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U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

March 16, 2022

RE: Freedom of Information Act Request No. 2022-F-02615

This is a final response to your Freedom of Information Act (FOIA) request to the Occupational Safety and Health Administration (OSHA) dated December 7, 2021, seeking three webinar programs. Your request was assigned to the OSHA Directorate of Whistleblower Protection Programs for a final response.

You requested:

> *A copy of the webinar presentation slides for "When is a Quit not a Quit" Copresented in January 2021 by the Office of Education. I also request a copy of the presentation slides for the Federal Railroad Safety Act and the National Transit Systems Security Act. I also request a copy of the slides for the presentation on postponement and deferral procedures.*

A search of the Agency's records located all three of these presentations, and OSHA can release these to you under FOIA. We have attached copies of the documents.

If you have questions about our response, please contact Robert B. Turnage at (202) 693-2036 or turnage.robb@dol.gov.

You have the right to appeal this decision with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statements or arguments. The appeal should also include a copy of your initial request and a copy of this letter.

If you appeal, you may mail your appeal to: Solicitor of Labor, U.S. Department of Labor, Room N-2420, 200 Constitution Avenue, NW, Washington, DC 20210 or fax your appeal to (202) 693-5538. Alternatively, you may email your appeal to foiaappeal@dol.gov; appeals submitted to any other email address will not be accepted. The envelope (if mailed), subject line (if emailed), or fax cover sheet (if faxed), and the letter indicating the grounds for appeal, should be clearly marked: "Freedom of Information Act Appeal."

In addition to filing an appeal, you may contact the Department's FOIA Public Liaison, Thomas G. Hicks, Sr., at (202) 693-5427 or hicks.thomas@dol.gov for assistance in resolving disputes.

You also may contact the Office of Government Information Services (OGIS) for assistance. OGIS offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may mail OGIS at the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001. Alternatively, you may send an email using the link from their website at https://ogis.archives.gov, or address it directly to ogis@nara.gov. Finally, you can contact OGIS by telephone: (202) 741-5770; fax: (202) 741-5769; or toll-free: 1-877-684-6448.

It is also important to note that the service offered by OGIS is not an alternative to filing an administrative FOIA appeal.

Thank you for your interest in occupational safety and health.

Sincerely,

ANTHONY ROSA
Digitally signed by ANTHONY ROSA
Date: 2022.03.17 12:48:12 -04'00'

Anthony Rosa, Acting Director
Directorate of Whistleblower Protection Programs

OSHA eLearning

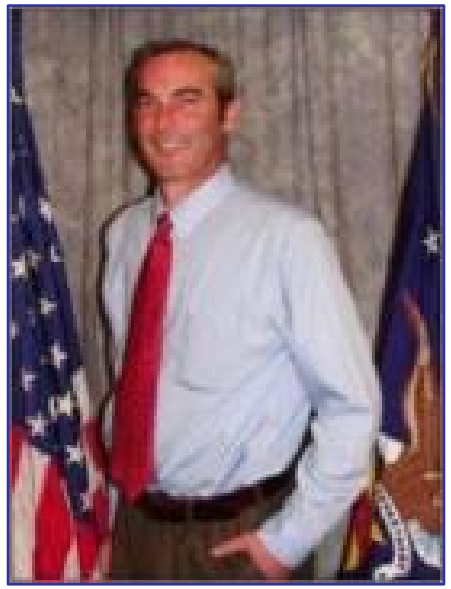
When a "Quit" Is Not a Quit: Work Refusals, Constructive Discharge, and the Ambiguous Action Doctrine

Webinar #0167

January 27, 2021

OSHA Occupational Safety and Health Administration

Welcome and Introduction



Moderator
Anthony Towey
OTI Director
DTE

Presenter
Meghan Smith
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DWPP

Presenter
Mark Lerner
Senior Attorney
SOL/OSH

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Topics

- Participants will be able to evaluate:
  - Work refusals
  - Constructive discharge
  - Whether an employer interpreted an ambiguous action from an employee as a quit

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Background

- There are three circumstances when an employee appears to quit that may be covered:
  - Work refusals
  - Constructive discharge
  - Employee says or does something ambiguous which the employer interprets as quitting

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Part 1

Work Refusals

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Work Refusals, Generally

- Refusals to work are generally protected under the whistleblower statutes. A refusal to work is a temporary cessation of work due to an objection to a particular task. It is not a quit or a resignation.
- The protections are similar, but there are differences.

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Work Refusals under Section 11(c) of the Occupational Safety and Health Act (11(c))

- Employees have the right to refuse to perform an assigned task if they:
  - Have a reasonable apprehension of serious injury or death arising from a hazardous condition at the workplace; and
  - Refuse in good faith to expose themselves to the hazardous condition; and
  - Have no reasonable alternative; and
  - Have insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels (i.e., contacting OSHA or an OSHA State Plan); and
  - Where possible, sought from their employer, and were unable to obtain, a correction of the dangerous condition.

