
VOLUME 1. GENERAL CONCEPTS, DIRECTION, GUIDANCE, AND DEFINITIONS

CHAPTER 6. WHISTLEBLOWER PROTECTION PROGRAM (AIR CARRIER)

SECTION 1. PROGRAM OVERVIEW

501. APPLICABILITY. This chapter contains direction and guidance for aviation safety inspectors (ASI) about the Whistleblower Protection Program (WBPP). The WBPP provides protection against discrimination for employees of air carriers, employees of contractors to air carriers, and employees of subcontractors to air carriers, who report air safety information to their employer or to the Federal Government.

503. BACKGROUND.

A. Legislative History. The Whistleblower Protection Program provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) was passed by the House and Senate and became law when HR 1000 was signed by the President on April 5, 2000. HR 1000 became Public Law 106-181, which was subsequently codified at Title 49 of the United States Code (49 U.S.C.) § 42121 (See figure 1.6.1.1).

B. Prior to the enactment of the law, air carrier employees and employees that worked for a contractor or subcontractor to an air carrier, who reported safety violations or alleged safety violations were not protected from discrimination by the Department of Labor (DOL). Many employees did not report safety concerns and alleged violations because of fear of reprisal up to and including losing their jobs. As a result, the Federal Aviation Administration (FAA) was not receiving valuable air carrier safety and security information from these employees.

C. The Whistleblower Protection Program, 49 U.S.C. Section 42121, provides for the protection of employees that provide, caused to be provided, or are about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any *violation or alleged violation* of any *order, regulation, or standard* of the FAA or any other provision of Federal law relating to air carrier safety or any other law of the United States; or has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier

safety under this subtitle or any other law of the United States.

D. Eligibility. To be eligible for Whistleblower Protection under the program, an air carrier, contractor, or subcontractor employee must have been engaged in a protected activity (e.g., reporting an alleged violation related to air carrier safety) (see figure 1.6.1.1, paragraph 42121 (a)(1) through (4)) and believe they are or have been discriminated against for engaging in the protected activity.

E. Personal Remedy. A personal remedy for discrimination is available only through the Department of Labor. Complainants that wish to seek a personal remedy for the alleged discrimination activity must file a complaint with the Department of Labor through the Occupational Safety and Health Administration (OSHA) **within 90 days** of the date of the alleged discrimination event. A discrimination event is the reprisal, discipline, and/or personnel action that the employee believes resulted from their reporting the safety information or other information related to air carrier safety, such as air carrier security information.

NOTE: Personal safety issues are not related to air carrier safety.

505. THE LAW.

A. Section 519 of Public Law 106-181, The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century is codified as 49 U.S.C. § 42121 and § 46301 (see figures 1.6.1.1 and 1.6.1.2). Title 49 U.S.C. § 42121 provides protection against employer discrimination for employees who provide safety information (figure 1.6.1.1).

B. Section 46301 paragraph (a)(1)(A) provides for civil penalties to be assessed against persons who violate the whistleblower protection provisions (figure 1.6.1.2).

C. Additionally, § 42121 paragraph (b)(3)(C) contains a frivolous complaint provision. If the Secretary of Labor finds that a complaint filed under § 42121 paragraph (b)(1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable

attorney's fee not exceeding \$1,000.

507. LEGISLATIVE AUTHORITY AND AGENCY RESPONSIBILITIES.

A. Department of Labor. The statute assigns responsibility to the Secretary of Labor to investigate allegations of discrimination and, if there is a reasonable belief that a violation has occurred, to issue an order of relief.

B. Occupational Safety and Health Administration (OSHA) Delegated Authority.

(1) On July 18, 2000, the Secretary of Labor delegated authority and assigned responsibility for the enforcement of the air carrier whistleblower protection program provisions of 49 U.S.C. § 42121 to OSHA.

(2) OSHA is responsible for investigating employee complaints of discrimination and may order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees.

C. FAA's Responsibilities.

(1) The law requires the Secretary of Labor upon receipt of a complaint to notify, in writing, the Administrator of the FAA of the filing of the complaint, of the allegations contained in the complaint (information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety or any other law of the United States), and of the substance of evidence supporting the complaint.

(2) FAA is responsible for investigating complaints related to air carrier safety and has authority under the FAA's statute to enforce air safety regulations and issue sanctions to airmen and air carriers for noncompliance with these regulations. FAA enforcement action may include air carrier and/or airman certificate suspension and/or revocation and/or the imposition of civil penalties (see FAA Order 2150.3, Compliance and Enforcement Program, as amended).

(3) In addition to FAA's enforcement action related to FAA regulations, AIR 21 also amended 49 USC 46301, FAA's civil penalty authority, to include civil penalties for violations of 49 U.S.C. § 42121, once the Secretary of Labor's Order of a finding becomes final.

