees who testify, assist or participate in proceedings concerning such violations or are about to do so. Sections 18C(a)(3) and (4), 29 U.S.C. 218C(a)(3) and (4). Finally, section 18C(a)(5) prohibits retaliation because an employee “objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).” References to “this title” in section 18C(a)(2) and (5) refer to title I of the Affordable Care Act.

In order to have a “reasonable belief” under sections 18C(a)(2) and (5) of the FLSA, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the enumerated categories of law. See *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1132 (10th Cir. 2013) (discussing the reasonable belief standard under analogous

<sup>1</sup> See, e.g., 29 CFR 1980.101(g) (defining employee to include former employees and applicants under the whistleblower provisions in the Sarbanes-Oxley Act); 29 CFR 1978.101 (Surface Transportation Assistance Act); 29 CFR 1981.101 (Pipeline Safety Improvement Act); 29 CFR 1982.101(d) (Federal Railroad Safety Act and the National Transit Systems Security Act); 29 CFR 1983.101(h) (Consumer Product Safety Improvement Act).

<sup>2</sup> See Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as Amicus Curiae, *Dellinger v. Science Applications Int'l Corp.*, No. 10–1499 (4th Cir. Oct. 15, 2010) (explaining that the phrase “any employee” in section 15(a)(3) of the FLSA does not limit an individual's retaliation claims to her current employer, but rather extends protection to prospective employees from retaliation for engaging in protected activity), and Brief of the Secretary of Labor and Equal Employment Opportunity Commission as Amicus Curiae, *Dellinger v. Science Applications Int'l Corp.*, No. 10–1499 (4th Cir. Sept. 9, 2011) (same); but see *Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226, 229–31 & n.2 (4th Cir. 2011) (accepting that former employees are protected from retaliation under section 15(a)(3) of the FLSA but holding that applicants for employment are not).

language in the Sarbanes-Oxley Act whistleblower provision, 18 U.S.C. 1514A); *Wiest v. Lynch*, 710 F.3d 121, 131–32 (3d Cir. 2013) (same); *Sylvester v. Parexel Int'l LLC*, ARB No. 07–123, 2011 WL 2165854, at \*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 complained of violated the relevant law. *See Sylvester*, 2011 WL 2165854, at \*12 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)); *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009) (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (“Subjective reasonableness requires that the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’”). The objective reasonableness of a complainant’s belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015) (internal citations and quotations omitted); *Sylvester*, 2011 WL 2165854, at \*12. However, the complainant need not show that the conduct complained of 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 or is likely to occur. *See Sylvester*, 2011 WL 2165854, at \*13 (citing *Welch*, 536 F.3d at 277); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008); *Melendez v. Exxon Chemicals Americas*, ARB No. 96–051, slip op. at 21 (ARB July 14, 2000) (“It is also well established that the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the aforementioned ‘reasonable belief’ standard rather than proving that actual violations have occurred.”).

OSHA received several comments on this section of the interim final rule. For the reasons discussed below, the only change OSHA has made to this section is to revise the section to clarify that, under section 18C(a)(1), an employee has “received” a premium tax credit or cost-sharing reduction not only when a premium tax credit is allowed on the individual’s tax return but also when an Exchange finds the employee eligible for APTC or for a cost-sharing reduction. At that point, the employee may apply financial assistance to reduce his or her share of the premium cost for coverage

purchased through the Exchange, and the prices that the Exchange provides to the employee for plans take into account the employee’s eligibility for such assistance. AFL–CIO and SEIU commented that OSHA should clarify that FLSA section 18C(a)(1) protects those who take the preliminary steps, such as gathering information, that are needed to apply for health insurance coverage on an Exchange and to apply for APTC. These commenters were particularly concerned about protecting employees who ask their employers about the health care coverage offered by their employers. These commenters noted that to apply for APTC for health insurance on an Exchange, individuals must provide certain information about their available employer-sponsored insurance options, if any. HHS has developed a form for employees to use in gathering information about any available employer-sponsored insurance options and this form instructs employees to get the information that they need from their employer. As SEIU explained “[a]s currently proposed, the system puts the burden on individuals to seek coverage information from their employer . . . in order to complete the exchange application. Because of this, it is imperative that the protection against retaliation extend to any preliminary actions taken to receive the tax credit.”

OSHA agrees that these commenters raise compelling concerns regarding the potential for retaliation against employees who seek information from their employer that they need to receive APTC when they purchase health insurance through an Exchange. OSHA declines to change the text of the rule, which generally mirrors the statutory language, in response to these comments. However, OSHA believes that, in certain circumstances, the existing case law under the other whistleblower protection statutes that OSHA administers supports protection for employees who seek information from their employer regarding employer-sponsored health coverage in order to receive APTC for health coverage through an Exchange.

When an employer believes that an employee has received a premium tax credit or cost-sharing reduction and takes action based on that belief, the employer’s retaliatory motive is the same whether it arises from an employee’s inquiry regarding employer-provided coverage in anticipation of applying for APTC or a cost-sharing reduction through the Exchange, or whether it arises once the applicable Exchange notifies the employer that the employee has qualified for a APTC or a cost-sharing reduction through the

Exchange. OSHA’s regulations under section 18C and case law under other anti-retaliation statutes make clear that an employer may not retaliate against an employee when the employer knows or suspects that the employee has engaged in activity protected by the statute. *See* 29 CFR 1984.104(e); *see also Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (noting under section 11(c) of the Occupational Safety and Health Act (11(c)) that “[i]t seems clear to this Court that an employer that retaliates against an employee because of the employer’s suspicion or belief that the employee filed an OSHA complaint has as surely committed a violation of § 11(c) as an employer that fires an employee because the employer knows that the employee filed an OSHA complaint”); *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994) (retaliation is unlawful under the FLSA if based on an employer’s mistaken belief that employees engaged in FLSA-protected activity); *Brock v. Richardson*, 812 F.2d 121, 124–25 (3d Cir. 1987) (same).

