

## Whistleblower Protection from Retaliation - OSHA 11(c)

**WORKSAFE**  
safety, health, and justice for workers  
seguridad, salud, y justicia para los trabajadores



### 11(c) APPLIES TO CALIFORNIA WORKERS TOO

Section 11(c) of the Federal Occupational Safety and Health Act [29 U.S.C. §660(c)] protects workers from discrimination or retaliation when workers:

- complain to their employer, union, OSHA, or other agency about job safety and health problems;
- file safety and health grievances;
- participate in safety and health committees; and
- participate in OSHA inspections and other OSHA-related activities.

Although it's widely assumed that the Federal Occupational Safety and Health Act (OSHA) has jurisdiction over the health and safety of federal workers, what is not understood is that Federal OSHA's **Office of the Whistleblower Protection Program (OWPP)**, responsible for investigating whistleblower cases, also has jurisdiction over all *state* whistleblower complaints, regardless of whether the worker is a federal employee or not. Fed OSHA has the right to step in and conduct an investigation of a state retaliation case if the complainant alleges that the DLSE is not adequately investigating the complaint when a worker has filed their complaint with both the OWPP and the DLSE.

This is called "**Dual Filing**," and is specifically provided for by Fed OSHA, as per the below except from the Whistleblower Investigations Manual<sup>1</sup>:

"States must include in their policy document(s) a description of their procedures for informing private sector complainants of their right to concurrently file a complaint under section 11(c) with Federal OSHA within 30 days of the alleged retaliatory action, as was required in DIS.7 (February 27, 1986), now incorporated into this manual. In most situations, OSHA will defer to the State for investigation of such retaliation complaints, but dual filing preserves a complainant's right to seek a federal remedy should the state be unable to effect appropriate relief."

OWPP also oversees 21 other federal statutes in addition to Section 11(c), which increases the likelihood of California workers potentially being covered by any one of the many federal statutes. These statutes include, among many, the Safe Drinking Water Act, the Toxic Substances Control Act, and the Clean Air Act.

<sup>1</sup> See Federal OSHA Whistleblower Investigations Manual, Chapter 1, "Preliminary Matters," VII (C), at 1-3 ([https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-003.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf)).

The standards that employees have to meet to prove that retaliation occurred in a federal case are lower than that for a state case, increasing the likelihood of success in a federally filed retaliation complaint. What that means in a nutshell is that workers have to clear a slightly lower hurdle to prove that retaliation occurred.

Thus, when considering filing a retaliation complaint, consider filing under Federal OSHA as well. The complaint must be filed within **30 days** of when the worker learns why they were punished.

The Regional Office for Northern California is located at:

Region IX Federal Contact Numbers  
90 7th Street, Suite 18100  
San Francisco, California 94103  
(415) 625-2547 (Main Public - 8:00 AM - 4:30 PM Pacific)  
(415) 625-2534 FAX

Further information can be found on the website at:  
[http://www.whistleblowers.gov/complaint\\_page.html](http://www.whistleblowers.gov/complaint_page.html)

### **Things to Remember Before You File an 11(c) Whistleblower Complaint**

If you want to do something to address hazards on the job, it is essential that you know your rights and what you may need to do to protect yourself in case of retaliation.

When the federal Occupational Safety and Health Act (OSH Act) was passed, it was recognized that there would never be enough inspectors to enforce the law in all of the workplaces in America on a regular basis. The law needed to give workers an active role at every jobsite to use their voices and take action. It also needed to include a provision ensuring that people could do this without fear of retaliation. Without effective protection from retaliation, all of the other health and safety rights we have are meaningless.

Under the OSH Act, it is against the law for an employer to retaliate against an employee who exercises their health and safety rights. Under section 11(c) of the OSH Act and other federal laws, you have the right to raise safety-related questions and complaints on the job. You can discuss safety with other workers, ask your employer for information about hazards, and report hazards to your employer, OSHA, or another government agency. See Box 1 below for a list of rights you have related to safety and health on the job. State-run OSHA programs must have similar protections.

### **But the Retaliation Law Doesn't Work Very Well.**

Unfortunately, employers sometimes do discriminate against workers for challenging unsafe working conditions. Employers are more likely to take advantage of the more vulnerable, low-wage, immigrant workers who often lack union protections.

