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# Investigator’s Desk Aid to the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) Employee Protection Provision

## 49 U.S.C. § 30171

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*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 investigating and adjudicating retaliation complaints under MAP-21’s Employee Protection Provision as of the “last revised” date listed below. This Desk Aid is internal guidance directed to OSHA personnel and is subject to change at any time. This Desk Aid is not intended to reflect the views of other governmental agencies. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. This document is intended only to provide clarity for OSHA personnel regarding existing requirements under the law or agency policies. There may be a delay between the publication of significant decisions or other authority under this employee protection provision and modification of the Desk Aid. The Code of Federal Regulations; documents issued in compliance with Executive Orders 13891 and 13892 and the Administrative Procedure Act, as applicable; and decisions of the Department of Labor’s Administrative Review Board remain the official source for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.*

### Abbreviations Used in this Desk Aid

<b>MAP-21</b>	Moving Ahead for Progress in the 21 <sup>st</sup> Century Act (used in this Desk Aid to refer just to the MAP-21’s Employee Protection Provision, 49 U.S.C. § 30171)
<b>NHTSA</b>	National Highway Traffic Safety Administration
<b>OSHA</b>	Occupational Safety and Health Administration
<b>chapter 301</b>	49 U.S.C. chapter 301, relating to motor vehicle safety

## I. MAP-21's Employee Protection Provision in a Nutshell

MAP-21's Employee Protection Provision prohibits motor vehicle manufacturers, part suppliers, and dealerships from discharging or otherwise retaliating against an employee for reporting motor vehicle defects, noncompliance, or violations of notification or reporting requirements enforced by NHTSA or engaging in other protected activities.

MAP-21's Employee Protection Provision<sup>1</sup> can be found at 49 U.S.C. § 30171. The procedures for investigation and resolution of MAP-21 Employee Protection Provision complaints can be found at 29 CFR Part 1988. Most of the definitions relevant to MAP-21 Employee Protection Provision complaints<sup>2</sup> can be found at 49 U.S.C. § 30102 and 29 CFR 1988.101.

### A. Covered Entity

MAP-21's Employee Protection Provision prohibits motor vehicle manufacturers, part suppliers, and dealerships from discharging or otherwise retaliating against an employee.

Employees are individuals presently or formerly working for, or an individual who is applying to work for, or an individual whose employment could be affected by a motor vehicle manufacturer, part supplier, or dealership.

*What is a manufacturer, part supplier, or dealership?*

Manufacturer is defined as a person (1) manufacturing or assembling motor vehicles or motor vehicle equipment; or (2) importing motor vehicles or motor vehicle equipment for resale.

Part Supplier is defined in the motor-vehicle whistleblower incentive provision administered by NHTSA at 49 U.S.C. § 30172 as “a manufacturer of motor vehicle equipment” and that definition will likely apply in cases under the MAP-21 Employee Protection Provision.

Dealership is defined as a person selling and distributing new motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale.<sup>3</sup>

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<sup>1</sup> MAP-21 contains other provisions that are administered by other federal agencies.

<sup>2</sup> MAP-21's Employee Protection Provision complaints are distinct from whistleblower submissions made under 49 U.S.C. § 30172, *Whistleblower incentives and protections*. NHTSA administers the whistleblower program under 49 U.S.C. § 30172 and that program is not addressed in this Desk Aid.

<sup>3</sup> The term “dealership” appears in 49 U.S.C. § 30171 and does not generally appear in other provisions of chapter 301, which consistently uses the term “dealer.” OSHA interprets the term “dealership” to refer to a “dealer” as that term is defined in 49 U.S.C. § 30102. See *Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Interim Final Rule*, 81 Fed. Reg. 13976, 13977 (Mar. 16, 2016).

*What is a motor vehicle?*

A motor vehicle is a vehicle that is driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

*What is motor vehicle equipment?*

Motor vehicle equipment is:

- (1) any system, part, or component of a motor vehicle as originally manufactured;
- (2) any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle; or
- (3) any device or an article or apparel, including a motorcycle helmet and excluding medicine or eyeglasses prescribed by a licensed practitioner, that (i) is not a system, part, or component of a motor vehicle; and (ii) is manufactured, sold, delivered, or offered to be sold for use on public streets, roads, and highways with the apparent purpose of safeguarding users of motor vehicles against risk of accident, injury, or death.

