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# Investigator’s Desk Aid to the Energy Reorganization Act (ERA) Whistleblower Protection Provision

## 42 U.S.C. § 5851

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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 ERA as of the “last revised” date listed 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 not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. 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. The Federal Register, the Code of Federal Regulations, and decisions of the Department of Labor’s Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.*

Abbreviations Used in this Desk Aid:

<b>AEA</b>	Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.)
<b>ADR</b>	Alternative Dispute Resolution
<b>ALJ</b>	Administrative Law Judge (DOL)
<b>DOE</b>	Department of Energy
<b>ERA</b>	Energy Reorganization Act (used in this Desk Aid to refer just to the Act’s whistleblower protection provision)
<b>NRC</b>	Nuclear Regulatory Commission
<b>OSH Act</b>	Occupational Safety and Health Act, 29 U.S.C. 660(c)
<b>OSHA</b>	Occupational Safety and Health Administration
<b>TVA</b>	Tennessee Valley Authority

## **I. ERA in a Nutshell**

The Energy Reorganization Act (ERA) of 1974 established the Nuclear Regulatory Commission (NRC) and divided responsibilities related to the regulation of the nuclear industry between the NRC and the Department of Energy (DOE). Section 211(a) of the ERA, as amended, protects certain employees in the nuclear industry from discharge or other retaliation by their employers for reporting violations of the ERA, or the Atomic Energy Act of 1954, as amended (AEA), or engaging in other protected activities.

Under the ERA, no covered employer may discharge or otherwise retaliate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee), whether at the employee’s initiative or in the ordinary course of the employee’s duties, engaged in any ERA-protected activity.

ERA’s whistleblower provision can be found at [42 U.S.C. 5851](#). The procedures for the investigation and resolution of ERA whistleblower complaints can be found at [29 CFR Part 24](#). Most of the definitions relevant to ERA whistleblower complaints can be found at [29 CFR 24.101](#).

## II. Covered Entities

ERA prohibits retaliation by covered employers against employees. Covered employers are defined in the statute as:

- Licensees of the NRC or an Agreement State and applicants for such licenses;
- Contractors or subcontractors of licensees (or applicants for licenses) of the NRC or an Agreement State;
- NRC contractors or subcontractors;
- DOE contractors and subcontractors that are indemnified by DOE under the AEA (except those covered by Executive Order 12344, which relates to the naval nuclear propulsion program); and
- The NRC and DOE (however, see discussion of sovereign immunity below).

### A. Employers

In determining whether an employer is covered by the ERA, pay attention to whether the employer's (or the entity that hired the employer) nuclear-related operations are regulated by the NRC or DOE because it may affect the analysis of protected activity.

#### 1. NRC-regulated Employers

##### a. What is a licensee of the NRC?

Because the ERA applies to NRC licensees and applicants for a license and their contractors and subcontractors, determining whether an entity is an NRC licensee or applicant for an NRC license is important for determining whether a respondent is a covered employer is under the ERA.

As of 2021, the NRC regulated 93 commercial nuclear power reactors operating in 28 States at 55 sites; 31 research and test (non-power) reactors; about 4,200 people licensed to operate reactors; 25 nuclear reactors in various stages of decommissioning; 80 independent spent fuel storage installations; 9 licensed fuel cycle facilities; 3 uranium recovery sites; and approximately 2,200 research, medical, industrial, government, and academic materials licensees. The NRC also had issued 6 reactor early site permits, 6 reactor design certifications, and 14 combined licenses for new reactors.<sup>1</sup>

NRC licenses are issued for activities such as:

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<sup>1</sup> Information Digest, 2021-2022, NUREG-1350, Volume 33, (October 2021), available at <https://www.nrc.gov/docs/ML2130/ML21300A280.pdf>.

- Constructing, operating, and decommissioning commercial reactors and fuel cycle facilities.
- Possessing, using, processing, exporting and importing nuclear materials and waste, and handling certain aspects of their transportation.
- Siting, designing, constructing, operating, and closing waste disposal sites.

More information about NRC licensing can be found at <https://www.nrc.gov/about-nrc/regulatory/licensing.html>.

## **b. What is an Agreement State?**

Under the AEA, the NRC may enter into an agreement with a State for the State to assume responsibility for licensing and regulating certain facilities, operators, and materials that would otherwise be licensed and regulated by the NRC. Agreement States have entered into agreements with the NRC that give them the authority to license and inspect byproduct, source, or special nuclear materials<sup>2</sup> used or possessed within their borders. As of July 2021, the NRC had agreements with 39 Agreement States. More information regarding the NRC's Agreement State Program can be found at: <https://www.nrc.gov/about-nrc/state-tribal/agreement-states.html>.