D. Transportation Security Administration (TSA). TSA has responsibility to investigate complaints related to air carrier security and to enforce air carrier security regulations under the Aviation and Transportation Security Act, Public

Law 107-71, dated November 19, 2001.

509. FAA'S RELATIONSHIP WITH DOL/OSHA.

A. Memorandum of Understanding (MOU).

(1) In March 2002 the FAA and OSHA signed an MOU to facilitate coordination and cooperation concerning the protection of employees who provide air safety information under the provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. Although FAA and OSHA will carry out their statutory responsibilities independently, the agencies agreed that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

(2) The MOU provides for a process that FAA and OSHA agreed to follow. The elements of the agreement are:

(a) FAA and OSHA will establish a procedure for coordinating and supporting enforcement of 49 U.S.C. § 42121.

(b) OSHA agrees to promptly notify the FAA national headquarters Whistleblower Protection Program of any discrimination complaints filed with the DOL under 49 U.S.C. § 42121.

(c) OSHA will promptly provide FAA with a copy of the complaint, findings, preliminary orders, investigation reports, and orders associated with any hearing or administrative appeal related to the complaint.

(d) OSHA will keep FAA informed of the status of any administrative or judicial proceeding seeking review of an order of DOL issued under 49 U.S.C. § 42121.

(e) When an individual directly notifies FAA of alleged discrimination that involves air carrier safety, FAA will investigate the safety complaint and will provide OSHA with a copy of the individual's allegations.

(f) FAA will inform the individual that a personal remedy for discrimination is available only through DOL and that the individual should personally contact DOL.

(g) FAA will provide the individual with the local address and telephone number of the nearest OSHA office and advise the individual that the law requires that complaints be filed with OSHA within ninety (90) days of the alleged discrimination.

(h) FAA and OSHA agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving an employee of air carrier or air carrier contractor or subcontractor of an air carrier.

(i) Each agency agrees to share all information it obtains relating to each complaint of discrimination and will adopt mutually agreeable procedures for the protection of information that either agency deems confidential.

(j) Each agency shall designate and maintain points of contact within its national headquarters and regional offices for purposes of implementation of this MOU and continued program oversight.

(k) Matters affecting program procedures and policy issues will be handled by the respective national headquarters office of each agency.

511. DUTIES AND RESPONSIBILITIES OF THE NATIONAL WHISTLEBLOWER PROTECTION PROGRAM OFFICE (WBPP), AFS-200W.

A. On July 29, 2002, the Director of Flight Standards officially established the WBPP, AFS-200W, physically locating it in the Air Transportation Division of the Flight Standards Service (AFS-200). The WBPP is responsible for:

- developing national policy
- developing interagency procedures between the FAA and DOL/OSHA
- providing guidance for investigations of air carrier whistleblower safety and security complaints and all other related activities which sets forth a process for coordinating and supporting enforcement of 49 U.S.C. 42121
- being the agency's liaison with DOL/OSHA on all matters concerning the FAA Air Carrier WBPP and the joint FAA/OSHA Aviation Safety and Health Program
- the review, coordination, and assignments of whistleblower safety complaints received from employees of air carriers, air carrier contractors, and air carrier subcontractors
- the management oversight of the FAA's Whistleblower Protection Program Hotline
- the implementation of MOUs with OSHA

B. Aviation Safety and Health Program (ASHP). The FAA ASHP is a second program under the responsibility of AFS-200W. The ASHP is responsible for:

- coordinating with OSHA to resolve jurisdictional authority for the investigation of aviation industrial accidents, injuries, and complaints
- providing advice to OSHA concerning whether the application of an OSHA requirement to the working conditions of aviation employees would compromise aviation safety. (See Volume 1, Chapter 7, TBD)

513. DUTIES AND RESPONSIBILITIES OF THE REGIONAL WHISTLEBLOWER COORDINATORS.

The Regional Whistleblower Coordinators:

A. Serve as the Regional focal point on all matters concerning Air Carrier WBPP complaints within their

regional area of responsibility.

B. Provide advice and assistance to OSHA Regional and field investigators, air carrier employees, air carrier contractor employees, and air carrier subcontractor employees within their respective regions concerning alleged violations of FAA orders, standards, and regulations or any other provision of Federal law relating to air carrier safety.

C. Receive, assign, track, coordinate, review, and evaluate all whistleblower complaints within their regional area of responsibility.

D. Coordinate, obtain, and share all information relating to whistleblower safety complaints with OSHA.

E. Provide technical information and guidance to FAA field office personnel and ensure the field inspectors thoroughly understands their responsibilities associated with conducting a whistleblower investigation.