Examples:<sup>4</sup>

- A company that sells new tires to individual customers for their personal automobiles is a dealership.
- A company that manufactures child car seats is a manufacturer of motor vehicle equipment and is a part supplier.
- A company that makes parts for recreational vehicles is a manufacturer of motor vehicle equipment and is a part supplier.
- A company that sells new school buses to local school districts is a dealership.
- A company that manufactures farm tractor parts and farm tractors that are not made primarily for use on public streets, roads, and highways is not a covered employer because the tractors do not fit within the definition of a motor vehicle.

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<sup>4</sup> The examples are provided for illustrative purposes only. Determinations of what constitute motor vehicles or motor vehicle equipment are made by NHTSA, which views the question as context specific.

## B. Protected Activity

Under MAP-21's Employee Protection Provision, an employee is protected from retaliation because the employee:

1. Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Secretary of Transportation, information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of chapter 301;

**OR**

2. Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of chapter 301;

**OR**

3. Testified or is about to testify in such a proceeding;

**OR**

4. Assisted or participated or is about to assist or participate in such a proceeding;

**OR**

5. Objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of chapter 301, or any order, rule, regulation, standard, or ban under chapter 301.

*Must the employee report an actual violation of motor vehicle safety law?*

MAP-21's Employee Protection Provision protects from retaliation an employee who provides information, files a proceeding, or objects to or refuses to participate in any activity so long as the employee reasonably believes there is or likely to be a defect, noncompliance, or violation. The employee does not need to provide information regarding a condition that *actually* is a defect, noncompliance, or violation of motor vehicle safety laws, orders, rules, regulations,

standards, or bans. A report based on a reasonable but mistaken belief of a defect, noncompliance, or violation is protected.

To have reasonable belief, an employee must have a subjective belief (i.e. actually believe that a defect, noncompliance, or violation exists or is likely to occur), and the belief must be objectively reasonable (i.e., a reasonable person in the employee's position could share this belief). In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. The report will be protected as long as a reasonable person with the same training and experience would also believe that the relevant condition or activity constitutes a defect, noncompliance, or violation.

*How specific does the employee's report of a violation or alleged violation need to be?*

The information that the employee provides to the employer or the U.S. Department of Transportation must be specific enough in relation to a given practice, condition, directive, or event for the employer or the U.S. Department of Transportation to investigate it. However, the employee does not have to specifically identify a provision of motor-vehicle safety law that he or she believes is being violated.

*Does MAP-21's Employee Protection Provision protect work refusals?*

Yes. MAP-21's Employee Protection Provision explicitly protects employees from retaliation for objecting to, or refusing to participate in, any activity that the employee reasonably believes to be in violation of chapter 301, or any order, rule, regulation, standard, or ban under chapter 301.

*What is a defect and what are some of the requirements that apply to defects and noncompliance reporting?*

A defect is broadly defined as any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment. Applicable NHTSA guidance primarily focuses on safety-related defects.<sup>5</sup> Some chapter 301 provisions that apply to defects reporting are:

Defect and Noncompliance Reporting Requirement: Under 49 U.S.C. § 30118(c), a manufacturer of a motor vehicle or replacement equipment is required to notify the Secretary of Transportation and the owners, purchasers, and dealers of the vehicle or equipment if the manufacturer (1) learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety; or (2) decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard prescribed under chapter 301.

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<sup>5</sup> NHTSA's guidance for reporting safety-related defects excludes conditions such as poor paint quality, ordinary wear and tear, and inoperable radios. More information about recall and defects reporting requirements and the types of defects that are considered safety-related can be found at [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/14218-mvsdefectsandrecalls\\_041619-v2-tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/14218-mvsdefectsandrecalls_041619-v2-tag.pdf). (Motor Vehicle Safety Defects and Recalls, What Every Vehicle Owner Should Know)

Reporting Requirement for Foreign Vehicles: The reporting requirement is not limited to defects found in the United States. If a manufacturer conducts a safety recall or other safety campaign in a foreign country, or the government of a foreign country has determined that a safety recall or other safety campaign must be conducted in the foreign country on a motor vehicle or motor vehicle equipment that is identical or substantially similar to a motor vehicle or motor vehicle equipment offered for sale in the United States, the manufacturer must report that determination to the Secretary of Transportation. 49 U.S.C. § 30166(l)(1)-(2).

