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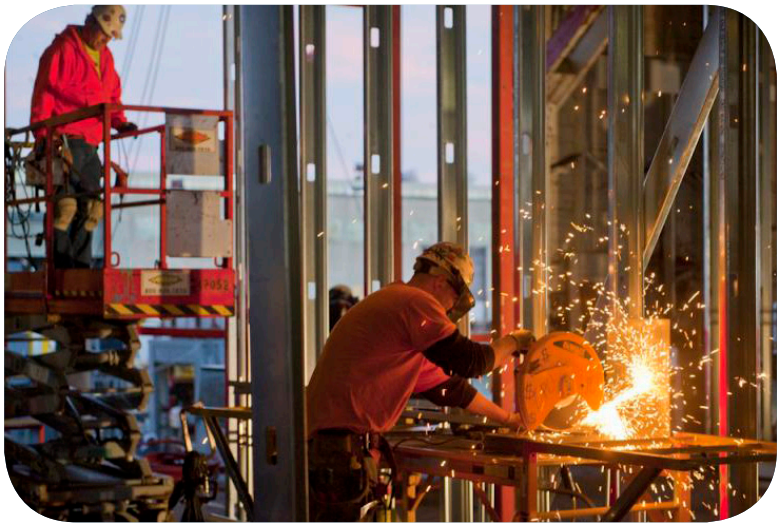
Securing the Right to a Safe and Healthy Workplace:

Improve State Laws to Protect Workers



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ABOUT THE CENTER FOR EFFECTIVE GOVERNMENT

Our mission is to build an open, accountable government that invests in the common good, protects people and the environment, and advances the national priorities defined by an active, informed citizenry.

To ensure government is effective and responsive to the priorities of the American people, we conduct policy research and develop policy proposals; create tools to encourage citizen participation and government accountability; and build broad-based coalitions to advance these values. To ensure the American people understand the vital role of government, we produce and disseminate educational tools and communications materials.

Securing the Right to a Safe and Healthy Workplace:

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EXECUTIVE SUMMARY

The Occupational Safety and Health Act (OSH Act), passed in 1970, recognizes that workers play a critical role in ensuring their workplaces are healthy and safe. The OSH Act gives workers the right to report unsafe working conditions and the right to refuse to work under such conditions without reprisal. The concept is for workers to function as the "eyes and ears" of the Occupational Safety and Health Administration (OSHA) and help the agency prioritize its limited resources to focus inspections on the most dangerous work sites. Workers will only report safety and health hazards in the workplace, however, if they can come forward without fear of reprisal. Thus, the law prohibits employers from taking any adverse action against employees who exercise the rights provided to them under the OSH Act.

Unfortunately, the weak guarantees written into the federal OSH Act leave workers with few protections against retaliation by an employer after reporting dangerous working conditions. Problems with current protections include the fact that the amount of time required to file a retaliation complaint is too short, investigations take too long, the burden of proof is too high, OSHA cannot preliminarily reinstate an employee once it determines that a complaint has merit, and employees cannot pursue a remedy independently, even if OSHA takes no action on their behalf. Between 2005 and 2012, OSHA received 11,153 complaints of retaliation, 10,380 were reviewed, and 2,542 (24.49 percent) were found to "have merit." Of these, 2,390 were settled out of court; 152 were recommended for litigation. But because OSHA filed suit in only seven percent of cases recommended for litigation, hundreds of workers were left without an adequate remedy.

The ineffectiveness of section 11(c) of the OSH Act has dire implications for workplace health and safety across the country. The Center for Effective Government released a report in August 2013, entitled *What's At Stake: Austerity Budgets Threaten Worker Health and Safety*, examining the impact of sequestration (in addition to the House of Representatives proposed budget cuts) on OSHA's ability to carry out its important work and keep America's workers safe and healthy. The report shows that OSHA has historically had a meager budget for enforcing its regulations given the breadth of its broad mandate, with funding for only one inspector per 1,900 workplaces in 1981. Today, in an era of fiscal retrenchment, OSHA's resources are even more stretched – its

funding supports only one inspector for every 4,300 workplaces. Now more than ever, OSHA needs help from workers to prioritize its inspections and efficiently apply its limited resources.

But the outdated and weak anti-retaliatory protections in current law limit what federal OSHA can do to protect workers' rights. The best solution would be improved federal legislation, and there are ongoing efforts to advance federal reforms. This push needs to continue. However, given the current gridlock in Congress, new federal legislation is unlikely to emerge in the near term.

To ensure that workers have the ability to report dangerous workplaces and be protected from discharge and other punitive actions, states must act to improve their labor laws to protect workers from retaliation. Effective state legislation to protect workers from retaliation by employers will require, at minimum, the following elements:

Employees should be given adequate time to file a retaliation complaint. Under the OSH Act, and several state laws, employees must file a retaliation complaint within 30 days or they lose the right to do so. This gives employees very little time to decide whether to take action, reach out for assistance, and file the complaint. Most recent federal whistleblower laws give employees 180 days to file. Any state law intended to protect employees who have experienced retaliation for reporting health or safety violations in the workplace should be given at least 180 days to file a complaint.

Agencies should conduct prompt and thorough investigations of retaliation complaints. Although the OSH Act states that the agency should complete investigations within 90 days, it now takes federal OSHA an average of 150 days to close an investigation. State agencies must be given the resources needed to meet the 90-day deadline so that employees are not left to suffer without pay while agencies investigate complaints.

Agencies should be authorized to preliminarily reinstate terminated employees. Under the federal OSH Act, an employee who has been fired in retaliation for filing a complaint has no right to preliminary reinstatement, even if the case takes years to complete. Preliminary reinstatement helps employees continue to pay bills or provide food and shelter for their families without having to apply for federal assistance. All states should consider updating their state plans or laws to include preliminary reinstatement.

The burden of proof should be reasonable. The OSH Act requires the employee to show that retaliation was a *motivating factor* for the employer's adverse action against the employee. However, newer federal statutes with whistleblower provisions that OSHA also oversees only require that an employee show that the protected activity was one factor affecting the employer's decision to take an adverse action. State laws should also include this less stringent burden of proof.

An employee should have a right to pursue his or her complaint if the state agency does not. Under the OSH Act, the choice to file suit is within OSHA's sole discretion. Other federal laws that protect whistleblowers, as well as some state plans, provide employees a right to independently pursue their case against an employer if OSHA fails to act or chooses not to file suit despite finding that a complaint has merit. All states should ensure that employees who have been retaliated against are empowered to independently pursue a claim of retaliation.

Adding these protections to state law will reduce workers' fear of retaliation, thus encouraging workers to come forward to report health and safety hazards. Increased reports of workplace hazards will also help federal OSHA and state plan programs strained by limited budgets identify and give high priority to the most dangerous facilities. As a result of improved protections from retaliation in state labor laws, private-sector workers and state and local workers across the nation can be effective contributors to ensuring the safe and healthful workplace intended by the OSH Act.

INTRODUCTION

Workplace Safety: An Under-Resourced Oversight System, Getting Worse

On March 23, 2005, a massive explosion at British Petroleum's (BP's) oil refinery in Texas City, Texas killed 15 workers and injured another 180 people. The explosion and subsequent fires destroyed office trailers at the site and damaged numerous buildings and homes within a three-quarter-mile radius of the refinery, resulting in damages exceeding $1.5 billion.

The incident began when workers at the refinery restarted a unit that had been shut down for maintenance. As operations personnel pumped flammable liquid hydrocarbons into a tower, the tower began to overflow. No alarms sounded to alert the operators that the level was too high, and in fact, some equipment indicated that the liquid level was declining. When pressure began to build up, the overflow was discharged into the back-up unit. The back-up unit overfilled, which produced a "geyser" of flammable liquid that exploded into flames. The liquid then fell to

the ground and evaporated, forming a flammable vapor cloud that was ignited by a diesel pickup truck idling nearby.

Written policies and procedures at the Texas City refinery noted that startups and shutdowns are the times when unexpected and unusual situations are particularly likely to occur and recommended that additional experienced personnel be involved in these procedures. However, no additional experienced staff was on-site during startup on the day of the explosion. Numerous other breakdowns in communication and safety procedures occurred on the day of the incident.

When the Occupational Safety and Health Administration (OSHA) completed its investigation of the incident, it cited BP for 301 willful violations and required the company to pay $21 million in damages in a settlement.[1] A follow-up investigation four years later resulted in 439 additional citations for willful violations of performance safety management standards and 270 failure-to-abate notices, with penalties exceeding $80 million. BP and OSHA entered new settlement agreements in 2010 and 2012 to resolve remaining violations.

The Chemical Safety Board, the independent federal agency charged with investigating industrial chemical accidents, dubbed the incident "one of the worst industrial disasters in recent U.S. history."[2] The Board's final report on the BP Texas City Refinery explosion concluded that the events leading to the disaster were not isolated incidents, but were endemic in BP's corporate culture.[3] The report noted that "[p]ersonnel were not encouraged to report safety problems and some feared retaliation for doing so."[4]

This case illustrates the tragic reality of many industrial workplaces in America today. Workers should be playing an active role in ensuring the health and safety of the places they work, but many are afraid they risk their jobs or other forms of retaliation for doing so.

1 U.S. Chem. Safety & Hazard Investigation Bd., No. 2005-04-I-Tx, Investigation Report: Refinery Explosion and Fire 20 (2007), *available at* http://www.csb.gov/assets/1/19/CSBFinalReportBP.pdf; *see also BP Texas City Violations and Settlement Agreements*, U.S. Dep't of Lab., http://www.osha.gov/dep/bp/bp.html (last visited Sept. 5, 2013).
2 U.S. Chem. Safety & Hazard Investigation Bd., *supra* note 1, at 17.
3 *Id.* at 18-20.
4 *Id.* at 26.