Similarly, an employer retaliates against an employee when the employer threatens to take action if the employee engages in activity protected under section 18C. *See* 29 CFR 1984.102(a) (defining retaliation to include threats and intimidation). Indeed, courts have long recognized that acts taken in anticipation of an employee’s protected activity to dissuade such activity can be actionable under the anti-retaliation provisions of many statutes. *See, e.g., Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993) (noting under Title VII’s anti-retaliation provision that “[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact”); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993) (noting that anticipatory employer action that “discourages the whistleblower before the whistle is blown” would violate ERISA anti-retaliation statute, even though the employee has not yet filed any formal complaint); *Perez v. Fatima/Zahra, Inc.*, No. 14–2337, 2014 WL 2154092 (N.D. Cal. May 22, 2014) (issuing temporary restraining order against employer who threatened employees that they would be fired for talking to investigators); *Solis v. SCA Restaurant Corp.*, 938 F. Supp. 2d 380, 389 (E.D.N.Y. 2013) (finding retaliation where employer threatened employees with termination in anticipation of their testimony for Secretary of Labor).

Thus, OSHA believes that an employee’s inquiry to his or her employer to gather the information necessary to apply for APTC for

coverage on the Exchange may trigger protection under section 18C if the employee can show that either the employer's belief that the employee had received a premium tax credit, or the employer's desire to deter the employee from taking any further action that would result in the employee's receiving a premium tax credit, contributed to the employer's action against the employee.

Renner commented that the regulations should clarify that an employer's decision to reduce an employee's hours of work to evade application of the Affordable Care Act is unlawful under FLSA section 18C noting that "the reduction of hours directly reduces the employee's wages and is materially adverse."

As explained earlier in this preamble, under section 4980H of the Code, applicable large employers must either offer health coverage that is affordable and that provides minimum value to their full-time employees (and offer coverage to their dependents), or be subject to assessment of an employer shared responsibility payment by the IRS if at least one full-time employee receives the premium tax credit. In general, for purposes of section 4980H of the Code, a full-time employee is an employee with an average of at least 30 hours of service per week. To the extent that Renner's comment implies that the whistleblower protections apply if an employer reduces an employee's hours of service to avoid or reduce liability under section 4980H of the Code, OSHA disagrees because section 4980H of the Code does not prohibit an employer from reducing an employee's hours of service in order to avoid a potential employer shared responsibility payment.

However, to the extent that Renner is commenting that reducing work hours in retaliation for activity protected under section 18C is unlawful, OSHA agrees. For instance, if an employer reduces the hours of an employee that the employer knows or suspects of receiving a premium tax credit or subsidy, the employer's actions may violate section 18C if the employee's receipt of the premium tax credit or subsidy was a contributing factor in the employer's decision to reduce the hours, and the employer is unable to show by clear and convincing evidence that it would have taken the same action in the absence of that protected activity. See 29 CFR 1984.104(e) (explaining the burdens of proof in Affordable Care Act whistleblower cases); see also 29 U.S.C. 218C(b)(1) (incorporating the burdens of proof in 15 U.S.C. 2087(b)(2)(B)). In addition, OSHA notes that an employer

violates section 18C if it threatens employees with reductions in hours in order to dissuade them from applying for APTC for health insurance on an Exchange. See, e.g., *Sauers*, 1 F.3d at 1128. OSHA declines to change the rule in response to Renner's comment because OSHA believes that this issue is adequately addressed in the case law under analogous anti-retaliation provisions and the rule has been drafted to be consistent with OSHA's rules under other whistleblower-protection statutes.

The Chamber commented that OSHA should limit the definition of intimidation as a form of retaliation asserting that the term "intimidation" left undefined is overly broad and that "[t]he conduct that is considered intimidating should not be actionable unless it results in a tangible adverse employment action, such as demotion, negative performance review, failure to promote, assignment of undesirable job duties, a pattern of harassment, and termination.

The Chamber further commented that equitable treatment of the different parties requires OSHA to apply a reasonable belief standard to respondents as well as to complainants. BCBS raised similar concerns regarding the IFR, commenting that OSHA should apply the final rule keeping in mind the unique challenges of implementing the Affordable Care Act, which may make it difficult to determine whether an employer's or issuer's actions are justified by the Affordable Care Act guidance in effect at the time.

After consideration, OSHA declines to amend the rule in response to the Chamber and BCBS's comments. With regard to the Chamber's suggestion that OSHA adopt a reasonable belief requirement for respondents as well as complainants and BCBS's comment that an employer or issuer's actions may be justified based on the Affordable Care Act guidance in effect at the time, OSHA notes that the statutory language includes no "reasonable belief" standard for employers. However, OSHA believes that case law under analogous statutes adequately addresses these concerns. For example, the fact that an employer is following the ACA guidance available at the time that an employee blows the whistle may impact whether the employee can show that he had a reasonable belief that the employer was violating the law. Similarly, if an employer takes an action against an employee based on a reasonable, but mistaken, belief of misconduct or another circumstance unrelated to protected activity, the employee's subsequent whistleblower

complaint may fail. See *Ledure v. BNSF Rwy. Co.*, ARB No. 13–044, 2015 WL 4071574, at \*6 (ARB Jun. 2, 2015) (affirming ALJ's conclusion that retaliation did not occur where employer's refusal to allow employee to return to work was based on reasonable, but mistaken, belief that employee was not medically qualified to return to work and not on protected whistleblowing).

With regard to the Chamber's comment that the rule should be changed to limit the definition of "intimidation," OSHA believes that the circumstances in which intimidation constitutes an adverse action under section 18C are adequately addressed by case law under the Department's other whistleblower statutes. While intimidation may be linked with some other form of adverse action, intimidation that is more than trivial may, standing alone, qualify as adverse action. The phrase "terms, conditions, or other privileges of employment" does not indicate that actionable adverse action is limited to "economic" or "tangible" conditions of employment. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (interpreting similar language in Title VII of the Civil Rights Act of 1964); see also *Menendez v. Halliburton, Inc.*, ARB Nos. 09–002, 09–003, 2011 WL 4439090 at \*11–12 (Sept. 13, 2011), *aff'd*, *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014) (interpreting similar language in the Sarbanes-Oxley Act). Rather, adverse action is action that a reasonable employee would find "materially adverse," that is, the action is more than trivial. Specifically, the evidence must show that the action at issue could well have dissuaded a reasonable worker from engaging in protected activity. See *Burlington Northern & Santa Fe R. R. Co. v. White*, 548, U.S. 53, 68 (2006); *Halliburton*, 771 F.3d at 261–62 (affirming ARB's finding of adverse action that was not a tangible employment action); *Williams v. American Airlines*, ARB No. 09–018, 2010 WL 5535815 at \*6–8 (Dec. 29, 2010) (discussing adverse action under the Department's whistleblower statutes). Thus, under this case law, unlawful retaliation would include intimidating an employee for engaging in protected activity when the intimidation would dissuade a reasonable employee from engaging in protected activity.

