

§1985.109. The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including:

(1) Reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

(2) The amount of back pay, with interest;

(3) Compensation for any special damages sustained as a result of the discharge or discrimination; and

(4) Litigation costs, expert witness fees, and reasonable attorney fees.

(d) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. In all cases, a copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

**§ 1985.115 Special circumstances; waiver of rules.**

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days' notice to all parties, waive any rule or issue such orders that justice or the administration of CFPA requires.

**PART 1986—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SEAMAN'S PROTECTION ACT (SPA), AS AMENDED**

**Subpart A—Complaints, Investigations, Findings, and Preliminary Orders**

Sec.

1986.100 Purpose and scope.

1986.101 Definitions.

1986.102 Obligations and prohibited acts.

1986.103 Filing of retaliation complaints.

1986.104 Investigation.

1986.105 Issuance of findings and preliminary orders.

**Subpart B—Litigation**

1986.106 Objections to the findings and the preliminary order and request for a hearing.

1986.107 Hearings.

1986.108 Role of Federal agencies.

1986.109 Decisions and orders of the administrative law judge.

1986.110 Decisions and orders of the Administrative Review Board.

**Subpart C—Miscellaneous Provisions**

1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.

1986.112 Judicial review.

1986.113 Judicial enforcement.

1986.114 District court jurisdiction of retaliation complaints under SPA.

1986.115 Special circumstances; waiver of rules.

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**Subpart A—Complaints, Investigations, Findings, and Preliminary Orders**

**§ 1986.100 Purpose and scope.**

(a) This part sets forth the procedures for, and interpretations of, the Seaman's Protection Act (SPA), 46 U.S.C. 2114, as amended, which protects a seaman from retaliation because the seaman has engaged in protected activity pertaining to compliance with maritime safety laws and accompanying regulations. SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105.

(b) This part establishes procedures pursuant to the statutory provisions set forth above for the expeditious handling of retaliation complaints filed by seamen or persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings, litigation before administrative law judges (ALJs), post-

hearing administrative review, withdrawals and settlements, and judicial review and enforcement. In addition, these rules provide the Secretary's interpretations on certain statutory issues.

**§ 1986.101 Definitions.**

As used in this part:

(a) *Act* means the Seaman's Protection Act (SPA), 46 U.S.C. 2114, as amended.

(b) *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.

(c) *Business days* means days other than Saturdays, Sundays, and Federal holidays.

(d) *Citizen of the United States* means:

(1) An individual who is a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22)) or a corporation, partnership, association, or other business entity if the controlling interest is owned by citizens of the United States. The controlling interest in a corporation is owned by citizens of the United States if:

(i) Title to the majority of the stock in the corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of a person not a citizen of the United States;

(ii) The majority of the voting power in the corporation is vested in citizens of the United States;

(iii) There is no contract or understanding by which the majority of the voting power in the corporation may be exercised, directly or indirectly, in behalf of a person not a citizen of the United States; and

(iv) There is no other means by which control of the corporation is given to or permitted to be exercised by a person not a citizen of the United States.

(2) Furthermore, a corporation is only a citizen of the United States if:

(i) It is incorporated under the laws of the United States or a State;

(ii) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and

(iii) No more of its directors are non-citizens than a minority of the number necessary to constitute a quorum.

(e) *Complainant* means the seaman who filed a SPA whistleblower complaint or on whose behalf a complaint was filed.

(f) *Cooperated* means any assistance or participation with an investigation, at any stage of the investigation, and regardless of the outcome of the investigation.

(g) *Maritime safety law or regulation* includes any statute or regulation regarding health or safety that applies to any person or equipment on a vessel.

(h) *Notify* or *notified* includes any oral or written communications.

(i) *OSHA* means the Occupational Safety and Health Administration of the United States Department of Labor.

(j) *Person* means one or more individuals or other entities, including but not limited to corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(k) *Report* or *reported* means any oral or written communications.

(l) *Respondent* means the person alleged to have violated 46 U.S.C. 2114.

(m) *Seaman* means any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States. The term includes an individual formerly performing the work described above or an applicant for such work.

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

(o) *State* means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(p) *Vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(q) *Vessel owner* includes all of the agents of the owner, including the vessel's master.

(r) Any future amendments to SPA that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

**§ 1986.102 Obligations and prohibited acts.**

(a) A person may not retaliate against any seaman because the seaman:

(1) In good faith reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;

(2) Refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public;

(3) Testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(4) Notified, or attempted to notify, the vessel owner or the Secretary of the department in which the Coast Guard is operating of a work-related personal injury or work-related illness of a seaman;

(5) Cooperated with a safety investigation by the Secretary of the department in which the Coast Guard is operating or the National Transportation Safety Board;

(6) Furnished information to the Secretary of the department in which the Coast Guard is operating, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(7) Accurately reported hours of duty under part A of subtitle II of title 46 of the United States Code.

(b) Retaliation means any discrimination against a seaman including, but is not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman.

(c) For purposes of paragraph (a)(2) of this section, the circumstances causing a seaman's apprehension of serious injury must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious

impairment of health resulting from the performance of duties as ordered by the seaman's employer. To qualify for protection based on activity described in paragraph (a)(2) of this section, the seaman must have sought from the employer, and been unable to obtain, correction of the unsafe condition. Any seaman who requests such a correction shall be protected against retaliation because of the request.

