

# Chapter 7

## Section 9(3) of Iowa Code Chapter 88 - the Iowa Occupational Safety and Health Act

### I. Introduction

Section 9(3) of Iowa Code Chapter 88 – Iowa Occupational safety and Health, mandates that *“A person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of the employee or others of a right afforded by this chapter. A person shall not discharge or in any manner discriminate against an employee because the employee, who with no reasonable alternative, refuses in good faith to expose the employee's self to a dangerous condition of a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; provided the employee, where possible, has first sought through resort to regular statutory enforcement channels, unless there has been insufficient time due to the urgency of the situation, or the employee has sought and been unable to obtain from the person, a correction of the dangerous condition.*

*An employee who believes that the employee has been discharged or otherwise discriminated against by a person in violation of this subsection may, within thirty days after the violation occurs, file a complaint with the commissioner alleging discrimination. Upon receipt of the complaint, the commissioner shall conduct an investigation as the commissioner deems appropriate. If, upon investigation, the commissioner determines that the provisions of this subsection have been violated, the commissioner shall bring an action in the appropriate district court against the person. In any such action, the district court has jurisdiction to restrain violations of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay. Within ninety days of the receipt of a complaint filed under this subsection, the commissioner shall notify the complainant of the commissioner's determination under this subsection.”*

### II. Coverage

Any private or public sector employee.

### III. Protected Activity

Activities protected by Section 9(3) include, but are not limited to, the following:

- A. Occupational safety or health complaints filed orally or in writing with IOSHA, the National Institute of Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department, health department, or police department. The time of the filing of the safety or health complaint in relation to the alleged retaliation and employer knowledge are often the focus of investigations involving this protected activity.
- B. Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel.
- C. Instituting or causing to be instituted any proceeding under or related to the IOSH Act. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a complainant of a determination not to issue a citation, employee contests of abatement dates, employee initiation of proceedings for the announcement of IOSHA standards, and employee application for modification or revocation of a variance. Filing an occupational safety or health grievance under a collective bargaining agreement would also fall into this category.
- D. Providing testimony or being about to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, depositions during inspections and investigations.
- E. Exercising any right afforded by the IOSH Act. The following is not an exhaustive list. This broad category includes communicating orally or in writing with the employee's supervisor or other management personnel about occupational safety or health matters, including asking questions; expressing concerns; reporting a work-related injury or illness; requesting a material safety data sheet (MSDS); and requesting access to records, copies of the IOSH Act, OSHA regulations, applicable OSHA standards, or plans for compliance (such as the hazard communication program or the bloodborne pathogens exposure control plan), as allowed by the standards and regulations.
- F. Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with union officials or co-workers.

This category (exercising any right afforded by the Act), also includes refusing to perform a task that the employee reasonably believes presents

a real danger of death or serious injury. An employee has the right to refuse to perform an assigned task if he or she:

1. Has a reasonable apprehension of death or serious injury , and
2. Refuses in good faith, and
3. Has no reasonable alternative, and
4. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting OSHA, and
5. Where possible, sought from his or her employer, and was unable to obtain, a correction of the dangerous condition.

An employee also has the right to comply with, and to obtain the benefits of, IOSHA standards and rules, regulations, and orders applicable to his or her own actions or conduct. Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by an OSHA standard, to refuse to purchase PPE (except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work.

An employee has the right to participate in an IOSHA inspection. He or she has the right to communicate with an IOSHA compliance officer, orally or in writing. He or she must not suffer retaliation because of the exercise of this right.

## **G. Relationship to State Plan States**

### **A. General.**

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §667, provides that any State, i.e., States as defined by 29 U.S.C. §652(7), that desires to assume responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a state plan under Section 18 does not affect the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any state, although 29 CFR 1977.23 and 1902.4(c)(2)(v) require that each state plan include whistleblower protections that are as effective as OSHA's Section 11(c). Therefore, in state plan states that cover the private sector, such employees may file occupational safety and health whistleblower complaints with federal OSHA, the state, or both.

### **B. State Plan State Coverage.**

All state plans extend coverage, including occupational safety and health whistleblower protections, to non-federal public employees; and the majority of the state plans also extend this coverage to private-sector employees in the state.

There are currently five jurisdictions operating state plans (Connecticut, Illinois, New Jersey, New York, and the Virgin Islands) that cover non-federal public employees only. In these five states, all private-sector coverage remains solely under the authority of federal OSHA.

### C. Overview of the 11(c) Referral Policy.

The regulation at 29 CFR §1977.23 provides that OSHA may refer complaints of employees protected by state plans to the appropriate state agency. It is OSHA's long-standing policy to refer all Section 11(c) complaints to the appropriate state plan for investigation; thus it is rarely the case that a complaint is investigated by both federal OSHA and a state plan. However, utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

1. **Exemption to the Referral Policy.** The Regional Administrator (RA) may determine, based on monitoring findings or legislative or judicial actions, that a state plan cannot adequately enforce whistleblower protections or for some reason cannot provide protection. In such situations, the RA may elect to temporarily process private-sector Section 11(c) complaints from employees covered by the affected state in accordance with procedures in non-plan states.
2. **Federal Review of a Properly Dually-Filed Complaint.** If a complaint has been dually filed with federal OSHA and a state plan state, and meets specific criteria as outlined in this chapter, OSHA will review the complaint under the basic principles of its deferral criteria, set forth in 29 CFR §1977.18(c).