Reporting Requirements of Known Injuries: Under 49 U.S.C. § 30166(m)(3)(C), a manufacturer of a motor vehicle or motor vehicle equipment must report to the Secretary of Transportation, as established by regulation, all incidents of which the manufacturer receives actual notice which involve fatalities or serious injuries which are alleged or proven to have been caused by a possible defect in the manufacturer's motor vehicle or motor vehicle equipment in the United States, or in a foreign country when the possible defect is in a motor vehicle or motor vehicle equipment that is identical or substantially similar to motor vehicle equipment offered for sale in the United States.

*Does MAP-21's Employee Protection Provision contain any explicit exceptions to protection?*

MAP-21's Employee Protection Provision does not protect employees who, acting on their own, without express or implied direction from the employer (or the employer's agent), deliberately violate any requirement relating to motor vehicle safety under chapter 301. This exception to protection is an affirmative defense that the employer must raise and requires an element of willfulness. In other words, for the exception to apply, the evidence must show that the employee knew or acted with reckless disregard for whether his or her conduct violated the law.

*What are examples of protected activities under MAP-21's Employee Protection Provision?*

Protected activities include, for instance:

- Internal safety complaints to management
- Safety complaints to NHTSA
- Complaints to the NHTSA safety hotline or online complaint form

Scenarios:

- An engineer works for a manufacturer of automobile parts. He learns that there is a condition that he reasonably believes to be a defect in a steering column that leads to an inadvertent deployment of the driver's side airbag. Upon learning that the manufacturer decided not to report the defect because of the cost associated with a recall, the engineer reports the defect to NHTSA. The engineer has engaged in protected activity under MAP-21's Employee Protection Provision by reporting a condition that he reasonably believes is a defect to NHTSA.

- An employee works for a motor vehicle manufacturer collecting consumer complaints. In compiling complaints regarding a faulty braking system on the company’s most popular motor vehicle, the employee realizes that the company only reported half of the complaints it received to NHTSA. The employee reports the anomaly to her boss. Her boss tells her that half of the complaints are probably driver error, not real safety complaints. The employee insists that the company must amend its safety report and is subsequently fired. Assuming that the employee’s belief that the company must amend its safety report is reasonable, the employee engaged in protected activity under MAP-21’s Employee Protection Provision by objecting to conduct that she reasonably believed to be in violation of chapter 301 or any order, rule, regulation, standard, or ban under chapter 301.

## **II. Procedures for Handling MAP-21 Employee Protection Provision Complaints**

Procedures for handling complaints under MAP-21’s Employee Protection Provision are contained in [29 CFR Part 1988](#). Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the “[What to expect during an OSHA Whistleblower Investigation](#)” section of OSHA’s website, in [OSHA’s MAP-21 Fact Sheet](#), and in the [OSHA Whistleblower Investigations Manual](#).

### **A. Complaint**

*Who may file:* An employee who believes that he or she has been retaliated against in violation of MAP-21’s Employee Protection Provision may file a complaint with OSHA. The employee may also have a representative file on the employee’s behalf.

*Form:* The complaint need not be in any particular form. Oral or written complaints are acceptable, including OSHA’s [Online Complaint form](#). If the complainant cannot make the complaint in English, OSHA will accept a complaint in any language.

*Timing:* The complaint must be filed within 180 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with guidance in OSHA’s Whistleblower Investigations Manual.

*Distribution of complaints and findings to partner agencies:* Complaints and findings in MAP-21’s Employee Protection Provision cases must be electronically sent to NHTSA.

### **B. Investigation**

Upon receiving a complaint, OSHA will evaluate the complaint to determine whether 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 protected activity;
- (2) The respondent knew or suspected that the employee engaged in protected activity;

- (3) The employee suffered an adverse action<sup>6</sup>; and
- (4) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not meet these requirements, and the complainant does not agree to administrative closure of the complaint, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a Department of Labor administrative law judge (ALJ).