## **c. How can I determine whether an entity is a licensee of the NRC or an Agreement State, or an applicant for such a license?**

The whistleblower complaint and other materials submitted by the complainant and the respondent during the investigation most often will establish the basis for ERA coverage. However, when necessary, the status of an entity as an NRC licensee or applicant for an NRC license can be verified by checking the NRC's website or by contacting the relevant NRC regional office. A list of licensee facilities is available online from the NRC at <http://www.nrc.gov/info-finder.html>, and a list of applicants for NRC licenses is available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html>. Neither list is exhaustive, however. When a facility's status is unclear, the NRC can be directly consulted. The status of the entity as a licensee of an Agreement State or an applicant for a license can be verified by contacting the relevant Agreement State liaison. Contact information for Agreement State liaisons is available at <https://scp.nrc.gov/asdirectory.html> or can be requested from the relevant NRC regional office.

## **d. Contractors and Subcontractors of NRC or Agreement State Licensees (or applicants for such licenses) and NRC Contractors and Subcontractors**

Contractors and subcontractors of NRC or Agreement State licensees (or applicants for such licenses) and NRC contractors and subcontractors are covered employers under the ERA. Such contractors and subcontractors are therefore prohibited from retaliating against an employee for engaging in ERA-protected conduct.

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<sup>2</sup> The definitions for byproduct, source, and special nuclear materials are available at <https://www.nrc.gov/materials.html>.

## 2. DOE Contractors and Subcontractors

DOE contractors and subcontractors that are indemnified by DOE under 42 U.S.C. 2210(d) are covered employers and are therefore prohibited from retaliating against an employee for engaging in ERA-protected conduct.<sup>3</sup>

If the materials submitted by the complainant and the respondent during the investigation do not establish the basis for ERA coverage, the status of an entity as a DOE contractor or subcontractor can be verified by checking DOE's website or by contacting the relevant DOE regional office.

Covered employers under the ERA do not include DOE contractors and subcontractors covered by Executive Order 12344, which relates to the naval nuclear propulsion program. Thus, covered employers under the ERA do not include any contractor or subcontractor of DOE that deals with work that is the subject of Executive Order 12344. For instance, a subcontractor performing work related to decommissioning and decontaminating naval nuclear reactor facilities for companies that contracted with the Office of Naval Reactors would not be a covered employer under the ERA.<sup>4</sup>

## 3. DOE and the NRC (and other federal agencies) as Respondents

The ERA provides that the NRC and the DOE are covered employers that are prohibited from retaliating against their employees. Additionally, in some instances, other federal agencies, such as the Veterans Administration, may conduct certain activities pursuant to an NRC license, making them covered employers prohibited from retaliating in violation of the ERA. However, federal sovereign immunity is not generally waived under the ERA.<sup>5</sup> Thus, a complainant may not pursue an ERA whistleblower claim against NRC, DOE, or another federal agency whose sovereign immunity is not waived. For certain federal agencies, sovereign immunity has been waived through means other than the ERA whistleblower provision. For example, the ARB has held that federal sovereign immunity has been waived with respect to ERA whistleblower claims against the Tennessee Valley Authority (TVA) because the TVA's enabling statute allows it to sue and be sued in its corporate name.<sup>6</sup> Thus, upon receiving an ERA whistleblower complaint against a federal agency, proceed as follows:

- If the complaint is against the TVA, proceed with the investigation.

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<sup>3</sup> The [Memorandum of Understanding \(MOU\)](#) between The U.S. Dept. of Labor and The U.S. Dept. of Energy (Aug. 28, 1992) clarifies that both DOL and DOE have jurisdiction over ERA whistleblower cases filed against DOE contractors and subcontractors at DOE facilities (these facilities are also known as Government-Owned or -Leased Contractor-Operated (GOCO) facilities). See Section V.B below for how to proceed when the complainant has filed their whistleblower complaint with both agencies.

<sup>4</sup> *Brown v. BWSR, LLC*, ARB Case No. 19-060, 2019-ERA-00003 (Feb 19, 2020).

<sup>5</sup> *Peck v. United States Dep't of Lab., Admin. Rev. Bd.*, 996 F.3d 224 (4th Cir. 2021) ; *Mull v. Salisbury Veterans Administration Medical Center*, ARB Case No. 09-107, 2011 WL 3882479 (Aug. 31, 2011) (Federal sovereign immunity barred ERA whistleblower claim against Veterans Administration);

<sup>6</sup> *Elliott v. TVA*, ARB Case No. 14-020, 2014 WL 4966170 (Sept. 17, 2014) (TVA's enabling statute waived sovereign immunity, thus complainant could bring ERA claim against TVA).

