

contractors who are in a position to witness and or identify the misconduct of other employees or contractors as opposed to reporting only on the employee's own employer. OSHA agrees that "safety-sensitive functions" include security-related activities, but believes that the definition as written is adequate.

The AFA commented that the terms "contractors, subcontractors, or agents or air carriers" be added to the definition of "person." The term "person" is included in the definitions because it is used variously in the statute to mean both organizations and individuals. The definition describes what type of legal entities may be included in the term "person."

#### *Section 1979.102 Obligations and Prohibited Acts*

This section describes the whistleblower activity which is protected under the Act and the type of conduct which is prohibited in response to any protected activity.

The NWC commented that § 1979.102(b) should explicitly include reports of security violations or reports of security weaknesses made to the employer or a law enforcement agency in the definition of protected activity. OSHA believes that the regulation appropriately sets forth the statutory definition of protected activity, which includes providing "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States." Therefore, OSHA does not believe that the additional language requested is necessary.

The AFA suggested that the words "actively or passively" be added to § 1979.102(b) to clarify that all forms of discrimination, whether active or passive, are violations of the Act. The AFA also recommended that the words "actual or constructive" be added before the word "knowledge" in § 1979.102(b)(1) and (2) to prevent an employer from making a "don't want to know" plausible deniability argument to escape accountability for violating the Act. OSHA considers that extensive case law exists involving analogous language in other employee protection statutes. Therefore, OSHA anticipates that similar interpretations would be applied under AIR21.

The NWC recommended that § 1979.102(c) be further defined, in order to prevent a chilling effect on employee disclosures, by stating that the

term "deliberate" does not apply to unintentional conduct. There is case law involving analogous provisions of other employee protection statutes defining the phrase "deliberate violations" for purposes of denying protection to an employee who causes a violation of applicable safety laws. *See, e.g., Fields v. United States Department of Labor Administrative Review Board*, 173 F.3d 811, 814 (11th Cir. 1999) ("petitioners moved knowingly and dangerously beyond their authority when, on their own, and fully aware that their employer would not approve, they conducted experiments inherently fraught with danger"). We anticipate that a similar construction of that term would be applied under AIR21.

#### *Section 1979.103 Filing of Discrimination Complaint*

This section explains the requirements for filing a discrimination complaint. Under AIR21, to be timely a complaint must be filed within 90 days of the alleged violation. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this date is considered to be when the discriminatory 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 Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001). Under § 1979.103(a), complaints may be made by any person on the employee's behalf with the consent of the employee.

Section 1979.103(b) of the interim rule permitted complaints to be made both in writing and orally. The rule has been changed to require that complaints be made in writing, which shall include a full statement of the acts and omissions alleged to constitute the violation, in accordance with the procedures for filing whistleblower complaints under several other employee protection provisions for which the Secretary of Labor has delegated the responsibility for enforcement to OSHA. Complaints still do not need to be made in accordance with any particular form. However, because of difficulty encountered in the processing of oral complaints, OSHA has determined that the process for filing full complaints in writing codified at 29 CFR 24.3(c) should apply to whistleblower complaints filed under AIR21.

The AFA commented that § 1979.103(c) should be changed to include the Federal Aviation Administration as a place where complaints may be sent because the

FAA website advised that whistleblower complaints may be filed with the FAA. Similarly, the NWC proposed that § 1979.103.(c), (d) and (e) should make clear that whistleblower complaints filed with other agencies should be deemed timely filed, particularly when the underlying safety concern was originally directed to the other agency. The NWC also commented that an internal whistleblower complaint to the employer should also act to toll the AIR21 statute of limitations. OSHA wants to make clear in the regulations that claims should preferably be filed with OSHA. However, as noted in OSHA's Whistleblower Investigations Manual (OSHA Instruction DIS 0-0.8), it is OSHA's policy, as supported by case law, that complaints timely filed by mistake with the FAA or other agency not having the authority to grant relief to the whistleblower may be considered timely filed with OSHA. The reference to filing with "any Department of Labor officer or employee" has been changed to "any OSHA officer or employee" to make the rule consistent with other whistleblower rules administered by OSHA.

The ATA commented that § 1979.103(e) should be deleted in its entirety because OSHA states no legal authority for the provision, individuals may intentionally file under one statute and not the other, and the section is vague because it does not make clear which statutory process OSHA will follow. The purpose of § 1979.103(e) is to make clear to the regulated community that OSHA reserves the right to investigate any whistleblower claim that properly falls under OSHA's purview. Section 11(c) of the Occupational Safety and Health Act ("OSH Act") provides employment protection for employees who exercise certain rights under the OSH Act, principal among them being the right to file an occupational safety and health complaint with OSHA within 30 days of the alleged violation. Section 11(c), unlike STAA and ERA, does not provide for an administrative determination of the merits of a complaint by the Secretary; instead, the Secretary of Labor may seek to bring an action in Federal District Court to enforce the whistleblower protection provision of the OSH Act. Section 1979.103(e), which is comparable to a provision in the STAA regulations (see § 1978.102(e)), puts the community on notice that OSHA considers all complaints filed with it as potential complaints under Section 11(c) if it should turn out in the course of the investigation that the underlying