#### Section 1984.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation



complaint under section 18C. 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. *E.E.O.C. v. United Parcel Serv., Inc.*, 249 F.3d 557, 561–62 (6th Cir. 2001). However, 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 section 18C complaint equitably tolled if the complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation. OSHA has revised this section of the rule to note this example of when the time for filing a complaint would be equitably tolled.

Complaints filed under section 18C of the FLSA need not be in any particular form. They may be either oral or in writing. When a complaint is made orally, OSHA will put the complaint 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.

OSHA notes that a complaint of retaliation filed with OSHA under the Affordable Care Act is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Sylvester v. Parexel Int'l, Inc.*, ARB No. 07–123, 2011 WL 2165854, at \*9–10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts OSHA to the existence of the alleged retaliation and the complainant's desire that OSHA investigate the complaint. Upon the filing of a complaint, OSHA is to determine whether “the complaint, supplemented as appropriate by interviews of the complainant” alleges “the existence of facts and evidence to make a prima facie showing.” 29 CFR 1984.104(e). As explained in § 1984.104(e), if the complaint, supplemented as appropriate, contains a prima facie showing, and the

respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. See 15 U.S.C. 2087(b)(2); 29 CFR 1984.104(e).

No comments were received on this section of the IFR. However, in addition to adding the example noted above of when the time for filing a complaint might be tolled, OSHA changed the term “email” in paragraph (d) to “electronic communication transmittal” because OSHA has published an on-line complaint form on its Web site, [http://www.whistleblowers.gov/complaint\\_page.html](http://www.whistleblowers.gov/complaint_page.html).

#### Section 1984.104 Investigation

This section describes the procedures that apply to the investigation of complaints under section 18C. Paragraph (a) of this section outlines the procedures for notifying the parties and appropriate federal agencies of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) describes the sharing of information submitted to OSHA during the investigation and the opportunity that each party will have to provide information to OSHA. Paragraph (d) of this section discusses confidentiality of information provided during investigations. Paragraph (e) of this section sets forth the applicable burdens of proof. 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.

Section 18C of the FLSA incorporates the burdens of proof set forth in CPSIA, 15 U.S.C. 2087(b). That statute requires that a complainant make an initial prima facie showing that protected activity was “a contributing factor” in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. A complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place

shortly after the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. See, *e.g.*, *Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005) (holding that years between the protected activity and the retaliatory actions did not defeat a finding of a causal connection where the defendant did not have the opportunity to retaliate until he was given responsibility for making personnel decisions).

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974, which is the same framework now applicable to section 18C of the FLSA, serves a “gatekeeping function” that “stem[s] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the respondent demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under section 18C of the FLSA 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 adverse action; or (2) the respondent 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.” *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); see, *e.g.*, *Lockheed Martin Corp.*, 717 F.3d at 1136. For protected activity to be a contributing factor in the adverse action, “a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail,” because a complainant alternatively can prevail by showing that the respondent's “reason, while true, is only one of the reasons for its conduct,” and that another reason



was the complainant's protected activity. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley whistleblower provision), *aff'd sub nom. Klopfenstein v. Admin. Review Bd., U.S. Dep't of Labor*, 402 F. App'x 936, 2010 WL 4746668 (5th Cir. 2010).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. See 15 U.S.C. 2087(b)(2)(B)(ii). 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. See, e.g., *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at \*3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in Surface Transportation Assistance Act).

BCBS and the Chamber commented on this section. BCBS commented that the regulations should provide procedures for instances when the complaint names multiple respondents and suggests amending § 1984.104(e)(2)(ii) to read as follows: "Each respondent knew or suspected . . . ." BCBS also commented that OSHA should dismiss complaints against respondents who do not have the requisite knowledge of alleged retaliation to justify continuing the complaint process against them, and clarify in § 1984.104(e)(3) that a showing that the adverse action took place shortly after the protected activity would not give rise to the inference that it was a contributing factor in the adverse action in instances when the respondent did not know or suspect that the complainant engaged in a protected activity.

OSHA declines to make these changes because they are unnecessary and could cause confusion. The IFR already does not exclude multiple respondents and adding the word "each" to § 1984.104(e)(2)(ii) could be construed as allowing liability only when all respondents have the requisite knowledge or suspicion. Additionally, the IFR already provides a basis for dismissing claims against respondents who lack requisite knowledge or

suspicion, such as at § 1984.104(e) where it provides that a "complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing that protected activity was a contributing factor in the alleged adverse action including that "[t]he respondent knew or suspected that the employee engaged in the protected activity . . . ."

The Chamber commented that the IFR improperly treated respondents and complainants differently by allowing complainants to receive copies of documents submitted by the respondent, subject to privacy and confidentiality standards, but providing no similar entitlement for respondents. OSHA believes this is incorrect. The IFR and the statute both provide the respondent the right to receive the substance of the evidence supporting the complaint, and OSHA's investigation procedures, which ensure that each party's submissions are available to the other party during the investigation, are further explained in OSHA's Whistleblower Investigations Manual. Nonetheless, to clarify that respondents and complainants are afforded equal access to each other's submissions during the OSHA investigation, OSHA has revised paragraph (c) of this section to reflect its current information sharing practices. Also, throughout this section, minor changes were made as needed to clarify the remaining provisions without changing their meaning.

#### Section 1984.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including preliminary reinstatement, affirmative action to abate the violation, back pay with interest, compensatory damages, attorney and expert witness fees, and costs. The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, preliminary order, also advise the respondent of the right to request an award of attorney fees not

exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if 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.

