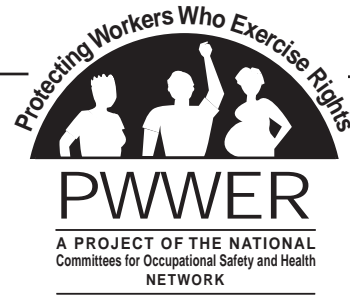

Using Section 11(c) of the Occupational Safety and Health Act (OSHA)



FACTSHEET OF THE “PROTECTING WORKERS WHO EXERCISE RIGHTS” PROJECT OF THE NATIONAL COSH NETWORK

“No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint ... under or related to this Act...or because of the exercise by such employee...of any right afforded by this Act.”

– from Section 11(c) of the Federal Occupational Safety and Health Act

You have the legal right to safe and healthy working conditions.

Yet every year, thousands of workers are fired because they complain about safety. Can you blow the whistle and keep your job, too?

In the U.S., it is against the law for an employer to retaliate against a worker who demands a safe and healthful workplace. The law — Section 11(c) of the federal Occupational Safety and Health Act — is supposed to protect workers who ask questions or complain about safety or take action to protect themselves from dangerous conditions. But it doesn't work very well. Workers need to be able to report hazards and be involved in health and safety activities without putting their jobs at risk.

This fact sheet explains how to exercise your right to a safe job and how to protect yourself — as much as possible — from illegal retaliation.

Your employer is breaking the law if he or she retaliates against you because you exercise your rights. Any retaliation or discrimination — including firing, demotion, transfer or harassment — is illegal.

Unfortunately, employers do sometimes discriminate against workers for challenging unsafe working conditions. Employers know that there is only a small chance of being punished for breaking the law that protects health and safety whistleblowers. And even when employers are caught, the penalty is usually light.

If your job is dangerous and you want to do something about it, you need to know what your rights are and know how to protect yourself from retaliation.

Some of Your Rights Under the Federal OSH Act

Under the federal Occupational Safety and Health Act and other federal laws, you have the right to:

- **Request** an inspection by filing a complaint with OSHA (on request, OSHA will keep your identity secret from the employer)
- **Request** information from, or complain about job health and safety hazards to: your employer, a labor union, the Occupational Safety and Health Administration (OSHA) or other government agency

- **Request and receive** information from your employer about hazards you may be exposed to, including Material Safety Data Sheets (MSDSs) for hazardous materials you work with
- **Request and receive** information about precautions to take when working with potentially hazardous materials or equipment
- **Refuse** an assignment that a “reasonable person” would see as creating “a real danger of death or serious injury,” when there is not enough time to file an OSHA complaint and when you have requested that your employer correct the condition, but it remains dangerous.
NOTE: While legal rights should (but often do not) protect work refusals, workers should remember that it is possible to get another job, but not another life.
- **Discuss** health or safety matters with other workers
- **Request and receive** results of air sampling, noise monitoring or any other health and safety testing
- **Respond** to questions from an OSHA inspector and point out hazards to the inspector, including telling the inspector about past accidents or illnesses and informing the inspector if your employer has temporarily eliminated hazards during the inspection
- **Request and receive** information about procedures to be followed if you are involved in an accident or are exposed to toxic substances
- **Participate** in union activities concerning health and safety matters
- **Talk privately** with an OSHA inspector on a confidential basis
- **Tell an inspector** whether your employer has been notified of hazards and whether you have received training for hazardous work
- **Have an employee representative** accompany an OSHA inspector during an inspection

If you need help exercising an OSHA right or filing a complaint for retaliation, contact:

- ☎ **Your local union** — (if you have one) — or the union’s national headquarters. If there is no union for you to contact, your options include calling:
- ☎ **A Committee on Occupational Safety and Health (COSH)**
There are COSH groups in more than 25 U.S. cities. If you can’t locate one near you, call 212-627-3900.
- ☎ **The Government Accountability Project**
Telephone 202-408-0034; e-mail gap@erols.com
- ☎ **OSHA (toll-free)** — contact the nearest OSHA office by dialing 800-321-OSHA. You will be prompted to press “1” to file a complaint. You will be prompted to press the ZIP code of your location. You will be connected to the local OSHA office.