- If the complaint is against the NRC, DOE, or the Veteran’s Administration, courts or the ARB have held that sovereign immunity is not waived for these agencies and the case must be dismissed. OSHA may wish to refer the complainant to the relevant agency’s Office of Inspector General or the Office of Special Counsel to explore other potential remedies.
- If the complaint is against a federal agency other than the agencies listed above, consult with RSOL or DWPP to determine whether federal sovereign immunity has been waived for that agency or there has been further case law impacting OSHA’s consideration of the case. It may also be appropriate to refer the complainant to the relevant agency’s Office of Inspector General or to the Office of Special Counsel.

#### **4. Examples of ERA-covered employers:**

- A security company hired by the operator of a power plant (an NRC licensee) to provide security services and guards for the power plant is a covered employer because it is a contractor of an NRC licensee.
- A company that manufactures specialized parts for use in nuclear power plants (NRC licensees) under contract with the power plants is a covered employer because it is a contractor of an NRC licensee.<sup>7</sup>
- A pharmacy that compounds and dispenses nuclear pharmaceuticals and operates under a license from an Agreement State is a covered employer.<sup>8</sup>
- A cancer research center conducts research involving radiological materials and is an NRC licensee. Therefore, it is a covered employer.<sup>9</sup>
- An operating company that operates a national laboratory owned by the DOE is a covered employer because it is a DOE contractor.

### **B. ERA-covered Employees**

The ERA protects an employee from retaliation by a covered employer. The ARB has interpreted the term “employee” to include current and former employees and applicants for employment, as well as persons whose employment could be affected by a covered employer. Thus, the ERA’s prohibition on retaliation against “an employee” has been held in some circumstances to protect an employee from retaliation by an entity that exercises substantial control over the employee’s day to day work in a facility but is not the employee’s direct employer.

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<sup>7</sup> *Armstrong v. Flowserve USA, Inc.*, ARB Case No. 14-023, 2016 WL 6024264 (ARB Sept. 14, 2016).

<sup>8</sup> *Benson v. North Alabama Radiopharmacy, Inc.*, ARB Case No. 08-037, 2010 WL 1776977 (ARB April 9, 2010).

<sup>9</sup> *Chen v. Dana-Farber Cancer Institute*, ARB Case No. 09-058, 2011 WL 1247211 (ARB March 31, 2011).

### III. Protected Activity

An employee is protected from retaliation under the ERA for having:

1. Notified the employer of an alleged violation of the ERA or the AEA;
2. Refused to engage in any practice made unlawful by the ERA or AEA after identifying the alleged illegality to the employer;
3. Testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the AEA;
4. Commenced, caused to be commenced, or having been about to commence (or cause to be commenced) a proceeding under the ERA or AEA, or a proceeding for the administration/enforcement of any requirement imposed under the ERA or AEA;
5. Testified or being about to testify in a proceeding under the ERA or AEA;
6. Assisted or participated (or having been about to assist or participate) in any manner in a proceeding under the ERA or AEA, or in any other action to carry out the purposes of the ERA or AEA.

#### A. To whom can an employee make a protected report of an alleged violation of nuclear safety law or an unsafe condition?

Protected reports can be made to an employer, NRC, DOE, or another relevant agency, such as a state agency responsible for nuclear safety, Congress, the news media, and others under certain circumstances.

#### B. What types of reports are protected?

An employee is protected from retaliation for providing information about conduct that the employee reasonably believes to be in violation of the ERA or the AEA, including regulations promulgated under the ERA or the AEA, or that the employee reasonably believes undermines the nuclear safety purposes of the ERA or the AEA.

The ERA has been interpreted broadly to protect employees from retaliation for providing information about or reporting potential violations of the ERA or the AEA, the regulations implementing these statutes, and health, safety, and security issues that relate to the purpose of the statutes to promote nuclear safety.

*Examples of activities that have been held to be protected under the ERA include:*

- Making informal reports to supervisors, the employer's compliance personnel, or the employer's safety hotline regarding safety, security, or health concerns related to the purposes of the ERA or AEA.
- Making a complaint to the NRC or DOE, or a state agency, or participating in an investigation, or testifying in a proceeding by one of these agencies.