This section also provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. In the Secretary's view, 26 U.S.C. 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation under section 18C of the FLSA are made whole. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases. See *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at \*14-15, 17 (ARB May 17, 2000); see also *Cefalu v. Roadway Express, Inc.*, ARB No. 09-070, 2011 WL 1247212, at \*2 (ARB Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, 2010 WL 1776974, at \*8 (ARB Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045, 2000 WL 1920347 at \*6 (ARB Dec. 29, 2000). Section 6621 of the Code provides the appropriate measure of compensation under section 18C and other DOL-administered whistleblower statutes because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. See *Ass't Sec'y v. Double R. Trucking, Inc.*, ARB No. 99-061, 1999 WL 529752 at \*4 (ARB July 16, 1999) (interest awards pursuant to Code section 6621 are mandatory elements of complainant's make-whole remedy). Code section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer's benefit from use of the withheld money) and thus provides the complainant with appropriate make-whole relief. See *E.E.O.C. v. County of Erie*, 751 F.2d 79, 82 (2d Cir. 1984) ("[s]ince the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [Code section 6621] has been adopted as a good indicator of the value of the use of money, it was well within" the district court's

discretion to calculate prejudgment interest under Code section 6621); *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181, 1987 WL 89652, at \*2 (NLRB May 28, 1987) (observing that “the short-term Federal rate [used by Code section 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces”). Similarly, as explained in the IFR, daily compounding of the interest award ensures that complainants are made whole for unlawful retaliation in violation of section 18C. *See* 78 FR 13227.

Finally, this section has been revised to note that when ordering back pay, OSHA also will require the respondent to submit the appropriate documentation to the Social Security Administration allocating the back pay to the appropriate period. Requiring the reporting of back pay allocation to the Social Security Administration serves the remedial purposes of section 18C by ensuring that employees subjected to retaliation are truly made whole. *See Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, 2014 WL 3897178, at \*4–5 (NLRB Aug. 8, 2014) (holding that back pay awards under the National Labor Relations Act should include the allocation of back pay to the appropriate calendar quarters). As the NLRB has explained, when back pay is not properly allocated to the years covered by the award, a complainant may be disadvantaged in several ways. First, improper allocation may interfere with a complainant’s ability to qualify for any old-age Social Security benefit. *Id.* at \*4 (“Unless a [complainant’s] multiyear back pay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age social security benefit”). Second, improper allocation may reduce the complainant’s eventual monthly benefit. *Id.* “[I]f a backpay award covering a multi-year period is posted as income for 1 year, it may result in SSA treating the [complainant] as having received wages in that year in excess of the annual contribution and benefit base.” *Id.* Wages above this base are not subject to Social Security taxes, which reduces the amount paid on the employee’s behalf. “As a result, the [complainant’s] eventual monthly benefit will be reduced because participants receive a greater benefit when they have paid more into the system.” *Id.* Finally, “social security benefits are calculated using a progressive formula: although a participant receives more in benefits

when she pays more into the system, the rate of return diminishes at higher annual incomes.” Therefore, a complainant may “receive a smaller monthly benefit when a multiyear award is posted to 1 year rather than being allocated to the appropriate periods, even if social security taxes were paid on the entire amount.” *Id.* The purpose of a make-whole remedy such as back pay is to restore the complainant to the same position the complainant would have occupied absent the prohibited retaliation. That purpose is not achieved when the complainant suffers the disadvantages described above. The Secretary believes that requiring proper social security allocation is necessary to achieve the make-whole purpose of a back pay award. In addition to adding the requirement that the respondent submit the appropriate documentation to the Social Security Administration allocating the back pay to the appropriate period, OSHA has made minor changes throughout this section as needed to clarify the provision without changing its meaning.

OSHA received two comments on the remedy of reinstatement provided for in this section. In the preamble to the IFR, OSHA noted that, while the statute is clear that reinstatement is the presumptive remedy under section 18C of the FLSA, in rare circumstances economic reinstatement or front pay in lieu of actual reinstatement may be appropriate and that reinstatement includes restoration of the terms, conditions, and privileges associated with the complainant’s employment as necessary to put the employee in the same position or a position equivalent to the position that the employee held prior to the retaliation. Beckner commented in support of the use of economic reinstatement where the employer-employee relationship has broken down beyond repair.

SEIU commented that OSHA should amend the rule to clarify that reinstatement, including preliminary reinstatement, means full restoration of pay and benefits. SEIU stated that reinstatement requires full restoration to the status quo and includes restoration of duties and hours where those were reduced to reduce an employee’s pay. As SEIU correctly noted, OSHA’s Whistleblower Investigations Manual, as well as relevant case law under the whistleblower protection statutes that OSHA administers, makes clear that reinstatement is reinstatement to the full status quo prior to the retaliation and would include a restoration of hours and duties as necessary to ensure that the whistleblower is returned to the

same position that he or she would have been in absent the retaliation. The statute explicitly requires that the Secretary order the employer “to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment.” 15 U.S.C.

2087(b)(3)(B)(ii). If the employee’s original position is not available, the employer may return the employee to an equivalent position. *See, e.g., Hobby v. Georgia Power Co.*, ARB Nos. 98–166, 98–169, 2001 WL 168898 at \*10 (ARB Feb. 9, 2001) (noting that “[w]hile the remedies section of the Energy Reorganization Act whistleblower provision states that the Secretary ‘shall . . . reinstate the [prevailing] complainant to his former position . . .’, this text has been construed to mean reinstatement to the same or a *similar* position to the job that was formerly held”) (emphasis original, citations omitted). Because the statutory text and the applicable case law make clear that reinstatement must restore the complainant to the position he would have occupied absent the retaliation or an equivalent position, OSHA has not made any changes to the rule to clarify the term reinstatement in response to SEIU’s comment.

#### Subpart B—Litigation

Section 1984.106 Objections to the Findings and the Preliminary Order and Requests for a Hearing

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections 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 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).

In this section, SEIU repeated its comment that the regulations should clarify that the term “reinstatement,” including “preliminary reinstatement,” means full restoration of pay and benefits. OSHA’s response to this comment is addressed in the discussion of § 1984.105. No substantive changes have been made to this section.

