

liability company, or sole proprietorship.

The final regulations also provide that a qualified individual shall file a certification with the IRS in the manner and at the time prescribed in forms, publications, or other guidance, such as Form 2210, "Underpayment of Estimated Tax by Individuals, Estates, and Trusts" (or any successor form and its instructions).

The final regulations will be applicable for taxable years that begin in 2009. The reduced percentage in section 6654(d)(1)(D) is limited to taxable years that begin in 2009 and does not apply to taxable years that begin before or after 2009.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business and no comments were received.

### Drafting Information

The principal author of these regulations is Janet Engel Kidd, Office of the Associate Chief Counsel, Procedure and Administration.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 1.6654–2 also issued under 26 U.S.C. 6654(m).

■ **Par. 2.** Section 1.6654–2 is amended by revising paragraphs (a) introductory text, (a)(1)(ii), and (f) to read as follows:

### § 1.6654–2 Exceptions to imposition of the addition to the tax in the case of individuals.

(a) *In general.* The addition to the tax under section 6654 will not be imposed for any underpayment of any installment of estimated tax if, on or before the date prescribed for payment of the installment, the total amount of all payments of estimated tax made equals or exceeds the lesser of the amount in § 1.6654–2(a)(1) or the amount in § 1.6654–2(a)(2).

(1) \* \* \*

(ii) *Special rule for taxable years beginning in 2009.* For any taxable year beginning in 2009, for a qualified individual, the amount described in paragraph (a)(1)(i) of this section is reduced to 90 percent of that amount.

(A) *Qualified individual* means any individual whose adjusted gross income shown on the individual's return for the preceding taxable year is less than \$500,000 and who certifies, as prescribed in paragraph (a)(1)(ii)(D) of this section, that more than 50 percent of the gross income shown on the return for the preceding taxable year was income from a small business.

(B) *Income from a small business* means income from the operation of a bona fide trade or business of which the individual was an owner during calendar year 2009, and that on average had fewer than 500 employees in calendar year 2008.

(C) The trade or business may be organized as, or take the legal form of, a corporation, partnership, limited liability company, or sole proprietorship.

(D) A qualified individual shall file a certification of the individual's qualification in the manner and at the time prescribed by the Internal Revenue Service in forms, publications, or other guidance.

\* \* \* \* \*

(f) *Effective/applicability date.* Paragraph (a)(1)(ii) of this section applies to any taxable year beginning in 2009 and does not apply to any taxable years beginning before or after 2009.

### § 1.6654–2T [Removed]

■ **Par. 3.** Section 1.6654–2T is removed.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: February 22, 2013.

**Mark J. Mazur,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2013–04680 Filed 2–25–13; 4:15 pm]

**BILLING CODE 4830–01–P**

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

**SUMMARY:** This document provides the interim final regulations governing the employee protection (whistleblower) provision of section 1558 of the Affordable Care Act, which added section 18C of the Fair Labor Standards Act, to provide protections to employees of health insurance issuers or other employers who may have been subject to retaliation for reporting potential violations of the law's consumer protections (e.g., the prohibition on denials of insurance due to pre-existing conditions) or affordability assistance provisions (e.g., access to health insurance premium tax credits). This interim rule establishes 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's final decision.

**DATES:** This interim final rule is effective on February 27, 2013. Comments and additional materials must be submitted (post-marked, sent or received) by April 29, 2013.

**ADDRESSES:** You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

**Fax:** If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

**Mail, hand delivery, express mail, messenger or courier service:** You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2011-0193, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., ET.

**Instructions:** All submissions must include the Agency name and the OSHA docket number for this rulemaking (Docket No. OSHA-2011-0193). Submissions, including any personal information provided, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions against submitting personal information such as social security numbers and birth dates.

**Docket:** To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

**FOR FURTHER INFORMATION CONTACT:**

**For Press inquiries:** Frank Meilinger, Director, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-1999. This is not a toll-free number. Email: [meilinger.francis2@dol.gov](mailto:meilinger.francis2@dol.gov).