A Right Without Effective Enforcement

The Occupational Safety and Health Act (OSH Act), signed into law in 1970 by President Richard M. Nixon, established the right of every man and woman in America to enjoy "safe and healthful working conditions."[5] Under the OSH Act, Congress created the Occupational Safety and Health Administration (OSHA) and charged it with issuing federal occupational health and safety standards.

The OSH Act nominally provides workers with protection against retaliation (i.e., being fired or other punitive action) for reporting hazardous or unsafe working conditions, refusing to work under dangerous conditions, or exercising any other rights protected by the law. Reports from workers are vital to help OSHA identify and investigate the most dangerous worksites.

Created as part of Nixon's "New Federalism," OSHA allows states to develop their own health and safety programs if they have established standards that are "at least as effective" as federal standards. For states that develop their own programs (with OSHA approval), federal OSHA provides up to 50 percent of the plan's operating costs. To date, 21 states and one territory operate under state plans that apply to both private- and public-sector workers. Four states and one territory operate under state plans that apply to only public-sector workers (private employees are protected under the federal OSH Act provisions).[6] Federal OSHA has jurisdiction over private-sector workers in all other states and territories.

In 1970, when the OSH Act was signed into law, approximately 14,000 workers were killed on the job each year (about 38 workers every single day). In 2011, nearly 5,000 workers died on the job (roughly 13 workers each day), about 50,000 workers died from occupational diseases, and more than 3.8 million injuries and illnesses were reported. But the actual number of injuries and

5 Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (2006)).
6 Connecticut, New Jersey, Illinois, New York, and the Virgin Islands have OSHA-approved state plans that only protect public-sector workers.

illnesses may be two to three times higher than actually reported.[7] So, while workplace safety has improved as a result of the law, much work remains to be done.

The OSH Act nominally provides workers with protection against retaliation (i.e., being fired or other punitive action) for reporting hazardous or unsafe working conditions, refusing to work under dangerous conditions, or exercising any other rights protected by the law. Reports from workers are vital to help OSHA identify and investigate the most dangerous worksites. However, the weak retaliation protection provisions in the law mean that workers often are unwilling to report health and safety hazards in the workplace.

Over the more than 40 years since passage of the OSH Act, the law has become a confusing patchwork of outdated and inadequately enforced regulations. It has never been updated to improve the protections for workers who do come forward to report problems. Yet Congress has tasked OSHA with investigating and enforcing whistleblower complaints written into 21 additional pieces of legislation.[8] Ironically, the protections against employer retaliation written into these laws far exceed the protections written into the original OSH Act. Workers who raise workplace health and safety concerns deserve the same protections against job loss and other forms of retaliation that other workers have. Federal lawmakers have introduced important proposals to modernize the law, notably the Protecting America's Workers Act, but Congress has yet to pass needed reforms and is unlikely to do so in the near future.

The Obama administration has prioritized protecting workers' voice, and improvements to OSHA's whistleblower protection program have been a key part of their committment. A Directorate of Whistleblower Protection Programs to oversee and coordinate whistleblower policy and enforcement, as well as a Whistleblower Protection Advisory Committee, were established at OSHA. The administration also sought increased funding for the whistleblower program (which Congress did not provide).

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7 AFL-CIO, Death on the Job: The Toll of Neglect 1, 12-14 (22d ed. 2013), http://www.aflcio.org/content/download/79181/1933131/DOTJ2013.pdf; *see also* James R. Hagerty, *Workplace Injuries Drop, but Claims of Employer Retaliation Rise*, Wall St. J., July 22, 2013, *available at* http://www.uswtmc.org/latest/news/WSJ-Workplace-Injuries-Drop-but-Claims-of-Employer-Retaliation-Rise1.pdf. The underreporting could be because employees are not reporting injuries and illnesses, or employers are not adding reports to the injury and illness log, or both.

8 *Whistleblower Protection Program: Statutes*, U.S. Dep't of Lab., http://www.whistleblowers.gov/statutes_page.html (last updated June 4, 2013).

As the economy has grown over the past few decades, the staff and budget for OSHA inspectors has not kept pace. In 1981, there were 4.5 million workplaces and 73.4 million workers. OSHA employed one federal inspector for every 1,900 workplaces. By 2011, the number of workplaces had doubled to 9 million and the number of workers had increased to 129.4 million, but the number of OSHA inspectors declined, leaving one federal inspector for every 4,300 workplaces.[9] Although International Labor Organization standards call for one inspector for every 10,000 workers, there was just one inspector for every 62,000 workers in the U.S. in 2011.[10] Federal and state OSHA programs combined have such limited resources that federal and state inspectors can visit each American workplace only once every 99 years (or only one percent of workplaces each year).[11]

In FY 2012, the whistleblower protection program operated with 119 staff and a budget of $15.9 million. In FY 2013, automatic spending cuts known as sequestration reduced OSHA's budget, including funding for its whistleblower program. These cuts have reduced the ability of OSHA staff to enforce the workplace health and safety standards already on the books or improve them as new risks to workers are identified by scientific advances.[12] With the prospect of future program cuts, federal and state health and safety programs will have even fewer resources to conduct inspections. Thus, the role of workers as sentinels in fighting health and safety hazards in the workplace will become even more critical.

Ensuring Safety from the Workers Up

Because only one percent of workplaces are now inspected in a given year due to the high ratio of workplaces to government inspectors, workers must act as OSHA's "eyes and ears" and report unsafe conditions to their employers or to government agencies to prevent injuries, illnesses, or fatalities.

However, with the decline of unions and the shift of many manufacturing facilities to "right to work" states with fewer workplace protections, workers may be even more unwilling to step for-

9 *See, e.g.*, Nick Schwellenbach, Ctr. for Effective Gov't, What's At Stake: Austerity Budgets Threaten Worker Health and Safety 30-31 & nn. 49-52 (2013), http://www.foreffectivegov.org/files/budget/whatsatstake-workersafety.pdf.

10 *Id.* In some states – Arkansas, Delaware, Florida, Louisiana, Massachusetts, Texas, and West Virginia – there is only one inspector for every 100,000 workers. AFL-CIO, *supra* note 7, at 108-10.

11 *See* AFL-CIO, *supra* note 7, at 114 & n.10. AFL-CIO calculated 99 years as the average inspection frequency of covered establishments for both federal and state OSHA inspectors. Federal OSHA states have an average of one inspection per workplace every 131 years and state plan states have a frequency of once every 76 years.

12 *See generally* Schwellenbach, *supra* note 9.

ward and report unsafe working conditions for fear that they will be fired or suffer other forms of retaliation if they do so. They have reason to be fearful. The overwhelming majority of workers in private industry have no right to impartial review of employer decisions to discipline or terminate them: they are "at-will" workers whose employers can fire them for any reason or for no reason at all (provided the employer does not violate laws prohibiting discrimination based on race, gender, or handicap).

Even so, the OSH Act is supposed to protect workers who report health and safety violations from dismissal or other retaliation from their employers. But reports of retaliation are increasing.

Retaliation Complaints Received	
Year	Complaints of Retaliation Filed
2005	1,194
2006	1,195
2007	1,301
2008	1,381
2009	1,267
2010	1,402
2011	1,668
2012	1,745
TOTAL	11,153

Since 2005, OSHA has received an increasing number of retaliation complaints except for a small decline in 2009.[13] Between 2005 and 2012, retaliation complaints filed with OSHA jumped by 551, a 46 percent increase. Efforts to strengthen the anti-retaliation provisions in the federal OSH Act are ongoing, but they are not likely to move forward in the near term. And despite the need for better protections, the House budget proposal would make it even more difficult for the agency to safeguard workers.[14] States can and should act now to protect workers from harm if they step forward to warn of workplace dangers.

FEDERAL OSHA PROVISIONS TO PROTECT WORKERS DEMANDING A SAFE WORKPLACE

The OSH Act is supposed to guarantee that every worker has a right to work in a safe and healthy work environment. Section 11(c) of the OSH Act provides the basic protection against retaliation for those who report safety and health hazards:[15]

13 AFL-CIO, *supra* note 7, at 80-81.
14 *See generally* SCHWELLENBACH, *supra* note 9.
15 Pub. L. No. 91-596, § 11(c), 84 Stat. 1590, 1603 (codified as amended at 29 U.S.C. § 660(c) (2006)).

> 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 chapter 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 chapter.

Specifically, the OSH Act protects workers who:

- Report injuries and illnesses to their employer
- Refuse to perform hazardous work
- Ask for a workplace inspection
- Report violations of state or federal laws or regulations
- Testify at OSHA-related proceedings
- Discuss health and safety hazards with co-workers
- Request health and safety information
- Exercise any rights under federal and state OSHA laws

Moreover, the act specifically prohibits employers from engaging in the following retaliatory actions against complaining workers, including:[16]

Roger Wood± worked as an experienced electrician at a chemical weapons disposal facility operated by a private contractor for the U.S. Army. The work Wood performed was inherently dangerous. A federal court described his working conditions as "probably as dangerous as any undertaken in the world." Yet Wood found that the basic safety equipment and training offered was inadequate. Soon after taking the position, Wood raised concerns, which were confirmed during an OSHA investigation that resulted in two citations for serious safety violations at the facility. Subsequently, Wood refused to work in a toxic area because his employer had not provided him with the proper protective equipment. Wood was fired for insubordination on Feb. 4, 1991, and filed a retaliation complaint with OSHA 11 days later. Although a regional officer recommended the Department of Labor file suit on Wood's behalf, after five years of review, the Department declined to pursue the case, concluding that Wood's refusal to work was not a protected activity under section 11(c) of the OSH Act. Wood filed suit in federal court seeking to force the Department of Labor to file suit on his behalf, but the U.S. Court of Appeals for the DC Circuit denied Wood's claim, finding that the Department of Labor has sole discretion on determinations about whether an employer acted in violation of the anti-retaliation provisions of the OSH Act.