The unit in OSHA that investigates retaliation claims has many problems, including lack of enough staff to investigate complaints quickly, as well as sloppy or incomplete investigations. They need to put the time in and work closely with you and your witnesses to put together a complete case. (See Box 3 below.) Employers know that there is only a small chance of being punished for breaking the law protecting health and safety whistleblowers. And even when employers are caught, the penalty is usually light. So, while your rights to a safe and healthful workplace are protected by law, your employer may try to retaliate against you for exercising them. The more involved you and your co-workers are in documenting both hazards and employer actions, the better your odds that these rights will work for you.

You can discourage illegal retaliation and defend against it, if necessary, by familiarizing yourself with your rights and specific ways to protect yourself. Here are some strategies to keep in mind:

**(1) Strength in Numbers:** Union members are in a much better position to enforce their rights than individual workers. Even if you are not in a union, you will be on firmer legal ground to fight retaliation if you join with at least one co-worker in raising questions or complaints about safety. Under the National Labor Relations Act, actions taken by more than one worker may be eligible for protection because they are “concerted activity.” You can file a retaliation claim with the National Labor Relations Board (NLRB) in addition to filing a retaliation complaint with OSHA. See factsheet on Rights under the NLRB for more information.

**(2) Chart Your Course Carefully:** If you have a union at your workplace, always raise health and safety questions with it first. If you don’t have a union, consider whether your employer is likely to respond positively to a question or suggestion about safety. If so, you might be able to resolve the problem without conflict. But you should prepare in advance for a hostile response, no matter how unlikely it might seem.

**(3) Make Your Safety Complaint to a Government Agency for Additional Protection From Retaliation:** Make your complaint to a government agency, such as OSHA, your local Fire Department, or state or county Health Department, instead of to your employer. An employer who first learns about a safety complaint from an official investigation may hesitate to retaliate because the government is already investigating. However, complaining to the government first is no guarantee against retaliation.

**(4) Keep Good Records:** Keep dated notes of details and the names of witnesses. If your employer responds verbally, make a note of what is said, when and by whom, and the names of any witnesses. It is a good practice to keep your notes on consecutive pages in a bound notebook. Keep copies of any documents. Also keep notes of your regular hours of work and duties; note that there are many forms of retaliation besides being fired. See Box 2.

**(5) Keep Records Away From the Workplace:** If your employer retaliates against you, you could be prevented from retrieving anything from the job.

**(6) Don't Miss Deadlines:** If you have been retaliated against for exercising an OSHA right, you have only 30 days to file an 11(c) whistleblower complaint with OSHA. You can file your initial complaint by telephoning any OSHA office and saying that you want to file an 11(c) complaint, but it is best to file by certified mail, because you will have a record that the complaint was received. The NLRB and state OSHA plans have different deadlines and rules for filing.

**(7) What to Include in Your Complaint:** You can file the Notice of Whistleblower Complaint Form (OSHA 8-60.1) online or download a copy, complete it, and mail or fax it to OSHA. Alternatively, you can submit a brief letter stating that you have been retaliated against because you exercised a right relating to safety and health. An OSHA investigator will contact you for details, so you do not need to include them in your complaint. However, you should keep records with as much detail as possible. OSHA will accept a complaint in any language. See attached sample complaint form.

**(8) Who Can File a Complaint?** You can file an 11(c) complaint yourself, or you can authorize a representative (such as your union, a COSH group, or anyone who you designate) to do it for you. An 11(c) complaint can be filed with any OSHA official or at any OSHA office. You can find an OSHA office in the telephone book, under U.S. Labor Department – Occupational Safety and Health Administration, by dialing 1-800-321-OSHA, or by visiting OSHA's website at [www.osha.gov](http://www.osha.gov).

### **What You Can Expect After You File An 11(c) Complaint**

**(1)** In response to your complaint, an OSHA investigator will interview you about what happened, which will be written down as a statement for you to sign. You should give the investigator the names of any witnesses who can confirm your allegations. The more written documentation you can provide, the better, so you are less dependent on whether you are assigned a knowledgeable and motivated investigator.

**(2)** After the investigator obtains your signed statement, he or she will prepare a letter informing your employer that OSHA is investigating your 11(c) complaint. In most cases, the investigator will deliver the letter to your employer by hand and will immediately interview any witnesses who are in the workplace.

**(3)** The investigator will interview your employer, too. Your employer might claim you were punished for another reason, such as lateness. In that case, the inspector will ask to see records that document the accuracy of such charges. Your employer cannot use something you've done as an excuse for punishing you when you exercise an OSHA right. Other witnesses will also be interviewed.