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Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)

- Supreme Court case that affirmed the right to refuse dangerous work
- We'll use the case to walk through a protected work refusal

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11(c) Work Refusal Elements

- Have a reasonable apprehension of serious injury or death arising from a hazardous condition at the workplace

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11(c) Work Refusal Elements, #2

- Refuse in good faith to expose themselves to the hazardous condition

11(c) Work Refusal Elements, #3

- Have no reasonable alternative;

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11(c) Work Refusal Elements, #4

- Have insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels (i.e., contacting OSHA or an OSHA State Plan). The mere fact that an employee contacted OSHA or could have contacted OSHA before the time set for the task does not mean that this element has not been met. If there was insufficient time for OSHA to respond before the time for the task, this element has been met

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11(c) Work Refusal Elements, #5

- Where possible, sought from their employer, and were unable to obtain, a correction of the dangerous condition.

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Surface Transportation Assistance Act (STAA)

- A person may not retaliate against a covered employee for
  - refusing to operate a vehicle because to do so would violate a federal commercial motor vehicle rule related to safety, health, or security, OR
  - because the employee had a reasonable apprehension of serious injury to himself or to the public related to a vehicle's safety or security condition. To obtain the benefits of this provision, the employee must have sought from the employer and been unable to obtain correction of the hazardous condition.

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Federal Railroad Safety Act (FRSA) and National Transit Systems Security Act (NTSSA)

- An employer may not retaliate against an employee for
  - refusing to violate a federal law, rule, or regulation related to railroad/transit safety or security
  - refusing to work when confronted with an imminent hazardous safety or security condition (if certain conditions are met); or
  - refusing to authorize the use of any safety- or security-related equipment, track, or structures if those structures present an imminent hazardous safety or security condition (and certain conditions are met).

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Seaman's Protection Act

- A person may not retaliate against a seaman for refusing to perform duties because of a reasonable apprehension of serious injury or serious impairment of health to the seaman, other seamen, or the public, if the seaman has first requested that the employer correct the dangerous condition

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Other Work Refusal Protections

- Explicit protections for work refusals can be found in many statutes (e.g. ERA, PSIA, MAP-21, ACA, CPSIA, CFPA, FSMA)
- Statutes without explicit work refusal protection have been interpreted to include work refusal protection at least in some circumstances (e.g. environmental statutes, SOX, AIR21)
- Consult statute-specific desk aids for more information

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Work Refusal Hypothetical #1

- CP worked for RP as a bus driver for private schools. CP's bus started having problems as she drove. At one point, the bus would only drive 5-7 mph. She believed the transmission was slipping. She pulled over and called RP to tell them the bus was unsafe to drive. RP told her there were no other buses available. CP reiterated that the bus was unsafe and may not be able to turn safely and thought they would eventually send a new bus. About 40 minutes later, dispatch called to ask her where she was. RP was angry and sent her a new bus. RP terminated her that day for leaving the students on the bus and not picking others up, believing it was unsafe.
- Did CP engage in a valid work refusal under STAA?

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Work Refusal Hypothetical #1 Analysis

- Under STAA, an employee may refuse to perform work if the employee had a reasonable apprehension of serious injury to himself or to the public related to a vehicle's safety or security condition.
- CP explained to RP that the bus was unsafe. Driving 5-7 miles per hour on roads where people go much faster would be a problem. CP engaged in a valid work refusal.

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Work Refusal Hypothetical #2

- CP was a construction worker. His manager told him to go work in a trench for a job that needed to be completed that day. CP looked at the trench and believed that it was improperly shored. He told his manager about the condition and his refusal to go in the trench. His manager told him to complete another task, which was safe, while he inspected the trench. CP stormed off, angry that his manager wouldn't take his word for it. RP fired CP for walking off the job.
- Did CP engage in a proper work refusal under 11(c)?

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Work Refusal Hypothetical #2 Analysis

- Improperly shored trenches can be very dangerous, so CP had a reasonable apprehension of death or serious injury.
- Because the trench could be dangerous, CP had a good faith reason for not going in the trench.
- He asked his manager to remedy the situation.
- CP knew the task needed to be completed that day, so he believed there was insufficient time to contact OSHA
- However, RP provided CP with a reasonable alternative – perform a different task.
- CP cannot meet all of the requirements of a valid work refusal under 11(c)

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Part 2

Constructive Discharge

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Elements of Constructive Discharge

- The employer makes conditions so intolerable for an employee that the employee resigns. It must be shown that the employer's imposition of intolerable conditions was *because of the employee's prior protected activity.* Merely quitting the job because conditions are unsafe is not a valid constructive discharge case.

