

# The Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109



# The Whistleblower Provision of FRSA

- Simply put, the whistleblower provision of FRSA provides whistleblower protection for railroad workers.

# FRSA Whistleblower History:

- On August 3, 2007, FRSA was amended to transfer authority for railroad carrier worker whistleblower protections to OSHA and to include new rights, remedies and procedures.
- On October 16, 2008, the FRSA was amended again, to prohibit discipline of employees for requesting medical treatment or for following medical treatment orders.

# Who is Covered under the FRSA Whistleblower Provision?

Employees of a railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier.

# What is a prima facie allegation?

- Elements of a Prima Facie Allegation:
  - 1. Protected Activity
  - 2. Employer Knowledge of Protected Activity
  - 3. Adverse Action
  - 4. Nexus or Causal Connection (Determined during Investigation)

# Protected Activity under FRSA:

- Management may not retaliate against employees because they provided information to, caused information to be provided to, or assisted in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or your company about an alleged violation of federal laws and regulations related to railroad safety and security, or about gross fraud, waste or abuse of funds intended for railroad safety or security.

# Protected Activity Cont.

- Employees are protected from retaliation for reporting hazardous safety or security conditions, reporting a work-related injury, or illness, refusing to work under certain conditions, or refusing to authorize the use of any safety- or security-related equipment, track or structures.

# Protected Activity Cont.

- In addition, an employee is also protected from retaliation (including being brought up on charges in a disciplinary proceeding) or threatened retaliation for requesting medical or first-aid treatment, or for following orders or a treatment plan of a treating physician for a work related injury.

# Prompt Medical Attention:

- A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.
- If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital.

# Employer Knowledge

- Perceived or Actual
- Reports directly to management
- Contact with Federal Agencies
- Report of injury

# Adverse Employment Action:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire

# Adverse Employment Acting Cont.:

- Intimidation
- Making threats
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Disciplining an employee for requesting medical or first-aid treatment.

# Adverse Employment Action Cont.

- Disciplining an employee for following orders or a treatment plan of a treating physician for a work related injury.
- Forcing an employee to work against medical advice.

# How to File a Whistleblower Complaint:

- Complaints must be filed within 180 days after the alleged adverse action occurred.
- Complaints can be filed orally or in writing in any language
- With the consent of the employee, complaints may be filed by any person on the employee's behalf
- [Whistleblowers.gov](https://www.whistleblowers.gov) for information on how to file.

# WHISTLEBLOWER Protection Programs



## Your RIGHTS

Whistleblower statutes protect you from retaliation. An employer cannot retaliate by taking "adverse action" against you for reporting injuries, safety concerns, or other workplace issues.

## Worker PROTECTIONS

Since passage of the OSH Act in 1970, Congress has expanded OSHA's whistleblower authority to protect workers from retaliation under twenty-two federal laws. Complaints must be reported to OSHA within set timeframes following the

## File a COMPLAINT

File a complaint if your employer has retaliated against you for exercising your [rights as an employee](#). In state OSHA Plans, employees may file a complaint with the State OSHA Plan. Under the OSH Act with both the [State](#) and [Federal OSHA](#).

# The Investigative Process:

- The investigator will interview Complainant along with Complainant's witnesses.
  - Confidentiality for non-management witnesses.
- Respondent will submit a position statement.
  - The investigator will interview Respondent's officials and request relevant documentation
- Complainant will have the opportunity to provide a rebuttal.

# The ways cases can end...

- Merit
- Non-Merit
- Settlement
- KICK-OUT
- Withdrawal

# What Complainant Must Show:

- The protected activity was a contributing factor in the adverse action
- How does Complainant do this:
  - Protected Activity
  - Employer Knowledge
  - Adverse Action
  - Nexus

# Respondent's Liability:

- Respondent will avoid liability if it can show, by clear and convincing evidence, that it would have taken the same adverse action even in the absence of the protected activity

# Post Investigation:

If the parties do not settle the matter, OSHA will issue either merit or non-merit Secretary's Findings

– Merit Findings (Make Whole)

- Backpay
- Preliminary Reinstatement
- Compensatory Damages
- Punitive Damages (capped at \$250,000)
- Attorney's Fees

# Post Investigation Cont.:

- The party that does not prevail has 30 days to file an appeal with an Administrative Law Judge.
- The next appeal step is the Administrative Review Board.
- After the ARB an appeal can be made to the US Court of Appeals.

# Have you seen me?

*(Name Here)*  
HAS WORKED

**8950** DAYS

WITHOUT A LOST  
TIME ACCIDENT

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THE BEST PREVIOUS  
RECORD WAS

**997** DAYS

DO YOUR PART!  
HELP MAKE  
A NEW RECORD

# Or Me?

THE EMPLOYEES  
OF THIS  
DEPARTMENT  
HAVE WORKED  
 DAYS  
WITHOUT A LOST  
TIME INJURY



# Incentives



# Employer Safety Incentive and Disincentive Policies and Practices

- When employees are fearful of reporting – the entire workforce is put at risk.
- Ensuring that employees can report injuries/illnesses without fear of retaliation is crucial to protecting worker safety and health.

# Behavior-Based Safety/Blame-the-Worker Programs & Practices

***“IF YOU GET INJURED, IT’S YOUR FAULT!”***

Behavior-based safety programs and practices focus on **worker behavior rather than on workplace hazards** as the cause of injuries and illnesses

# 5 D's



# Workplace Policies and Practices that Could Discourage Reporting

A policy of taking a disciplinary action against employees who report a work related injury, regardless of the circumstances.

Employers have an obligation to establish a way for employees to report injuries.

29 CFR 1904.35(b)

# ACCIDENT REPORT



The Accident: Worker was stung by a bee

Question on Employer's Accident Report Form:

“What did the affected employee do or not do that contributed to the accident? Why do you feel their actions contributed to the accident?” The employee should have been aware that a bee had landed on his shirt and taken the appropriate steps to remove the bee without being stung.”

The Answer: OLD MENTALITY

# Workplace Policies and Practices that Could Discourage Reporting

Employer imposes discipline on the ground that the injury resulted from the violation of a safety rule.

Scenario

Do you monitor for compliance with the work rule in the absence of an injury?

# INJURY DISCIPLINE

## ("Situational Awareness")

“Our manager likes to give out written warnings for employees who get hurt. The usual reason is ‘**not aware of your surroundings.**’ The latest one came for an employee who received a laceration on the finger while moving a piece of equipment. He had all of the required PPE. Even after a management investigation revealed that they did not have the proper device to make this equipment move, he received a written warning for ‘**not properly evaluating the situation.**’ ”

# Questions:

- Thank you for your time and cooperation!