### D. Procedures for Referring Complaints to State Plans

1. In general, all federally-filed complaints alleging retaliation for occupational safety or health activity under state plan authority i.e., private-sector and non-federal public sector, will be referred to the appropriate state plan official for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. If such complaints also contain allegations of retaliation covered under the OSHA-administered whistleblower laws other than Section 11(c), such allegations will be investigated by federal OSHA under those laws.
2. **Referral of Private-Sector Complaints.** A private-sector employee may file an occupational safety and health whistleblower complaint with federal OSHA under Section 11(c) and with the state plan. When a complaint from a private-sector employee is received, the complaint will be screened, but not docketed, as a

federal Section 11(c) complaint. A memo to the file will be drafted to document the screening, the federal filing date and the fact that the complaint was dually filed, so that the complaint can be acted upon, if needed.

3. **Referral of Public Sector Complaints.** Any occupational safety and health whistleblower complaint from a non-federal public employee will be referred, without screening, to the state.
4. **Referral Letters.** Federal OSHA shall promptly refer Section 11(c) complaints to the state by means of a letter, fax or e-mail to the state office handling state plan whistleblower complaints. In addition, the complainant will be notified of the referral by letter. The referral letter will inform the complainant that he or she may request federal review of dually filed 11(c) complaint, as follows:
  - a. “OSHA will not conduct a parallel investigation. [State agency] will conduct the investigation of your retaliation complaint. However, should you have any concerns regarding [state agency’s] conduct of the investigation, you may request a federal review of your retaliation claim under Section 11(c) of the OSH Act. Such a request may only be made after any appeal right has been exercised and the state has issued a final administrative decision. The request for a review must be made in writing to the OSHA [Regional Office] indicated below and postmarked within 15 calendar days after your receipt of the State’s final administrative decision. If you do not request a review in writing within the 15- calendar day period, your federal 11(c) complaint will be closed.”
5. **Federal Statutes Other than 11(c).** Complaints filed solely under the whistleblower statutes administered by OSHA (other than 11(c)) are under the exclusive authority of federal OSHA and may not be referred to the states. If a complaint is filed under a federal OSHA whistleblower statute other than Section 11(c) and a state whistleblower statute, it is important to process the complaint in accordance with the requirements related to each of the named federal statutes in order to preserve the respondent’s and complainant’s rights under the differing laws. Therefore, it will be necessary to coordinate the federal and state investigations.

#### **E. Procedures for Processing Dually Filed 11(c) Complaints**

1. **Complainant’s Request for Federal Review.** If a complainant requests federal review of a dually filed complaint under Section 11(c) (“a dually filed complaint”) after receiving a state determination, it will be evaluated to determine whether it has been properly dually filed.

2. **Proper Dual Filing.** OSHA will deem a complaint to be a properly dually filed only if it meets the following criteria:
  - a. Complainant filed the complaint with federal OSHA in a timely manner (i.e., within 30 days or within the time allowed by extenuating circumstances, see Chapter 2); and
  - b. A final administrative determination has been made by the State; and
  - c. Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's determination letter; and
  - d. Complainant and Respondent would be covered under Section 11(c). (See Paragraph III.)
3. **Administrative Closure of Complaints Not Dually Filed**
  - a. If upon request for review, the complaint is deemed to be not properly dually filed, the complaint will be administratively closed, and the complainant will be notified, except as noted in subparagraph (b). Section 11(c) appeal rights will not be available. Further review of such complaints will be conducted under Complaint About State Plan Administration (CASPA) procedures.
  - b. If the complainant requests federal review before the state determination is made, the complainant shall be notified that he or she may request review only after a state determination is made. However, in cases of extraordinary delay or misfeasance by the state, the RA may allow a federal review before the issuance of a state determination.
4. **Federal Review.** The OSHA review of a properly dually-filed complaint will be conducted as follows:
  - a. **Preliminary Review.** Under the basic principles of §1977.18(c), before deferring to the results of the state's proceedings, it must be clear that:
    - i. The state proceedings "dealt adequately with all factual issues;" and
    - ii. The state proceedings were "fair, regular and free of procedural infirmities;" and
    - iii. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
  - b. The preliminary review will be conducted on a case-by-case basis, after careful scrutiny of all available information, including the state's investigative file. The State's dismissal of

the complaint “will not ordinarily be regarded as determinative of the Section 11(c) complaint.” This means that OSHA may not defer to the state’s determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the case be re-opened and the specific deficiencies corrected by the State.