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Intolerable Conditions

- Conditions must be objectively intolerable

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Factors Indicating Constructive Discharge

- Demotion
- Reduction in salary
- Reduction in job responsibilities
- Badgering, harassment, or humiliation by an employer calculated to encourage resignation
- Offer of early retirement that would make an employee worse off

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Lockheed Martin Corp. v. Administrative Review Bd. U.S. Dept. of Labor, 713 F.3d 1121 (10th Cir. 2013)

- CP started as communications director in 2003
- 2006 reported inappropriate expenses charged to government as part of "pen pal" program with soldiers
- Lower performance appraisal
- Job posted without her knowledge
- Scolded for applying for promotion
- Lost office and told to telework or work in visitor office that doubled as supply room
- Lost job title and supervisory responsibilities
- Excluded from meeting where scheduled to win award
- Inquiries into the nature of her position met with silence
- Told she would be demoted

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Constructive Discharge Hypothetical #1

- CP worked as the Director of Operations for RP, a charter jet service. CP alerted RP to several regulatory issues and informed him via text that an action RP wanted to take was illegal. RP texted back and called CP a derogatory term. During another heated text exchange, RP threatened to fire CP if he kept complaining. CP resigned when he had an additional disagreement with RP regarding the airworthiness of a particular aircraft.
- Did RP constructively discharge CP?

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Constructive Discharge Hypothetical #1 Answer

- No. RP had some harsh words for CP but did not create working conditions so intolerable that a reasonable person would be forced to quit. RP made no moves to actually terminate CP's position. While RP may not have always acted kindly toward CP, the conditions were not objectively intolerable.

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Constructive Discharge Hypothetical #2

- CP worked for a woodworking business as an accountant/HR manager. She informed RP that she believed he was illegally classifying employees as independent contractors. RP told CP he would keep classifying the workers as independent contractors because it reduced his tax obligations. After CP told him of the violations, RP reduced CP's hours by half, reduced her hourly rate by a third, forced her to come in at 7 a.m., which she was unable to do because of childcare obligations that RP was aware of, and began berating her daily for perceived mistakes. CP quit.
- Did RP constructively discharge CP?

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Constructive Discharge Hypothetical #2 Answer

- Yes. CP engaged in protected activity under the Taxpayer First Act when she informed RP that he was illegally classifying employees as independent contractors. RP retaliated by reducing her pay and hours, harassing her, and changing her schedule. Effectively, RP made the situation intolerable for CP. Consequently, RP constructively discharged CP.

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Part 3

Ambiguous Action Doctrine

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What Is the Ambiguous Action Doctrine?

- An employer who decides to interpret an employee's ambiguous actions as a quit or resignation has decided to discharge an employee.

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Does the doctrine apply to all statutes?

- Most of the case law involves STAA and AIR21, but it is applicable to all the whistleblower statutes.

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Minne v. Star Air, Inc., ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007)

- RP was company operating commercial motor vehicles to sell ammunition at gun shows.
- CPs drove to shows, sold ammunition, and brought back whatever didn't sell.
- WVDOT pulled over CP Privott for several violations
  - Hauling a load in excess of-10,000 lbs. without a CDL
  - Overweight trailer
  - Truck didn't have the name of the company, home base, or DOT number and
  - Privott didn't have a log book

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Minne v. Star Air, Inc., ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007) , cont.

- Privott told RP he wouldn't drive again until the issues were fixed.
- Privott told CP Minne about the issues & Minne also objected.
- Privott unsuccessfully tried to work with RP to resolve the issues
- Privott refused to drive b/c he believed rental truck did not comply with regulations
- Minne told RP repeatedly that he would not drive until the problems were corrected
- Minne was removed from scheduling & his credit card was cancelled.

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Minne v. Star Air, Inc., ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007) Analysis

- RP alleged that both CPs quit.
- Neither CP ever said they quit, but they both refused to drive until RP was in compliance with DOT regulations.
- A discharge is any termination of employment by an employer.
- There is no evidence that Privott or Minne resigned.
- Ending of the employment relationship was one-sided. In this case, RP ultimately ended the relationship.

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Klosterman v. E.J. Davies, Inc., ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010)

- CP worked for RP as a shop steward
- Shop steward can only be discharged if authorized by arbitrator
- CP made many complaints to RP about the safety of various vehicles. DOT found many violations.
- RP expressed desire to appoint new shop steward in letter to union
- Same day, CP complained about his assigned truck's condition.
- RP told him to drive or go home. CP went home.
- RP told the union that CP had quit. CP disagreed.

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Klosterman v. E.J. Davies, Inc., ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010) Analysis

- The ARB cited *Minne* and noted that, “it is the supervisor's behavior. . ., rather than the employee's, which ultimately ended the employment relationship.”
- CP didn’t say anything ambiguous in this case, but RP chose to interpret his decision to go home as a quit.
- Effectively, RP terminated CP’s employment. Consequently, RP committed an adverse action.