**For technical inquiries:** Katelyn Wendell, Program Analyst, Directorate of Whistleblower Protection Programs, OSHA, U.S. Department of Labor, Room N-4624, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2199. This is not a toll-free number. Email: [Wendell.katelyn.j@dol.gov](mailto:Wendell.katelyn.j@dol.gov). This Federal Register publication is available in alternative formats. The alternative formats available are: Large print, electronic file on computer disk (Word

Perfect, ASCII, Mates with Duxbury Braille System), and audiotape.

**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” are used in this rulemaking to refer to the final, amended version of the law. The Affordable Care Act contains various provisions designed to make health care more affordable and accountable.

Among the policies to achieve its goals, the Affordable Care Act's section 1558 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 or a cost-sharing reduction (referred to as a “subsidy” in section 18C) under section 1402 of Affordable Care Act. These provisions allow employees to receive tax credits or cost-sharing reductions while enrolled in a qualified health plan through an exchange, if their employer does not offer a coverage option that is affordable and provides a basic level of value (i.e., “minimum value”). Certain large employers who fail to offer affordable plans that meet this minimum value may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through the Exchange. Thus, the relationship between the employee's receipt of a credit and the potential tax penalty imposed on an 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). Title I includes a range of insurance company accountability policies such as: The prohibition of lifetime dollar limits on coverage, the requirement for most plans to cover recommended preventive services with no cost sharing, and, starting in 2014, guaranteed availability (also known as guaranteed issue) protections so that individuals and employers will be able to obtain coverage that currently can be denied due to a pre-existing condition, and the prohibition on the use of factors such as health status, medical history, gender, and industry of employment to set premium rates.

Section 18C became effective on the date the health care law was enacted, March 23, 2010. On January 1, 2014, the scope of coverage of section 18C will be expanded by section 2706(b) of the Public Health Service Act (PHSA), 42 U.S.C. 300gg *et seq.*, as amended by section 1201 of the Affordable Care Act. 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.” Thus, the protections provided by section 18C will extend in 2014 to cover retaliation with respect to an employee's compensation, terms, conditions or other privileges of employment by health insurance issuers offering group or individual health insurance coverage regardless of whether those issuers are the employer of the person retaliated against. Since the enactment of the Affordable Care Act, a health insurance issuer is prohibited from retaliating against its own employees who engage in activity protected by section 18C. Beginning in 2014, those issuers will also be prohibited from retaliating against persons who are not their employees with respect to those persons' compensation, terms, conditions or other privileges of employment, including their employer-sponsored health insurance. An employee will be protected from retaliation (e.g., having that issuer limit or end health insurance coverage), not only by her employer, but also by the insurance issuer that provides

employer-sponsored health insurance coverage to the employee.

These interim rules establish procedures for the handling of whistleblower complaints under section 18C of the FLSA; these procedures are very similar to those used for whistleblower complaints in other industries.

## **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 may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) 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.

The Secretary may conduct an investigation only if the complainant has made a *prima facie* showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that the respondent would have taken the same adverse action in the absence of that activity.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, 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 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, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order.

The Secretary also may award a prevailing respondent a reasonable attorney's fee, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

The statute 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**

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of section 18C of the FLSA and 15 U.S.C. 2087(b) of CPSIA. Responsibility for receiving and investigating complaints under section 18C has been delegated to the Assistant Secretary for Occupational Safety and Health. Secretary'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's Order 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

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

#### *Section 1984.100 Purpose and Scope*

This section describes the purpose of the regulations implementing section 18C of the FLSA and provides an overview of the procedures covered by these regulations.

#### *Section 1984.101 Definitions*

This section includes general definitions for the Affordable Care Act whistleblower provision codified at section 18C of the FLSA. 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.

The FLSA defines "employer" as including "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." 29 U.S.C. 203(d). The FLSA defines "person" to mean "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a).

