**U.S. Department of Labor**

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

JAN 11 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: JORDAN BARAB
Deputy Assistant Secretary

DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN
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SUBJECT: Clarification of the Work Refusal Standard under 29 CFR 1977.12(b)(2)

I. PURPOSE:

This document serves to clarify the proper application of the Section 11(c) work refusal interpretive regulation, 29 C.F.R. 1977.12(b)(2).

II. STATUTE AND REGULATION:

This guidance addresses 29 CFR 1977.12(b)(2), the Section 11(c) interpretive regulation, which provides:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition,

in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

In the Whistleblower Investigations Manual (WIM), Chapter 7, par. IV.E., p. 7-4, this language has been broken down into five requirements for a protected work refusal:

1) a reasonable apprehension of death or serious injury,
2) a good faith refusal,
3) no reasonable alternative,
4) insufficient time to eliminate the condition through regular statutory channels, and
5) where possible, the employee sought and was unable to obtain a correction of the dangerous condition.

III. BACKGROUND:

The work refusal standard is by far the most frequently discussed substantive issue at DWPP's Review Forum (DRF) and the Department of Labor Review Committee (DRC). For example, in FY 2014, approximately 22 percent of cases discussed at the DRF or the DRC involved a possible misapplication of the work refusal regulation.

In addition, in FY 2014 there were 165 complaints administratively closed on the basis of an unprotected work refusal under Section 11(c), which represents 3.9 percent of Section 11(c) complaints that were administratively closed. In FY 2015, there were 138 complaints administratively closed on the basis of an unprotected work refusal, representing 3.3 percent of all 11(c) complaints administratively closed. Thus, the issues identified below implicate a large percentage of the whistleblower program's work across the country.

IV. ISSUES IDENTIFIED:

Many of the issues identified relate to the fact that 29 CFR 1977.12(b)(2) is a test for protected activity, and thus failure to meet the work refusal test does not necessarily make a complaint non-merit. OSHA staff should be sure to only administratively close cases in which a Complainant engaged in an unprotected work refusal if (1) the Complainant is not alleging that he engaged in additional protected activities, and (2) the work refusal does not meet the requirements of 29 CFR 1977.12(b)(2).

More specifically, DWPP has identified four significant trends in work refusal cases:

1. Administrative Closures and Docket/Dismiss cases: Cases occasionally are docketed and dismissed or administratively closed for lack of a prima facie case based on invalid work

refusals. However, conducting substantive interviews or gathering evidence is generally *necessary* to determine whether a work refusal was valid. Often, cases are listed as "invalid work refusals" in IMIS and screened out without the documentation necessary to show that the facts needed for that determination were considered.

- Example 1: The Complainant complained to management about experiencing headaches, nausea, and fainting because of his exposure to an industrial chemical that was labeled as a hazardous substance according to 29 CFR 1910.1200. The chemical was recently introduced into the manufacturing process, and other workers also complained of the fumes. The Complainant was made to work third shift so that no one else would be exposed. On several occasions, the Complainant alleges that he passed out and only came to the next morning. The Complainant refused to work with the chemical for several months until the workplace could be ventilated and he could receive proper personal protective equipment. The Respondent ordered the Complainant not to use any PPE while other workers were around because it might startle them. The Respondent also refused to ventilate the workspace. The Complainant called the manufacturer of the chemical to request safety information, and when the Respondent learned of this call, the Respondent made the Complainant train his replacement. When the Complainant refused to train his replacement, he was fired. The complaint was docketed and dismissed for "invalid work refusal" and the complainant appealed. Here, there were actually two work refusals and numerous protected activities, which would probably require investigation beyond the initial complainant interview.

2. Misapplication of the "Insufficient Time" Requirement: Under 1977.12(b)(2), a requirement for a valid work refusal is "...that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." This criterion has been interpreted by the Supreme Court in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10-11 (1980) to mean that there was insufficient time to apprise OSHA of the danger. It is not an absolute requirement that a complainant call federal or state OSHA after being instructed to perform a dangerous task. Nonetheless, complaints were dismissed based on the fact that a worker did not call OSHA when given a dangerous assignment.

   OSHA should determine whether (1) the complainant called federal or state OSHA and, if not; (2) whether there was a period of time during which the complainant reasonably could have contacted federal or state OSHA but did not do so.

- Example 2: The Complainant worked with waste that contained high levels of lead, and he had been trained to only use a particular type of jump-suit while working in contaminated areas. The Complainant arrived to work one day and was given a jumpsuit made out of a different material. The Complainant allegedly had no prior notice that new jump suits would be issued, and the Complainant reasonably believed that the new jump suits were not OSHA-compliant. The Complainant asked for an old jump suit, and was told that he would not be given one. He refused to perform his usual duties and was terminated. The case was dismissed because the Complainant did not attempt to eliminate the danger through regulatory channels. However, there is no indication that the Complainant had time to do so before refusing the assignment.