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Ambiguous Action Doctrine Hypothetical #1

- CP worked as a truck driver for RP. CP complained to management several times that he was having various medical problems as a result of fumes from his truck. RP inspected the truck several times and found no issues. CP was eventually diagnosed with a health condition, and his doctor said he was too sick to drive. RP had a policy that, if a driver could not drive due to injury or illness, it would send him home. After being cleared to return, RP would allow the driver to come back. RP told CP it needed its truck back and offered him a bus ticket home. CP refused because his doctors were located near RP and asked if RP would pay would pay for a hotel room. RP declined and explained they weren't firing him but sending him home until he was well enough to drive. CP believed the RP fired him when they told him to go home. He did not return.
- Did RP commit an adverse action against CP?

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Ambiguous Action Doctrine Hypothetical #1 Analysis

- No. CP misunderstood RP, but that misunderstanding was one-sided on CP's part.
- The ambiguous action doctrine applies if the complainant says something or does something ambiguous that the respondent interprets as the complainant quitting.
- RP's policy was clear – they would have re-hired CP when he was well if he had asked to come back.

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Ambiguous Action Doctrine Hypothetical #2

- Under DOT regulations, commercial truck loads have a total weight limit and a weight limit per axle. RP received estimated weights from its clients. RP's practice was to drive to a weigh station and, if the truck was overweight on an axle, drive to a loading dock to rework it. RP claimed that this was industry practice, though they knew it was illegal. CP had an overweight axle and refused to drive it to have it reworked. He also called DOT to confirm that he should not drive.
- CP wrote the following text to RP:
  - They're asking me to do something illegal and I'm not doing it. I'm done.
- RP interpreted the text as a statement that CP quit.
- Did RP commit an adverse action against CP?

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Ambiguous Action Doctrine Hypothetical #2 Analysis

- CP did not expressly give notice of his resignation.
- CP's text can be interpreted in two ways – quitting or refusing to continue an illegal practice.
- Because it was ambiguous, RP committed an adverse action against CP when it assumed he quit.

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Questions

- Presenter contact information:

  Meghan Smith - smith.meghan.p@dol.gov;

  Mark Lerner - lerner.mark@dol.gov

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Review

- You can now evaluate:
  - Work refusals
  - Constructive discharge
  - Whether an employer interpreted an ambiguous action from an employee as a quit

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Thank you for your webinar participation and feedback!

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OSHA eLearning

Federal Railroad Safety Act (FRSA) and National Transit Systems Security Act (NTSSA)

Webinar #0171

June 2, 2021

OSHA Occupational Safety and Health Administration

Welcome and Introduction

Moderator

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Presenter

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Presenter

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Topics

- Determine statutes' coverage
- Describe statutes' protected activity
- Describe statutes' enforcement responsibilities

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Purpose of FRSA and NTSSA

- FRSA promotes safety in every area of railroad operations and reduces railroad-related accidents
- NTSSA promotes safety and security in public transportation operations

By protecting employees from retaliation for a wide range of protected activities

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Part 1

FRSA & NTSSA Process & Remedies

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Filing Deadlines and Investigation Procedures

FRSA & NTSSA share the same regulations and investigation procedures:

- 180 days to file complaint with OSHA
- Contributing factor causation standard
- Preliminary Reinstatement
- ALJ statutes
- Kick-out available after 210 days
- Regulations at 29 CFR Part 1982

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Available Remedies under FRSA and NTSSA

- Reinstatement with same seniority (incl. preliminary reinstatement)
- Back pay with interest
- Compensatory damages, including damages resulting from retaliation, and attorney's fees
- Punitive damages up to $250,000
- Other injunctive relief

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Part 2

Coverage

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FRSA Coverage

FRSA prohibits retaliation by:

- Railroad carriers
- Officers & employees
- Contractors & subcontractors (Sec. 20109(a) protected activities only)

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FRSA Coverage – Railroad Carriers

- Covered railroad carriers include:
  - Freight railroads
  - Long-distance, intercity passenger railroads
  - Commuter railroads
  - Short-haul passenger service (e.g., airport to downtown or to resort)
  - Most tourist, scenic, and excursion railroads
- Urban rapid transit operations are not FRSA-covered railroad carriers

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FRSA Coverage – Contractors and Subcontractors

- Section 20109(a) prohibits contractors and subcontractors of railroad carriers from discharging or otherwise retaliating against an employee for engaging in any of the protected activities listed in that subsection.
- Examples of contractors and subcontractors include:
  - manufacturers of railroad equipment
  - repair shops
  - track maintenance contractors
  - staffing firms
  - medical contractors

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NTSSA Coverage

- NTSSA prohibits retaliation by:
  - Public transportation agencies
  - Officers & employees
  - Contractors & subcontractors

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NTSSA Coverage—Public Transportation Agency

- NTSSA covers public transportation agencies
  - A public transportation agency is a "publicly owned operator of public transportation **eligible** to receive federal assistance under Chapter 53 of Title 49"

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NTSSA Coverage—Public Transportation

- Public transportation means “regular, continuing, shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability or low income.”

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NTSSA Coverage, cont.