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How To File A Complaint About Retaliation for Health and Safety Activities

Complaints about retaliation can be filed with OSHA in a face-to face conversation or by telephone, but it is much safer to **file by certified mail** (return receipt requested), because you will then have a record that the complaint was received by the agency. Your 11(c) complaint should be a brief letter, with a statement of who your employer is, what OSHA right you exercised before your employer retaliated against you, what your employer did to you, and when you discovered (or suspected) your employer was retaliating against you. There is no official form for a complaint to be filed with OSHA. Do not send copies of documents or other evidence with your complaint, but do describe any evidence you have.

You can file an 11(c) complaint yourself, or **you can authorize a representative** (such as your union, a COSH group or anyone who you designate) to do it for you. An 11(c) complaint can be filed with any OSHA official or at any OSHA office. You can find the address of a nearby OSHA office in the telephone book, under U.S. Labor Department, Occupational Safety and Health Administration.

The first thing OSHA will do is check whether your 11(c) complaint falls under the law against retaliation.

Your complaint should answer these questions:

- **What OSHA right did you exercise before your employer retaliated against you?**
For a complaint to fall under 11(c), the retaliation must be in response to your having used a right that is protected by OSHA (see “Some of Your Rights under the Federal OSH Act,” above).
- **When did you discover that your employer retaliated against you?** You must file the 11(c) complaint within 30 days of when you learn that your employer punished you for exercising an OSHA right. If your employer concealed the real reason for the retaliation from you, the 30-day period does not begin until you learn the reason for the punishment.

If your 11(c) complaint was filed more than 30 days after you learned why you were punished, or if the punishment was not related to your exercise of an OSHA right, OSHA will toss it out. For example, if your complaint says you were fired because you refused to wear a hard hat, OSHA will close the case, because there is no right under OSHA to refuse to wear appropriate personal protective equipment.

If your complaint alleges something that could be a violation of the law, OSHA will assign an investigator to the case. The investigator will interview you to obtain a detailed description of what happened, which will be written down as a statement for you to sign. **You should give the investigator the names of any witnesses who can confirm your allegations and any additional evidence.**

If OSHA decides you don't have a case, the investigator will contact you before the case is officially closed. If you have new information to add, you should do so. If you agree with OSHA's reason for refusing your complaint, OSHA will close the case. If you tell the investigator you do not agree with OSHA's decision to close the case, OSHA will investigate further, until it can fully document the reasons for its decision, or until it decides you have a valid case.

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How To Follow Up on A Complaint About Retaliation

After the investigator interviews you and obtains your signed statement, he or she will prepare a letter informing your employer that OSHA is investigating your 11(c) complaint. Usually, the investigator will deliver the letter to your employer by hand, and will immediately interview any witnesses who are in the workplace. When the investigator interviews managers, the employer or his representative can be present, but interviews with non-managers will be conducted privately. The investigator will ask the witnesses for signed statements.

The investigator will interview your employer, too. Your employer might claim you were punished for another reason, such as lateness. In that case, the inspector will ask to see records that document such charges. Your employer cannot use something you've done as an excuse for punishing you when you exercise an OSHA right. For example, if your employer has knowingly allowed you to do something in the past (such as leaving work early), your employer would be violating the law by deciding to punish you for doing the same thing after you raise a health and safety issue. If your employer knows that several workers are all doing the same thing wrong, he or she can't legally single out for punishment the one worker who has been involved in job safety and health activities. But if your employer can prove that you were punished for a reason unrelated to the exercise of your OSHA rights, the investigation will be closed.

OSHA looks for the following elements in deciding whether an 11(c) complaint has "merit":

- If "protected activity" occurred [ie. which OSHA right(s) did a worker engage in?]
- If "adverse action" (employer retaliation) occurred
- If the employer was aware that the worker engaged in "protected activity" (exercised OSHA rights)
- If there is a connection between the "protected activity" and the employer's "adverse action"

OSHA will also look for signs of "employer animosity" or anger directed at you related to the "protected activity." OSHA also considers an 11(c) case to be stronger if the retaliation occurred close in time after the "protected activity" took place.

When the investigation is over, the investigator will explain the conclusion to you and answer any questions. If OSHA contends there is not enough evidence to prove your complaint, the agency will close the case and send you a letter stating why. If you disagree with OSHA, you have 15 days to send an appeal to: Office of Investigative Assistance, U.S.D.O.L.– OSHA, Room N 3603, 200 Constitution Ave., NW, Washington, D.C. 20210.