± *Whistleblower and Victim's Rights Provisions of H.R. 2067, The Protecting America's Workers Act, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education & Labor*, 111th Cong. 46-47 (2010) (statement of Lynn Rhinehart, General Counsel, AFL-CIO) (citing Wood v. Dep't of Labor, 275 F. 3d 107 (DC Cir. 2001), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56055/pdf/CHRG-111hhrg56055.pdf.

16 29 U.S.C. § 660(c) (2006); 29 C.F.R. § 1977 (2012); *see also Whistleblower Protection Program*, U.S. Dep't of Lab., http://www.whistleblowers.gov (last updated June 4, 2013).

- Discharge
- Blacklisting
- Demotion
- Denial of overtime pay or promotion
- Discipline
- Denial of benefits
- Refusal to hire or rehire
- Firing or laying off
- Intimidation
- Making threats
- Reassignment to a less desired position
- Reduction in pay or hours
- Suspension

A Government Accountability Office (GAO) study that surveyed OSHA inspectors found that 22 percent of inspectors believed that employees could not file a complaint without retaliation by their employers; another 26 percent believed that the OSH Act provides little protection to employees.

However, several provisions of the OSH Act are too narrow and the remedies too weak to actually protect workers. For example, the amount of time required to file a retaliation complaint is too short, investigations take too long, the burden of proof is too high, OSHA cannot preliminarily reinstate employees once it determines that a complaint has merit, and employees are not empowered to pursue their case independently when OSHA fails to take action on their behalf.

The end result is that federal law simply does not protect workers who demand a safe and healthy workplace. In fact, a Government Accountability Office (GAO) (formerly General Accounting Office) study that surveyed OSHA inspectors found that 22 percent of inspectors believed that employees could not file a complaint without retaliation by their employers; another 26 percent believed that the OSH Act provides little protection to employees; less than 10 percent believed an employee who filed a complaint would be protected from retaliation.[17]

17 H. Comm. on Educ. & Labor, U.S. House of Representatives, Comprehensive Occupational Safety and Health Reform Act, H.R. Rep. 102-663, at 47 (1992) (referencing U.S. Gov't Accountability Office, GAO/HRD-91-9FS, Occupational Safety & Health: Inspectors' Opinions on Improving OSHA Effectiveness 41 (1990), *available at* http://www.gao.gov/assets/90/88995.pdf).

THE LIMITATIONS OF OSHA'S FEDERAL ANTI-RETALIATION AUTHORITY[18]

Since the OSH Act was adopted, Congress has passed, and assigned OSHA to enforce, 21 additional anti-retaliation statutes that protect employees who report various kinds of law-breaking occurring in their workplace or industry – from violating airline safety rules to product safety rules to financial and securities fraud.[19] But almost 60 percent of all the complaints of employer retaliation OSHA receives are related to workers who complained about workplace health or safety under the OSH Act.[20]

> *An audit of OSHA's section 11(c) discrimination investigations in 1997 warned that undue delays in settling cases have negative consequences, such as "the quality of the evidence tends to erode with the passing of time, key witnesses may no longer be available, and worker financial hardships tend to increase because of the lack of timely compensation."*

The newer anti-retaliatory statutes provide workers with better protections than section 11(c) of the OSH Act. Although the Obama administration has given more attention and resources to OSHA's whistleblower protection program, OSHA is limited in what it can do to improve protections for workers who report safety and health hazards with a weak, out-of-date underlying statute. The shortcomings of the OSH Act's anti-retaliation rules are discussed below.

18 *See* Appendix A of this report for a series of charts related to this section.
19 *Whistleblower Protection Program*, *supra* note 16.
20 *Whistleblower and Victim's Rights Provisions of H.R. 2067, The Protecting America's Workers Act, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education & Labor*, 111th Cong. 30 (2010) (statement of Dr. Celeste Monforton, Assistant Research Professor, Department of Environmental & Occupational Health, George Washington University School of Public Health and Public Services), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56055/pdf/CHRG-111hhrg56055.pdf.

The 30-Day Filing Period is Too Brief

Under the OSH Act, an employee must file a retaliation complaint within 30 days of any adverse action on the part of the employer. This is too short a time for employees to determine if retaliation was the reason they were discharged. By the time they learn their employer acted illegally, it may be too late to file. By contrast, most other federal laws give employees up to 180 days to file a retaliation complaint. In 2012, at least 310 OSHA retaliation complaints were dismissed as "untimely" when the complaint was filed – i.e., the complaint was filed after the 30-day deadline.[21]

OSHA Investigations of Retaliation Take Too Long

When an employee has been demoted, threatened, or terminated, he or she is desperate for an immediate remedy. OSHA investigations of retaliation complaints are supposed to be completed within 90 days, yet the average retaliation investigation now takes more than 150 days to complete.[22] Almost every other statute that OSHA oversees has a 30- or 60-day deadline for investigating retaliation complaints. Completing investigations promptly is crucial to limit the harm caused to employees. An audit of OSHA's section 11(c) discrimination investigations in 1997 warned that undue delays in settling cases have negative consequences, such as "the quality of the evidence tends to erode with the passing of time, key witnesses may no longer be available, and worker financial hardships tend to increase because of the lack of timely compensation."[23] Moreover, when employers retaliate against employees and nothing happens, it sends a powerful signal to other workers to not complain. The longer an investigation takes, the more likely it is that retaliation will have a chilling effect on other workers.

OSHA has approximately 96 whistleblower investigators, excluding supervisors, to manage the 1,500-plus complaints it receives annually under the 22 various federal statutes it oversees.

21 Occupational Safety & Health Admin., U.S. Dep't of Labor, Meeting of the Whistleblower Protection Program Advisory Committee 143 (2013) (statement of Michael Mabee, Supervisory Investigator, Region 1, New England States, Occupational Safety and Health Administration's Whistleblower Program), *available at* https://www.osha.gov/dep/oia/MWPPAC01-29-2013.pdf.

22 Comm. on Educ. & Labor, U.S. House of Representatives, Robert C. Byrd Miner Safety and Health Act of 2010, H.R. Rep. No. 111-579, pt. 1, at 74 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt579/pdf/CRPT-111hrpt579-pt1.pdf.

23 Office of Inspector Gen., U.S. Dep't of Labor, Report No. 05-97-107-10-105, Nationwide Audit of OSHA's Section 11(c) Discrimination Investigations 14 (1997).

OSHA has approximately 96 whistleblower investigators, excluding supervisors, to manage the 1,500-plus complaints it receives annually under the 22 various federal statutes it oversees. OSHA simply lacks the resources to complete its investigations within the 90-day deadline.

OSHA Cannot Grant Preliminary Reinstatement to a Discharged Employee

The OSH Act contains no mechanism for preliminary reinstatement of a discharged employee, even when OSHA finds that a complaint has merit. Claims of retaliation are typically challenged by employers for years. During that time, the employee suffers a financial loss for having stepped forward and reported unsafe working conditions. Preliminary reinstatement would ensure that employees are not needlessly penalized for exercising their federal rights. It would also send a powerful message to co-workers that if you step forward to report unsafe working conditions, the law protects you for doing so. A number of other federal anti-retaliatory laws require that a finding of merit be accompanied by a preliminary order that includes immediate reinstatement when the employee was improperly demoted or terminated. Under a preliminary order, even if the employer files an appeal, the employee is immediately reinstated.

The OSH Act contains no mechanism for preliminary reinstatement of a discharged employee, even when OSHA finds that a complaint has merit. Claims of retaliation are typically challenged by employers for years.

The Burden of Proof is Too High

Under section 11(c) of the OSH Act, the employee must show that the health and safety complaint (the protected activity) was a *motivating factor* for the employer's retaliatory act. In other words, the employee must show that the protected activity was a substantial reason for the employer's action or that the retaliatory action would not have occurred "but for" the employee

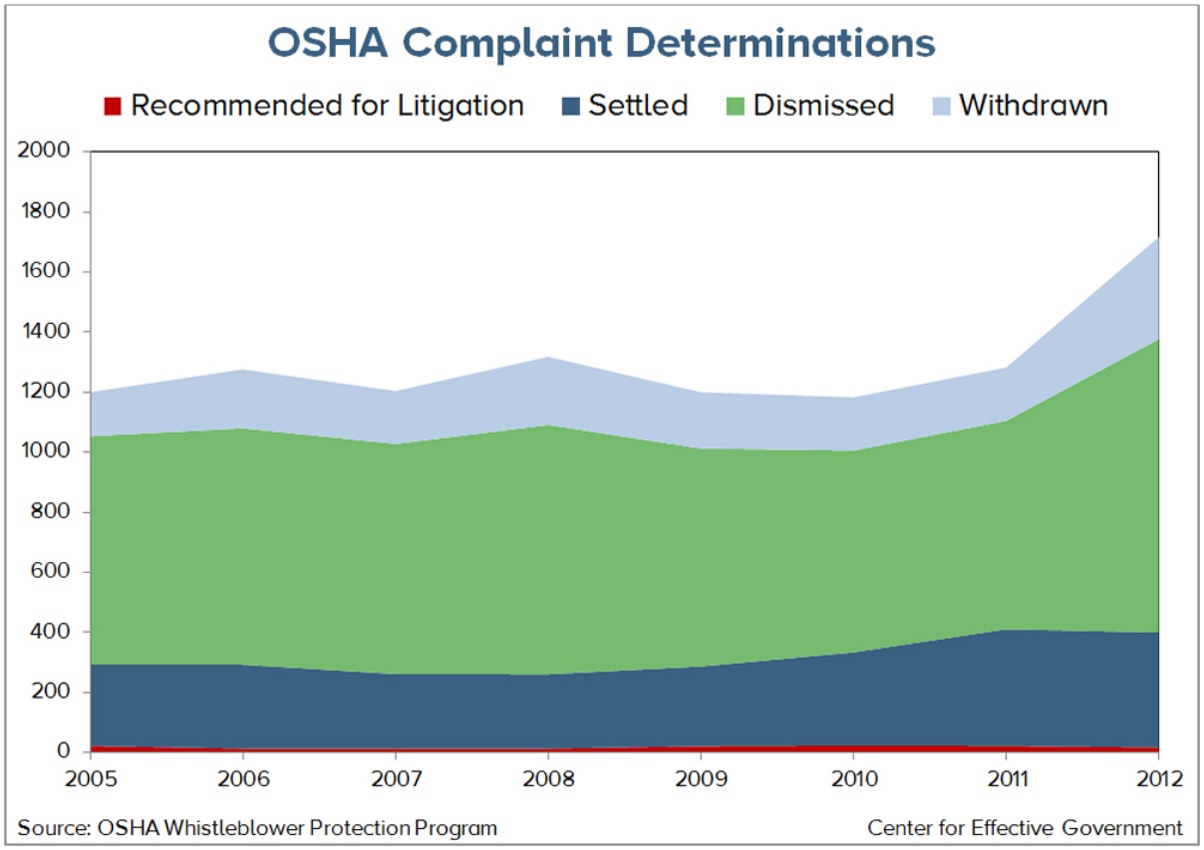
blowing the whistle.[24] Even after this is shown, the employer has an opportunity to show that it would have taken the same action against the employee even if the employee had not engaged in a protected activity.