#### Section 1984.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18 subpart A. Hearings are 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 continue to have broad discretion to limit discovery where necessary to expedite the hearing. 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.

No comments were received on this section and no changes were made.

#### Section 1984.108 Role of Federal Agencies

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under section 18C of the FLSA. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ, petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Internal Revenue Service of the United States Department of the Treasury, the United States Department of Health and Human Services, and the Employee Benefits Security Administration of the United States Department of Labor, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings.

No comments were received on this section. Throughout this section, minor changes were made as needed to clarify the provision without changing its meaning.

#### Section 1984.109 Decision and Orders of the Administrative Law Judge

This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under section 18C. Specifically, the complainant must demonstrate (*i.e.* prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. *See, e.g., Allen*, 514 F.3d at 475 n.1 (“The term ‘demonstrates’ means to prove by a preponderance of the evidence.”). If the employee demonstrates that the protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. *See id.*

Paragraph (c) of this section provides that OSHA’s determinations regarding whether to proceed with an investigation under section 18C 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 (c) also notes that the ALJ can dispose of a matter without a hearing if the facts and circumstances warrant.

Paragraph (d) notes the remedies that the ALJ may order under section 18C and provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Paragraph (d) has been revised to note that when back pay is ordered, the order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate period. Paragraph (e) requires that the ALJ’s decision be served on all parties to the proceeding, the Assistant Secretary, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ’s order will be effective 14 days

after the date of the decision unless a timely petition for review has been filed with the ARB. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review.

No comments were received on this section. In addition to the revision noted above regarding the allocation of back pay to the appropriate period, minor changes were made as needed to clarify the provision without changing its meaning.

#### Section 1984.110 Decision and Orders of the Administrative Review Board

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

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ’s factual determinations will be reviewed under the substantial evidence standard. 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 section 18C, which otherwise would be effective, while review is conducted by the ARB. The Secretary believes that a stay of an ALJ’s preliminary order of reinstatement under section 18C would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the

parties, and the public interest favors a stay.

If the ARB concludes that the respondent has violated the law, it will order the remedies listed in paragraph (d). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Paragraph (d) has been revised to note that when back pay is ordered, the order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate period. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.

Beckner and Renner commented that the time period for filing a petition for review with the ARB of an ALJ's decision is too short. Beckner commented that allowing both parties only 14 days to petition the ARB to review an ALJ decision appeal is too short and inconsistent with the rule's allowing 30 days to determine whether an ALJ's decision was in error. Renner commented that "[t]he proper adjudication of whistleblower matters would be enhanced if parties and their counsel can prepare their briefs, and select their issues, thoughtfully. . . . When faced with the unusually short time limit of fourteen (14) days to submit a petition that must list all issues, advocates are likely to overselect. To preserve issues and avoid missing a meritorious claim, they are likely to list every issue that might conceivably apply. While counsel could choose to drop issues between the petition and the brief, requiring counsel to list all the issues in the petition makes it more likely that counsel will then face pressure to brief those issues." He added that "some whistleblowers or their counsel may find the task of reviewing the record to identify all appealable issues so consuming that they miss the short deadline for filing the petition for review."

Renner also commented that the provision that objections to legal conclusions not raised in petitions for review may be deemed waived should be changed. He specifically suggested that section 1984.110(a) should be amended to read as follows: "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 so that the Administrative Review Board may determine that the review presents issues worthy of full briefing." He stated that the provision as written could work against the remedial purpose of the law.

After consideration, OSHA declines to alter the time period within which to appeal the decision of an ALJ. We believe that 14 days is sufficient and note that it is consistent with the time periods available under various other whistleblower provisions for which OSHA is responsible, which range from ten business days to 14 calendar days. Compare 29 CFR 1983.109(e) with 29 CFR 1985.109(e); 29 CFR 1987.109(e). OSHA also declines to adopt Renner's additional suggestions relating to this section. First, OSHA declines to extend the time limit to petition for review because the shorter review period is consistent with the practices and procedures followed in OSHA's other whistleblower programs. Furthermore, parties may file a motion for extension of time to appeal an ALJ's decision, and the ARB has discretion to grant such extensions.

OSHA also declines to change the provision that objections to legal conclusions not raised in petitions for review "may" be deemed waived. OSHA first notes that the use of the term "may" in the IFR was made as a result of comments submitted by Renner on other whistleblower rules recently published by OSHA. *See, e.g.,* Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008, 77 FR 40494, 40500–01 (July 10, 2012); Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, as amended, 77 FR 44121, 44131–32 (July 27, 2012). OSHA believes that use of the non-mandatory word "may" adequately addresses Renner's underlying concern that grounds not raised in a petition for review may be barred from consideration before the ARB.

In addition to the revision noted above regarding the allocation of back pay to the appropriate period, minor changes were made as needed to clarify this section without changing its meaning.

#### *Subpart C—Miscellaneous Provisions*

##### **Section 1984.111 Withdrawal of Complaints, Findings, Objections, and Petitions for Review; Settlement**

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

No comments were received on this section. Minor changes were made as needed to this section to clarify the provision without changing its meaning.

##### **Section 1984.112 Judicial Review**

This section describes the statutory provisions of CPSIA, incorporated into section 18C of the FLSA, for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ALJ or the ARB to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

No comments were received on this section and no changes were made.

##### **Section 1984.113 Judicial Enforcement**

This section describes the Secretary's power under section 18C to obtain judicial enforcement of orders and the terms of settlement agreements. Section 18C incorporates the procedures, notifications, burdens of proof, remedies, and statutes of limitations set forth in CPSIA, 15 U.S.C. 2087(b), which expressly authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary. *See* 15 U.S.C. 2087(b)(6) ("Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order."). Specifically, reinstatement orders issued at the close of OSHA's investigation are immediately enforceable in district court pursuant to 15 U.S.C. 2087(b)(6) and (7). Section 18C of the FLSA provides, through CPSIA, that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. *See* 15 U.S.C. 2087(b)(3)(B)(ii). Section 18C of the FLSA also provides, through CPSIA, that the Secretary shall accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed by subsection (b)(3)(B) of CPSIA, which includes reinstatement where appropriate, and that any preliminary order of reinstatement shall not be stayed upon the filing of objections. *See* 15 U.S.C. 2087(b)(2)(A) ("The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order."). Thus, under section 18C of the FLSA, enforceable orders include preliminary orders that contain the relief of reinstatement prescribed by 15 U.S.C. 2087(b)(3)(B). This statutory interpretation is

consistent with the Secretary's interpretation of similar language in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century and Sarbanes-Oxley. See 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)). Also, through application of CPSIA, section 18C of the FLSA permits the person on whose behalf the order was issued to obtain judicial enforcement of the order. See 15 U.S.C. 2087(b)(7).