If the OSHA investigation determines that you were punished for exercising an OSHA right, OSHA may begin to negotiate a settlement with your employer immediately. In that case, OSHA may ask your employer to restore to you whatever was illegally taken away, such as rescinding a demotion, transfer or dismissal, including payment of lost wages and fringe benefits.

If OSHA comes to an agreement with your employer over how to settle the case, OSHA will almost always ask if you will join in the agreement. If you will, then the case is settled. If you will not agree to the terms that OSHA and your employer agree on, OSHA has the power (which it seldom uses) to settle the case unilaterally, without your agreement.

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Six Steps to Prevent Retaliation When You Exercise Your OSHA Rights

And Defend Against Retaliation If Prevention Doesn't Work

- 1 Ask yourself if you are prepared for an antagonistic response before you take action,** even if you don't anticipate a hostile reaction. You may not expect it, but you should not allow yourself to be caught off guard by a harsh response to a simple question or complaint about safety.
- 2 Join with co-workers:** Union members are in a much better position to enforce their rights than individual workers. Even if you are not in a union, you will be on firmer legal ground to fight retaliation if you join with at least one other co-worker in raising questions or complaints about safety. Under the National Labor Relations Act, actions taken by more than one worker may be eligible for protection because they are "concerted activity."
- 3 Chart your course carefully:** Always raise health and safety questions with your union first, if you belong to one. If possible, contact resources (your union, COSH group, etc.) for assistance before you take action. If you don't have a union and you anticipate a hostile reaction, talk with at least one co-worker, a "COSH" group and/or a lawyer who knows labor law. Your employer might respond positively to a question or suggestion about safety, but **you should prepare in advance for a hostile response, no matter how unlikely it might seem.**
- 4 Consider complaining to the government, not your employer:** You may give yourself some protection by making your safety complaint to a government agency, such as OSHA or your local Fire Department or Health Department, instead of to your employer. An employer who first learns about a safety complaint from an official investigation may hesitate to retaliate because the government is already investigating. However, complaining to the government first is no guarantee against retaliation.
- 5 Keep good records in a safe place:** Keep dated notes of details, and the names of witnesses. If your employer responds orally, make a note of what is said, when and by whom, and the names of any witnesses. It is a good practice to keep your notes on consecutive pages in a bound notebook, so they will be more useful if you need to use them as evidence. Keep copies of any documents you send or receive. If you have not been keeping records and you find yourself in the middle of a struggle over safety, or if your employer retaliates against you over a health and safety matter, **write down everything that has happened until that time,** with as much detail as possible. **Keep records away from the workplace.** If your employer retaliates against you, you could be prevented from retrieving anything from the job.
- 6 Don't miss deadlines:** If you have been retaliated against for exercising an OSHA right (or if you think you might have been, but aren't certain) **you have only 30 days to file** an 11(c) complaint with OSHA. The 30 days begin when you become aware that you have been punished for exercising an OSHA right, which could be later than the time you were punished, if the true reason for the punishment was concealed. If your 30-day deadline is about to expire, you can file your initial complaint by telephoning any OSHA office and saying that you want to file an 11(c) complaint. Give OSHA the basic facts of the case and be sure to get the name of the person who takes the information from you. Your complaint will be logged in as of the date of the call, and an OSHA investigator should contact you.

When OSHA negotiates with the employer for a settlement, its policy is to seek to “make the victim whole,” that is, to recover everything a worker lost because of the retaliation, including all wages, benefits, seniority and leave time (plus interest). OSHA is also able to seek “punitive damages” — monies a worker could receive above and beyond lost wages and benefits — but OSHA rarely pursues this option. If you believe you have suffered blatant illegal retaliation for your health and safety activities, encourage OSHA to pursue punitive damages. Punitive damages are important to deter employers from becoming repeat offenders.

If OSHA decides you have a valid case and it cannot reach a settlement agreement with your employer, OSHA will refer the case to prosecutors at the Labor Department (the Solicitor of Labor’s Office). The Labor Department can (and often does) refuse to take action, and sends the case back to OSHA for more negotiations with your employer; or, it can sue your employer in federal court, asking for a court order that will force your employer to make restitution. OSHA and the Labor Department will not charge you anything for representing you in negotiating a settlement or suing your employer.

Keep in mind that workers’ strongest protection against employers’ retaliatory action lies in having a union and being able to file a grievance under the union contract. Workers who have suffered employer retaliation can file OSHA 11(c) complaints, and (if they are in a union) file a grievance under their union contract, and file complaints under other applicable federal and/or state laws.