

U.S. Department of Labor

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



Reply to the attention of:

DECISION

MEMORANDUM FOR THE ASSISTANT SECRETARY

THROUGH:

JORDAN BARAB
Deputy Assistant Secretary

DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM:

WILLIAM DONOVAN
Acting Director, Directorate of Whistleblower Protection Programs

LAFE SOLOMON,
Senior Advisor, Office of the Solicitor

SUBJECT: Referring Untimely 11(c) Complainants to the NLRB

SUMMARY

Section 11(c) of the Occupational Safety and Health Act of 1970 (Section 11(c)) requires that complaints be filed with OSHA within 30 days of the alleged adverse action. Hundreds of Section 11(c) complaints are screened out or dismissed each year because the complainant has failed to timely file the complaint. However, some of these complainants may be able to file a charge alleging unfair labor practices with the National Labor Relations Board (NLRB). In an effort to improve customer service for these complainants, as well as improve cooperation between OSHA and the NLRB, the Directorate of Whistleblower Protection Programs (DWPP) and the Office of the Solicitor recommend that OSHA refer complainants who have filed, or attempted to file, untimely complaints under Section 11(c) to the NLRB. Implementation of this policy can be achieved through normal OSHA intra-agency communications, as discussed further below.

BACKGROUND

Section 7 of the National Labor Relations Act (NLRA) in relevant part provides that "Employees shall have the right to ... engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA prohibits unfair labor practices which restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Employees may file a charge with the NLRB alleging unfair labor practices.

Section 11(c) provides that "no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Employees may file complaints with OSHA alleging retaliation prohibited by 11(c).

Although there may be some individual safety and health activities which may be protected solely under the OSH Act, many employee safety activities involve concerted activity protected under the NLRA and therefore may be protected under both Acts. Given this possible overlap, OSHA and the NLRB signed an MOU in 1975, outlining the procedures for handling worker safety retaliation complaints file with both or either agency. The MOU generally provides that where a complaint is filed with both agencies, enforcement actions should primarily be taken under the OSH Act, rather than the NLRA.

Since the development of the MOU, the number of 11(c) complaints filed with OSHA has steadily risen. DWPP and SOL agree that it is appropriate to reconsider ways in which NLRB and OSHA may cooperate in order to fully protect the rights of employees filing complaints with either agency. One area in which OSHA can take immediate action without requiring additional resources is referral of untimely 11(c) complainants to the NLRB.

Section 11(c) requires that employees file a complaint of retaliation with OSHA within 30 days of the alleged adverse action. This is a very short time in which to file a complaint, as compared to some of the newer anti-retaliation statutes that OSHA enforces, most of which have a 180-day time limit to file a complaint. Approximately 300 Section 11(c) complaints are screened-out each year for missing the 30-day filing deadline, at least a third of which miss the deadline by 30 days or less. OSHA may not investigate these complaints to determine whether retaliation has occurred.

RECOMMENDED POLICY

DWPP and SOL recommend that OSHA establish the following policy:

OSHA personnel will advise all complainants who have filed, or attempted to file, an untimely Section 11(c) complaint to also contact the NLRB to inquire about filing a charge alleging unfair labor practices. OSHA personnel must first follow their Region's policy with respect to discussing the complainant's rights under Section 11(c) and options with respect to untimely filed complaints (e.g. screen out or docket/dismiss).

After such discussion, OSHA personnel will then advise complainants regarding their ability to contact the NLRB. OSHA will advise the complainant that they *may* file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than OSHA's (1 month) and therefore OSHA recommends that the complainant contact the NLRB as soon as possible to discuss his or her rights. OSHA personnel should then give the complainant the contact information for the complainant's appropriate NLRB Field Office, which can be found at

<http://www.nlr.gov/who-we-are/regional-offices>, and the NLRB's toll-free number, 1-866-667-NLRB. Closing letters for screened out complaints will also include information regarding contacting the NLRB. DWPP will work with SOL to provide sample language to be used during telephone conversations and in screen-out closing letters.

Any OSHA personnel who respond to calls or written communications from employees regarding their rights under Section 11(c) should be trained and instructed on this policy, including non-whistleblower staff. This instruction can be delivered simply through intra-agency communications from the Regional Administrators (RAs) to their Regional and Area Office staff, via email communication and regular staff meetings.

EXPECTED PUBLIC REACTION

DWPP does not expect the establishment of this policy to generate any public criticism. DWPP expects internal and external stakeholders to respond favorably.

COMMUNICATION ROLL OUT STRATEGY

OSHA will communicate this policy to the RAs and Whistleblower Supervisors through a memorandum from the Assistant Secretary to the RAs. DWPP will also discuss this policy with the RAs and Whistleblower Supervisors during regularly scheduled teleconferences. The RAs and Whistleblower Supervisors will then communicate this policy to their Regional and Area Office staff through regularly scheduled staff meetings and normal email communications. DWPP does not recommend a public roll out of this policy.

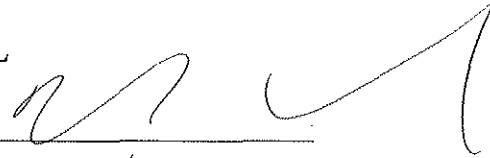
RECOMMENDED COURSE OF ACTION

DWPP and SOL recommend that you approve the proposed policy so that OSHA may begin implementation.

CONTACT

Please contact Bill Donovan, Acting Director, at (202) 693-2554, if you have any questions.

APPROVAL

Approved:  _____

Date: 3-6-14

Disapproved: _____

Date: _____

COMMENTS