- Refusing to sign off on inspection reports or other documents that the complainant reasonably believes would violate the ERA or AEA or regulations under the ERA or AEA or otherwise compromise the public health and safety purposes of the ERA or AEA.
- Providing information related to potential nuclear safety hazards to a private party (such as a general contractor when the complainant worked for a subcontractor) that shared the information with federal regulators prompting a federal investigation.
- Providing information related potential nuclear safety hazards to the news media which could lead to an investigation by federal regulators.<sup>10</sup>
- Raising concerns regarding a potential nuclear safety issue to coworkers prompting coworkers to engage in a protected work refusal.<sup>11</sup>

### C. What does the ERA’s “reasonable belief” standard require?

To be protected under the ERA, an employee’s report of an alleged violation of nuclear safety law or an unsafe condition, or an employee’s work refusal on the same basis, must be based on a reasonable belief that there is a violation or hazardous condition. To have a reasonable belief, an employee must have a subjective, good faith belief (i.e., actually believe that a violation or hazard has occurred, is occurring, or is likely to occur), and the belief must be objectively reasonable (i.e., it must be possible that a reasonable person in the employee’s position would share this belief). Employees do not have to prove an actual violation of a nuclear safety law or regulation; a report based on a reasonable but mistaken belief that conduct violates the law or presents a hazard is protected.

In determining whether the employee had an objectively reasonable belief, the employee’s training, experience, and educational background are relevant. That is, it must be possible that a reasonable person with the same training and experience would also believe that the relevant activity is a violation or hazard. Thus, for example, an experienced employee who handles nuclear safety issues at an NRC contractor and routinely works with NRC inspectors may be held to a higher standard of reasonableness than a less sophisticated employee.

*Examples of cases requiring evaluation of the complainant’s reasonable belief:*

- A lower level technician employed at a DOE licensed facility complains to her supervisors about their practice of allowing employees to spend their idle time in an area of a plutonium facility where there is a risk of exposure to radiation, in apparent violation of applicable safety regulations. She explains at the time that she is concerned about the dangers of exposure and the complications that the employees’ presence poses for exiting the area in the event of an accidental release of radioactive material. As a technician, the employee’s complaint

<sup>10</sup> [Gutierrez v. Regents of the University of California](#), ARB No. 99 116, ALJ No. 1998 ERA 19 (ARB Nov. 13, 2002).

<sup>11</sup> [Stone & Webster Engineering Corp. v. Herman](#), 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997).



appears to be objectively reasonable. If the employee also had a subjective, good faith belief that there was a violation or hazard, the complaints are protected by the ERA, even if turns out that there is no violation of applicable safety regulations.

- An employee at a nuclear power plant is asked to continue work on a retubing project at the plant. On the previous day's shift, the employee had seen dust at the work site and learned that workers on the previous night shift wore respirators or dust masks while working in the same area. The complainant also had doubts as to whether the health technicians on the scene were properly carrying out their duties to ensure the air was free of contamination by radioactive material. After being denied a dust mask, the employee refuses to continue work on the project. Absent an adequate explanation from the employer, the employee's refusal is protected if the employee has a subjective, good faith belief that working without a dust mask poses a risk to his safety and that belief is objectively reasonable.
- In the same circumstances as in the example above, assume that the safety & health foreman on the scene responds to the employee's complaint by collecting air samples from the allegedly dangerous area, to check for contamination. The tests come back negative, and the foreman explains to the employee that the test revealed no detectable radioactive contaminants in the air at the site. After receiving that explanation, the employee continues to refuse to work, citing his doubts about the test. His continued refusal will lose its protected status unless he has reasonable grounds for those doubts based on his expertise or other knowledge about sources of contamination.

#### **D. What activity is protected under the ERA "catch-all" provision?**

Under the "catch-all" provision, 42 U.S.C. 5851(a)(1)(F), an employee is protected from retaliation for having assisted or participated (or having been about to assist or participate) in any manner in a proceeding under the ERA or AEA or in any other action to carry out the purposes of the ERA or AEA.

OSHA should consider whether a complaint qualifies for protection under the ERA's "catch-all" provision when the alleged protected activity does not fit neatly into any other category but has a clear relationship to nuclear safety.

*An example that fits into the ERA "catch-all" provision:*

- A technician was informed that a ladder was left in a high-radiation area, a possible hazard to anyone who later used the ladder. The technician wrote up and submitted a Radiological Deficiency Report regarding the ladder to his supervisor. The technician's documentation of a safety concern that was raised by another employee constituted protected activity.<sup>12</sup>
- A machinist at a company that manufactured pumps, valves, and seals for use in nuclear power generation complained to coworkers involved with quality control

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<sup>12</sup> Paynes v. Gulf States Utilities Co., 93-ERA-7 (ALJ Dec. 3, 1997) ARB Case No. 98-045, 1999 WL 702414 (ARB August 31, 1999).

and testing that certain parts were defective and prone to malfunction. His complaints prompted quality control tests of the parts, which were ultimately found not to be defective.<sup>13</sup>

### **E. How specific must the complainant’s report of an alleged violation or hazard be in order to be protected under the ERA?**

In order to be a protected activity, the employee’s report must be specific enough about the conduct that the employee believes is illegal or hazardous to allow the employer to investigate the conduct and to understand the relationship between the report and nuclear safety. However, the employee does not need to point to a particular legal provision that he or she believes is being violated, and there are no “magic words” the complainant has to use to report his or her concerns.