**(4)** The investigator will meet with you when the investigation is over. If OSHA believes there is not enough evidence to prove your complaint, OSHA will close the case and send you a letter explaining why. You then have 15 days to send an appeal to: Office of Investigative Assistance, U.S. D.O.L. – OSHA, Room N3603, 200 Constitution Ave., NW, Washington, D.C. 20210.

**(5)** If the OSHA investigation determines that you were punished for exercising an OSHA right, OSHA may begin to negotiate a settlement with your employer immediately. In that case, OSHA may ask your employer to restore to you whatever was illegally taken away, such as rescinding a demotion, transfer, or dismissal, including payment of lost wages and fringe benefits. Undocumented workers can receive back pay but will not be reinstated.

**(6)** If OSHA comes to an agreement with your employer for a settlement, OSHA will ask if you will join in the agreement. If you will, then the case is settled. If you will not agree to the terms that OSHA and your employer agree on, OSHA has the power to settle the case unilaterally, without your agreement.

**(7)** When OSHA negotiates with the employer for a settlement, its policy is to seek to “make the victim whole,” that is, to recover everything a worker lost because of the retaliation, including all wages, benefits, seniority, and leave time (plus interest). OSHA is also able to seek “punitive damages” — monies a worker could receive up to three times above and beyond lost wages and benefits — but OSHA rarely pursues this option. If you believe you have suffered blatant illegal retaliation for your health and safety activities, encourage OSHA to pursue punitive damages. Punitive damages are important to deter employers from becoming repeat offenders. See factsheet on the Cambridgeport decision.

**(8)** If OSHA decides you have a valid case and it cannot reach a settlement agreement with your employer, OSHA will refer the case to prosecutors at the Labor Department. The Labor Department can (and often does) send the case back to OSHA for more negotiations with your employer; or it can sue your employer in federal court, asking for a court order that will force your employer to make restitution. For more information, contact your local COSH group or your local OSHA office, which you may reach by dialing 1-800-321-OSHA.

## Box 1: Some of Your Protected Rights Under the Federal OSH Act

Under the federal Occupational Safety and Health Act and other federal laws, you have the right to:

1. **Request** an inspection by filing a complaint with OSHA (on request, OSHA will keep your identity secret from the employer);
2. **Request** information from or complain about job health and safety hazards to your employer, a labor union, the Occupational Safety and Health Administration (OSHA), or other government agency;
3. **Request and receive** information from your employer about hazards you may be exposed to, including Material Safety Data Sheets (MSDSs) for hazardous materials you work with;
4. **Request and receive** information about precautions to take when working with potentially hazardous materials or equipment;
5. **Refuse** an assignment that a “reasonable person” would see as creating “a real danger of death or serious injury,” when there is not enough time to file an OSHA complaint and when you have requested that your employer correct the condition, but it remains dangerous;
6. **Discuss** health or safety matters with other workers;
7. **Request and receive** results of air sampling, noise monitoring, or any other health and safety testing;
8. **Respond** to questions from an OSHA inspector and point out hazards to the inspector, including telling the inspector about past accidents or illnesses and informing the inspector if your employer has temporarily eliminated hazards during the inspection;
9. **Request and receive** information about procedures to be followed if you are involved in an accident or are exposed to toxic substances;
10. **Report an injury or illness** to your employer – there must be a process that encourages reporting without fear of retaliation. Your state **workers’ compensation** laws also may have provisions to protect your right to file a claim without retaliation;
11. **Participate** in union activities concerning health and safety matters;
12. **Talk privately** with an OSHA inspector on a confidential basis; and
13. **Tell an inspector** whether your employer has been notified of hazards and whether you have received training for hazardous work.

## Box 2: What Employer Activities are Considered Retaliation?

Protection from discrimination means that an employer cannot retaliate by taking “adverse action” against workers, such as:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denial of benefits
- Failure to hire or rehire
- Intimidation or making threats
- Reassignment affecting prospects for promotion
- Reducing pay or hours

Source: [www.whistleblowers.gov](http://www.whistleblowers.gov)

## Box 3: How OSHA Determines If Retaliation Took Place

The investigation must document that:

- The employee engaged in a **protected activity** (see Box 1);
- The **employer knew** about the protected activity;
- The employer took an **adverse action** (see Box 2); and
- A **nexus** or connection exists: the protected activity was the motivating factor (or under some laws, a contributing factor) in the decision to take the adverse action against the employee.