Many other anti-retaliation provisions do not require the employee to prove that his or her protected activity was a significant or motivating factor for the employer's retaliatory act.[25] Instead, the employee need only show that his or her protected activity was a *contributing factor*, meaning that the employee's protected activity was one factor that affected the employer's decision.[26] This more appropriate standard means that a charge of retaliation could be satisfied by circumstantial evidence that the employer took an adverse action against an employee shortly after learning that the employee blew the whistle.

Employees Cannot Pursue Cases Independently

Under the OSH Act, OSHA is the sole enforcer of an employee's right to report unsafe working conditions, injuries, or fatalities. This means an employee cannot file a lawsuit charging that an employer retaliated against the employee because of a health or safety complaint. Instead, the employee has to wait for OSHA to find that his or her claim of retaliation "has merit." And if OSHA dismisses the complaint or takes longer than 90 days to issue a merit finding, the employee has no right to request an administrative hearing or to independently file suit against the employer. Even if OSHA agrees that retaliation has taken place, the employee has no remedy unless OSHA files suit on the employee's behalf.

24 Occupational Safety & Health Admin., U.S. Dep't of Labor, Instruction CPL 02-03-003, Whistleblower Investigations Manual 3-5 to 3-8 (2011), *available at* http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.
25 *Id.*
26 *Id.* at 3-7 to 3-8.



OSHA rarely files such suits. Between 2005 and 2012,[27] the agency found that 2,542 (24.49 percent) of the 10,380 complaint determinations issued "had merit." Of these, 152, or about six percent of the complaints with merit, were recommended for litigation, and 2,390 were settled out of court. A study from an earlier period found OSHA filed suit to protect employees with meritorious claims about seven percent of the time.[28]

Between 2005 and 2012, the agency found that 2,542 (24.49 percent) of the 10,380 complaint determinations issued "had merit." Of these, 152 were recommended for litigation, and 2,390 were settled out of court.

27 AFL-CIO, *supra* note 7, at 2, 80-81.

28 Comm. on Educ. & Labor, U.S. House of Representatives, Robert C. Byrd Miner Safety and Health Act Of 2010, H.R. Rep. No. 111-579, pt. 1, at 74 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt579/pdf/CRPT-111hrpt579-pt1.pdf.

The Outcome of Federal OSHA § 11(c) Complaints Filed by Workers, FY 2005-2012							
Year	Cases Received	Cases Completed	Complaint Determinations				
			Total Meritorious				
			Recom'd for Litigation	Settled	Dismissed	Withdrawn	Total Determi-nations
2005	1,194	1,160	23 (1.92%)	271 (22.58%)	760 (63.33%)	146 (12.17%)	1,200
2006	1,195	1,229	14 (1.10%)	279 (21.87%)	787 (61.68%)	196 (15.36%)	1,276
2007	1,301	1,167	14 (1.16%)	248 (20.60%)	766 (63.62%)	176 (14.62%)	1,204
2008	1,381	1,255	14 (1.06%)	247 (18.74%)	830 (62.97%)	227 (17.22%)	1,318
2009	1,267	1,168	22 (1.83%)	265 (22.08%)	726 (60.50%)	187 (15.58%)	1,200
2010	1,402	1,144	24 (2.03%)	310 (26.20%)	672 (56.80%)	177 (14.96%)	1,183
2011	1,668	1,234	23 (1.79%)	388 (30.27%)	694 (54.13%)	177 (13.81%)	1,282
2012	1,745	1,653	18 (1.05%)	382 (22.25%)	977 (56.90%)	340 (19.80%)	1,717
TOTAL	11,153	10,010	152 (1.46%)	2,390 (22.03%)	6,212 (59.85%)	1,626 (15.66%)	10,380

Given these statistics, it is clear that workers need to have another way to fight back against retaliation. Some federal anti-retaliation laws allow an employee to appeal a dismissal of his or her complaint and request an administrative hearing. These laws also often include a provision – called a "kickout clause" – that allows an employee to pursue his or her complaint independently if OSHA has taken no action after a certain number of days have passed since the complaint was filed. In other words, if OSHA fails to complete an investigation in a timely manner, or to take action to protect a worker's right, the worker may file a lawsuit on his or her own to be reinstated and/or to recover back pay to remedy employer retaliation. This is the same right that federal law provides to employees who allege race or sex discrimination, or who are victimized by wage theft.

Furthermore, giving workers the right to pursue their claims independently will create added pressure on employers to avoid retaliation and to resolve claims fairly when they arise. The government simply brings too few cases to effectively pressure employers to do the right thing. And

even when employees prevail, the small amount of damages the employer may have to pay fails to discourage future retaliation.

> *It is clear that workers need to have another way to fight back against retaliation. Some federal anti-retaliation laws allow an employee to appeal a dismissal of his or her complaint and request an administrative hearing. These laws also often include a provision – called a "kickout clause" – that allows an employee to pursue his or her complaint independently if OSHA has taken no action after a certain number of days have passed since the complaint was filed.*

This is a critically important protection, particularly now as public resources are being curtailed. The government has limited resources, and they are becoming more constrained. Agencies responsible for worker health and safety, like OSHA, have never been well funded, and with their budgets shrinking, their ability to achieve their mission is increasingly at risk.[29] New cuts are likely to result in more unsafe workplaces, more accidents and injuries, and higher costs for business and society down the road. A worker who experiences retaliation by an employer for having reported health or safety hazards in the workplace must be protected under the law. If the federal agency charged with ensuring such protections is unable to do so, then the worker must have an alternative means of recovery.

There is No Mechanism to Discourage Retaliation by Employers or Encourage Settlements

Because OSHA files so few cases, employers have little to fear if they improperly discharge an employee who reports safety and health hazards. ***There is no fine for violating the law.*** Even if OSHA files suit, employers are charged only for what the employee would have earned, minus any monies received. With the threat of paying damages so remote, employers have little incentive to voluntarily settle claims by compensating employees or rehiring them. Only a small percentage of complaints result in a settlement, and the average amount is too low to encourage employees to

29 Schwellenbach, *supra* note 9, at 3.

step forward and report health and safety hazards. According to a GAO report, in 2007, the average settlement for a retaliation complaint under the OSH Act was $5,288.[30]

STRONGER STATE LAWS ARE NEEDED TO PROTECT WORKERS WHO DEMAND A SAFE AND HEALTHY WORKPLACE

As noted at the outset of this report, OSHA has a hybrid system of enforcement that uses both federal and state programs to ensure that all workplaces in the country meet federally determined minimum standards of safety and health. OSHA encourages states to develop their own programs and will provide up to 50 percent of the operating costs for an approved state plan. For states that choose to operate their own health and safety programs, they must submit state plans to OSHA showing that they have adopted workplace health and safety standards that meet or exceed those in federal law. States are also required to conduct inspections to enforce their standards and operate occupational safety and health training and education programs. State plans developed for the private sector must also cover state and local government employees, but OSHA has permitted some states to limit state plan coverage to public-sector employees only.