The MAP-21 Employee Protection Provision uses a “contributing factor” standard of causation. Thus, following the investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that protected activity was a contributing factor in the decision to take adverse action against the complainant and the respondent has not shown by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. A contributing factor is a factor which, alone or with other factors, in any way affects the outcome of a decision.

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as neutral reference), and reasonable attorney’s fees and costs.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

If the complainant and respondent agree to settle their case during the investigation, they must submit the settlement agreement for OSHA’s review and approval.

### **C. Administrative and Judicial Review**

Either the complainant or the respondent may object to OSHA’s findings within 30 days and request a hearing before an ALJ. Filing objections will stay OSHA’s order for all relief except reinstatement, which is *not* automatically stayed. If no objections are filed, OSHA’s findings become the final order of the Secretary of Labor, not subject to review.

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery

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<sup>6</sup> An adverse action is an action that might dissuade a reasonable employee from engaging in protected activity under the MAP-21 Employee Protection Provision. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA’s investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ’s decision in the case to the Department of Labor’s Administrative Review Board (ARB), which may either accept or reject the case for review. A complainant or respondent may obtain review of an ARB decision or an ALJ decision that the ARB has declined to review by appealing to the appropriate U.S. Court of Appeals.

#### **D. Kick-Out Provision**

The MAP-21 Employee Protection Provision permits a complainant to bring a *de novo* action in federal district court if 210 days have passed since the filing of the complaint with OSHA, the Department of Labor has not reached a final decision on the complaint, and the delay is not due to the bad faith of the complainant.

### **III. Resources and Relevant NHTSA Regulations**

The [NHTSA website](https://www.nhtsa.gov) contains a wealth of information that can be helpful to OSHA investigators in cases under the MAP-21 Employee Protection Provision, including NHTSA regulations and advisory circulars, as well as many other materials. Relevant NHTSA regulations can be found at <https://www.nhtsa.gov/laws-regulations>. In addition, a safety issues and recalls webpage can be found at <https://www.nhtsa.gov/recalls>.

The following chart lists some of the NHTSA regulations that are most frequently relevant to OSHA’s MAP-21 Employee Protection Provision investigations:

<b>Regulation</b>	<b>Title</b>	<b>Brief Description</b>
49 CFR Part 565	Vehicle Identification Number (VIN) Requirements	This part specifies the format, content, and physical requirements for a VIN system and its installation to simplify vehicle identification information retrieval and to increase the accuracy and efficiency of vehicle recall campaigns.
49 CFR Part 571	Federal Motor Vehicle Safety Standards	This part contains Federal Motor Vehicle Safety Standards (FMVSS). Manufacturers are required to certify that the motor vehicles and motor vehicle equipment they manufacture comply with all applicable FMVSS at the time of manufacture. If the motor vehicles or items of motor vehicle equipment do not comply, manufacturers need to follow the noncompliance notification procedures in part 573.

49 CFR Part 573	Defect and noncompliance responsibility and reports	<p>Contains a variety of regulations including:</p> <ul style="list-style-type: none"> <li>• 573.6(b) requires a report to be filed within 5 working days after a safety-related defect has been determined to exist or that a noncompliance with an applicable FMVSS exists. Case law has interpreted this provision to include those situations where a manufacturer <i>should have known</i> of a safety-related defect or a noncompliance with an FMVSS</li> <li>• 573.6(c) discusses what information shall be included in the report</li> <li>• 573.6(c)(10) requires that a representative copy of all notices, bulletins, and other communications that relate directly to the defect or noncompliance and are sent to more than one manufacturer, distributor, dealer, or purchaser be sent to NHTSA</li> <li>• 573.7 requires the manufacturer to file quarterly reports regarding notification (recall) campaigns</li> <li>• 573.11 contains a prohibition on sale or lease of new defective and noncompliant motor vehicles and items of replacement equipment</li> <li>• 573.12 contains a prohibition on sale or lease of new and used defective and noncompliant motor vehicle equipment</li> </ul>
49 CFR Part 576	Record Retention	<p>Contains requirements for the retention by manufacturers of motor vehicles and of motor vehicle equipment of claims, complaints, reports, or other records concerning alleged or proven motor vehicle or motor vehicle equipment defects and malfunctions that may be related to safety.</p>
49 CFR Part 577	Defect and noncompliance notification	<ul style="list-style-type: none"> <li>• Contains requirements about what must be included in a notification</li> <li>• 577.7(a) requires the notification to be furnished no later than 60 days from the date the manufacturer files its defect or noncompliance report under part 573</li> <li>• 577.8 prevents certain disclaimers in the notification</li> <li>• 577.13 contains the requirements of notification to dealers and distributors</li> </ul>

