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MISCELLANEOUS PROVISIONS

- 1978.112 Arbitration or other proceedings.
- 1978.113 Judicial enforcement.
- 1978.114 Statutory time periods.
- 1978.115 Special circumstances; waiver of rules.

AUTHORITY: 29 U.S.C. 657(g)(2); 29 U.S.C. 660(c)(2); 49 U.S.C. 31101 and 31105; Secretary of Labor's Order No. 1-90, 55 FR 9033.

SOURCE: 53 FR 47681, Nov. 25, 1988, unless otherwise noted.

Subpart A—Interpretive Rules [Reserved]

Subpart B—Rules of Procedure

COMPLAINTS, INVESTIGATIONS, FINDINGS AND PRELIMINARY ORDERS

§ 1978.100 Purpose and scope.

(a) This subpart implements the procedural aspects of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 2305, which provides for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

(b) Procedures are established by this subpart pursuant to the statutory provision set forth above for the expeditious handling of complaints of discrimination made by employees, or persons acting on their behalf. These rules, together with those rules set forth at 29 CFR part 18, set forth the procedures for submission of complaints under section 405, investigations, issuance of findings and preliminary orders, objections thereto, litigation before administrative law judges, post-hearing administrative review, withdrawals and settlements, judicial review and enforcement, and deferral to other forums.

§ 1978.101 Definitions.

(a) *Act* means the Surface Transportation Assistance Act of 1982 (STAA) (49 U.S.C. 2301 *et seq.*).

(b) *Secretary* means Secretary of Labor or persons to whom authority under the Act has been delegated.

(c) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person

or persons to whom he or she delegates authority under the Act.

(d) *Employee* means (1) a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle); (2) a mechanic; (3) a freight handler; or (4) any individual other than an employer; who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment.

(e) *Commercial motor carrier* means a person who meets the definition of *motor carrier* found at 49 U.S.C. 10102(13) (Supp. 1987) and *motor private carrier* found at 49 U.S.C. 10102(16) (Supp. 1987).

(f) *OSHA* means the Occupational Safety and Health Administration.

(g) *Complainant* means the employee who filed a section 405 complaint or on whose behalf a complaint was filed.

(h) *Named person* means the person alleged to have violated section 405.

(i) *Person* means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.

§ 1978.102 Filing of discrimination complaint.

(a) *Who may file*. An employee may file, or have filed by any person on the employee's behalf, a complaint alleging a violation of section 405.

(b) *Nature of filing*. No particular form of complaint is required.

(c) *Place of filing*. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer or employee is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.

(d) *Time for filing*. (1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of section 405 (a) or (b) “* * * may, within one hundred and eighty days after such alleged violation

occurs," file or have filed by any person on the employee's behalf a complaint with the Secretary.

(2) A major purpose of the 180-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.

(3) However, there are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, *e.g.*, where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period. The Assistant Secretary will not ordinarily investigate complaints which are determined to be untimely.

(e) *Relationship to section 11(c) complaints.* A complaint filed by an employee within thirty days of the alleged violation or otherwise timely filed pursuant to section 11(c) of the OSHA Act, which alleges discrimination relating to safety or health, shall be deemed to be a complaint filed under both section 405 and section 11(c). Normal procedures for investigations under both sections will be followed, except as otherwise provided.

(f) Upon receipt of a valid complaint, OSHA shall notify the named person of the filing of the complaint by providing a copy of the complaint, sanitized to protect witness confidentiality if necessary, and shall also notify the named person of his or her rights under 29 CFR 1978.103 (b) and (c).

§ 1978.103 Investigation.

(a) OSHA shall investigate and gather data concerning the case as it deems appropriate.

(b) Within twenty days of his or her receipt of the complaint the named person may submit to OSHA a written statement and any affidavits or documents explaining or defending his or her position. Within the same twenty days the named person may request a

meeting with OSHA to present his or her position. The meeting will be held before the issuance of any findings or preliminary order. At the meeting the named person may be accompanied by counsel and by any persons with information relating to the complaint, who may make statements concerning the case. At such meeting OSHA may present additional allegations of violations which may have been discovered in the course of its investigation.

(c) If, on the basis of information gathered under paragraphs (a) and (b) of this section, OSHA has reasonable cause to believe that the named person has violated the Act and that temporary reinstatement is warranted, prior to the issuance of findings and preliminary order as provided for in § 1978.104, OSHA shall again contact the named person to give him or her notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. The named person shall be given the opportunity to submit a written response, to meet with the investigators and to present statements from rebuttal witnesses. The named person shall present this rebuttal evidence within five days of OSHA's notification pursuant to this subsection, or as soon thereafter as OSHA and the named person can agree, if the interests of justice so require.

§ 1978.104 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within sixty days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the named person or others have discriminated against the complainant in violation of section 405 (a) or (b). If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed in section 405(c)(2)(B). Such order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together

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with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. At the complainant's request the order may also assess against the named party the complainant's costs and expenses (including attorney's fees) reasonably incurred in filing the complaint.

(b) The findings and the preliminary order shall be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order shall inform the parties of the right to object to the findings and/or the order and shall give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the findings and/or order.

(c) Upon the issuance of findings that there is reasonable cause to believe that a violation has occurred, any pending section 11(c) complaint will be suspended until the section 405 proceeding is completed. When the section 405 proceeding is completed the Assistant Secretary will determine what action, if any, is appropriate on the section 11(c) complaint. If the Assistant Secretary's findings indicate that a violation has occurred, the Assistant Secretary shall make a separate determination as to whether section 11(c) has been violated.

§ 1978.105 Objections to the findings and the preliminary order.

(a) *Basic procedures.* Within thirty days of receipt of the findings or preliminary order the named person or the complainant, or both, may file objections to the findings or preliminary order providing relief or both and request a hearing on the record. The objection and request shall be in writing and shall state whether the objection is to the findings or the preliminary order or both. Such objection shall also be considered a request for a hearing. The date of the postmark shall be considered to be the date of filing. Objections shall be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC and

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copies of the objections shall be mailed at the same time to the other parties of record, including the Assistant Secretary's designee who issued the findings and order.

(b) *Effective date of findings and preliminary order and failure to object.* (1) The findings and the preliminary order shall be effective thirty days after the named person's receipt thereof, or on the compliance date set forth in the preliminary order, whichever is later, unless an objection to the findings or preliminary order has been timely filed. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections thereto.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, such findings or preliminary order, as the case may be, shall become final and not subject to judicial review.

LITIGATION

§ 1978.106 Scope of rules; applicability of other rules; notice of hearing.

(a) Except as otherwise noted, hearings shall be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated at 29 CFR part 18, 48 FR 32538 (July 15, 1983), amended at 49 FR 2739 January 20, 1984. Hearings shall be conducted as hearings *de novo*.

(b) Upon receipt of an objection, the Chief Administrative Law Judge shall immediately assign the case to a judge who shall, within seven days following the receipt of the objection, notify the parties, by certified mail, of the day, time, and place of hearing. The hearing shall commence within 30 days of the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties.

(c) If both complainant and the named person object to the findings and/or order, the objections shall be consolidated and a single hearing shall be conducted. If the objections are not received simultaneously, the hearing shall commence within 30 days of the receipt of the later objection.