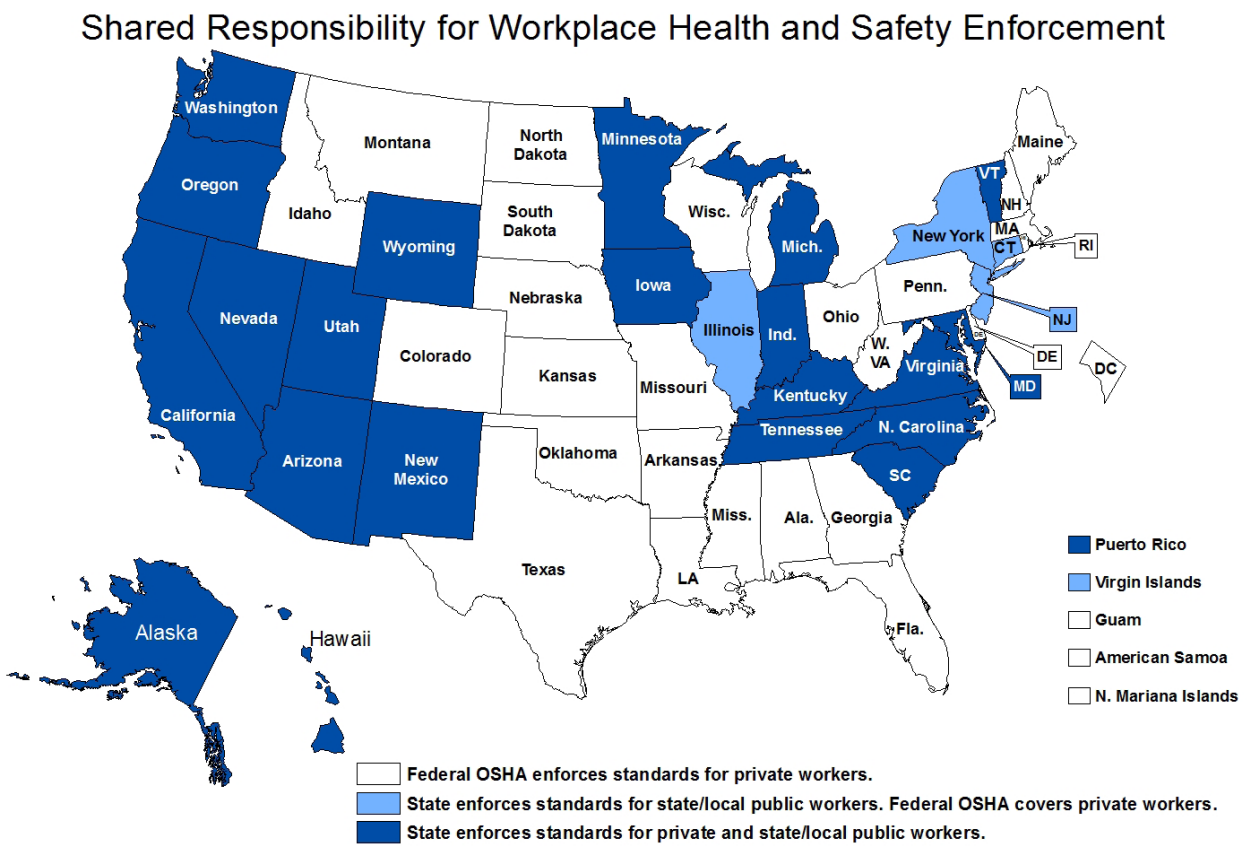
Twenty-one states and one territory that have approved state plans protect private- and public-sector workers. Four other states – Connecticut, New Jersey, Illinois, and New York – and the Virgin Islands have state OSHA plans that protect only public-sec-

Neal Jorgenson,[–] a laborer for Plastics Industries in a small town (Preston) in Idaho, was terminated after only six months on the job – seven days after he filed an OSHA complaint raising concerns about safety hazards on the job. OSHA found his case to have merit, but no suit was filed on his behalf because the federal judges in Idaho were viewed as hostile to retaliation claims. He lost $3,000 in wages that he will never recover. When he testified before Congress about the OSH Act, he said, "Would I recommend that someone file a whistleblower complaint with OSHA? Absolutely not, the way the law is written."

– COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, ROBERT C. BYRD MINER SAFETY AND HEALTH ACT OF 2010, H.R. REP. NO. 111-579, pt. 1, at 75-76 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt579/pdf/.

30 U.S. Gov't Accountability Office, GAO-09-106, Whistleblower Protection Program: Better Data and Improved Oversight would Help Ensure Program Quality And Consistency 27, tbl. 6 (2009), *available at* http://www.gao.gov/assets/290/285189.pdf (calculating the average settlement based on 172 agreements containing monetary damages for complaints settled in Fiscal Year 2007).

tor workers. In these four states and one territory, and in the 25 states without state plans, federal OSHA is responsible for enforcing these standards in private-sector workplaces. These federal OSHA protections apply only to the private sector; federal OSHA is not responsible for state and local government workers anywhere (see map below).



Because the federal OSH Act does not preempt state whistleblower protections, all states are free to adopt stronger protections than provided by federal law. In fact, some states have adopted additional whistleblower protection laws to protect workers, but the protections are not comprehensive and leave workers wondering if they are covered, what actions are protected, and whether the protections will be adequately enforced. States need to do more.

Examples of States with Additional Whistleblower Protections

The complexity of undertaking a review of all applicable state anti-retaliation laws prohibited including a comprehensive review in this report, but we have reviewed supplementary laws in seven states that provide a cross-sectional picture of the levels of protection provided by non-state plan states. In all of these states, federal OSHA has jurisdiction over private-sector workers. Two of these states, Connecticut and New Jersey, operate approved state programs that cover only public-sector workers.

Of the seven states, Connecticut provides the most comprehensive protections for both public and private workers, and we have included a case study from that state that illustrates the importance of employees having a right of private action. New Jersey also provides protections for public-sector workers that supplement its state plan for these employees and extends protections to private-sector workers. Delaware provides general whistleblower protections to public- and private-sector workers. Pennsylvania and Colorado only cover public-sector workers in their laws, and Massachusetts and Montana provide piecemeal whistleblower protections to public-sector workers and only protect private-sector employees under certain, limited conditions. A brief summary of each state's anti-retaliation laws is included below.

All states could benefit from improving upon their protections or adding new protections in state law by enacting the model legislation recommended in this report. (For an interactive map of state whistleblower protection statutes, see *State Whistleblower Statutes*, Nat'l Whistleblower Ctr., http://whistleblowers.nonprofitsoapbox.com/index.php?option=com_content&task=view&id=742&Itemid=161.)

Louis Nagy III° testified before Congress that he was fired after telling a co-worker he was going to request an OSHA inspection at his workplace. The South Carolina Occupational Safety and Health Administration (SC OSHA) concluded that retaliation had occurred and recommended that a suit be filed on Nagy's behalf, but no suit was filed and Nagy was left without a job or compensation.

° H. Comm. on Educ. & Labor, U.S. House of Representatives, Comprehensive Occupational Safety and Health Reform Act, H.R. Rep. 102-663, at 47 (1992).

Connecticut

In addition to Connecticut's state plan, which covers state and local workers only, Connecticut has enacted legislation to protect public- and private-sector workers under its general whistleblower protection law.[31] The law prohibits an employer from taking any disciplinary action against an employee because he or she disclosed to a public body a violation or suspected violation of any state or federal law or regulation or any municipal ordinance or regulation. This includes an employee being requested to participate in an investigation, hearing, or inquiry held by that public body, or a court action. The law goes further for municipal employers by prohibiting retaliation against an employee who discloses information concerning unethical practices, mismanagement, or abuse of authority by a municipal employer.

The procedures for filing a retaliation complaint require that the employee has first exhausted all available administrative remedies. Then, the employee may file a lawsuit within 90 days of the date of the final administrative determination or within 90 days of the violation, whichever is later. The burden of proof is on the plaintiff to show that the basis for the employer's adverse action was more likely than not that the employee engaged in a protected activity. An employee may be entitled to reinstatement of his job, back wages, and reestablishment of employee benefits. The court may also require an employer found to have acted in violation of the statute to pay the employee's court costs and attorney's fees.

How State Protections Can Work: Becky McClain's Day in Court under Connecticut Law

Becky McClain worked for Pfizer, Inc., in Connecticut for ten years as a molecular biologist, until she was fired after raising concerns about health and safety in the laboratory where she worked.[32] As a member of a Safety Committee,[33] Becky brought attention to safety hazards in the laboratory, including the fact that scientists were not provided adequate workspace away from dangerous

31 Conn. Gen. Stat. § 31-51m (2013).
32 McClain v. Pfizer, Inc., No. 3:06-cv-1795 (WWE), 2011 U.S. Dist. LEXIS 68415 (D. Conn. June 27, 2011), *aff'd*, No. 11-3002-cv, 505 F. App'x 59, 2012 U.S. App. LEXIS 25451 (2d Cir. 2012).
33 Amended Complaint at 3, McClain v. Pfizer, Inc., No. 3:06-cv-1795 (WWE), 2011 U.S. Dist. LEXIS 68415 (D. Conn. June 27, 2011), *aff'd*, No. 11-3002-cv, 505 F. App'x 59, 2012 U.S. App. LEXIS 25451 (2d Cir. 2012).

viruses to write reports, take breaks, or perform general administrative tasks.[34] Then, in September 2002, a noxious odor emerged from the laminar hood system – a piece of laboratory equipment that protects workers from exposure to dangerous microbes – where she and her colleagues were working. Becky, her supervisor, and other scientists reported that they became nauseous. The odor remained until August 2003. Scientists continued to work in the laboratory during this 11-month period, but every time the hood was turned on, they became ill and had to evacuate the laboratory.

In February 2003, Becky alleges that her direct supervisor threatened to give her a poor performance review because she continued to raise concerns about the laboratory's safety. Between October and November 2003, Becky alleges that she was exposed to an experiment by a co-worker who was using a dangerous virus without use of appropriate protective equipment (i.e., he was performing the experiment on an open bench next to her computer instead of inside of the biocontainment hood that prevents viruses from escaping into the laboratory).[35] Becky had been experiencing nausea and headaches, and other neurological symptoms, and her health was declining, so she took a medical leave of absence from February to June 2004. When she was hospitalized, doctors diagnosed her with transient periodic paralysis due to a potassium drop in her blood levels. At least one physician thought her "symptoms could be due to an exposure to genetically manipulated viral matter while at Pfizer."[36] Pfizer disagreed.

Before returning to work, Becky and her attorney tried to arrange a meeting with Pfizer in an attempt to negotiate improved working conditions. But instead, on Oct. 26, 2004, Pfizer placed Becky on unpaid leave and told her that she would be fired for job abandonment if she did not return to work.

Becky then filed a formal complaint with OSHA for retaliation within the 30-day notice period. Pfizer received notice of the complaint in January 2005. A few months later, on May 26, Becky was terminated. A year passed before OSHA informed Becky that her complaint was being dismissed. The first notice Becky received provided no explanation for the dismissal. Becky appealed the decision, but her appeal was denied on March 2, 2006, and her complaint was officially dismissed on Sept. 26, almost two years after she was discharged. Notably, the Connecticut District

34 *McClain*, 2011 U.S. Dist. LEXIS 68415, at *4.