5. **Deferral.** If the state’s proceedings meet the criteria above, the RA may simply defer to the state’s findings. The complaint will be administratively closed, and the complainant will be notified. Appeal rights will not be available.
6. **No Deferral.** Should state correction be inadequate and the RA determines that OSHA cannot properly defer to the state’s determination pursuant to 29 CFR 1977.18(c), the RA will conduct whatever additional investigation is necessary, with every effort being made not to duplicate any portion of the state investigation believed to have been adequately performed and documented. Based on the investigation’s findings, the RA may either dismiss, settle, or recommend litigation.
7. **State Plan Evaluation.** Should any recommendations for needed corrective actions by the state with regard to future state investigation techniques, policies and procedures arise out of the federal 11(c) review of a properly dually filed complaint, those recommendations will be referred to the RA for use in the state plan evaluation.

#### **F. Referral Procedure – Complaints Received by State Plan States**

1. In general, 11(c)-type complaints received by a state plan state which are under dual federal-state authority will be investigated by the state and shall not be referred to federal OSHA.
2. Because employers in state plan states do not use the federal OSHA poster, the states must advise private-sector complainants of their right to file a federal 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to concurrent federal protection. This may be accomplished through such means as an addition to the state safety and health poster, a checklist, handout, or in the letter of acknowledgment, by the inclusion of the following paragraph:
  - a. “If you are employed in the private sector or the United States Postal Service, you may also file a retaliation complaint under Section 11(c) of the federal Occupational Safety and Health Act. In order to do this, you must file your complaint with the U.S. Department of Labor - OSHA within thirty (30) days of

the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under OSHA's Section 11(c). Although OSHA will not conduct a parallel investigation, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final administrative determination; that is, after the State's appeals process is completed. To file such a complaint, contact the OSHA Regional Office representative indicated below:

USDOL/OSHA, Whistleblower Protection Program, 2300 Main Street, S#1010, Kansas City, MO 64108; 816-283-0545, ext. 231 or 816-283-0547 (fax)"

3. At the conclusion of each whistleblower investigation conducted by a state, the state must notify the complainant of the determination in writing and inform the complainant of the State's appeals process. If the complaint constituted a dually-filed complaint, the determination letter will inform the complainant as follows:
  - a. "Should you have any concerns regarding this agency's conduct of the investigation, you may request a federal review of your retaliation claim under section 11(c) of the OSH Act. Such a request may only be made after this agency has issued a final administrative determination after exercise of all appeal opportunities. The request for a review must be made in writing to the OSHA [Regional Office] indicated below and postmarked within 15 calendar days after your receipt of this final administrative decision. If you do not request a review in writing within the 15 calendar day period, your federal retaliation complaint will be closed."
4. **Federal Whistleblower Statutes other than Section 11(c).** Complainants in state plan states must be made aware of their rights under the whistleblower protection provision administered by the state plan and should be informed of their rights under the federal whistleblower statutes (other than Section 11(c)) enforced by Federal OSHA, which protect activity dealing with other federal agencies and which remain under Federal OSHA's exclusive authority. State plan states must determine whether their whistleblower provisions are pre-empted in these circumstances by provisions of the state occupational safety and health law or directly by the substantive provisions of the other federal agency's statute. See paragraph D.5.



## **G. Complaints About State Program Administration (CASPA)**

1. OSHA state plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a state's program may file a Complaint About State Program Administration (CASPA) with the appropriate RA. (See: 29 CFR 1954.20; CSP 01-00-002/STP 2-0.22B, Chap. 11.)
2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a state plan made to OSHA by any person or group. The CASPA process provides a mechanism for employers, employees, and the public to notify federal OSHA of specific issues, systemic problems, or concerns about a state program. A CASPA may reflect a generic criticism of the state program administration or it may relate to a specific investigation.
3. Because properly dually-filed 11(c) complaints undergo federal review under the Section 11(c) procedures outlined in Paragraph E of this chapter, no duplicative CASPA investigation is required for such complaints. Complaints about the handling of state whistleblower investigations from non-federal public sector employees, and from private-sector employees who have not properly dually-filed their complaint, will be considered under CASPA procedures.
4. Upon receipt of a CASPA complaint relating to a state's handling of a whistleblower case, OSHA at the regional level will review the state's investigative file and conduct other investigation as necessary to determine if the state's investigation was adequate and that the determination was supported by appropriate available evidence. A review of the state's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the Whistleblower Protection Program.
5. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future state investigations techniques, policies and procedures. A review under CASPA procedures is not an appeal and a review under CASPA procedures will not be reviewed by the Appeals Committee; however, it should always be possible to reopen a discrimination case for corrective action. If the Region finds that the outcome in a specific state whistleblower investigation is not appropriate (i.e., final state action is contrary to federal practice and is less protective than if investigated federally; does not follow state policies and procedures; relied on state policies and procedures that are not at least as effective as OSHA's policies and procedures), the Region should require the state to take appropriate action to reopen the case or in some manner

correct the outcome, whenever possible, as well as make procedural changes to prevent recurrence.