The FLSA defines "employee" to mean "any individual employed by an employer." 29 U.S.C. 203(e)(1). 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 section 102 of the U.S. Code at title 5), in any executive agency (as

defined in section 105 of such title), 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. 29 U.S.C. 203(e)(2)(A). An employee generally also includes any individual employed by the United States Postal Service or the Postal Regulatory Commission, 29 U.S.C. 203(e)(2)(b); and any individual employed by a State, political subdivision of a State, or an interstate governmental agency. The definition of “employee” under the FLSA does not include 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. 29 U.S.C. 203(e)(2)(c).

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 discrimination 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 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).

#### 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 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 this Act” in section 18C(a)(1) refers to receipt of a cost-sharing reduction under section 1402 of the Affordable Care Act. 42 U.S.C. 18071.

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. 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. This includes health insurance reforms such as providing guaranteed availability (also known as guaranteed issue) protections so that individuals and employers will be able to obtain coverage when it currently can be denied, continuing current guaranteed renewability protections, prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates, limiting age rating, and prohibiting issuers from dividing up their insurance pools within markets.

<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).

In order to have a “reasonable belief” under sections 18C(a)(2) and (5), a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. *See Sylvester v. Parexel Int’l LLC*, ARB No. 07–123, 2011 WL 2165854, at \*11–12 (ARB May 25, 2011) (discussing the reasonable belief standard under analogous language in the Sarbanes-Oxley Act whistleblower provision, 18 U.S.C. 1514A). 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 id.* The “reasonableness” of a complainant’s belief is typically determined “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* at \*12 (internal quotation marks and citation omitted). 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 where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. *Id.* at \*13.

#### 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), this is considered to be 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. *Equal Emp’t Opportunity Comm’n 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. Complaints filed under section 18C of the FLSA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf.

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 the Agency to the existence of the alleged retaliation and the complainant’s desire that the Agency investigate the complaint. Upon the filing of a complaint with OSHA, the Assistant Secretary 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 section 1984.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, 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).

#### 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) specifies that throughout the investigation the Agency will provide to the complainant (or the complainant’s legal counsel if the complainant is represented by counsel) a copy of respondent’s submissions to the Agency that are responsive to the complainant’s whistleblower complaint and the complainant will have an opportunity to respond to those submissions. Before providing such materials to the complainant, the Agency will redact them in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations. Paragraph (e) of this section sets forth the applicable

burdens of proof. Paragraph (f) describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary 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. The complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action.

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 (ERA), 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 (or cease investigating) if either: (1) The complainant fails to meet 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 statutory burdens of proof require an employee to prove that the alleged protected activity was a “contributing factor” in the alleged adverse action. If the employee proves that the alleged

protected activity was a contributing factor in the adverse action, the respondent, to escape liability, must prove by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. 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)). In proving that protected activity was 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).

The statutory burdens of proof do not address the evidentiary standard that applies to a complainant’s proof that protected activity was a contributing factor in an adverse action. Rather, they simply provide that the Secretary may find a violation only “if the complainant demonstrates” that protected activity was a contributing factor in the alleged adverse action. See 15 U.S.C. 2087(b)(2)(B)(iii). It is the Secretary’s position that the complainant must prove by a “preponderance of the evidence” that his or her protected activity contributed to the adverse action; otherwise the burden never shifts to the respondent to establish its defense by “clear and convincing evidence.” See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“The term ‘demonstrates’ [under identical language in another whistleblower provision] means to prove by a preponderance of the evidence.”). Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the respondent can escape liability only by proving by clear and convincing evidence that it would have taken the same action even in the

absence of the prohibited rationale. The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard.

Section 18C also incorporates the authorities in the FLSA sections 9 and 11, 29 U.S.C. 209 and 211, to issue subpoenas and conduct investigations. Such authorities under section 18C are delegated and assigned to the Assistant Secretary for Occupational Safety and Health. See Secretary’s Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012).

#### *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, and compensatory damages. 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’s fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. 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.