**§ 1986.103 Filing of retaliation complaints.**

(a) *Who may file.* A seaman who believes that he or she has been retaliated against by a person in violation of SPA may file, or have filed by any person on the seaman's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a seaman is unable to file a complaint in English, OSHA will accept the complaint in any other language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the seaman resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>.

(d) *Time for filing.* Not later than 180 days after an alleged violation occurs, a seaman who believes that he or she has been retaliated against in violation of SPA may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(e) *Relationship to section 11(c) complaints.* A complaint filed under SPA alleging facts that would also constitute a violation of section 11(c) of the Occupational Safety and Health

Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both SPA and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would also constitute a violation of SPA will be deemed to be a complaint filed under both SPA and section 11(c). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

**§ 1986.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of the respondent's rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the U.S. Coast Guard.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the Agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the Agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Agency will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides in-

formation on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The seaman engaged in a protected activity;

(ii) The respondent knew or suspected that the seaman engaged in the protected activity;

(iii) The seaman suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the seaman engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in

the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1986.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

**§ 1986.105 Issuance of findings and preliminary orders.**

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the respondent retaliated against the complainant in violation of SPA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief. Such order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order may also require the respondent to pay punitive damages of up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or the order and to request a hearing. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor.

At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and the preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and request for a hearing have been timely filed as provided at § 1986.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

### Subpart B—Litigation

#### § 1986.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1986.105(c). The objections and request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, and the OSHA official who issued the findings.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any

objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order will become the final decision of the Secretary, not subject to judicial review.

#### § 1986.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated, and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

#### § 1986.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. In any case in which the respondent objects to the findings or the preliminary order, the Assistant Secretary ordinarily will be the prosecuting party. In any other cases, at the Assistant Secretary's discretion,

the Assistant Secretary may participate as a party or participate as amicus curiae at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) If the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1) of this section, he or she may, upon written notice to the ALJ or the Administrative Review Board, as the case may be, and the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ or the Administrative Review Board, as the case may be, will issue appropriate orders to regulate the course of future proceedings.

(3) Copies of documents in all cases shall be sent to all parties, or if they are represented by counsel, to the latter. In cases in which the Assistant Secretary is a party, copies of the documents shall be sent to the Regional Solicitor's Office representing the Assistant Secretary.

(b) The U.S. Coast Guard, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at its discretion. At the request of the U.S. Coast Guard, copies of all documents in a case must be sent to that agency, whether or not that agency is participating in the proceeding.

**§ 1986.109 Decisions and orders of the administrative law judge.**

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent

demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1986.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation, reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a

timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The ALJ decision will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the decision for review.

**§ 1986.110 Decisions and orders of the Administrative Review Board.**

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any

briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary and on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees the complainant may have incurred); and payment of punitive damages up to \$250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.



**Subpart C—Miscellaneous Provisions****§ 1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.**

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or a preliminary order at any time before the expiration of the 30-day objection period described in § 1986.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or preliminary order become final, a party may withdraw objections to the Assistant Secretary's findings and/or preliminary order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's

findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a SPA complaint and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary's consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ or by the ARB, if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in a United States district court pursuant to 49 U.S.C. 31105(e), as incorporated by 46 U.S.C. 2114(b).

**§ 1986.112 Judicial review.**

(a) Within 60 days after the issuance of a final order under §§ 1986.109 and 1986.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

## § 1986.113

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB, or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

### § 1986.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order, including one approving a settlement agreement issued under SPA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

### § 1986.114 District court jurisdiction of retaliation complaints under SPA.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. The action shall, at the request of either party to such action, be tried by the court with a jury.

(b) Within seven days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

### § 1986.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue such

## 29 CFR Ch. XVII (7–1–16 Edition)

orders as justice or the administration of SPA requires.

## PART 1987—PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER SECTION 402 OF THE FDA FOOD SAFETY MODERNIZATION ACT

### Subpart A—Complaints, Investigations, Findings and Preliminary Orders

- 1987.100 Purpose and scope.
- 1987.101 Definitions.
- 1987.102 Obligations and prohibited acts.
- 1987.103 Filing of retaliation complaint.
- 1987.104 Investigation.
- 1987.105 Issuance of findings and preliminary orders.

### Subpart B—Litigation

- 1987.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1987.107 Hearings.
- 1987.108 Role of Federal agencies.
- 1987.109 Decision and orders of the administrative law judge.
- 1987.110 Decision and orders of the Administrative Review Board.

### Subpart C—Miscellaneous Provisions

- 1987.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1987.112 Judicial review.
- 1987.113 Judicial enforcement.
- 1987.114 District court jurisdiction of retaliation complaints.
- 1987.115 Special circumstances; waiver of rules.

AUTHORITY: 21 U.S.C. 399d; Secretary of Labor's Order No. 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor's Order No. 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

SOURCE: 81 FR 22539, Apr. 18, 2016, unless otherwise noted.

### Subpart A—Complaints, Investigations, Findings and Preliminary Orders

#### § 1987.100 Purpose and scope.

(a) This part sets forth the procedures for, and interpretations of, section 402 of the FDA Food Safety Modernization Act (FSMA), Public Law 111-353, 124 Stat. 3885, which was signed into law on January 4, 2011. Section 402