No comments were received on this section. OSHA has revised this section slightly to more closely parallel the provisions of the statute regarding the proper venue for an enforcement action.

#### Section 1984.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth the statutory provisions that allow a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, under certain circumstances. By incorporating the procedures, notifications, burdens of proof, remedies, and statutes of limitations set forth in CPSIA, 15 U.S.C. 2087(b), section 18C permits a complainant to file an action for de novo review in the appropriate district court if there has been no final decision of the Secretary within 210 days of the filing of the complaint, or within 90 days after receiving a written determination. “Written determination” refers to the Assistant Secretary’s written findings issued at the close of OSHA’s investigation under section 1984.105(a). 15 U.S.C. 2087(b)(4). The Secretary’s final decision is generally the decision of the ARB issued under section 1984.110. In other words, a complainant may file an action for de novo review in the appropriate district court in either of the following two circumstances: (1) A complainant may file a de novo action in district court within 90 days of receiving the Assistant Secretary’s written findings issued under section 1984.105(a), or (2) a complainant may file a de novo action in district court if more than 210 days have passed since the filing of the complaint and the Secretary has not issued a final decision. The plain language of 15 U.S.C. 2087(b)(4), by

distinguishing between actions that can be brought if the Secretary has not issued a “final decision” within 210 days and actions that can be brought within 90 days after a “written determination,” supports allowing de novo actions in district court under either of the circumstances described above. However, in the Secretary’s view, 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 210 days after the filing of the complaint or within 90 days of the complainant’s receipt of the Assistant Secretary’s written findings. 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.

Under section 18C of the FLSA, the Assistant Secretary’s written findings become the final order of the Secretary, not subject to judicial review, if no objection is filed within 30 days. See 15 U.S.C. 2087(b)(2). Thus, a complainant may need to file timely objections to the Assistant Secretary’s findings in order to preserve the right to file an action in district court.

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 the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. In all cases, a copy of the 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 complainant’s compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed. The section also incorporates the statutory provisions which allow for a jury trial at the request of either party in a district court action, and which specify the remedies and burdens of proof in a district court action.

OSHA received two comments on this section that are addressed in the general comments discussion. OSHA made minor changes to this section, substituting the term “retaliation” for “discrimination” and clarifying that in all cases parties must provide a copy of the district court complaint 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. *Section 1984.115 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 section 18C of the FLSA requires.

No comments were made on this section and no substantive changes were made.

#### IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, Section 1984.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The assigned OMB control number is 1218–0236.

#### V. Administrative Procedure Act

NFIB and the Chamber commented that the IFR should be reissued as a Notice of Proposed Rulemaking. However, the notice and comment rulemaking procedures of section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This rule is a rule of agency procedure, practice, and interpretation within the meaning of that section.

This rule is “procedural on its face,” because it sets forth procedures for OSHA to use in investigating complaints under the whistleblower provisions of the ACA, and procedures for the Secretary’s adjudication of ACA whistleblower cases. See *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1150, 1152 (5th Cir. 1984) (OSHA rule which “set[] forth procedural steps to guide the agency in exercise of its statutory authority to conduct investigations,” was “procedural on its face.”); see also *American Hosp. Assoc. v. Bowen*, 834 F.2d 1037, 1050–51 (D.C. Cir. 1987) (holding the same with regard to HHS enforcement plan). The rule is “primarily directed toward improving the efficient and effective operations of”

the agency. *See Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (citations omitted) (explaining the difference between procedural and legislative rules). The rule does not alter the rights or interests of the parties to an ACA whistleblower proceeding, which are set forth in the statute and relevant case law. Rather, the rule sets forth the procedures under which the Secretary will investigate and adjudicate ACA whistleblower disputes.

The rule is also interpretative, in part, since it also clarifies certain statutory terms, reminds parties of their existing obligations under the statute, and explains preexisting requirements under the statute. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015), *quoting Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (noting that interpretative rules are “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers”); *see also Mendoza*, 754 F.3d at 1021 (“Interpretative rules are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required.”) (internal citations and quotations omitted). Therefore, OSHA was not required to publish a notice of proposed rulemaking in the **Federal Register** and request public comments on this rule. Although it was not required to do so for this procedural and interpretative rule, OSHA sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. OSHA also finds good cause to provide an immediate effective date for this final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases. Furthermore, most of the provisions of this rule were in the IFR and have already been in effect since February 27, 2013 so a delayed effective date is unnecessary.

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

NFIB and the Chamber commented that the IFR failed to comply with Executive Orders 12866 and 13563. OSHA disagrees. The Office of

Management and Budget has concluded that this rule is a “significant regulatory action” within the meaning of section 3(f)(4) of Executive Order 12866. Executive Order 12866, reaffirmed by Executive Order 13563, requires a full economic impact analysis only for “economically significant” rules, which are defined in Section 3(f)(1) of Executive Order 12866 as rules that may “[h]ave 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.” The rule is procedural and interpretative in nature. Because it simply implements procedures necessitated by enactment of section 18C of the FLSA, the rule is expected to have a negligible economic impact and no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and the fact that no notice of proposed rulemaking has been published, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 1531 *et seq.* Finally, this rule does not have “federalism implications,” in that it 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**

NFIB and the Chamber commented that the IFR did not comply with the requirements of the Regulatory Flexibility Act (RFA) and that OSHA should have produced an Initial Regulatory Flexibility Analysis (IRFA). NFIB also asserts that a Small Business Advocacy Review panel is warranted. OSHA disagrees. The notice and comment rulemaking procedures of section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the RFA. *See* SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, at 9 (May 2012); available at: [http://www.sba.gov/sites/default/files/rfaguide\\_0512\\_0.pdf](http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf). 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. For similar reasons, OSHA does not agree that a Small Business Advocacy Review panel is warranted.