Conversely, some cases, particularly interpreting the ERA’s “catch-all” provision, 42 U.S.C. 5851(a)(1)(F), have held that the employee’s report, work refusal, or other action must implicate nuclear safety “definitively and specifically.” This requirement aims to distinguish between complaints or acts that are related to nuclear safety only in a vague or speculative way, versus those that are focused on ensuring nuclear safety.

*Examples:*

- An employee at an NRC licensee facility repeatedly raised concerns with a supervisor about the procedures for handling contaminated tools to prevent employee exposure. By raising those concerns, the employee effectively took action to carry out the nuclear safety purposes of the ERA or the AEA.<sup>14</sup>
- An employee performing safety-related functions at a nuclear power plant complained to his supervisor that he was required to work, without proper authorization, in excess of the maximum number of hours allowed under an applicable NRC hours of service limits. Because a clearly stated objective of the hours of service limits was to prevent staff fatigue that could lead to unsafe conditions in the reactor, the employee’s complaint was ERA-protected activity.<sup>15</sup>
- A janitor refused to enter certain areas in a nuclear power plant. When the supervisor asked why, the janitor would only repeat that “it just isn’t safe.” The employee’s complaint was too vague to enable the employer to investigate the issue and its connection to nuclear safety and is thus likely not ERA-protected activity.

### **F. Under what circumstances are work refusals protected under the ERA?**

The ERA explicitly protects work refusals when the employee refuses to carry out a practice made unlawful by the ERA or AEA after identifying the alleged illegality to the employer. In other instances, a work refusal may be protected under the ERA’s “catch-all” provision. In such “catch-all” cases, the employee must have identified the hazard to

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<sup>13</sup> *Armstrong v. Flowserve*, ARB Case No. 14-023 (Sept. 14, 2016).

<sup>14</sup> *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931-33 (11th Cir. 2005).

<sup>15</sup> *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB Sept. 29, 2006).

the employer with sufficient specificity for the employer to identify the implications for safety and attempt to address the hazard.

## **G. When should OSHA investigate a case under both the ERA and Section 11(c) of the OSH Act, or other whistleblower protection statutes?**

### **1. Occupational Safety and Health complaints**

Nuclear industry employees may file complaints originating from raising occupational safety or health concerns that are not nuclear safety related. Such complaints should be investigated, as appropriate, under Section 11(c) of the OSH Act. In this situation, OSHA's treatment of the complaint will vary depending on the category of employer at issue in the complaint because DOE has adopted OSHA's safety and health regulations while the NRC has not. Thus:

- If the employer is an NRC licensee (or an Agreement State licensee) or a contractor or subcontractor to an NRC or Agreement State Licensee, the complaint should be handled under Section 11(c) only.
- If the employer is a DOE contractor or subcontractor, the employer is covered by the DOE's regulations relating to occupational safety and health at 10 CFR Part 851, and OSHA should docket and investigate the case under the ERA, but not Section 11(c).

*Examples:*

- A facility contains an administrative office area where an employee reports that electrical cords crisscross the walking areas, creating numerous tripping hazards. If this facility is, for example, a medical research center licensed by the NRC, then the complaint should be filed only under Section 11(c). If the facility is a DOE contractor (such as a national laboratory), then the complaint should be filed under the ERA.
- Complainant, an employee of a DOE contractor, complains that the training complainant and coworkers are given regarding separating components from decommissioned nuclear weapons is inadequate to prevent their exposure to radiation. The complaint should be filed under the ERA.

### **2. Multi-Statute Complaints**

In some cases, the allegations in the employee's complaint may implicate both the ERA and another OSHA-enforced whistleblower protection statute. Such overlap most often occurs between the ERA and either Section 11(c) of the OSH Act (as it relates to NRC-regulated employers but not the DOE contractors discussed above) or one of the environmental whistleblower protection laws that OSHA enforces (which apply to both NRC-regulated employers and DOE contractors and subcontractors). When such overlap occurs, OSHA generally should process the case under all applicable statutes.

In order for a complaint to be related to nuclear safety, the safety or health concern is not required to be something that would primarily impact the general public rather than

employees. The impact can focus primarily on employees. An example of a multi-statute complaint is one in which the employee in a nuclear power plant alleges retaliation for complaining about exposure to radiation (ERA) and a tripping hazard (section 11(c) of the OSH Act). Such a complaint should be investigated under both statutes.