- Example 3: The Complainant was a general laborer and was assigned to use a forklift which he allegedly had never been trained to use. The Respondent terminated the Complainant for refusing an assignment approximately ten minutes later. The complaint was dismissed for an unprotected work refusal because the complainant did not contact OSHA. However, before reaching the conclusion that the Complainant should have called OSHA, the investigation should have explored whether the Complainant had *time* in which to call OSHA.

- Example 4: The Complainant, a pipefitter, was welding pipe inside a building when the power unexpectedly went out. The Complainant stopped working and eventually left the job site while it was still dark. The case was dismissed for, among other reasons, the fact that the Complainant did not attempt to eliminate the danger through regulatory channels. However, the Complainant was not aware ahead of time that the lights would go out, and there was no time for the Complainant to call OSHA before refusing to weld in the dark.

3. Other Protected Activities Not Considered: Cases are often dismissed for an unprotected work refusal without investigating other protected activities that are alleged in the complaint. A case should only be dismissed based on an unprotected work refusal if it was the *only* protected activity alleged.

   In many cases, other forms of protected activity usually precede the actual refusal, such as the complainant raising a safety-related concern *before* refusing to perform a task. Of course, the Respondent may allege that it terminated the Complainant for insubordination or for refusing an assignment, but such justifications should still be tested for pretext like any other.

- Example 5: The Complainant was a laborer for a staffing agency that assigned him to work with solid waste. The Complainant alleges that he was given improper personal protective equipment which caused both of his hands to become infected. The Complainant reported the infection and the improper PPE to the Respondent. When the Complainant was later re-assigned to the same site, he again raised his concerns with the Respondent. The Respondent terminated the Complainant for insubordination and the case was dismissed for lack of protected activity. Although the work refusal was likely unprotected, the Complainant engaged in multiple protected activities when he consistently raised the concerns regarding PPE and the infection.

- Example 6: The Complainant was a maintenance worker in a factory that made food products. On occasion, he would be required to perform maintenance on a silo that held a large amount of sugar. The Complainant frequently voiced his concerns that management wanted him to access the inside of the silo by opening the hatch while sugar was passing through it. This action would stir up dust. One day, the Complainant felt ill and refused to perform the maintenance according to management's instructions. The Complainant was suspended, pending investigation into his refusal. The next day, the Complainant went to the doctor and was diagnosed, allegedly for the first time, with an illness caused by dust inhalation. The Complainant provided the diagnosis to Respondent while he was still suspended. The next day, Respondent decided to terminate the Complainant. The Complainant alleged that he engaged in three protected activities, raising concerns with management regarding the dust, engaging in a work refusal, and reporting an injury. The investigation was focused almost entirely on the first two protected activities, and the prima facie case based on the Complainant reporting a work-related illness was not brought-up in interviews or discussed in the ROI.

4. Mixing Analysis of a Refusal and a Voluntary Quit Action: In investigations, work refusal analysis is sometimes combined with factual disputes as to whether a complainant quit or was fired. These should be separate analyses:

    1.) Was the employee terminated (or constructively discharged) or did the employee voluntarily quit?
    2.) If the employee was terminated or constructively discharged for a refusal, did the refusal amount to protected activity?

However, it should be noted that where there is a protected refusal to work, the complainant does not inform management that he or she is quitting, the complainant leaves the workplace, and the employer regards the employee's action as a quit, e.g. by claiming in an unemployment

compensation proceeding that complainant quit, the employer's action should be regarded as a discharge. This principle has been adopted by the Department of Labor under analogous OSHA whistleblower statutes. *See, e.g., Nevarez v. Werner Enterprises*, ARB No. 14-010, ALJ No. 2013-STA-012 Slip op. at 10-11 (ARB Oct. 30, 2015).

- Example 7: A worker who received daily assignments from a union hiring hall was assigned to operate a large piece of machinery. The machinery had many blind spots, and so the worker asked to have a checker assist him in avoiding striking pedestrians or coworkers. The Respondent refused to provide a checker and pointed out that none of the other operators used checkers. The next time that the union assigned the Complainant to work for Respondent, the Complainant refused to perform the task without a checker. The Respondent again refused to provide one, and the Complainant left the job site. The Complainant claimed that he was sent home and was no longer offered assignments with Respondent. Respondent claimed that it paid Complainant for the entire day even though Respondent interpreted Complainant's actions as a voluntary quit. The case was eventually dismissed because Complainant did not have a reasonable apprehension of death or serious bodily injury, and thus did not engage in a protected work refusal. However, the investigation did not determine the adverse action.