#### **List of Subjects in 29 CFR Part 1984**

Administrative practice and procedure, Employment, Health care, Investigations, Reporting and recordkeeping requirements, Whistleblower.

#### **Authority and Signature**

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

Signed at Washington, DC, on October 5, 2016.

**David Michaels,**

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

■ Accordingly, for the reasons set out in the preamble, 29 CFR part 1984 is revised to read as follows:

### **PART 1984—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER SECTION 1558 OF THE AFFORDABLE CARE ACT**

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

Sec.

- 1984.100 Purpose and scope.
- 1984.101 Definitions.
- 1984.102 Obligations and prohibited acts.
- 1984.103 Filing of retaliation complaint.
- 1984.104 Investigation.
- 1984.105 Issuance of findings and preliminary orders.

#### **Subpart B—Litigation**

- 1984.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1984.107 Hearings.
- 1984.108 Role of Federal agencies.
- 1984.109 Decision and orders of the administrative law judge.
- 1984.110 Decision and orders of the Administrative Review Board.

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

- 1984.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1984.112 Judicial review.
- 1984.113 Judicial enforcement.
- 1984.114 District court jurisdiction of retaliation complaints.
- 1984.115 Special circumstances; waiver of rules.

**Authority:** 29 U.S.C. 218C; Secretary of Labor’s Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor’s Order No. 2–2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

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

### § 1984.100 Purpose and scope.

(a) This part implements procedures under section 1558 of the Patient Protection and Affordable Care Act, Public Law 111–148, 124 Stat. 119, which was signed into law on March 23, 2010 and was amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152, 124 Stat. 1029, signed into law on March 30, 2010. The terms “Affordable Care Act” or “the Act” are used in this part to refer to the final, amended version of the law. Section 1558 of the Act amended the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) by adding new section 18C. 29 U.S.C. 218C. Section 18C of the FLSA provides protection for an employee from retaliation because the employee has received a credit under section 36B of the Internal Revenue Code of 1986, 26 U.S.C. 36B, or a cost-sharing reduction (referred to as a “subsidy” in section 18C) under the Affordable Care Act, or because the employee has engaged in protected activity pertaining to title I of the Affordable Care Act or any amendment made by title I of the Affordable Care Act.

(b) This part establishes procedures under section 18C of the FLSA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf and sets forth the Secretary’s interpretations of section 18C on certain statutory issues. These rules, together with those codified at 29 CFR part 18, set forth the procedures under section 18C of the FLSA 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.

### § 1984.101 Definitions.

As used in this part:

(a) *Advance payments of the premium tax credit* or “*APTC*” means advance payments of the premium tax credit as defined in 45 CFR 155.20.

(b) *Affordable Care Act* or “*the Act*” means the Patient Protection and Affordable Care Act, Public Law 111–148, 124 Stat. 119 (Mar. 23, 2010), as amended.

(c) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under section 18C of the FLSA.

(d) *Business days* means days other than Saturdays, Sundays, and federal holidays.

(e) *Complainant* means the employee who filed an FLSA section 18C complaint or on whose behalf a complaint was filed.

(f) *Employee* means:

(1) Any individual employed by an employer. In the case of an individual employed by a public agency, the term employee means any individual employed by the Government of the United States: As a civilian in the military departments (as defined in 5 U.S.C. 102), in any executive agency (as defined in 5 U.S.C. 105), in any unit of the judicial branch of the Government which has positions in the competitive service, in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, in the Library of Congress, or in the Government Printing Office. The term employee also means any individual employed by the United States Postal Service or the Postal Regulatory Commission; and any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than an individual who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and who holds a public elective office of that State, political subdivision, or agency, is selected by the holder of such an office to be a member of his personal staff, is appointed by such an officeholder to serve on a policymaking level, is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(2) The term *employee* does not include:

(i) Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered—and such services are not the same type of services which the individual is employed to perform for such public agency;

(ii) Any employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency that volunteers to perform services for any other State, political

subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement; or

(iii) Any individual who volunteers their services solely for humanitarian purposes to private non-profit food banks and who receive groceries from the food banks.

(3) The term *employee* includes former employees and applicants for employment.

(g) *Employer* includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(h) *Exchange* means an Exchange as defined in 45 CFR 155.20.

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

(j) *Person* means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(k) *Respondent* means the employer named in the complaint who is alleged to have violated section 18C of the FLSA.

(l) *Secretary* means the Secretary of Labor or person to whom authority under section 18C of the FLSA has been delegated.

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

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

### § 1984.102 Obligations and prohibited acts.

(a) No employer may discharge or otherwise retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or an individual acting at the request of the employee), has engaged in any of the activities specified in paragraphs (b)(1) through (5) of this section.

(b) An employee is protected against retaliation because the employee (or an individual acting at the request of the employee) has:

(1) Received a credit under section 36B of the Internal Revenue Code of



1986, 26 U.S.C. 36B, or a cost-sharing reduction under the Affordable Care Act, or been determined by an Exchange to be eligible for advance payments of the premium tax credit (APTC) or for a cost-sharing reduction;

(2) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of title I of the Affordable Care Act (or an amendment made by title I of the Affordable Care Act);

(3) Testified or is about to testify in a proceeding concerning such violation;

(4) Assisted or participated, or is about to assist or participate, in such a proceeding; or

(5) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of title I of the Affordable Care Act (or amendment), or any order, rule, regulation, standard, or ban under title I of the Affordable Care Act (or amendment).

#### **§ 1984.103 Filing of retaliation complaint.**

(a) *Who may file.* An employee who believes that he or she has been retaliated against in violation of section 18C of the FLSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

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

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

(d) *Time for filing.* Within 180 days after an alleged violation of section 18C of the FLSA occurs, any employee who believes that he or she has been retaliated against in violation of that section may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-

delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

#### **§ 1984.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1984.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or complainant's legal counsel if complainant is represented by counsel) and to the appropriate office of the federal agency charged with the administration of the general provisions of the Affordable Care Act under which the complaint is filed: Either the Internal Revenue Service of the United States Department of the Treasury (IRS), the United States Department of Health and Human Services (HHS), or the Employee Benefits Security Administration of the United States Department of Labor (EBSA).