#### **H. Does the ERA contain any explicit exceptions to protection?**

ERA does not protect employees who, acting on their own, without express or implied direction from the employer (or the employer's agent), deliberately cause a violation of any requirement of the ERA or the AEA. 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.

### **IV. Procedures for Handling ERA Whistleblower Complaints**

Procedures for handling ERA whistleblower complaints are contained in [29 CFR Part 24](#). 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, the [OSHA Whistleblower Investigations Manual](#), and the [ERA Fact Sheet](#).

#### **A. Complaint**

*Who may file:* An employee who believes that he or she has been retaliated against in violation of ERA 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. If the complainant cannot make a 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 the guidance in OSHA's Whistleblower Investigations Manual.

*Distribution of complaints and findings to partner agencies:* Complaints and findings in ERA cases should be sent to both the NRC and the DOE.

#### **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 ERA-protected activity;

2. The respondent knew or suspected that the employee engaged in ERA-protected activity;
3. The employee suffered an adverse action;<sup>16</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, and the complainant does not agree to administrative closure of the case, 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).

ERA uses a “contributing factor” standard of causation. Thus, following its investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that ERA-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 a neutral reference), and reasonable attorney 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 the 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. 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 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 its 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

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<sup>16</sup> An adverse action is an action that might dissuade a reasonable employee from engaging in ERA protected activity. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

investigation into the ALJ proceeding. The ALJ may hold a hearing or dismiss the 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. The ARB's decision is subject to discretionary review by the Secretary of Labor. A complainant or respondent may obtain review of a final, reviewable decision by the Department of Labor by appealing to the appropriate U.S. Court of Appeals.

#### **D. Kick-out**

ERA permits a complainant to bring a *de novo* ERA action in federal district court if 365 days have passed since the filing of the complaint with OSHA and the Department of Labor has not reached a final decision on the complainant, and the delay is not due to the bad faith of the complainant.

### **V. Other Resources for Employees**

#### **A. NRC Investigations of Retaliation Claims**

NRC also investigates allegations of employee retaliation for raising potential safety concerns to a licensee or the NRC. Discrimination against an employee for raising safety concerns is prohibited by the Commission's regulations. In accordance with 42 U.S.C. 5851, the NRC defines discrimination to include discharge and other actions that relate to compensation or terms, conditions, and privileges of employment. Enforcement actions available to the NRC against licensees, their employees, contractors, or contractor employees include denying, revoking, or suspending a license, imposing civil penalties, and referring a case to DOJ for DOJ to seek criminal sanctions. However, even if the NRC substantiates that discrimination occurred, it does not have the authority to provide a personal remedy such as reinstatement or back pay to an employee. Only the Department of Labor has the authority to order personal remedies for the retaliation.

Retaliation complaints filed with OSHA under the ERA whistleblower provision and retaliation complaints filed with the NRC inevitably cover the same issues. Therefore, when the investigator is aware that a complainant has also filed a complaint with the NRC, the investigator should contact the NRC to coordinate the investigation whenever possible.

As an alternative to an NRC investigation, the NRC includes in its enforcement policy the voluntary use of Alternative Dispute Resolution (ADR) in addressing retaliation complaints and other allegations of wrongdoing (i.e., harassment, intimidation, retaliation, or discrimination). If both parties agree to participate, a neutral mediator will be appointed to help them reach resolution. The process is completely voluntary, and any party may withdraw from the negotiation at any time.

When a complainant has both filed an ERA whistleblower complaint with OSHA and agreed to ADR through the NRC's program, OSHA may consider briefly postponing the investigation so that ADR can occur. If a settlement is reached, OSHA will honor a

settlement entered into through the NRC's ADR program that provides adequate personal remedies to the complainant and otherwise meets OSHA's settlement approval requirements. Parties should submit the settlement agreement for OSHA's review and approval.

More information about the NRC's program for investigating complaints regarding nuclear safety violations and retaliation is available at:

<https://www.nrc.gov/docs/ML1720/ML17208A272.pdf#page=7>

## **B. DOE Contractor Employee Protection Program (DOE-CEPP)**

DOE also has a program designed to provide relief to employees of DOE contractors who have suffered retaliation by their employers for engaging in certain protected activities, including reporting allegations of danger to employees or to public health or safety. The DOE Office of Hearings and Appeals is responsible for investigations, hearings, and appeals. The Director of the Office of Hearings and Appeals appoints an investigator, who then conducts an investigation. When the investigator issues a report of the investigation, the Director appoints a different individual to serve as the hearing officer. The office publishes the regulations and its whistleblower decisions on its web site. In general, if the employee prevails, he or she may obtain employment-related relief, such as back pay, reinstatement, and reasonable attorneys' fees and expenses incurred in pursuing the complaint.