49 CFR Part 579	Reporting of information and communications about potential defects	<p>Contains regulations including:</p> <ul style="list-style-type: none"> <li>• 579.5(a) requires manufacturers to furnish to NHTSA a copy of all notices, bulletins, and other communications sent to more than one manufacturer, distributor, dealer, lessor, lessee, owner, or purchaser in the United States, regarding any defect in its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or any flaw or unintended deviation from design specifications) whether or not such defect is safety-related</li> <li>• 579.5(b) requires each manufacturer to furnish a copy of each communication relating to a customer satisfaction campaign, consumer advisory, recall, or other safety activity involving the repair or replacement of motor vehicles or equipment that that manufacturer issued to, or made available to, more than one dealer, distributor, lessor, lessee, or other manufacturer, owner, or purchaser, in the United States</li> <li>• 579.11 and 579.12 contain regulations relating to reporting of safety recalls and other safety campaigns in foreign countries</li> <li>• 579.21 to 571.29 contain regulations relating to reporting of early warning information</li> </ul>
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## Attachment 1: Optional Worksheet: Analyzing MAP-21’s Employee Protection Provision Complaints

*In order to issue merit findings, answers 1 to 9 must be “yes” and answer 10 must be “no.”*

	Yes	No
<b>Timeliness</b> (See Desk Aid p. 7)		
1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Coverage</b> (See Desk Aid pp. 2-3)		
2. Is respondent a motor vehicle manufacturer, part supplier, or dealership? (Reminder: A dealership sells and distributes <i>new</i> motor vehicles or <i>new</i> motor vehicle equipment to purchasers other than for resale)?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of the MAP-21 Employee Protection Provision?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Protected Activity</b> (See Desk Aid pp. 4-7)		
4. Has the complainant (or is complainant about to):		
a. Provided/caused to be provided to the employer or the Secretary of Transportation information relating to any motor vehicle defect, noncompliance, or any violation/alleged violation of any notification or reporting requirement of chapter 301?		
b. Filed/caused to be filed a proceeding relating to any motor vehicle defect, noncompliance, or any violation/alleged violation of any notification or reporting requirement of chapter 301?	<input type="checkbox"/>	<input type="checkbox"/>
c. Testified, assisted, or participated in such a proceeding?		
d. Objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of chapter 301 or any order, rule, regulation, standard, or ban under chapter 301?		
5. For items 4a., 4b., or 4d., does the complainant have a subjective, good faith belief that there is a potential defect, non-compliance, or violation?	<input type="checkbox"/>	<input type="checkbox"/>
6. For items 4a., 4b., or 4d., would a reasonable person with similar training, knowledge, and experience believe that a defect, noncompliance, or violation exists or is likely to occur?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Employer Knowledge</b>		
7. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to the 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>		
8. 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 protected activity. Common examples include firing, demoting, or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Nexus (Contributing Factor)</b>		
9. Was complainant’s protected activity a <i>contributing factor</i> in respondent’s decision to take adverse action against the complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to:		
• Close timing (temporal proximity) between the protected activity and the adverse action		
• Evidence of hostility towards the protected activity.	<input type="checkbox"/>	<input type="checkbox"/>
• Disparate treatment of complainant as compared to other employees following the protected activity.		
• Changes in respondents’ treatment of complainant after the protected activity.		
• Indicators that respondent’s stated reasons for the adverse action are pretext.		
<b>Affirmative Defense</b>		
10. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	<input type="checkbox"/> No	<input type="checkbox"/> Yes