35 Amended Complaint at 5, McClain v. Pfizer, Inc., No. 3:06-cv-1795 (WWE), 2011 U.S. Dist. LEXIS 68415 (D. Conn. June 27, 2011), *aff'd*, No. 11-3002-cv, 505 F. App'x 59, 2012 U.S. App. LEXIS 25451 (2d Cir. 2012).

36 McClain v. Pfizer, Inc., 692 F. Supp. 2d 229, 234 (D. Conn. Feb. 26, 2010) (order granting in part and denying in part the Defendant's motion for summary judgment).

Court later found a "lack of evidence on the record that the Regional Administrator played a role in the initial denial of the complaint, and the absence of any evidence on the record that the Appeals Committee considered and decided McClain's appeal. . . ."[37]

In accordance with Connecticut's Labor Statutes, § 31-51m(b), Becky filed a private right of action in Connecticut Superior Court on Oct. 11, 2006, alleging that Pfizer terminated her employment in violation of the state whistleblower protection law.[38] After a long jury trial, Becky was awarded $1.37 million in damages, plus attorney's fees and punitive damages. Although she lost her career and spent thousands of dollars in out-of-pocket medical expenses, she was able to recover some damages under state law because she had the right to file suit.

Delaware

Delaware operates without a state plan, and therefore, private-sector workers generally must seek protections under the federal OSH Act. However, Delaware's Whistleblower Protection Act[39] supplements the federal protections for private-sector employees and also extends those protections to public-sector workers. Another statute provides additional protections for public employees only. Delaware has also enacted anti-retaliation statutes that apply to specific instances of retaliation.

Under Delaware's Whistleblower Protection Act, an employer is prohibited from taking any retaliatory action against an employee because the employee: (1) discloses or is about to disclose to a public body a violation which the employee knows or reasonably believes has or is about to occur; (2) participates in a public investigation or hearing concerning a violation; (3) refuses to commit or assist in committing a violation; or (4) reports to the employer or the employee's supervisor a violation that the employee knows or reasonably believes has or is about to occur.

A violation includes, in part, an act or omission by an employer that is inconsistent with and a serious deviation from a law, rule, or regulation developed by the U.S., the state, or a political subdivision of the state (e.g., a county, a municipality) to protect employees or others from health,

37 *Id.* at 240.
38 Connecticut's whistleblower protection law discussed here provides protection against retaliation for private-sector workers. This law is independent of Connecticut's state plan, which only provides protections against retaliation to the state's public-sector employees.
39 Del. Code Ann. tit. 19, §§ 1701-1708 (2013).

safety, or environmental hazards while on the employer's premises or elsewhere.[40]

An employee who has been retaliated against in violation of the state law may file suit within three years of the retaliatory action. The burden of proof rests with the employee to show that the primary basis for the employer's adverse action was that the employee undertook an act protected by the law. If a court finds that the employer violated the act, it may order all appropriate relief, including reinstatement of the employee, back wages, reinstatement of benefits, removal of records related to the adverse employment action, actual damages, or any other relief that the court deems appropriate, including court costs and attorney's fees.

The second law covers only Delaware's state and local employees.[41] This law is limited to reporting to an elected official a violation or suspected violation of a law or regulation promulgated under the laws of the U.S., the state, its school districts, or a county or municipality of the state. A public employee who has been retaliated against may file a suit against his or her employer within 90 days of the alleged violation. The employee may seek reinstatement, actual damages, or both.

Additionally, other anti-retaliation statutes cover specific instances of retaliation, such as for employees exercising their rights under the state's Hazardous Chemical Information Act, or for filing a complaint with the Department of Labor concerning a violation of state contractor laws.

Montana

Montana does not operate under a state plan; however, state law includes some protections for private- and public-sector employees. Under Montana's Wrongful Discharge from Employment law,[42] employers are prohibited from retaliating against an employee because he or she discloses or refuses to participate in a violation of public policy. Public policy means "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."

40 Del. Code Ann. tit. 29, § 1702(6)(a) (2013). A violation may also consist of an act or omission by an employer that is inconsistent with or a serious deviation from financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or a law, rule, or regulation under state law, a political subdivision of the state, or federal law, which protects any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer. § 1702(6)(b).

41 Del. Code Ann. tit. 29, § 5115 (2013).

42 Mont. Code Ann. §§ 39-2-901 to 39-2-915 (2012).

However, the statute only extends to violations of public policy when another state or federal law does not already provide a remedy or procedure.[43]

The law is further limited to discharges of an employee only and requires the employee to first exhaust all internal grievance procedures. The law also does not apply to employees covered by a written collective bargaining agreement or a written employment contract for a specific term. The National Whistleblower Center cautions that the statute was enacted to preempt the state's common law remedy for wrongful discharge in violation of public policy and warns that the statute "has a low rating for protecting whistleblowers" because it "effectively undermines and prohibits common law public policy claims."[44]

An employee who has been retaliated against in violation of the law may seek lost wages and fringe benefits for up to four years from the date of discharge. The law provides the employee punitive damages if the employee can establish by clear and convincing evidence that the employer engaged in actual fraud or actual malice in discharging the employee.

Public employees are protected under Montana's OSH Act[45] for filing a complaint with the Montana Department of Labor and Industries (DOLI) of a violation of a workplace standard, cooperating with the department during an inspection or investigation, or testifying or cooperating with the department in any legal case.

New Jersey

New Jersey operates under a state plan that protects public-sector workers only. But New Jersey's Conscientious Employee Protection Act[46] extends coverage to private-sector workers and supplements the state plan's protections for public employees. The law prohibits an employer from taking a retaliatory action against an employee because the employee: (1) discloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice that the employee

43 Because of the law's limitations, private-sector employees who report health and safety violations are likely preempted from coverage under Montana law because the federal OSH Act already provides a remedy and procedure for filing complaints for retaliation.

44 *Montana*, Nat'l Whistleblower Center, http://whistleblowers.nonprofitsoapbox.com/index.php?option=com_content&task=view&id=658&Itemid=991 (last visited Sept. 6, 2013).

45 Mont. Code Ann. § 50-71-123 (2012).

46 N.J. Stat. Ann. §§ 34:19-1 to 34:19-14 (2013).

reasonably believes is in violation of a law, rule, or regulation, or is fraudulent or criminal; (2) discloses information to, or testifies before, any public body; or (3) refuses to participate in any activity, policy, or practice that the employee reasonably believes is in violation of a law, rule, or regulation, is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare, or protection of the environment.

With limited exceptions, the employee must first provide written notice to his or her supervisor and allow the employer a reasonable opportunity to correct the activity, policy, or practice. An employee who has been discriminated against in violation of the state law may file a lawsuit within one year of the retaliatory act. The court may award all appropriate relief to an employee whose case prevails, including an injunction to restrain the violation of the act, reinstatement of the employee to the same or an equivalent position, reinstatement of benefits, back wages, benefits, and other remuneration, and court costs and attorney's fees. The court or jury may also order the assessment of a civil fine and/or punitive damages.

Pennsylvania

Pennsylvania is a non-state plan state, and thus, its private-sector employees are protected by the federal OSH Act. The state's whistleblower law provides protections to public employees.[47] The law prohibits an employer from retaliating against an employee because the employee disclosed an instance of wrongdoing or waste, or because the employee was requested to participate in an investigation, hearing, inquiry, or in a court action.

An employee who has been retaliated against in violation of the state law may file a lawsuit within 180 days of the retaliatory act. The burden of proof is on the employee to show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had or was about to report in good faith an instance of wrongdoing or waste to the employer or an appropriate authority. If the court finds that the employer violated the act, it may order reinstatement of the employee, back wages, reinstatement of benefits, actual damages, or a combination thereof. The court may also award court costs and reasonable attorney's fees. An employer who is in violation of the act may also be subject to civil fines or temporary suspension from public service.

47 43 Pa. Stat. §§ 1421-1428 (2013).

Colorado

Colorado state law does not provide additional protections for private-sector workers. Thus, private-sector workers in the state have only the remedies provided by the federal OSH Act. However, Colorado has enacted a statute that protects public-sector workers from disciplinary action if the employee discloses information on a matter of public concern "regarding any action, policy, regulation, practice, or procedure, including but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency."[48] The law requires that the employee first make a good faith effort to disclose the information to his or her supervisor or to a member of the general assembly.

The burden of proof is on "the claimant [to] establish that his [or her] disclosures fell within the protection of the statute and that they were a substantial or motivating factor in the employer's opposition to his receipt of benefits . . . ."[49]

The procedures for filing a retaliation complaint under the state law depends on whether the employee is in the state personnel system. If the employee is in the system, he or she may file a written complaint with the state personnel board within 10 days. The board sets a hearing for review of the complaint within 90 days of receiving a response from the affected state agency. If the board finds at the hearing that a violation has occurred, the board must order appropriate relief within 45 days of the hearing.

Employees who are not in the state personnel system, or employees who are in the system but whose complaint was dismissed by the board, may file a lawsuit to recover damages, court costs, and any other relief the court deems appropriate. The law does not specify the statute of limitations for filing a complaint in court.

48 Colo. Rev. Stat. Ann. § 24-50.5-102 (2013).
49 Colo. Rev. Stat. Ann. § 24-50.5-103 (2013) (citing Ward v. Indus. Comm'n, 699 P.2d 960 (Colo. 1985)).

Massachusetts

Massachusetts does not operate under a state plan, so federal OSHA protections cover the state's private-sector workers. Massachusetts has enacted legislation that prohibits retaliation in certain instances, but the state has no law that provides general coverage to private- or public-sector employees.