In ordering interest on back pay under section 18C, the Secretary has determined that interest due will be computed by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points. The Secretary believes that daily compounding of interest achieves the make-whole purpose of a back pay award. Daily

compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board. See *Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, 356 NLRB No. 8, 2010 WL 4318371, at \*3–4 (NLRB Oct. 22, 2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he or she received prior to his termination, but not actually return to work. Such “economic reinstatement” is akin to an order for front pay and frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), which protects miners from retaliation. See, e.g., *Sec’y of Labor ex rel. York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at \*1 (ALJ June 26, 2001). Front pay has been recognized as a possible remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., *Moder v. Vill. of Jackson*, ARB Nos. 01–095, 02–039, 2003 WL 21499864, at \*10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”); *Hobby v. Georgia Power Co.*, ARB No. 98–166, ALJ No. 1990–ERA–30 (ARB Feb. 9, 2001), *aff’d sub nom. Hobby v. U.S. Dep’t of Labor*, No. 01–10916 (11th Cir. Sept. 30, 2002) (unpublished) (noting circumstances where front pay may be available in lieu of reinstatement but ordering reinstatement); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99–041, 99–042, 00–012, 1996 WL 518592, at \*6 (ARB Sept. 6, 1996) (under ERA, front pay appropriate where employer had eliminated the employee’s position); *Michaud v. BSP Transport, Inc.*, ARB Nos. 97–113, 1997 WL 626849, at \*4 (ARB Oct. 9, 1997) (under the Surface Transportation Assistance Act, 49 U.S.C. 31105, front pay appropriate where employee was unable to work due to major depression resulting from the retaliation); *Brown v. Lockheed Martin Corp.*, ALJ No. 2008–SOX–49,

2010 WL 2054426, at \*55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under Sarbanes-Oxley, front pay may be awarded as a substitute when reinstatement is inappropriate). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of section 18C of the FLSA. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

#### *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).

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay OSHA’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under section 18C of the FLSA 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 no timely objection to OSHA’s findings and/or preliminary order is filed, then OSHA’s findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

##### *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. It specifically provides for hearings to be consolidated if both the complainant and respondent object to the findings and/or order of the Assistant Secretary. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

##### *Section 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.

##### *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. Paragraph (c) of this section further provides that the Assistant Secretary’s determination to dismiss the complaint without an investigation or without a complete investigation under section 1984.104 is not subject to review. Thus, section 1984.109(c) clarifies that the Assistant Secretary’s determinations on 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 the Assistant Secretary to conduct an investigation or make further factual findings. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is described above in the discussion of section 1984.104. Paragraph (d) notes the remedies that the ALJ may order under section 18C and, as discussed under section 1984.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. 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.

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

*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 permits complainants to withdraw their complaints orally and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

*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 ARB to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

*Section 1984.113 Judicial Enforcement*

This section describes the Secretary's authority 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).

*Section 1984.114 District Court Jurisdiction of Retaliation Complaints*

This section sets forth 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, it is the Secretary's position that complainants may not initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 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. See 15 U.S.C. 2087(b)(5)(B) (providing that an order with respect to which review could have been obtained in [the court of appeals] shall not be subject to judicial review in any criminal or other civil proceeding).

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. 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 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.

#### *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.

#### **IV. Paperwork Reduction Act**

This rule contains a reporting provision (filing a retaliation complaint, section 1984.103) which was previously reviewed as a statutory requirement of section 18C of the FLSA, 29 U.S.C. 218C, and approved for use by the Office of Management and Budget ("OMB"), and was assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

#### **V. Administrative Procedure Act**

The notice and comment rulemaking procedures of 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 is a rule of agency procedure, practice and interpretation within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for these regulations, which provide the procedures for the handling of retaliation complaints. Although this is a procedural rule not subject to the notice and comment procedures of the APA, the Agency is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the Agency receives and reviews the public's comments.

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

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

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." Because the rule is procedural and interpretative in nature, it is expected to have a negligible economic impact. Therefore, no economic impact analysis has been prepared. For the same reason, 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." The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" and

therefore is not subject to Executive Order 13132 (Federalism).

## VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of section 18C of the FLSA. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

### 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 February 13, 2013.

**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 added 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's Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary's Order 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

### 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 section 1402, 42 U.S.C. 18071, 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. 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) *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 by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152.

(b) *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.

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

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

(e)(1) *Employee* means 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.

(f) *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.

