

---

# Investigator’s Desk Aid to the Asbestos Hazard Emergency Response Act (AHERA) Whistleblower Protection Provision

## 15 U.S.C. § 2651

---

### Table of Contents

I. AHERA in a Nutshell .....	2
II. Statute and Regulations.....	2
III. Coverage.....	3
A. Covered Entities .....	3
B. Covered Employees.....	3
IV. Protected Activity .....	3
V. Procedures for Handling AHERA Complaints.....	4
A. Complaint.....	4
B. Investigation.....	5
C. Review .....	5
D. Kick-Out.....	5
Attachment 1 (Optional Worksheet: Analyzing AHERA Whistleblower Complaints).....	6

---

*This Desk Aid represents the Occupational Safety and Health Administration’s (OSHA’s) summary of the scope of coverage and protected activity and the procedures for handling investigations under the whistleblower protection provision of the Asbestos Hazard Emergency Response Act (AHERA) as of the “last revised” date below. This Desk Aid is intended for OSHA’s use and the guidance herein is subject to change at any time. This Desk Aid is informational in content. It is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. Furthermore, there may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid.*

#### *Abbreviations Used in this Desk Aid:*

AHERA	Asbestos Hazard Emergency Response Act
DWPP	Directorate of Whistleblower Protection Programs
EPA	Environmental Protection Agency
OSH Act	Occupational Safety and Health Act of 1970
RSOL	Regional Solicitor’s Office
WIM	Whistleblower Investigations Manual

## I. AHERA in a Nutshell

AHERA is designed to protect individuals from asbestos in public and private, nonprofit elementary and secondary schools. The whistleblower provision of AHERA protects employees (whether or not they are employees of a State or local educational agency) from discharge or other forms of retaliation by a State or local educational agency (defined below) for making complaints about potential violations of AHERA in covered schools.

Under AHERA, no State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of AHERA to any other person, including a State or the Federal government.

Days to File	Respondents Covered	Kick-Out Provision	Allowable Remedies				Review		Burden of Proof
			Backpay	Preliminary Reinstatement	Compensatory	Punitive	Days	Venue	
90	Covered School (Public Elementary or Secondary; BIE; Private, Nonprofit Elementary or Secondary; Defense Department Schools)	No	Yes	No	Yes	Yes	15	OSHA	But-for

## II. Statute and Regulations

15 U.S.C. § 2651 provides:

*(a) PUBLIC PROTECTION. No State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this title to any other person, including a State or the Federal Government.*

*(b) LABOR DEPARTMENT REVIEW. Any public or private employee or representative of employees who believes he or she has been fired or otherwise discriminated against in violation of subsection (a) may within 90 days after the alleged violation occurs apply to the Secretary of Labor for a review of the firing or alleged discrimination. The review shall be conducted in accordance with section 660(c) of Title 29.*

AHERA specifically states that the Secretary’s “review” shall be conducted in accordance with Section 11(c) of the OSH Act. There are no regulations for AHERA, but Section 11(c) regulations contained in 29 CFR Part 1977 provide guidance to the extent they are consistent with AHERA.

### III. Coverage

Covered Entities:

State and local educational agencies. This includes private, nonprofit elementary and secondary schools.

Covered Employees:

All employees, public or private, whether or not they are employed by a school, and any representatives of employees.

#### A. Covered Entities

AHERA covers State and local educational agencies. These agencies are primarily responsible for the state supervision of public elementary and secondary schools; public authorities controlling public elementary and secondary schools; certain schools funded by the Bureau of Indian Education (BIE); private, nonprofit elementary and secondary schools; and defense dependents' education system schools.

#### B. Covered Employees

Section 211 of AHERA covers all employees, public or private, and any representatives of employees. Although the language of Section 211(a) covers "persons," Section 211(b) authorizes the Secretary of Labor to handle only discrimination against "employees." However, the employees need not be employees of state or local educational agencies.

### IV. Protected Activity

*Complaints to whom?*

Any person, including a State or federal agency.

*Complaints about what?*

A violation of AHERA (*i.e.*, violations regarding the management and handling of asbestos in covered schools). The complaint need not be accurate as long as it is based upon the complainant's reasonable belief.

AHERA addresses the management and handling of asbestos to reduce and prevent asbestos exposure hazards in covered schools. The AHERA whistleblower provision protects reporting violations of AHERA to any person, including a State or federal agency. Violations traditionally regard building renovations but can also relate to the accreditation of a contractor or laboratory to do asbestos work under 15 U.S.C. § 2646.

*Example:*

- A campus supervisor at a public high school in Colorado complained to the principal and staff about dust from the summer's asbestos removal project on surfaces in the school buildings and asked a contractor to have wipe samples taken. She later reported the findings to the press and appeared on TV news interviews where she stated that she intended to file a lawsuit because the school had exposed her to asbestos. The school subjected the supervisor to 13 months of threats and harassment, including statements that “*everything was fine until little missy took her sample,*” and “*maybe you should just quit.*” The district then placed her on half-day fire patrol. This assignment meant that she could not be present to pick-up her handicapped son from his school bus. Thus, the supervisor had no choice but to quit. OSHA found merit and obtained a consent judgment on behalf of the campus supervisor.

