: 4510-26-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1989

[Docket Number: OSHA-2020-0006]

RIN 1218-AD27

Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act (TFA)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: On March 7, 2022, 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 7623(d) of the Taxpayer First Act (TFA or Act). The IFR established procedures and time frames for the handling of retaliation complaints under TFA, 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 TFA whistleblower provisions on certain matters. This final rule adopts the IFR with one technical change.

DATES: This final rule is effective on March 13, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Meghan Smith, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693-2199 (this is not

a toll-free number) or email: *OSHA.DWPP@dol.gov*. This *Federal Register* publication is available in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Background.

The Taxpayer First Act (TFA or Act), Pub. L. 116-25, 133 Stat. 981, was enacted on July 1, 2019. Section 1405(b) of the Act, codified at 26 U.S.C. 7623(d) and referred to throughout the interim final rule and this final rule as the TFA "anti-retaliation," "employee protection," or "whistleblower" provision, prohibits retaliation by an employer, or any officer, employee, contractor, subcontractor, or agent of such employer against an employee in the terms and conditions of employment in reprisal for the employee having engaged in protected activity. Protected activity under the TFA includes any lawful act done by an employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud. To be protected, the information or assistance must be provided to one of the persons or entities listed in the statute, which include the Internal Revenue Service (IRS), the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The Act also protects employees from retaliation in reprisal for any lawful act done to testify, participate in, or otherwise assist in any administrative or judicial action taken by the IRS relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud. The interim final rules established

procedures for the handling of retaliation complaints under the Act, which OSHA is finalizing with one technical correction in this final rule.

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

On March 7, 2022, OSHA published in the *Federal Register* an IFR establishing procedures for the handling of whistleblower retaliation complaints under the TFA. 81 FR 13976. The IFR also requested public comments. The prescribed comment period closed on May 6, 2022. OSHA received two comments responsive to the IFR.

The first commenter, a private citizen, stated their opinion that the proposed regulation was "totally outside the purview of OSHA and Safety and Health concerns," and that "OSHA and other government agencies" are "unconstitutional." OSHA disagrees with this comment. The TFA rule is a procedural and interpretative rule that implements a statutory provision lawfully enacted by Congress in which Congress assigned to the Secretary of Labor the responsibility to receive and adjudicate TFA retaliation complaints. The Secretary of Labor in turn assigned to OSHA the responsibility to administer the whistleblower program with respect to TFA retaliation complaints. See Sec'y's Order No. 8-2020 (May 15, 2020), 85 FR 58,393, 2020 WL 5578580 (Sept. 18, 2020). In OSHA's experience, promulgating procedural and interpretative rules governing the more than twenty whistleblower protection statutes that OSHA administers aids the public in understanding the procedures applicable to whistleblower cases and the standards that will apply to adjudication of such cases. As such, OSHA is making no revisions to the TFA rule in response to this comment.

The second commenter, the United Brotherhood of Carpenters and Joiners of America, expressed support for the rule and recommended adding "making referrals to immigration authorities" in the list of prohibited conduct outlined in 29 CFR 1989.102(a). OSHA agrees with the commenter that referring a worker to immigration authorities in retaliation for the worker's complaint about the employer's tax law violation would

violate the TFA anti-retaliation provision. OSHA has reaffirmed this view in recent public guidance regarding retaliation in violation of the whistleblower protection laws it administers. See, e.g., OSHA Whistleblower Protection Program Fact Sheet (August 2022), available at *https://www.osha.gov/sites/default/files/publications/OSHA3638.pdf* ("Retaliation can involve several types of actions, such as . . . [r]eporting the employee to the police or immigration authorities"), Whistleblower Investigations Manual, p. 29 (April 29, 2022) , available at *https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf* (noting adverse action can include "[r]eporting or threatening to report an employee to the police or immigration authorities"). However, because the list of prohibited conduct in 29 CFR 1989.102(a) is not exhaustive, OSHA believes that the language in the IFR is expansive enough to encompass retaliatory referrals to immigration authorities. Additionally, OSHA has drafted the regulatory text of 29 CFR 1989.102 to be consistent with its rules governing other OSHA-enforced whistleblower statutes to the extent possible under the applicable statutory language. See, e.g., 29 CFR 1987.102 (listing examples of retaliatory conduct prohibited under the FDA Food Safety Modernization Act whistleblower provision); 29 CFR 1980.102 (listing examples of retaliatory conduct prohibited under the Sarbanes-Oxley Act whistleblower provision). OSHA's rules implementing other whistleblower statutes do not include the suggested language and adding the language in this rule could lead to confusion regarding whether this conduct is prohibited under the other whistleblower-protection statutes. Accordingly, OSHA is making no revisions to the TFA rule in response to this comment.

III. Discussion of Change

This final rule corrects one section of the Code of Federal Regulations, 29 CFR section 1989.110(a), to harmonize the final rule with 29 CFR part 26. Under that part, pro se litigants do not have to electronically file petitions with the ARB, or show "good

cause" to file by mail or some other non-electronic method. Therefore, OSHA is revising 29 CFR section 1989.110(a) to be consistent with 29 CFR part 26. Accordingly, this rule modifies the IFR published on March 7, 2022. In all other respects, this rule adopts as final, without change, the IFR published on March 7, 2022.

IV. Paperwork Reduction Act.

This rule contains a reporting provision (filing a retaliation complaint, § 1989.103) which was previously reviewed as a statutory requirement of TFA and approved for use by the Office of Management and Budget (OMB), as part of the Information Collection Request (ICR) assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act of 1995 (PRA). See Pub. L. 104-13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

V. Administrative Procedure Act.

The notice and comment rulemaking procedures of § 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 two comments pertinent to the IFR that it received in deciding to finalize 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 makes one technical change and otherwise 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 know with the certainty afforded by a final rule what procedures are applicable to pending cases.

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

The Office of Information and Regulatory Affairs 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 § 6(a)(3)(C) of Executive Order 12866 has been prepared.

Also, because this rule is not significant under Executive Order 12866, 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 interpretative 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).

VII. 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 Small Business Administration 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 TFA and considered the two comments pertinent to the IFR that it received in deciding to finalize the procedures in the IFR.

List of Subjects in 29 CFR Part 1989

Administrative practice and procedure, Employment, Taxation, Whistleblower.

Authority and Signature

This document was prepared under the direction and control of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC on February 27, 2023.

Douglas L. Parker,
Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons set forth in the preamble, the Department of Labor amends 29 CFR part 1989, which was published as an interim final rule at 87 FR 12575 on March 7, 2022, as follows:

PART 1989—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE TAXPAYER FIRST ACT (TFA)

1. The authority citation for part 1989 continues to read as follows:

Authority: 26 U.S.C. 7623(d); Secretary of Labor's Order 08-2020 (May 15, 2020), 85 FR 58393 (September 18, 2020); Secretary of Labor's Order 01-2020 (Feb. 21, 2020), 85 FR 13024-01 (Mar. 6, 2020).

2. Amend § 1989.110 by revising paragraph (a) to read as follows:

§ 1989.110 Decisions and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue decisions under this part subject to the Secretary's discretionary review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 30 days of the date of the decision of the ALJ. All petitions and documents submitted to the ARB must be filed in accordance with 29 CFR part 26. The date of the postmark, facsimile transmittal, or electronic transmittal will be considered to be the date of filing; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. The petition for review must also be served on the Assistant

Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of petitions for review on them under this section.

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