Massachusetts state law protects public-sector employees for: (1) disclosing or threatening to disclose to a supervisor or to a public body, an activity, policy, or practice of the employer that the employee reasonably believes is a violation of a law, rule, or regulation, or poses a risk to public health, safety, or the environment; (2) providing information to or testifying before a public body regarding a violation of law, or a rule or regulation, or activity, policy, or practice that the employee reasonably believes poses a risk to public health, safety, or the environment; or (3) objecting to or refusing to participate in any activity, policy, or practice which the employee reasonably believes is a violation of a law, rule, or regulation, or poses a risk to public health, safety, or the environment.[50]

Before disclosing the information to a public body, the employee must first provide the information in writing to his or her supervisor and allow a reasonable opportunity for the employer to remedy the issue. The law only provides three limited exceptions to the notification requirement.[51]

An employee who has been retaliated against in violation of the state law may file a lawsuit within two years. The statute does not specify the burden of proof that must be met in the litigation. If the court finds the employer has violated the act, it may issue a temporary restraining order or a preliminary or permanent injunction to restrain the violation, reinstate the employee, reinstate the employee's benefits, order payment of back wages, and require the employer to pay court costs and attorney's fees.

50 Mass. Ann. Laws ch. 149, § 185 (LexisNexis 2013).

51 There is an exception to this requirement if: (1) the employee is reasonably certain that one or more supervisors has knowledge of the violation and it is emergency in nature, (2) the employee has a reasonable fear that disclosure would result in physical harm, or (3) the employee discloses the violation to a public body (in accordance with specific procedures) to provide evidence of what the employee reasonably believes to be a crime. Mass. Ann. Laws ch. 149, § 185(c)(2) (LexisNexis 2013).

Massachusetts also prohibits retaliation against employees that have filed a complaint, instituted an action, or testified in a proceeding under the state's law regarding hazardous substances disclosure by employers.[52]

All States Must Act Now to Protect Their Private- and Public-Sector Workforce

Clearly, there is a compelling need to protect workers from retaliation for reporting unsafe or unhealthy working conditions. However, without help from Congress to address the weaknesses in the federal OSH Act, states must update their laws to improve protections for private- and public-sector workers when they report health and safety hazards in the workplace.

Moreover, proposed funding cuts to federal OSHA's budget underscore the importance of workers' ability to report health and safety hazards without fear of retaliation to contribute to federal OSHA's ability to prioritize inspections in non-state plan states. These proposed funding cuts may also result in federal OSHA not having enough resources to provide up to 50 percent of funding for approved state plan programs.[53] With fewer resources, the role played by workers to serve as the "eyes and ears" of OSHA and report safety and health hazards in their workplaces becomes even more crucial. To overcome the weaknesses in the federal OSH Act, as well as the potential impact of the proposed budget cuts, states must improve their laws to better protect workers against retaliation for reporting unsafe and unhealthy working conditions.

CONCLUSION: STATES SHOULD DO MORE TO PROTECT WORKERS

Too often, workers see dangers on the job but feel they have no choice but to continue working under hazardous conditions. They are afraid to report injuries, illnesses, or unsafe working conditions. While federal law is supposed to protect employees who report safety and health violations, injuries, or fatalities, or who refuse unsafe work, it rarely does so.

52 Mass. Ann. Laws ch. 111F, § 13 (LexisNexis 2013).
53 *See generally* Schwellenbach, *supra* note 9.

When inspections do occur, employers often shut down or slow down production to hide hazardous operations. Too often, inspectors do not see what is really going on. Employees who spend too much time talking to investigators are often singled out for harassment.

Safety competitions – where workers are rewarded for low injury rates – pressure employees not to report injuries and illnesses on the job so co-workers can win prizes. Workers who report injuries, particularly when it means their co-workers lose a prize as a result, are often ostracized or worse. When injuries go unreported, an employer's safety record looks better than it really is, so the employer is less likely to be inspected, and workers are unable to claim workers' compensation benefits for work-related medical care and wage loss.

The best solution to this problem would be legislation on the federal level, like the Protecting America's Workers Act. But in the absence of Congress moving in the near term to better protect workers' voice and safety, it is critical that states act.

If states do not strengthen anti-retaliation laws, workers will not be willing to act as "the eyes and ears" of OSHA. Any modern-day legislation intended to protect employees from retaliation must provide, at minimum, five key rights:

Employees must be given adequate time to file a retaliation complaint. Under the OSH Act, and several state laws, employees only have 30 days to file a retaliation complaint. This does not give employees enough time to decide whether to take action, reach out for assistance, and file the complaint. Any state law intended to protect employees who have experienced retaliation for reporting health or safety violations in the workplace should give at least 180 days to file a complaint. This is consistent with all modern federal laws, as well as the laws in several states.

Agencies must conduct a prompt and thorough investigation of retaliation complaints. The OSH Act provides that OSHA should complete an investigation of a retaliation complaint within 90 days. However, the agency lacks the resources needed to complete most investigations in less than 150 days. Under federal law, employees receive no right to pursue the case independently when OSHA takes too long. State agencies must be given the resources needed to ensure they can meet deadlines so that employees are not left to suffer without pay while agencies are investigating complaints.

Agencies must be authorized to preliminarily reinstate employees until a decision has been reached. Under the federal OSH Act, an employee who has been retaliated against is given no preliminary reinstatement, even if the case takes years to complete. Preliminary reinstatement helps employees continue to pay bills or provide food and shelter for their families without having to apply for federal assistance. Most modern federal whistleblower statutes provide for preliminary reinstatement. All states should consider updating their state plans or laws to include preliminary reinstatement.

The burden of proof should be reasonable. The OSH Act requires federal OSHA to prove that retaliation was a *motivating* factor for the employer's adverse action against the employee. However, no modern statute with whistleblower provisions that OSHA oversees requires such a high burden of proof. Rather, these statutes only require that an employee show his or her protected activity was one factor that affected the employer's decision to take an adverse action.

An employee must have a right to pursue his or her complaint if the state agency does not. Under the OSH Act, only OSHA may pursue an action against an employer for retaliation. Even if OSHA finds that the retaliation complaint has merit, the choice to file suit is within OSHA's sole discretion. If OSHA does not file suit – and the agency usually does not – the employee is left with no remedy, and the employer is never penalized. Federal laws passed since the OSH Act provide employees the right to pursue legal action if OSHA fails to act or chooses not to file suit despite finding that a complaint has merit. Several state plan states also provide employees a private right of action to pursue their cases when the agency dismisses the complaint or fails to take action on the employee's behalf. All states should follow suit so that employees who have been retaliated against are empowered to independently pursue a claim of retaliation.

The OSH Act has not been updated since it was enacted in 1970, despite major weaknesses that leave workers without adequate protections from retaliation by an employer. Federal-level reforms are sorely needed. Lawmakers, unions, and advocates have made an important push to advance legislation, and agency staff have worked hard from within OSHA to improve the whistleblower protection program. These efforts must continue. However, with ongoing partisan gridlock in Washington, DC, it is unlikely that Congress will strengthen federal law any time soon. And in an era of budget cuts, OSHA is unlikely to have the resources it needs to pursue more cases on behalf of employees who have experienced retaliation.

State laws that better protect workers will encourage more workers to report hazards, and could thereby improve the targeting of inspections at the state level. To effectively protect workers, state law must provide employees an adequate time to file a retaliation complaint, require the agency to conduct prompt and thorough investigations of complaints they receive, authorize the agency to issue an order that includes preliminary reinstatement until a final decision has been reached, include a burden of proof that is reasonable, and empower employees to pursue their cases independently if the agency dismisses the complaint or fails to take action on behalf of the employee. Better state anti-retaliation laws are an essential component of providing private-sector workers and state and local workers across the nation with a safe and healthful workplace, as Congress originally intended the OSH Act to do.

APPENDIX A. MODEL LEGISLATION

The model legislation on the next page would strengthen state anti-retaliation protections. The legislation is modeled on proposed federal legislation and the federal Surface Transportation Act. It would:

- Provide a worker with 180 days to report suspected retaliation;
- Provide a worker with preliminary reinstatement if the state's labor commissioner finds evidence of retaliation;
- Provide a worker with a right to independently pursue a claim of retaliation if the state labor commissioner dismisses a complaint or fails to complete its investigation within 90 days; and
- Provide a more reasonable standard for proving retaliation.

The legislation would guarantee workers protection from retaliation for reporting health and safety hazards or illnesses and injuries either to government officials or their employers.

Model – Protecting [State's] Workers Act

Be It Enacted by the Legislature of the State of [State]:

Section 1. This act may be cited as the "Protecting [State's] Workers Act"

Section 2. Increasing Protections for Workers Who Report Unsafe Working Conditions

A. 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 the [state's labor law] 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 such act, including reporting any injury, illness or unsafe condition to the employer, agent of the employer, safety and health committee involved, or employee safety and health representative involved.

B. No person shall discharge or in any manner discriminate against an employee for refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in a serious injury to, or serious impairment of the health of, the employee or other employees. The circumstances causing the employee's apprehension of serious injury or serious impairment of health shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is a bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances. In order to qualify for protection under this paragraph, the employee, when practicable, shall have sought from the employee's employer, and have been unable to obtain, a correction of the circumstances causing the refusal to perform the employee's duties.

Section 3. Procedure

A. Any employee who believes that the employee has been discharged, disciplined or otherwise discriminated against by any person in violation of Sections 2A or 2B may, within 180 days after such alleged violation occurs, file a written or oral complaint with [labor commissioner] alleging that such discharge or discrimination violates Sections 2A or 2B.

Upon receipt of such a complaint, the [labor commissioner] shall notify the person named in the complaint (referred to in this subsection as the 'respondent') of the filing of the complaint.

B. Not later than 60 days after the receipt of a complaint filed under Section 3A, the [labor commissioner] shall conduct an investigation and determine whether there is reasonable cause to believe that an unlawful motive contributed to the discharge or discrimination. Upon completion of the investigation, the [labor commissioner] shall issue findings and notify the complainant and the respondent of the [labor commissioner's] findings. If the [labor commissioner] concluded there is a reasonable cause to believe an employer violated section 2, the [labor commissioner] shall issue a preliminary order providing the relief described in Section G.