## V. INVESTIGATIVE CONSIDERATIONS FOR SECTION 11(C) COMPLAINTS INVOLVING A WORK REFUSAL.

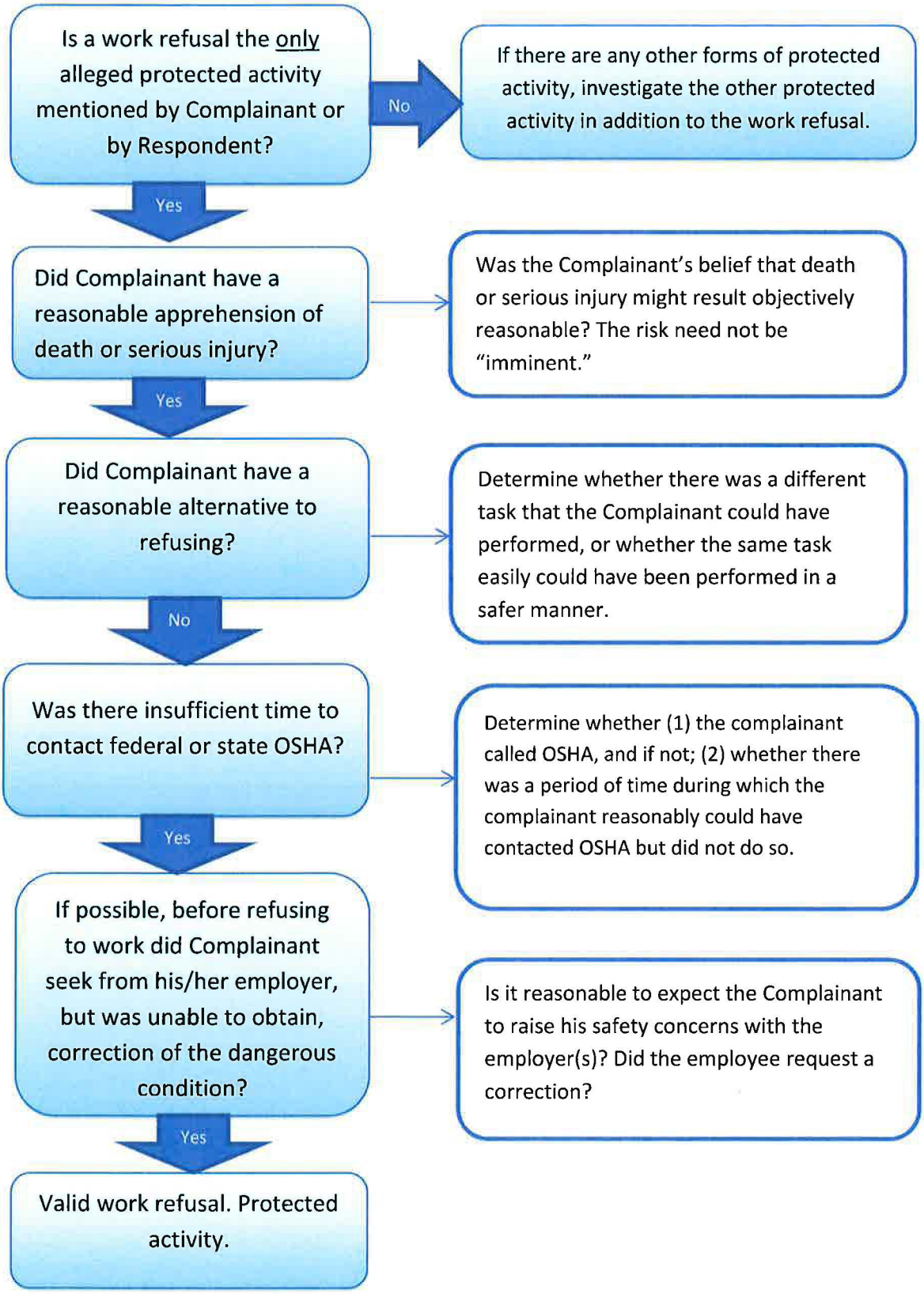
The following are situational considerations to ensure that the work refusal criteria under section 11(c) are applied properly:

- A case filed under Section 11(c) should only be administratively closed for an unprotected work refusal if the work refusal is the **only** protected activity alleged and the work refusal does not meet the requirements of 29 CFR § 1977.12(b)(2) as described above.

- Be sure to determine whether a complainant alleging a work refusal engaged in additional protected activities. Complainants frequently raise safety concerns before engaging in a work refusal, which may have precipitated the work refusal. Any protected activity that occurred after a work refusal but before the adverse action occurs also should be considered.

- If a respondent alleges that it terminated a complainant because of an unprotected work refusal, the respondent's defense should still be tested for pretext if the complainant alleges a prima facie case based on other protected activities.

- Complainants are not required to contact federal or state OSHA before engaging in a work refusal if there was insufficient time to do so.

Attached to this memo is a Work Refusal Desk Aid that may be used as a quick reference. If further guidance or assistance is needed regarding the proper application of the work refusal criteria, please contact RSOL, DWPP, or your supervisor.

Work Refusal Desk Aid