Further, a complainant may face a choice of remedies depending on whether he/she files his/her complaint with OSHA first. Under the regulation governing the DOE-CEPP, if a complainant has already filed a whistleblower complaint regarding the same allegations with another federal agency, such as OSHA, the DOE will likely decline to accept the complaint if the complainant subsequently files with the DOE. There is no similar obligation on OSHA, however, to decline to accept a complaint under the ERA if the complainant has already filed with the DOE, although if a complaint is pending before DOE and is in active investigation or settlement discussions at DOE, OSHA may consider briefly postponing its investigation, and will generally honor any settlement or other resolution reached through the DOE process that provides adequate personal remedies to the complainant and otherwise meets OSHA's settlement approval requirements. Parties should submit the settlement agreement for OSHA's review and approval.

More information regarding DOE's program is available at:

<https://www.energy.gov/gc/10-cfr-708-doe-contractor-employee-protection-program>

## **VI. Resources Relevant to ERA Whistleblower Investigations**

The NRC and DOE websites include a wide range of information that may be helpful to OSHA investigators in ERA investigations. Below is a list of some of the resources available:

- The NRC's [Glossary of Nuclear Energy-Related Terms](#).
- The NRC's [factsheet regarding employee safety](#).

- The NRC [Facility Locator](#) to find operating power reactors and major nuclear fuel facilities licensed by the NRC, as well as sites undergoing decommissioning.
- NRC [information regarding reporting safety concerns and retaliation to the NRC](#).
- The NRC online [library](#) of regulatory and guidance documents and basic references regarding NRC and its regulatory programs.
- [Map of DOE facilities](#).
- DOE has posted a chart (“[Reporting Worker Safety and Health Concerns – Department of Energy](#)”) summarizing the programs to which those nuclear industry employees under DOE’s oversight may report concerns or file complaints. It also lists the scope of coverage of each of those programs.
- DOE’s [anti-retaliation](#) program for employees of DOE contractors
- DOE’s [Safety and Security Enforcement Process Overview](#) describes the DOE’s philosophy and approach to implementing its enforcement program for violations of the Department’s regulations pertaining to nuclear safety, radiation protection, worker safety and health, and classified information security. DOE recommends it as a principal reference for any contractor that is facing an enforcement investigation by the Office of Enforcement within DOE's Office of Enterprise Assessments. See pp. 54 – 55 for information on whistleblower protection.

## VII. NRC and DOE Regulations Relevant to OSHA’s ERA Whistleblower Investigations

The following chart lists some of the NRC and DOE regulations that are most frequently relevant to OSHA’s ERA whistleblower investigations:

<b>NRC Regulation</b>	<b>Title</b>	<b>Brief Description</b>
10 CFR 20	Standards for Protection Against Radiation	These standards aim to control the receipt, possession, use, transfer, and disposal of licensed materials by any licensee in a manner that the total dose to an individual does not exceed the standards for protection against radiation.
10 CFR 25	Access Authorization	These regulations establish procedures for granting, reinstating, extending, transferring, and terminating access authorizations for licensee personnel, contractors, and others who may require access to classified information.
10 CFR 26	Fitness-for-Duty Programs	These regulations prescribe requirements and standards for the establishment, implementation, and maintenance of fitness-for-duty programs (e.g., alcohol, drugs, fatigue).



<b>NRC Regulation</b>	<b>Title</b>	<b>Brief Description</b>
10 CFR 50	Domestic Licensing of Production and Utilization Facilities	These regulations establish two types of licenses - Class 103 licenses for commercial and industrial facilities and Class 104 for medical therapy and research and development. They also establish standards related to certain conduct by licensees, applicants for a license, and contractors and subcontractors as follows: 50.5 Deliberate Misconduct; 50.7 Employee Protection; 50.9 Completeness and Accuracy; 50.36 Technical Specifications; 50.46 Emergency Core Cooling; 50.47 Emergency Plans; 50.48 Fire Protection; 55.55a Codes and standards; 50.59 Changes, tests, and experiments; 50.65 Maintenance; 50.120 Training and Qualifications of nuclear power plant personnel; Appendix A: General Design Criteria; Appendix B: Quality Assurance Criteria
10 CFR 52	Licenses, Certifications, and Approvals for Nuclear Power Plants	(New Reactors) Governs the issuance of early site permits, standard design certifications, combined licenses, standard design approvals, and manufacturing licenses for nuclear power facilities licensed under Section 103 of the AEA; 52.4 Deliberate Misconduct; 50.5 Employee Protection; 52.6 Completeness and Accuracy
10 CFR 70	Domestic Licensing of Special Nuclear Material	These regulations prescribe license requirements for the possession, delivery, or transfer of special nuclear material (e.g., plutonium, uranium 233, uranium enriched in the isotope 233 or 235 – not source material).
10 CFR 73	Physical Protection of Plants and Materials	These regulations prescribe requirements for the establishment and maintenance of physical protection of special nuclear material at fixed sites and in transit.
10 CFR 110	Export and Import of Nuclear Equipment and Material	These regulations prescribe licensing, enforcement, and rulemaking procedures and criteria for the export and import of nuclear equipment and material.