- What is **not** a public transportation agency?
  - Intercity passenger rail transportation provided by Amtrak
  - Intercity bus service
  - Charter bus service
  - School bus service
  - Sightseeing transportation service
  - Courtesy shuttle service of one or more specific establishments
  - Intra-terminal or intra-facility shuttle services

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Covered Employees Under FRSA and NTSSA

Protected employees under FRSA and NTSSA include:

- Current employees
- Former employees
- Applicants for employment
- An individual whose employment could be affected by

A railroad carrier or public transportation agency, or contactor/subcontractor.

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Coverage Hypothetical #1

- Complainant works as an electrician for Shiny Signals that contracts with Rickety Railroad to install transformers for railway signals. She complains in good faith to the project superintendent that after installing the transformer, the connected highway-rail grade crossing system it connects to is not functioning properly.
- Does FRSA protect her?

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Coverage Hypothetical #1 Analysis

- Yes – Complainant is protected under 20109(a)(1).

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Coverage Hypothetical #1, cont.

- What if she complained that it is unsafe to work on the transformer because it is placed on a housekeeping pad that hangs over a retaining wall more 10 feet above the ground and the worker is afraid she could fall?
- Does FRSA protect her?

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Coverage Hypothetical #1, Analysis cont.

- No – Contractors are not protected under FRSA for reporting a hazardous safety or security condition under 20109(b)(1)(A).

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Coverage Hypothetical #2

- Complainant alleged that she was terminated for engaging in protected activity under NTSSA. Complainant worked for the County of Henrico (CoH). CoH was a member of the Greater Richmond Transit Company (GRTC), a regional transit authority. CoH does not operate any public transportation itself, but does contribute funds to a shared ride service offered by the local airport through GRTC.
- Is CoH a public transportation agency under NTSSA?

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Coverage Hypothetical #2 Analysis

- No – CoH has no public transportation. GRTC is a separate entity. The GRTC has members consisting of a group of different entities. While CoH is a member of GRTC, it is separate and distinct from it.

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Part 3

Protected Activity

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General Protected Activity under Both FRSA and NTSSA

- Providing information to or assisting in investigation by:
  - Federal, state, or local regulatory or law enforcement agency
  - A member or committee of Congress/GAO
  - A supervisor or other person with authority to investigate, discover, or terminate misconduct
- Information or investigation must relate to:
  - violation of any federal law, rule, or regulation related to railroad/public transportation safety or security
  - fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad/public transportation safety or security

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General Protected Activity under Both FRSA and NTSSA, cont.

- Refusing to violate or assist in the violation of any federal law, rule, or regulation relating to railroad/public transportation safety or security
- Filing a complaint, directly causing a proceeding to be brought, or testifying in a proceeding related to the enforcement of FRSA/NTSSA and other railroad safety and security laws listed in the statutes
- Reporting a hazardous safety or security condition

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General Protected Activity under Both FRSA and NTSSA, cont.

- Cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the NTSB
- Providing information to the Secretary of Transportation, the Secretary of Homeland Security, the NTSB, or any federal, state, or local regulatory or law enforcement agency regarding facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation/public transportation

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Work Refusals under FRSA and NTSSA

- An employer may not retaliate against an employee for
  - refusing to violate a federal law, rule, or regulation related to railroad/transit safety or security
  - refusing to work when confronted with an imminent hazardous safety or security condition (if certain conditions are met)
  - refusing to authorize the use of any safety- or security-related equipment, track, or structures if those structures present an imminent hazardous safety or security condition (and certain conditions are met)

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FRSA Protected Activity

- Notifying or attempting to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or illness of an employee
- Accurately reporting hours on duty

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Prohibition on Denial, Delay or Interference with Medical or First Aid Treatment

- A railroad carrier, officer or employee 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 an employee requests transportation to a hospital, the railroad must promptly transport the employee to the nearest hospital where the employee can receive safe and appropriate medical care

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Prohibition on Discipline or Threats of Discipline Related to Medical or First Aid Treatment cont.

- Disciplining or threatening discipline for requesting medical or first aid treatment, or for following a treatment plan of a treating physician for an injury that occurred during the course of employment
- Discipline is defined as bringing disciplinary charges, suspending, terminating, placing on probation, or issuing a written reprimand
- Exception: A railroad carrier may refuse to allow an employee to return to work following medical treatment if refusal is pursuant to FRA medical standards for fitness for duty or (if none) the railroad carrier's own standards for fitness for duty

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Protected Activity Hypothetical #1

- CP worked in various roles on a ferry. The ship had been taken out of service for repairs. When CP returned to work, she saw a sign warning of asbestos, a worker wearing a respirator, plastic sheeting, and a glove bag over an open ceiling. She complained to her manager that there was ongoing asbestos work. When she returned to the room, everything was gone, and she was told there was no asbestos. CP started to have respiratory issues on board the ferry. She complained to the Coast Guard and OSHA about asbestos and requested a respirator. No asbestos was ultimately found.
- Did CP engage in protected activity under NTSSA?

