

protected safety or health activity falls under OSHA's authority rather than that of the FAA. The final rule also clarifies that the requirements of Section 11(c) necessarily apply to complaints that OSHA treats as having been filed under the OSH Act, and that the requirements of AIR21 apply to complaints that OSHA treats as having been filed under AIR21.

Section 1979.104 Investigation

AIR21 contains a requirement similar to the requirement in the ERA that a complaint shall be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included in this section is the AIR21 requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the prima facie showing of the complainant. Under this section, the named person has the opportunity within 20 days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of his or her position.

If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within ten business days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments why preliminary relief is not warranted. This provision provides due process procedures in accordance with the Supreme Court decision under STAA in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). In addition, we clarified that the ten-day time period refers to ten business days. This is consistent with the Federal Rules of Civil Procedure 6(a), which excludes from the computation of the period of time intermediate Saturdays, Sundays, and legal holidays, when the period of time prescribed or allowed is less than 11 days.

In a comment submitted by the AFA, it was suggested that § 1979.104(a) be revised to require the Assistant Secretary to notify both the named person and the complainant of the filing of the complaint and their rights under the Act. However, the statutory language only requires that the named person be notified in writing. As a matter of policy, OSHA does acknowledge receipt of the complaint in writing back to the complainant.

The ATA commented that § 1979.104(b) should be modified to make clear that if OSHA initiates an investigation, but later concludes that the complainant has failed to establish a prima facie case or that the respondent has rebutted the prima facie case, the agency should terminate the investigation. This comment misapprehends OSHA's practice and the intent of the rule. If, at any point in the investigation, it becomes clear that a prima facie showing cannot be established or that the evidence otherwise reveals that the complaint lacks merit, OSHA will dismiss the complaint.

The TTD, NWC, AFA, and Senator Grassley all commented that § 1979.104(b)(1)(iv) and (b)(2) should be changed to more accurately reflect the language of the statute in describing the complainant's burden of proof. The commenters felt that the use of the word "likely" effectively changed the intent of the statutory language placing on the complainant the burden to demonstrate that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." OSHA agrees that the language of the interim rule could be construed to alter or otherwise inaccurately reflect the language of the statute, and has changed it by deleting the word "likely."

The AFA suggested that § 1979.104(c) be changed to require the Assistant Secretary to share documents submitted by the named person with the complainant and to allow the complainant to be present during the initial meeting with the named person, if requested. OSHA believes that, consistent with other whistleblower laws, the language of the statute is clear that the initial investigation by OSHA is to be conducted independently for the purpose of establishing the factual circumstances and facilitating an early resolution of the claim.

The ATA recommended that § 1979.104(c) be changed to lengthen the named person's response time from ten days to 30 days. ATA felt that ten days is not enough time to research and provide an appropriate response that is

substantial enough to make the required demonstration by "clear and convincing evidence." OSHA agrees that ten days may frequently be a very short time to effectively research and prepare a response. However, because the statute provides only 60 days for OSHA to complete the entire investigation and issue findings, OSHA believes that allowing half that time for submitting an initial response will impede its ability to complete the investigation in a timely manner. The final rule is changed to permit 20 days for submitting an initial response and a request for a meeting, which is also consistent with other whistleblower statutes having a 60-day investigation time frame.

The AFA suggested that § 1979.104(d) be modified to delete the words, "other than the complainant" from the last sentence to ensure confidentiality for all persons, including the complainant. This rule is intended to affirmatively provide for the protection of the identity of persons who come forward to OSHA to provide information or testimony relevant to OSHA's investigation of the whistleblower complaint. The phrase is not intended to limit or restrict in any way OSHA's ability to appropriately withhold information or documentation provided by the complainant which would ordinarily be exempt from disclosure under the provisions of the Freedom of Information Act.

The AFA also suggested that § 1979.104(e) be changed to require that when the Assistant Secretary concludes that reinstatement is warranted, the complainant, as well as the named person, be contacted to give notice of the substance of the evidence supporting the complainant's claim and an opportunity to be present in any subsequent meeting. The NWC recommended that § 1979.104(e) be deleted in its entirety because a second review of the respondent's position unnecessarily delays the investigation. As noted above, it is OSHA's position that OSHA's investigation is conducted independently prior to the administrative hearing phase of the process, in which all parties participate fully. The purpose of § 1979.104(e) is to ensure compliance with the Supreme Court's ruling in *Brock v. Roadway Express, Inc.*, 107 S. Ct. 1740 (1987), in which the court, on a constitutional challenge to the temporary reinstatement provision in the employee protection provisions of the Surface Transportation Assistance Act (now codified at 49 U.S.C. 31105), upheld the facial constitutionality of the statute and the procedures adopted by OSHA under the Due Process Clause of the Fifth Amendment, but ruled that the record