

Whistleblower Protection: Protection from Retaliation for Using Your Rights

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) law 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 demands a safe and healthful workplace. 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 complain about 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, even though 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.

* Note that there is also a new OSHA policy to target certain employer practices that have the effect of discouraging reporting of injuries, illnesses, or hazards. Collective action to ensure this policy is followed at your jobsite can help prevent retaliation. See attached factsheet for more information.

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

(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 orally, 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. NLRB and state OSHA plans have different deadlines and rules for filing. (For example, you have 90 days to file in California, but they will not accept complaints by phone, email, or fax.)

(7) What to Include in Your Complaint: There is no official form for an 11(c) complaint. Instead, you should 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 clicking [here](#).

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;
13. **Tell an inspector** whether your employer has been notified of hazards and whether you have received training for hazardous work; and

Source: Adapted from a factsheet by the New Jersey Work Environment Council (NJWEC)

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

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.