<b>DOE Regulation</b>	<b>Title</b>	<b>Brief Description</b>
10 CFR Part 830	Nuclear Safety Management	This part governs the conduct of DOE contractors, DOE personnel, and other persons conducting activities (including providing items and services) that affect, or may affect, the safety of DOE nuclear facilities.
<b>DOE Regulation</b>	<b>Title</b>	<b>Brief Description</b>
10 CFR Part 835	Occupational radiation protection	The rules in this part establish radiation protection standards, limits, and program requirements for protecting individuals from ionizing radiation resulting from the conduct of DOE activities.
10 CFR Part 851	Worker safety and health program	The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites. This part establishes the requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing DOE contractors and their workers with safe and healthful workplaces at DOE sites; and procedures for investigating whether a violation of a requirement of this part has occurred, for determining the nature and extent of any such violation, and for imposing an appropriate remedy.
10 CFR Part 824	Procedural rules for the assessment of civil penalties for classified information security violations	This part implements subsections a., c., and d. of section 234B. of the Atomic Energy Act of 1954 (the Act), 42 U.S.C. 2282b. Subsection a. provides that any person who has entered into a contract or agreement with the Department of Energy, or a subcontract or sub-agreement thereto, and who violates (or whose employee violates) any applicable rule, regulation, or order under the Act relating to the security or safeguarding of Restricted Data or other classified information, shall be subject to a civil penalty for each violation. Subsections c. and d. specify certain additional authorities and limitations respecting the assessment of such penalties.

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

<i>In order to issue merit findings, answers 1 to 9 must be "yes" and answer 10 must be "no."</i>	Yes	No
<b>Timeliness</b> (See Desk Aid p. 11)		
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. 3-6) (check at least one category)		
2. Is the respondent a:		
<input type="checkbox"/> Licensee of the NRC or an Agreement State or an applicant for such a license?	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> Contractor or subcontractor of a licensee (or applicant for a license) of the NRC or an Agreement State?	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> NRC contractor or subcontractor		
<input type="checkbox"/> DOE contractor and subcontractor (not involved in naval nuclear propulsion work)?		
3. Is complainant an employee within the meaning of the ERA whistleblower provision?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Protected Activity</b> (See Desk Aid pp. 6-10)		
4. Has the complainant (or was complainant about to)(pick at least one):		
a. Notified his employer of an alleged violation of the ERA or the AEA?		
b. Refused to engage in any practice made unlawful by the ERA or AEA after identifying the alleged illegality to the employer?		
c. Testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of the ERA or the AEA?	<input type="checkbox"/>	<input type="checkbox"/>
d. Commenced/caused a proceeding under the ERA or AEA, or a proceeding for the administration/enforcement of a requirement imposed under the ERA or AEA?		
e. Testified in a proceeding under the ERA or AEA?		
f. Assisted or participated in any manner in a proceeding under the ERA or AEA, or in any other action to carry out the purposes of the ERA or AEA?		
5. For items 4a., b., and the "catch all" provision of 4f., does the complainant have a subjective, good faith belief that the conduct complained of violated the law?	<input type="checkbox"/>	<input type="checkbox"/>
6. For items 4a., b., and the "catch all" provision of 4f., would a reasonable person with similar training, knowledge, and experience believe that a violation occurred?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Employer Knowledge</b>		
7. Did respondent know or suspect that complainant engaged in 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>		
8. Did respondent discharge or take other adverse action against complainant? (Adverse action is any action that could dissuade a reasonable employee from engaging in ERA-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 ERA-protected activity a <i>contributing factor</i> in respondent's decision to take adverse action against 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 animus 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 respondent's 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 <i>clear and convincing evidence</i> that respondent would have taken the same action against complainant absent the protected activity?	<input type="checkbox"/>	<input type="checkbox"/>
	No	Yes