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Protected Activity Hypothetical #1 Analysis

- Yes – The NTSSA does not require that a hazardous condition actually exist, so long as CP has a reasonable belief that the condition is unsafe. CP's belief was credible because asbestos remediation work had recently been completed in the room and she'd seen asbestos workers in protective gear.

Protected Activity Hypothetical #2

- CP is a conductor. In preparation for a train movement, she began to test the air brakes on all 40 cars as required by FRA regulations. When she was partly done with the tests, the trainmaster ordered her to move the train because it was already late. CP refused and completed the tests, discovering problems on the last car. The trainmaster called her again to ask what was going on. CP told the trainmaster about the car with the defective brakes. The trainmaster dismissed her concerns and ordered her to depart. She refused because of the risk of derailment. CP called the FRA to report that Respondent attempted to force her to move the train without completing the tests and the problem with the last car.
- Did CP engage in protected activity under FRSA?

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Protected Activity Hypothetical #2 Analysis

- CP engaged in protected activity under the following FRSA sections:
  - 20109(a)(1)(C) – She provided information to her employer about a defective car
  - 20109(a)(2) – She refused to violate the regulations that all cars must be tested
  - 20109(b)(1)(B) – She refused to operate a train that she believed would derail because of the problem with the brakes
  - 20109(a)(1)(A) – She reported to the FRA that a train car had a brake problem

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Part 4

Unique Issues in FRSA & NTSSA Investigations

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Unique Issues in FRSA & NTSSA Investigations

- Statute overlap
- Election of Remedies
- State sovereign immunity
- Special considerations in FRSA injury reporting cases

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There is overlap between FRSA, NTSSA & Other Statutes

- Ferryboats may be covered under NTSSA and SPA
- Commuter buses may be covered by NTSSA and STAA
- Safety and health complaints could fall under NTSSA and 11(c)
- Commuter or short-haul passenger railroads may be operated by transit agencies and would be covered by both FRSA & NTSSA
- Railroad and transit employees may raise environmental concerns

Election of remedies may apply when other statutes are implicated

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Election of Remedies

- FRSA & NTSSA both provide that:
  - An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act

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Election of Remedies—OSHA's interpretation

- An employee cannot pursue a FRSA/NTSSA case and a case based on another statute prohibiting retaliation based on the same protected activity
- OSHA will docket a case under both FRSA/NTSSA and other applicable OSHA whistleblower statutes
- OSHA will require an election before THE END of its investigation

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Election of Remedies

Election of Remedies Applies

- OSH Act Section 11(c) claims and state plan state analogs
- FRSA/NTSSA claims
- Claims under other whistleblower statutes
- Whistleblower claims under state statutes for same protected activity

Election of Remedies Does Not Apply

- Federal Employers' Liability Act (FELA) & other worker's compensation claims
- Title VII race, gender, national origin discrimination & retaliation claims
- Age Discrimination in Employment Act (ADEA) age discrimination claims
- State common law claims (e.g., termination against public policy)
- CBA grievance/arbitration

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Election of Remedies Example

- Complainant works as a laborer for Rickety Railroad that has a large rail yard with its own sewage treatment plant. While moving supplies from a storage shed connected to the plant, she is overcome by chemical fumes causing her to feel ill. She also notices that sewage is leaking out of the plant, and flowing into an adjacent stream. She notifies the superintendent of the problem and then refuses to work and asks for a different assignment. The superintendent then states “you need to learn to take things like a man” and terminates her employment. Complainant files complaints with OSHA, the EEOC and lawsuit under the state’s whistleblower protection laws.
- How should OSHA proceed?

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Election of Remedies Example

Possible Statutes:

	Days to File	Preliminary Reinstatement	Punitive Damages	Attorney Fee	Burden of Proof	Kick Out
FRSA	180	Yes	Yes – 250K cap	Yes	Contributing	Yes
11(c)	30	No	Yes	No	But For	No
SDWA	30	No	Yes	Yes	Motivating	No
CAA	30	No	No	Yes	Motivating	No

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Election of Remedies Example

- Same facts except that she works for Loyal Labor which contracts with Rickety to perform labor on the yard?

Election of Remedies Example

	Days to File	Preliminary Reinstatement	Punitive Damages	Attorney Fee	Burden of Proof	Kick Out
~~FRSA~~	~~180~~	~~Yes~~	~~Yes 250k Cap~~	~~Yes~~	~~Contributing~~	~~Yes~~
11(c)	30	No	Yes	No	But For	No
SDWA	30	No	Yes	Yes	Motivating	No
CAA	30	No	No	Yes	Motivating	No

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Emerging FRSA & NTSSA Issue: State Sovereign Immunity

- State sovereign immunity sometimes raised if RP= public transportation agency or railroad owned/operated by a state
  - Sovereign immunity NOT Applicable if RP is not “arm of the state”
- For instance, state sovereign immunity will not apply to:
  - Railroads and transit agencies run by local governments
  - Private employers including contractors to transit agencies

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State Sovereign Immunity, cont.

