

Straight Track - A Hoey & Farina Newsletter

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The Hoey & Farina

RAILROAD RETALIATION REPORT

Part 6: CLARIFYING PROCEDURES UNDER SECTION 20109

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Last August, Congress gave the United States Secretary of Labor responsibility for investigating retaliation claims under Section 20109 of the Federal Rail Safety Act. And, the Occupational Safety and Health Administration ("OSHA"), as part of the Department of Labor, will be handling retaliation claims under Section 20109.

Laws such as Section 20109 include substance and procedure. Besides knowing the rights granted to railroad employees by Section 20109, you also need to know something about the procedures for filing retaliation claims.

To help understand the new law, this issue of the **Railroad Retaliation Report** presents five important procedural questions, plus preliminary answers. **These are preliminary answers because OSHA has not yet issued regulations that specifically govern retaliation claims from railroad employees under Section 20109.** Accordingly, our preliminary answers are based on how OSHA has handled complaints from non-railroad employees.

Besides handling retaliation cases under the Occupational Safety Act, OSHA has also been assigned the task of handling retaliation claims filed under 13 others statutes - including laws that protect airline, trucking and asbestos-removal employees. Remember, if you intend to pursue a retaliation complaint under Section 20109, you need to know how to proceed, and how OSHA has responded to complaints in the past.

1. How do I file a retaliation complaint?

The best practice is to send a **written complaint** to the regional OSHA office where you live, or where the railroad violated Section 20109.

2. What does the complaint have to include?

OSHA recommends the following in a retaliation complaint:

1. Your full name, address and phone number; plus your employer's name, address and phone number.
2. The date the complaint is being filed, plus the date of the alleged adverse action.

3. A **brief summary** of the alleged discrimination or retaliation.

This brief summary must include the following:

- (a) The facts that show you engaged in protected activity (e.g., reporting a personal injury).
- (b) The facts that show your employer knew that you engaged in protected activity.
- (c) Supporting evidence that shows you suffered adverse employment action or discrimination (e.g., firing, demotion, suspension or reprimand).
- (d) Supporting evidence that shows the adverse action was caused, at least in part, by the fact that you engaged in protected activity.

3. What does OSHA do when it receives a complaint?

As soon as OSHA receives the complaint, a supervisor reviews it to see if (1) the appropriate jurisdictional requirements have been satisfied; (2) it was filed on time; and (3) the complaint contains the required factual allegations.

When OSHA opens up a file on a complaint, a supervisor will send a letter to you to let you know that the complaint has been received. This letter will give the official name and number of the case, plus the name of the investigator who will be handling the case.

An OSHA investigator might contact you, as a preliminary matter, to obtain additional information. And, OSHA may send a questionnaire to the complainant asking for additional information.

An OSHA supervisor will also send a letter to the railroad notifying it of the complaint, and requesting that the railroad submit a written position-statement. Sometimes, though, if OSHA plans on conducting a surprise inspection, it delays notifying an employer of a complaint.

4. When does the clock start running on the 180-day deadline for filing a retaliation complaint under Section 20109, and when does it stop?

The deadline for filing a retaliation complaint under Section 20109 usually starts running from **the date of the adverse action**. A complaint must be received by OSHA within 180-days of the adverse action. If the adverse action or discrimination is **continuing** - such as prolonged harassment or blacklisting - the time for filing a complaint starts running from the **last act** of discrimination.

Sometimes, even though a complaint is **mailed** before the deadline, it is received by OSHA **after** the deadline expires. When a complaint is sent by mail, the date of filing is the date of the **postmark**. So, be sure to ask the U. S. Postal Service for proof of the date of mailing. If the last day of the deadline falls on a weekend or a federal holiday, the next business day will be the final day for filing.

Complaints filed after the statutory deadline will usually be closed, without any investigation.

5. Is a railroad employee ever entitled to an extension of the 180-day deadline for filing a retaliation complaint under Section 20109?

Failure to file a complaint on time is **not** excused if it was based on ignorance of the deadline, or the filing of another claim, such as a personal injury case, or a grievance. OSHA may grant an extension of the deadline for filing a retaliation complaint only in **extraordinary** circumstances, depending on the facts of the particular case. In actuality, don't count on an extension.

OSHA might extend the deadline for filing a retaliation complaint if:

1. The employer **concealed the existence** of adverse action from the employee.
2. The employee was unable to file a retaliation complaint on time because of **serious illness or injury**.
3. The employee was unable to file within the deadline because of a **natural disaster**, such as a snowstorm or flood. But the conditions have to be so bad that a reasonable person would not have been able to file a complaint on time.
4. The employee mistakenly filed the complaint with another government agency that does not did not have authority to grant relief to the employee.

Conclusion

Filing a retaliation claim under Section 20109 is a serious undertaking. You need to know the substance and procedures of the new law, and discuss your case with a Union Representative and/or Designated Legal Counsel before filing a retaliation claim.

Unfortunately, there are railroad supervisors who will make every effort to concoct an excuse to fire an employee they don't want on the property. And, even if you eventually prove that the firing was in retaliation for filing a complaint with OSHA, the railroad can still put you out of work for a lengthy period of time as you progress your claim under the collective bargaining agreement.

If you intend to pursue a retaliation complaint under Section 20109, you need to know how to proceed, and how OSHA, to the best of our knowledge, will handle the case. However, railroad employees who are the victims of retaliation **today** cannot wait until OSHA issues specific regulations for claims by railroad employees.