

VOLUME 11 FLIGHT STANDARDS PROGRAMS

CHAPTER 3 WHISTLEBLOWER PROTECTION PROGRAM (AIR CARRIER)

Section 1. Program Overview

11-92. 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.

11-93. 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 House Resolution (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 11-16).

B. Background. 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. Provisions. 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 11-16 below, 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.

11-94. 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 11-16 and 11-17). Title 49 U.S.C. § 42121 provides protection against employer discrimination for employees who provide safety information (Figure 11-16).

B. Section 46301 paragraph (a)(1)(A) provides for civil penalties to be assessed against persons who violate the whistleblower protection provisions (Figure 11-17).

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.

11-95. 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.

11-96. FAA'S RELATIONSHIP WITH DOL/OSHA: MEMORANDUM OF UNDERSTANDING (MOU).

A. 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.

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

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

2) 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.

3) 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.

4) 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.

5) 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.

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

7) 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.

8) 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.

9) 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.

10) 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.

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

11-97. DUTIES AND RESPONSIBILITIES OF THE NATIONAL WHISTLEBLOWER PROTECTION PROGRAM OFFICE (WBPP), QUALITY, INTEGRATION & EXECUTIVE SERVICES (AQS-100).

A. Responsibilities. 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 AQS-100. 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.

11-98. 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, AQS-100. This memorandum summarizes the

investigation results, includes the division manager's concurrence, and includes the district office's report as an attachment.

11-99. 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 Aviation Safety (AVS) organizations with the majority of Whistleblower complaints assigned to AFS. Therefore, on April 17, 2002 the FAA Administrator established the FAA's WBPP under AVS in Flight Standards Service, AFS.

11-100. 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 a.m. to 4 p.m., Eastern Time, except Federal Holidays. After business hours, callers may leave a voice message.

11-101. WHISTLEBLOWER PROTECTION PROGRAM WEB PAGE. For additional information about the WBPP, see the FAA website at www.faa.gov/safety/programs_initiatives/aircraft_aviation/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.

Figure 11-16, Title 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 concludes 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.