



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1988

[Docket Number: OSHA-2015-0021]

RIN 1218-AC88

Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: On March 16, 2016, the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (Department) issued an interim final rule (IFR) that provided procedures for the Department's processing of complaints under the employee protection (retaliation or whistleblower) provisions of Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21). The IFR established procedures and time frames for the handling of retaliation complaints under MAP-21, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor) and judicial review of the Secretary's final decision. It also set forth the Department's interpretations of the MAP-21 whistleblower provisions on certain matters. This final rule adopts, without change, the IFR.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Britania C. Smith, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-4618, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone (202) 693-2199. This is not a toll-free number. Email: OSHA.DWPP@dol.gov. This Federal Register publication is available in alternative formats. The alternative formats available are: large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System), and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background.

The Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, was enacted on July 6, 2012 and, among other things, funded surface transportation programs at over \$105 billion for fiscal years 2013 and 2014. Section 31307 of the Act, codified at 49 U.S.C. 30171 and referred to throughout this rulemaking as MAP-21, prohibits motor vehicle manufacturers, parts suppliers, and dealerships from discharging or otherwise retaliating against an employee because the employee provided, caused to be provided or is about to provide information to the employer or the Secretary of Transportation relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301 of title 49 of the U.S. Code (Chapter 301); filed, caused to be filed or is about to file a proceeding relating to any such defect or violation; testified, assisted or participated (or is about to

testify, assist or participate) in such a proceeding; or objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of Chapter 301, or any order, rule, regulation, standard or ban under such provision.

Chapter 301 is the codification of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, which grants the National Highway Traffic Safety Administration (NHTSA) authority to issue vehicle safety standards and to require manufacturers to recall vehicles that have a safety-related defect or do not meet federal safety standards. This final rule adopts, without change, the provisions in the IFR which established procedures for the handling of whistleblower complaints under MAP-21.

II. Interim Final Rule, Comment Received and OSHA's Response.

On March 16, 2016, OSHA published in the **Federal Register** an IFR establishing procedures for the handling of whistleblower retaliation complaints under MAP-21. 81 FR 13976. The IFR also requested public comments. The prescribed comment period closed on May 16, 2016. OSHA received one comment responsive to the IFR. The commenter, a private citizen, stated in full that:

After the OSHA investigation, the complainant should have a reasonable chance to respond to whatever the investigation found before the final determination. The investigation should rely on facts: any witness remarks need to be substantiated by facts, and the complainant should be able to respond to them. Investigations need to be conducted according to strict guidelines with facts checked perhaps by another investigator.

OSHA is making no revisions to the MAP-21 rule in response to this comment. OSHA believes that the procedures in the IFR, see e.g., 29 CFR 1988.104(c), as supplemented by OSHA's whistleblower investigations manual, available at <http://www.whistleblowers.gov>, operate to give complainants adequate opportunities to

review and respond to information submitted by the employer in a MAP-21 whistleblower investigation and to ensure adequate supervision of investigators. In addition, as provided in the rules, any party who objects to OSHA's findings has an opportunity to seek de novo review before an administrative law judge. Accordingly, this rule adopts as final, without change, the IFR published on March 16, 2016.

III. Paperwork Reduction Act.

This rule contains a reporting provision (filing a retaliation complaint, Section 1988.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The assigned OMB control number is 1218-0236.

IV. Administrative Procedure Act.

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section. Therefore, publication in the Federal Register of a notice of proposed rulemaking and request for comments was not required for this rulemaking. Although this is a procedural and interpretative rule not subject to the notice and comment procedures of the APA, OSHA provided persons interested in the IFR 60 days

to submit comments and considered the one comment pertinent to the IFR that it received in deciding to finalize without change the procedures in the IFR.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the Federal Register is inapplicable. OSHA also finds good cause to provide an immediate effective date for this final rule, which simply finalizes without change the procedures that have been in place since publication of the IFR. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

V. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132.

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order

12866. Therefore, no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and because no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretive in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

VI. Regulatory Flexibility Analysis.

The notice and comment rulemaking procedures of Section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, at 9; also found at: <https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act>. This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and, therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA. Nonetheless OSHA, in the IFR, provided interested persons 60 days to comment on the

procedures applicable to retaliation complaints under MAP-21 and considered the one comment pertinent to the IFR that it received in deciding to finalize without change the procedures in the IFR.

List of Subjects in 29 CFR Part 1988.

Administrative practice and procedure, Automobile dealers, Employment, Investigations, Motor vehicle defects, Motor vehicle manufacturers, Part suppliers, Reporting and recordkeeping requirements, Whistleblower.

**PART 1988--PROCEDURES FOR HANDLING RETALIATION COMPLAINTS
UNDER SECTION 31307 OF THE MOVING AHEAD FOR PROGRESS IN THE
21ST CENTURY ACT (MAP-21)**

For the reasons set out in the preamble, the interim final rule adding 29 CFR part 1988, which was published at 81 FR 13976 on March 16, 2016, is adopted as a final rule without change.

Signed at Washington, D.C. on December 8, 2016

David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

BILLING CODE: 4510-26-P

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