AHERA complaints may also implicate other whistleblower protection statutes. For example, the Clean Air Act is often implicated in an AHERA complaint. Investigators must remember to consider other statutory implications when screening AHERA complaints.

## **V. Procedures for Handling AHERA Complaints**

Since Section 211 of AHERA specifically refers to Section 11(c) of the OSH Act, all of the procedures and remedies under Section 11(c), including, but not limited to, administrative subpoenas and lawsuits filed by the Secretary in federal district court, apply to AHERA cases, except as expressly noted.

### **A. Complaint**

*Who may file:* An employee who believes that he or she has been retaliated against in violation of AHERA may file a complaint with OSHA. The employee may also have a representative file on the employee's behalf. The complaint should be filed with the OSHA Area Office where the protected activity took place, but filing with any OSHA Regional or Area Office or online is acceptable.

*Form:* The complaint need not be in any particular form. Oral or written complaints are acceptable. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

*Timing:* The complaint must be filed within 90 days from the time that the adverse action is communicated to the complainant. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA's [Whistleblower Investigations Manual](#).

*Distribution of complaints and findings to partner agencies:* Complaints and findings in AHERA cases must be sent to the EPA.

## **B. Investigation**

Upon OSHA receiving a complaint, OSHA will evaluate the complaint to determine if the complaint contains a *prima facie* allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, should allege that:

1. The employee engaged in AHERA-protected activity;
2. The respondent knew of or suspected that the employee engaged in AHERA-protected activity;
3. The employee suffered an adverse action;<sup>1</sup> and
4. There is a causal connection between the protected activity and the adverse action.

If the complaint meets these requirements, then OSHA will ask for a position statement from the respondent and proceed with the investigation.

OSHA must determine whether it has reasonable cause to believe that a violation occurred. In other words, OSHA must determine whether it has reasonable cause to believe that complainant would not have suffered the adverse action *but for* the protected activity. If it does, OSHA will informally consult with the RSOL. In a merit case, a lawsuit may then be filed on behalf of the Secretary of Labor in federal district court.

If OSHA does not find reasonable cause to believe that respondent violated AHERA, then it sends a letter with findings to that effect to the complainant with a copy to the respondent. This letter must state that the complainant has a right to request review of the field's dismissal by OSHA's DWPP.

Relief in an AHERA case includes, but is not limited to, reinstatement, back pay, compensatory damages, and in the special circumstances described in the WIM, punitive damages.

## **C. Review**

The complainant may disagree with OSHA's dismissal within 15 days of receipt and request a review of the field's findings by contacting the DWPP. The review process is the same as that for Section 11(c) dismissals.

## **D. Kick-Out**

AHERA does not include a "kick-out" provision, and therefore does not permit a complainant to file his or her claim in federal district court if the Department of Labor has not made a final decision in the case within a specified number of days.

---

<sup>1</sup> An adverse action is an action that might dissuade a reasonable employee from engaging in AHERA-protected activity. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, and disciplining the employee.

## Attachment 1: Optional Worksheet: Analyzing AHERA Whistleblower Complaints

*In order to recommend the filing of an AHERA suit, answers 1 to 7 must be "yes."*

	Yes	No
<b>Timeliness</b>		
1. Was complaint filed within 90 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Coverage</b> (See Desk Aid pp. 3.)		
2. Is complainant an employee, public or private, whether or not employed by a school, or a representative of an employee?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is respondent an agency responsible for the state supervision of public elementary or secondary schools; a public authority controlling public elementary or secondary schools; a school funded by the Bureau of Indian Education described in 20 U.S.C. 7801(30)(C); a private, nonprofit elementary or secondary school; or a defense dependents' education system school?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Protected Activity</b> (See Desk Aid pp. 3-4.)		
4. Has complainant reported to any person, including a State or federal agency, any violations of AHERA, which deals with asbestos in the covered schools, including violations involving the accreditation of a contractor or laboratory to do asbestos work under 15 U.S.C. § 2646? (The complaint need not be accurate as long as it is based on the complainant's reasonable belief.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Employer Knowledge</b>		
5. Did respondent know or suspect that complainant or someone associated with complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Adverse Action</b>		
6. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in AHERA-protected activity. Common examples include demoting or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Nexus (But-for)</b>		
7. Was complainant's AHERA-protected activity a <i>but-for reason</i> for respondent's decision to take adverse action against complainant? Evidence that an adverse action occurred because of the protected activity includes, but is not limited to: <ul style="list-style-type: none"> <li>• Close timing (temporal proximity) between the protected activity or an agency's response to the protected activity and the adverse action.</li> <li>• Evidence of hostility towards the protected activity.</li> <li>• Disparate treatment of complainant as compared to other employees following the protected activity.</li> <li>• Changes in respondent's treatment of complainant after the protected activity.</li> <li>• Indicators that respondent's stated reasons for the adverse action are pretext.</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>