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

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

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

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

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that 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 complaint shows that the adverse action took place shortly after the protected activity, or at the first opportunity available to respondent, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel, if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the

same adverse action in the absence of the complainant's protected activity.

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

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1984.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated section 18C of the FLSA 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 to the complainant, 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 afterwards as OSHA and the respondent can agree, if the interests of justice so require.

#### **§ 1984.105 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 section 18C of the FLSA.

(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 require, where appropriate: Affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate period.

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

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

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1984.106. 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**

##### **§ 1984.106 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 section 18C of the FLSA, 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 § 1984.105(b). The objections, request for a hearing, and/or request for attorney fees must be in writing and state whether the objections are to the findings and/or the preliminary order, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review.

**§ 1984.107 Hearings.**

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

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

**§ 1984.108 Role of Federal agencies.**

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

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

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

**§ 1984.109 Decision and orders of the administrative law judge.**

(a) The decision of the administrative law judge (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 § 1984.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: Affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate period.

(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 reasonable attorney fees, not exceeding \$1,000.

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

**§ 1984.110 Decision and orders of the Administrative Review Board.**

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

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the

decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision 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.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: Affirmative action to abate the violation; reinstatement of the complainant to the complainant's former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate period.

(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 reasonable attorney fees, not exceeding \$1,000.

### Subpart C—Miscellaneous Provisions

#### § 1984.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

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

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1984.106, 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, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's approval of a settlement reached by the respondent and the complainant demonstrates OSHA's consent and achieves the consent of all three parties.

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

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1984.113.

#### § 1984.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1984.109 and 1984.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

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

#### § 1984.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under section 18C of the FLSA, 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 or in the United States district court for the District of

Columbia. Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under section 18C of the FLSA, 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.

**§ 1984.114 District court jurisdiction of retaliation complaints.**

(a) 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:

(1) Within 90 days after receiving a written determination under § 1984.105(a) provided that there has been no final decision of the Secretary; or

(2) If there has been no final decision of the Secretary within 210 days of the filing of the complaint.

(3) At the request of either party, the action shall be tried by the court with a jury.

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1984.109. The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including:

(1) Reinstatement with the same seniority status that the employee would have had, but for the discharge or retaliation;

(2) The amount of back pay, with interest; and

(3) Compensation for any special damages sustained as a result of the discharge or retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

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

**§ 1984.115 Special circumstances; waiver of rules.**

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the ALJ or the ARB on review may, upon

application, after three-days notice to all parties, waive any rule or issue such orders that justice or the administration of section 18C of the FLSA requires.

[FR Doc. 2016–24559 Filed 10–12–16; 8:45 am]

**BILLING CODE 4510–26–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA–R08–OAR–2016–0424; FRL–9953–92–Region 8]**

**Approval and Promulgation of Air Quality Implementation Plans; South Dakota; Revisions to the Permitting Rules**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve State Implementation Plan (SIP) revisions submitted by the State of South Dakota on October 23, 2015 and July 29, 2013 related to South Dakota's Air Pollution Control Program. The October 23, 2015 submittal revises certain definitions and dates of incorporation by reference and contains new, amended and renumbered rules. In this rulemaking, we are taking final action on all portions of the October 23, 2015 submittal, except for those portions of the submittal which do not belong in the SIP. This action is being taken under section 110 of the Clean Air Act (CAA).

**DATES:** This final rule is effective on November 14, 2016.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2016–0424. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Kevin Leone, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado

80202–1129, (303) 312–6227, [leone.kevin@epa.gov](mailto:leone.kevin@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. What is the EPA approving?**

The EPA is approving all revisions as submitted by the State of South Dakota on October 23, 2015, with the exception of the revisions that we are not acting on, as outlined in section III of our proposed rulemaking published on August 8, 2016 (81 FR 52388). We are taking final action to approve the following revisions: (1) 74:36:01:01 (*Definitions*) - 74:36:01:01(8), 74:36:01:01(29), 74:36:01:01(67), 74:36:01:01(73), 74:36:01:05, and 74:36:01:20 ; 74:36:02 (*Ambient Air Quality*)—74:36:02:02, 74:36:02:03, 74:36:02:04 and 74:36:02:05; 74:36:03 (*Air Quality Episodes*)—74:36:03:01 and 74:36:03:02; 74:36:04 (*Operating Permits for Minor Sources*)—74:36:04:04, 74:36:04:03 and 74:36:04:21.01; 74:36:09 (*Prevention of Significant Deterioration*)—74:36:09:02, 74:36:09:03, 74:36:09:02(7), 74:36:09:02(8) and 74:36:09:02(9); 74:36:10 (*New Source Review*)—74:36:10:02, 74:36:10:03.01, 74:36:10:05, 74:36:10:07 and 74:36:10:08; 74:36:11 (*Performance Testing*)—74:36:11:01; 74:36:12 (*Control of Visible Emissions*)—74:36:12:01 and 74:36:12:03; 74:36:18 (*Regulations for State Facilities in the Rapid City Area*)—74:36:18:10; 74:36:20 (*Construction Permits for New Sources or Modifications*)—74:36:20:05; 74:36:01:01(73) (*Subject to Regulation*); and the deletion of 74:36:04:03.01 (*Minor Source Operating Permit Variance*).

We provided a detailed explanation of the bases for our proposal. See 81 FR 52388. We invited comment on all aspects of our proposal and provided a 30-day comment period. The comment period ended on September 8, 2016.

In this action, we are responding to the comments we received and taking final rulemaking action on the rules from the State's July 29, 2013 and October 23, 2015, submittals.

**II. Brief Discussion of Statutory and Regulatory Requirements**

The changes we are taking final action to approve are consistent with the CAA and EPA regulations. Specifically:

1. CAA section 110(a)(2)(C), requires each state plan to include “a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that the National Ambient Air Quality Standards [NAAQS] are achieved, including a permit program as