F. Answer public inquires about the Whistleblower Program.

G. Ensure all whistleblower complaints assigned to FAA organizations in their respective regions are adequately investigated and responded to within established timelines.

H. Ensure that EACH safety allegation in the complaint has been adequately investigated and addressed and appropriate action is being or has been taken.

I. Review the district office's response to each safety allegation for completeness and action taken; return for further investigation if necessary.

J. When the Regional Whistleblower Coordinator finds the responses acceptable, the coordinator prepares a memorandum from the Regional Division Manager to the Director of Flight Standards Service, Attn: WBPP, AFS-200W. This memorandum summarizes the investigation results, includes the division manager's concurrence, and includes the district office's report as an attachment.

515. ORGANIZATIONAL RESPONSIBILITIES. The FAA WBPP is an Agency program that encompasses many FAA organizations and coordination with other agencies such as DOL, OSHA, the Department of Transportation Office of Inspector General, and TSA. All whistleblower complaints filed under 49 U.S.C. § 42121 must allege a violation related to air carrier safety. Air carrier safety issues are mostly the responsibility of the Associate Administrator for Regulation and Certification (AVR) organizations with the majority of Whistleblower complaints assigned to AFS. Therefore, on April 17, 2002 the FAA Administrator established the FAA's WBPP under AVR in Flight Standards Service, AFS.

517. WHISTLEBLOWER PROTECTION PROGRAM

HOTLINE.

A. This hotline is for employees of air carriers, air carrier contractors, and air carrier subcontractors that would like information about the whistleblower program and how to file a complaint:

1-800-255-1111 (Press 1 for main menu then press 5)

B. Regular business hours are Monday-Friday, 8 am until 4 pm, Eastern Time, except Federal Holidays. After business hours, callers may leave a voice message.

519. WHISTLEBLOWER PROTECTION PROGRAM

WEB PAGE. For additional information about the WBPP, see the FAA website at:

www.faa.gov/avr/afs/whistleblower/

NOTE: The FAA Web page contains an electronic whistleblower complaint form. This form should be recommended to employees in lieu of a fax or hard copy by mail. Employees may submit additional documentation to the investigating inspector after the initial complaint is received and assigned.

520 - 530. RESERVED.

FIGURE 1.6.1.1.**TITLE 49 OF THE UNITED STATES CODE (49 U.S.C.) SECTION 42121****TITLE 49. TRANSPORTATION****SUBTITLE VII. AVIATION PROGRAMS****PART A. AIR COMMERCE AND SAFETY****SUBPART II. ECONOMIC REGULATION****CHAPTER 421. LABOR-MANAGEMENT PROVISIONS****SUBCHAPTER III. WHISTLEBLOWER PROTECTION PROGRAM****49 USCS § 42121 (2002)**

§ 42121. Protection of employees providing air safety information

(a) Discrimination against airline employees. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.

(1) Filing and notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.

(A) In general. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor con-

cludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.

(i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final order.

(A) Deadline for issuance; settlement agreements. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints. If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

(4) Review.

(A) Appeal to Court of Appeals. Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack. An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by Secretary of Labor. Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.

(A) Commencement of action. A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees. The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Non applicability to deliberate violations. Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States.

(e) Contractor defined. In this section, the term "contractor" means a company that performs safety-sensitive functions by contract for an air carrier.

FIGURE 1.6.1.2.
TITLE 49 U.S.C. SECTION 46301, PARAGRAPH (a)(1)(A)

TITLE 49. TRANSPORTATION

SUBTITLE VII. AVIATION PROGRAMS

PART A. AIR COMMERCE AND SAFETY

UBPART IV. ENFORCEMENT AND PENALTIES

CHAPTER 463. PENALTIES

49 USCS § 46301 (2002)

§ 46301 Civil penalties

(a) General penalty.

(1) A person is liable to the United States Government for a civil penalty of not more than \$1,000 for violating--

(A) chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 411 [49 USCS §§ 41101 et seq.], chapter 413 (except sections 41307 and 41310(b)-(f)), chapter 415 (except sections 41502, 41505, and 41507-41509), chapter 417 (except sections 41703, 41704, 41710, 41713, and 41714), chapter 419 [49 USCS §§ 41901 et seq.], **subchapter II or III of chapter 421** [49 USCS §§ 42111 et seq. or 42121], chapter 441 [49 USCS §§ 44101 et seq.] (except section 44109), 44502(b) or (c), chapter 447 (except sections 44717 and 44719-44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)-(d)(1)(A) and (d)(1)(C)-(f), and 44908), or section 47107(b) (including any assurance made under such section) of this title;...

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