C. Not later than 30 days after the [labor commissioner] has issued findings under Section 3B, either the respondent or the complainant may file objections to the findings or preliminary order, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. If the [labor commissioner] determines that the provisions of this section have not been violated, the complainant may, as an alternative to requesting a hearing on the record, institute a civil action in [state trial court] on his or her own behalf within 30 days of the dismissal of the complaint.

D. If a hearing described in Section 3C is not requested in the 30-day period, the order shall be deemed to be a final order and not subject to judicial review.

E. If the [labor commissioner] does not issue findings under Section 3B with respect to a complaint within 90 days after the receipt of the complaint, the complainant may request a hearing on the complaint. The [labor commissioner] shall adopt rules for the conduct of such hearing. Alternatively, the complainant may independently institute a civil action in [state trial court] within 30 days.

F. The [labor commissioner] shall expeditiously conduct a hearing requested under Sections 3C, 3D, and 3E. Upon the conclusion of such hearing, the [labor commissioner] shall issue a final order within 120 days.

G. If, in response to a complaint filed under Section 3A, the [labor commissioner] determines that a violation of Section 2 has occurred, in issuing an order under Section 3F, the [labor commissioner] shall require:

a. The respondent who committed such violations to correct the violation;

b. Such respondent to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment;

c. Such respondent to pay compensatory damages and punitive damages, and provide other appropriate relief if an improper motive contributed to the violation.

H. On issuing an order requiring a remedy described in Section 3, the [labor commissioner], at the request of the complainant, may assess against the respondent against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the [labor commissioner], by the complainant for, or in connection with a complaint upon which the order was issued.

I. The [labor commissioner] shall require employers to post for employees information on the protections included within this section.

APPENDIX B. COMPARISON OF ANTI-RETALIATION PROVISIONS IN FEDERAL LAWS WITHIN OSHA'S JURISDICTION[54]

Days to File Retaliation Complaint under Federal Laws	30	90	180
Occupational Safety and Health Act (OSHA) § 11(c), 29 U.S.C. § 660(C) (1970)	X		
Toxic Substances Control Act (TSCA) 15 U.S.C. § 2622 (1976)	X		
Clean Air Act (CAA) 42 U.S.C. § 7622 (1977)	X		
Asbestos Hazard Emergency Response Act (AHERA) 15 U.S.C. § 2651 (1986)		X	
Pipeline Safety Improvement Act (PSIA) 49 U.S.C. § 60129 (2002)			X
Energy Reorganization Act (ERA) 42 U.S.C. § 5851 (1974) (as amended by the Energy Policy Act of 2005)			X
Surface Transportation Assistance Act (STAA) 49 U.S.C. § 31105 (1982) (as amended by the 9/11 Commission Act of 2007)			X
Federal Railroad Safety Act (FRSA) 49 U.S.C. § 20109 (1970) (as amended by the 9/11 Commission Act of 2007 and The Rail Safety Improvement Act of 2008)			X
Consumer Product Safety Improvement Act (CPSIA) 15 U.S.C. § 2087 (2008)			X
Sarbanes-Oxley Act (SOX) 18 U.S.C. § 1514A (2002) (as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010)			X
Affordable Care Act (ACA) 29 U.S.C. § 218C, Sec. 1558 (2010)			X

54 This appendix contains charts that compare section 11(c) of the OSH Act to a sampling of other federal laws with whistleblower protections within OSHA's jurisdiction. For space considerations, we have chosen only a small sampling of the 22 federal laws whose whistleblower protections OSHA enforces. The laws are listed in order from oldest to newest to show how newer laws provide better protections than the outdated provisions of the OSH Act.

Days to Complete a Retaliation Investigation	30	60	90
Occupational Safety and Health Act (OSHA) § 11(c)			X
Toxic Substances Control Act (TSCA)	X		
Clean Air Act (CAA)	X		
Asbestos Hazard Emergency Response Act (AHERA)			X
Pipeline Safety Improvement Act (PSIA)		X	
Energy Reorganization Act (ERA)	X		
Surface Transportation Assistance Act (STAA)		X	
Federal Railroad Safety Act (FRSA)		X	
Consumer Product Safety Improvement Act (CPSIA)		X	
Sarbanes-Oxley Act (SOX)		X	
Affordable Care Act (ACA)		X	

Law Requires Protected Activity to be a Motivating/Contributing Factor for Retaliation	Burden
Occupational Safety and Health Act (OSHA) § 11(c)	Motivating
Toxic Substances Control Act (TSCA)	Motivating
Clean Air Act (CAA)	Motivating
Asbestos Hazard Emergency Response Act (AHERA)	Motivating
Pipeline Safety Improvement Act (PSIA)	Contributing
Energy Reorganization Act (ERA)	Contributing
Surface Transportation Assistance Act (STAA)	Contributing
Federal Railroad Safety Act (FRSA)	Contributing
Consumer Product Safety Improvement Act (CPSIA)	Contributing
Sarbanes-Oxley Act (SOX)	Contributing
Affordable Care Act (ACA)	Contributing

Preliminary Reinstatement of Employee	Yes/No
Occupational Safety and Health Act (OSHA) § 11(c)	No
Toxic Substances Control Act (TSCA)	No
Clean Air Act (CAA)	No
Asbestos Hazard Emergency Response Act (AHERA)	No
Pipeline Safety Improvement Act (PSIA)	Yes
Energy Reorganization Act (ERA)	No
Surface Transportation Assistance Act (STAA)	Yes
Federal Railroad Safety Act (FRSA)	Yes
Consumer Product Safety Improvement Act (CPSIA)	Yes
Sarbanes-Oxley Act (SOX)	Yes
Affordable Care Act (ACA)	Yes

Kick-out Clause that Allows for Private Action if No Action Is Taken After a Complaint Has Been Filed	Days
Occupational Safety and Health Act (OSHA) § 11(c)	No
Toxic Substances Control Act (TSCA)	No
Clean Air Act (CAA)	No
Asbestos Hazard Emergency Response Act (AHERA)	No
Pipeline Safety Improvement Act (PSIA)	No
Energy Reorganization Act (ERA)	>1 year
Surface Transportation Assistance Act (STAA)	>210 days
Federal Railroad Safety Act (FRSA)	>210 days
Consumer Product Safety Improvement Act (CPSIA)	>210 days
Sarbanes-Oxley Act (SOX)	>180 days
Affordable Care Act (ACA)	>210 days

Kick-out Clause After Findings Issued if No Final Decision	Days
Occupational Safety and Health Act (OSHA) § 11(c)	No
Toxic Substances Control Act (TSCA)	No
Clean Air Act (CAA)	No
Asbestos Hazard Emergency Response Act (AHERA)	No
Pipeline Safety Improvement Act (PSIA)	No
Energy Reorganization Act (ERA)	No
Surface Transportation Assistance Act (STAA)	No
Federal Railroad Safety Act (FRSA)	No
Consumer Product Safety Improvement Act (CPSIA)	>90
Sarbanes-Oxley Act (SOX)	No
Affordable Care Act (ACA)	>90

APPENDIX C. ANTI-RETALIATION PROTECTIONS: OSHA STATE-PLAN STATES

Anti-Retaliation Protections in States with OSHA State Plans				
State	Days for Worker to File Complaint	Days for Agency to Issue Finding	Preliminary Reinstatement	Worker Can Pursue Complaint If Agency Does Not
AK	30	90	No	May appeal determination within 10 days.
AZ	30	90	No	Not Specified
CA	180	60	If the employer does not comply with the Commissioner's order within 10 days, the Commissioner may enforce the order in court and shall petition the court for temporary relief or restraining order. However, the statute does not provide that the Commissioner may petition a court for temporary relief or restraining order if the order is appealed within 10 days.	May appeal determination within 10 days. Additionally, if case dismissed, the complainant may file suit independently.
CT*	180	90 (after hearing)	No	May appeal commissioner's decision to Superior Court.
HI	60	90	No	May appeal determination within 20 days. Employee may also have an independent right of action.
IA	30	90	No	Not Specified
IN	30	90	No	Not Specified
IL*	30	90	No	Not Specified
KY	120	90	Yes, upon an initial determination by the commissioner that an employee has been wrongfully discharged, the secretary of the Labor Cabinet may order reinstatement of the employee pending a final determination and order of the review commission.	If dismissed, may petition the secretary for review of the determination.
MD	30	90	No	Not Specified
MI	30	90	No	May request a review of the determination within 15 days.

MN	30	Not Specified	No	Not specified, but may have a private action.
NC	180	90	No	If no finding issued 90 days after complaint filed, may request a right-to-sue letter; if case is dismissed without investigation, a right-to-sue letter is provided.
NJ*	180	90	No	Not Specified
NM	30	60	No	Not Specified
NV	30	90	No	Not Specified
NY*	30	90	No	Not Specified
OR	90	90	No	If case is dismissed, or no action is taken within 1 year after complaint is filed, agency must issue a 90-day notice to file a civil suit. Additionally, instead of filing a complaint, the employee may file a civil suit within one year of the retaliatory action.
PR	30	90	No	Not Specified, but law states that employee may have an independent claim to recover compensation for wrongful discharge.
SC	30 days (private); 1 year (public, file in court)	Not Specified	No	Not Specified
TN	30	90	No	May appeal decision or determination within 10 days.
UT	30	90	No	Not Specified
VA	60	Not Specified	No	May file suit if case dismissed.
VI*	30	90	No	Not Specified
VT	30	90	No	Private action in addition to or in lieu of filing complaint with agency.
WA	30	90	No	May file suit if case dismissed.
WY	30	90	No	Not Specified

*State plan covers public employees only.

Disclaimer: The legal information contained in this chart is based on the most current information available to the Center for Effective Government as of the release of this report. Although we have attempted to confirm the accuracy of this information, information may have changed since the date of this report. For the most up-to-date information on the handling of retaliation complaints in your state, please refer to your state's official laws and regulations.

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