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

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

(i) *Respondent* means the employer named in the complaint who is alleged to have violated the Act.

(j) *Secretary* means the Secretary of Labor or person to whom authority under the Affordable Care Act has been delegated.

(k) 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.

#### **§ 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 subsidy under

section 1402 of the Affordable Care Act, 42 U.S.C. 18071;

(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.

#### **§ 1984.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary 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, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of its rights under paragraphs (b) and (f) of this section and paragraph (e) of § 1984.110. The Assistant Secretary 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 the Assistant Secretary 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 the Assistant Secretary to present its position.

(c) Throughout the investigation, the Agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the Agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Agency will also provide the complainant with an opportunity to respond to such 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 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, 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, an investigation of the complaint will not be conducted or will 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 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, the Assistant Secretary 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 the Assistant Secretary 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, the Assistant Secretary will again 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, the Agency will redact them, if necessary, in accordance 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 investigators, 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 the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary 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's 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.

(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, 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's fees not exceeding \$1,000 from the 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's 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. The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's 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) Copies of documents must be sent to the Assistant Secretary, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of the Assistant Secretary, or where the Assistant Secretary is participating in the proceeding, or where service on the Assistant Secretary 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 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 the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1984.104(e) nor the Assistant Secretary'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's 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.

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

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. 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's fees, must file a written petition for review with the 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's 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.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney's fee, 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 the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary'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 the case may be.

(e) Any settlement approved by the Assistant Secretary, 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 or a person on whose behalf the order was issued 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. The Secretary also may file a civil action seeking enforcement of the order in the United States district court for the District of Columbia.

#### **§ 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 section 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 discrimination;

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

(3) Compensation for any special damages sustained as a result of the discharge or discrimination, 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. 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 these rules, 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. 2013-04329 Filed 2-22-13; 11:15 am]

BILLING CODE 4510-26-P

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

#### **32 CFR Part 199**

[DOD-2009-HA-0038]

RIN 0720-AB50

#### **TRICARE: Smoking Cessation Program**

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements Section 713 of the Duncan Hunter National Defense Authorization Act

(NDAA) for Fiscal Year 2009. Section 713 states the Secretary shall establish a smoking cessation program under the TRICARE program. The smoking cessation program under TRICARE shall, at a minimum, include the following: The availability, at no cost to the beneficiary, of pharmaceuticals used for smoking cessation, with the limitation on the availability of such pharmaceuticals to the mail-order pharmacy program under the TRICARE program; smoking cessation counseling; access to a toll-free quit line 24 hours a day, 7 days a week; access to print and Internet web-based tobacco cessation material. Per the statute, Medicare-eligible beneficiaries are excluded from the TRICARE smoking cessation program.

**DATES:** *Effective Date:* This final rule is effective March 29, 2013.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ginnean Quisenberry, Population Health, Medical Management, and Patient Centered Medical Home Division, Office of the Chief Medical Officer, TRICARE Management Activity, telephone (703) 681-6717.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Executive Summary**

###### *A. Purpose of the Final Rule*

The purpose of this final rule is to implement the provisions of the Duncan Hunter NDAA for FY 2009 (Pub. L. 110-417) that establishes a smoking cessation program under the TRICARE program. Establishment of the TRICARE smoking cessation program attempts to reduce the number of TRICARE beneficiaries who are nicotine dependent, thereby improving the health of the TRICARE beneficiary population and reducing Department of Defense costs, in particular those related to the adverse effects of smoking. The legal authority for the Final Rule is Section 713 of the Duncan Hunter NDAA FY09 (Pub. L. 110-417).

###### *B. Summary of the Major Provisions of the Final Rule*

Section 713 of the Duncan Hunter NDAA for FY 2009 stipulates the following key features for inclusion in the TRICARE smoking cessation program:

1. *The availability, at no cost to the beneficiary, of pharmaceuticals used for smoking cessation, with a limitation on the availability of such pharmaceuticals to the national mail-order pharmacy program under the TRICARE program if appropriate.*

Smoking cessation medications will be covered by TRICARE through the Mail Order Pharmacy program, as well