

civil penalty of up to \$1,000. This provision is administered by the FAA.

### III. Summary of Regulations and Rulemaking Proceedings

On April 1, 2002, the Occupational Safety and Health Administration published in the **Federal Register** an interim final rule promulgating rules which implemented Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 67 FR 15454-15461. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by May 31, 2002. On May 29, 2002, OSHA received a request from the Association of Flight Attendants requesting a 30-day extension of the comment period, and on June 13, 2002, OSHA published a notice in the **Federal Register** extending the comment period to June 30, 2002, 67 FR 40597.

In response, six organizations filed comments with the agency. Comments were received from the Association of Flight Attendants (AFA); the Air Line Pilots Association (ALPA); the Transportation Trades Department, AFL-CIO (TTD); the Air Transport Association (ATA); the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); and the National Whistleblower Legal Defense and Education Fund on behalf of the National Whistleblower Center (NWC). Senator Charles Grassley of Iowa also submitted comments.

OSHA has reviewed the comments and, in response, has developed a final rule which makes some changes in the interim final rule. Other changes urged by commenters were considered but rejected. OSHA addresses the comments in the discussion that follows. The comments and OSHA's response are discussed in the order of the provisions of the rule.

#### General Comments

OSHA received four comments of a general nature relating to the regulations. The AFL-CIO questioned whether the interim procedures related to filing of complaints, processing of investigations and conduct of administrative reviews satisfy the following four requirements which, in its opinion, are needed to meet the intent of Congress:

(1) Whistleblowers must have control of their legal cases through an Individual Right of Action;

(2) The investigating and prosecuting authority must not have discretionary authority that may be abused to

undermine the legal interests of complainants;

(3) Loopholes that allow illegal employer conduct or circumscribe the protected acts of complainants must be eliminated; and

(4) Legal burdens of proof for whistleblowers must be realistic. OSHA believes that, as a general matter, the interim rules provide for administrative and judicial review procedures and burdens of proof required by AIR21 and fully satisfy the spirit and intent of Congress to provide whistleblower protection to aviation workers, thus helping to increase the safety of the aviation industry and the traveling public.

The NWC suggested that OSHA posters be amended to inform employees of all the whistleblower laws administered by OSHA; or, in the alternative, OSHA should make posters regarding employee rights under all the whistleblower laws widely available free of charge to the regulated community and encourage employers to comply with the law and voluntarily post notice of the law. OSHA believes that posters and other means or informing employers and employees of their rights and responsibilities under the various whistleblower statutes are vital to achieving the goals of the statutes, although AIR21 does not authorize OSHA to require employers to post notice of the law. However, the FAA has developed and distributed posters and other informational materials to airport authorities, employers and employee groups around the country.

The ATA submitted three general comments regarding the nature of the relationship between OSHA and the FAA. The ATA suggested that the rules be modified to provide that (1) the FAA has complete and exclusive jurisdiction over air carrier safety issues, (2) when OSHA receives an AIR21 discrimination complaint, the FAA must first make a threshold determination as to whether the underlying safety issues raised by the complaint relate to a violation, and (3) throughout any investigation by OSHA, the FAA retains exclusive authority to determine any air carrier safety issues underlying or related to the discrimination complaint. With respect to the first and third comments, OSHA agrees that the FAA has authority over air carrier safety issues as defined by statute. OSHA does not agree, however, that AIR21 provides that it is the FAA's responsibility to first make a threshold determination as to whether the underlying safety issues raised by the complainant relates to an air carrier

safety violation. That initial, threshold determination of whether the complainant engaged in activities protected by the law is common to all the various whistleblower statutes and is made by OSHA in the regular course of determining a prima facie showing that protected conduct was a contributing factor in the alleged unfavorable personnel action.

#### Section 1979.100 Purpose and Scope

This section describes the purpose of the regulations implementing AIR21 and provides an overview of the procedures covered by these new regulations. No comments were received relating to this section.

#### Section 1979.101 Definitions

In addition to the general definitions, the regulations include program-specific definitions of "air carrier" and "contractor." The statutory definition of "air carrier" applicable to AIR21 is found at 49 U.S.C. 40102(a)(2), a general definitional provision applicable to air commerce and safety. The statutory definition of "contractor" is found in AIR21 at 49 U.S.C. 42121(e).

Four comments were received regarding the definitions contained in § 1979.101. The NWC proposed that the term "air carrier" include those carriers owned by foreign persons, stating that it would be inconsistent with safety and national security to exclude from protection whistleblowers who uncovered and disclosed problems related to air carriers which may happen to be owned or controlled by foreign corporations or persons. AIR21 is contained in Title 49, Subtitle VII, Part A, of the United States Code. While AIR21 contains a definition of "contractor," it does not contain a definition of "air carrier" and so the general definitions applicable to Part A contained in Subpart 1 apply. The terms "air carrier" and "foreign air carrier" are separately defined by statute at 49 U.S.C. 40102(a)(2) ("air carrier") and 49 U.S.C. 40102(a)(21) ("foreign air carrier"), and the general definition of air carrier is set forth in the AIR21 rule. OSHA has no authority to define the terms otherwise.

The NWC also stated that the definition of the term "contractor" should be further explained to ensure that the definition include all contractors which perform, directly or indirectly, any function whatsoever which may have safety implications, and that safety-sensitive functions specifically include security related activities. The NWC suggested that the definition of "safety-sensitive" should include persons who work for