- If state sovereign immunity applies, it will bar CP from pursuing the case beyond the OSHA level
- OSHA must investigate the case and can refer the case to RSOL for litigation even if CP cannot pursue the case before ALJ or district court
- Work with RSOL during the investigation to determine whether state sovereign immunity applies and to develop a merit case for litigation

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Evaluating State Sovereign Immunity in FRSA and NTSSA Cases

- Is respondent raising state sovereign immunity? (can be waived if not raised)
- Is respondent an arm of the state? (Ask RP, CP & RSOL)
- If yes, is state sovereign immunity waived/abrogated?
  - Neither FRSA nor NTSSA abrogates state sovereign immunity
  - A state law, such as the enabling statute establishing the respondent agency, may contain a waiver of sovereign immunity (e.g. NJ law waives NJ Transit's sovereign immunity for FRSA claims but not NTSSA claims)
- If not abrogated, state sovereign immunity applies and OSHA would have to refer a merit case to RSOL for litigation

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Questions

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Review

- As a result of viewing this presentation you should be able to:
  - Determine statutes' coverage
  - Describe statutes' protected activity
  - Describe statutes' enforcement responsibilities

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OSHA eLearning

Postponement and Deferral

Webinar #0175

September 1, 2021

OSHA Occupational Safety and Health Administration

Welcome and Introduction

Moderator
Name
Title
Office/Directorate

Presenter
Meghan Smith
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Presenter
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Topics

- Participants will be able to evaluate when it may be appropriate to
  - Postpone a case
  - Defer to a decision in another forum
- Participants will learn the procedures for postponing an investigation or deferring to a decision in another forum

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Background

- Why are we giving this training?
  - Stakeholder comments
  - Confusion on the issue
  - No prior training on the subject

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Part 1

Postponement

What is postponement?

- What is postponement? It is delaying an OSHA whistleblower investigation because the complainant has a case pending before another agency or tribunal.

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What are the criteria for postponement?

- The criteria are set forth in 29 C.F.R. 1977.18(b).
- The proceedings must not violate rights under any relevant OSHA whistleblower statute.
- Forum must be able to decide the ultimate issue of retaliation
- The rights asserted and the factual issues in the other proceeding must be substantially the same rights as those protected by the OSHA whistleblower statute.
- The factual issues must be substantially similar.

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What is the postponement procedure?

- Notify parties of postponement
- Notify parties they must tell us the results of the proceeding
- Case remains open during postponement
- If the other proceeding is not resolved after a long time, OSHA may end the postponement and resume the investigation.

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Postponement when a complainant kicks out

- If a complainant files under a statute with a kickout provision and one without, consider postponing the investigation under the statute without a kickout provision
  - Postponing is often but not always the best course of action
  - If a complainant kicks out, OSHA should not treat the other claim as withdrawn.

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Postponement Hypothetical #1

- CP works as a truck driver. CP files a STAA claim, alleging RP suspended him for refusing to violate HOS rules. At the same time, CP files a union grievance. The union grievance procedures allows for a neutral arbitrator. Also, the CP may have a union representative, and the arbitrator can determine whether RP retaliated against CP. RP asks OSHA to postpone the STAA investigation until the arbitration, which is scheduled for two weeks from the request.
- Is postponement appropriate?

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Postponement Hypothetical #1 Analysis

- Yes. CP will have representation, the arbitrator is neutral (rather than a RP employee), and the forum can decide the ultimate issue of retaliation.

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Postponement Hypothetical #2

- CP worked as a railroad engineer. CP files a FRSA claim alleging RP terminated him for reporting a workplace hazard. RP claims it terminated CP for causing the hazard. Pursuant to the CBA, RP held an investigative hearing overseen by a railroad manager prior to terminating CP. CP and management witnesses testified. The only issue considered in hearing was whether there was a violation of the safety rule. RP found a violation and terminated CP. The hearing officer did not have authority to consider retaliation. CP has appealed his termination to a Public Law Board ("PLB") which will consider his case based on the record from the railroad hearing.
- Is postponement appropriate?

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Postponement Hypothetical #2 Analysis

- No. CP had representation and was able to present testimony and evidence. However, the hearing was presided over by a company official and did not consider the ultimate issue of retaliation. While the PLB is a neutral body, it will not collect new evidence and instead will rely on the record from the company hearing. Deferral to the PLB's final decision also would not be appropriate for the same reasons.

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Part 2

Deferral

What is deferral?

- When another agency or tribunal has issued a final determination regarding the same adverse action(s) alleged in an OSHA whistleblower complaint, in some circumstances, OSHA should defer to the agency's or tribunal's conclusion and dismiss the case.

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Examples of Decisions to Be Considered for Deferral

- Union arbitration decisions
- Arbitration decisions outside of collective bargaining
- State court and adjudicatory agency decisions
- Determinations of agencies investigating WB cases under OSHA State Plans
- Federal court and adjudicatory agency decisions

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Criteria for Deferral

- The proceedings must have dealt adequately with all factual issues, including considering whether there was retaliation for WB activity.
- The proceedings must have been fair, regular, and free of procedural infirmities.
- The outcome of the proceedings must not be repugnant to the policy or purposes of the relevant OSHA whistleblower statute.
- If the other action is dismissed without an adjudicatory hearing, such dismissal will not ordinarily be determinative of the OSHA whistleblower complaint.

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Internal Postponement and Deferral

- Occurs when a complainant has a case under both a district court statute (i.e. 11(c), AHERA, or ISCA) and an OSHA administrative statute (e.g., STAA, AIR-21, etc.)
- Cases dismissed under an administrative statute, should be dismissed under the district court statute, unless there are separate issues in the cases.
- If OSHA issues a merit finding in an administrative case, the case under the district court statute should ordinarily be dismissed.
- If an adjudicator issues a final order against an employee in an administrative case, the district court statute case must be dismissed, unless there are clearly separate significant issues in the latter case.

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When is deferral to arbitration not under a collective bargaining agreement (non-union) appropriate?

- Deferral should be the exception, not the rule:
  - Factors previously mentioned need to be considered(ie. all relevant factual issues including retaliation were considered in the arbitration, fairness, and repugnance to the WB statutes)
  - Procedural fairness and whether the outcome is repugnant to whistleblower law may be of greater concern in this context

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Factors to consider in determining whether a non-union arbitration agreement is fair

- Was the employee's agreement to arbitration voluntary?
  - Was the agreement made as a condition of employment or after the dispute arose?
  - Was the arbitration agreement entered into in a way that generally invalidates a contract, such as fraud or duress?
- Does the arbitration agreement provide for a neutral arbitrator?

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Factors to consider in determining whether a non-union arbitration agreement is fair, cont.

- Does the agreement allow for discovery for the employee?
- Is the arbitration prohibitively expensive for CP or is the cost of arbitration greater than the potential relief to CP?
- Does the agreement permit the employee to recover the full range of remedies available under the applicable statute?
- Are the arbitration agreement's terms binding on both the employee and employer?

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Deferral procedure

- Obtain all applicable information about the other proceeding, especially the decision of the other forum.
- Consult with RSOL and gather any information requested by RSOL.
- Determine whether referral is appropriate on the basis of the criteria previously discussed in consultation with RSOL.
- Issue findings based on deferral if appropriate.

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Deferral procedure, cont.

- The ROI must include a discussion of why deferral is appropriate
- Draft abbreviated Secretary's Findings
- Record in OITSS as "Dismissed"
  - If the other proceeding results in a settlement of the OSHA whistleblower claim, record as "Settled Other" and process according to the procedures in the WIM settlement chapter

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Deferral Hypothetical

- RP terminated CP after CP was injured on the job, claiming that CP was hurt because she violated safety protocols. CP filed an 11(c) claim. CP was also covered by a CBA with an arbitration clause. At the arbitration, CP was represented by two union officials. The arbitrators were RP employees. CP was allowed to present evidence and rebut claims but was not able to conduct discovery. The arbitrators found that she had been working unsafely and was not terminated for reporting an injury.
- Should OSHA defer to the results of the arbitration if CP files an 11(c) claim?

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Deferral Hypothetical Analysis

- No. While there are factors that lean toward granting deferral – the ability to present evidence and the retaliation issue was actually litigated - ultimately, the proceeding was decided by RP employees. This was not a neutral forum. In addition, CP was not allowed to conduct discovery, which may have led to evidence showing that RP fired her for illegal reasons.

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Part 3

Special Topics in Postponement and Deferral

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Arbitration Agreements

- In order to defer, does OSHA need a copy of the arbitration agreement (whether an arbitration under a collective bargaining agreement or not)?

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Arbitration Agreements, cont.

- Yes

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Transcripts and exhibits

- Can you use transcripts and exhibits from another proceeding as evidence, even if you don’t defer to the decision of the other forum?

Transcripts and exhibits, cont.

- Yes. Investigators may use testimony and exhibits in the other proceeding to make factual findings in the OSHA WB case, even if there is no deferral to the decision of the other forum.

Remedies

- Is deferral appropriate if complainant has been received some remedies through the other forum but the other forum did not decide the retaliation issue?

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Remedies, cont.

- It depends. If there are additional remedies, such as compensatory or punitive damages, that complainant or the Secretary could pursue under the OSHA WB statute, deferral is not appropriate.

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Questions

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Review

- As a result of viewing this presentation you should be able to:
  - Evaluate when to postpone a case
  - Evaluate when to defer to another forum's decision
  - Describe postponement/deferral procedures

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