

§ 1987.102

(a) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under FSMA.

(b) *Business days* means days other than Saturdays, Sundays, and Federal holidays.

(c) *Complainant* means the employee who filed a complaint under FSMA or on whose behalf a complaint was filed.

(d) *Covered entity* means an entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.

(e) *Employee* means an individual presently or formerly working for a covered entity, an individual applying to work for a covered entity, or an individual whose employment could be affected by a covered entity.

(f) *FD&C* means the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, which is chapter 9 of title 21.

(g) *FDA* means the Food and Drug Administration of the United States Department of Health and Human Services.

(h) *Food* means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article.

(i) *FSMA* means section 402 of the FDA Food Safety Modernization Act, Public Law 111-353, 124 Stat. 3885 (Jan. 4, 2011) (codified at 21 U.S.C. 399d).

(j) *OSHA* means the Occupational Safety and Health Administration of the United States Department of Labor.

(k) *Person* includes an individual, partnership, corporation, and association.

(l) *Respondent* means the employer named in the complaint who is alleged to have violated the FSMA.

(m) *Secretary* means the Secretary of Labor or person to whom authority under the FSMA has been delegated.

(n) Any future statutory amendments that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

29 CFR Ch. XVII (7-1-14 Edition)

§ 1987.102 Obligations and prohibited acts.

(a) No covered entity may discharge or otherwise retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee), has engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) An employee is protected against retaliation because the employee (or any person acting pursuant to a request of the employee) has:

(1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the FD&C or any order, rule, regulation, standard, or ban under the FD&C;

(2) Testified or is about to testify in a proceeding concerning such violation;

(3) Assisted or participated or is about to assist or participate in such a proceeding; or

(4) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of the FD&C, or any order, rule, regulation, standard, or ban under the FD&C.

§ 1987.103 Filing of retaliation complaint.

(a) *Who may file.* An employee who believes that he or she has been retaliated against in violation of FSMA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English,

OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>.

(d) *Time for filing.* Within 180 days after an alleged violation of FSMA occurs, any employee who believes that he or she has been retaliated against in violation of that section may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1987.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1987.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the FDA.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent and the com-

plainant each may submit to OSHA a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent and the complainant each may request a meeting with OSHA to present its position.

(c) OSHA will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to OSHA that are responsive to the complainant's whistleblower complaint at a time permitting the complainant an opportunity to respond. Before providing such materials to the complainant, OSHA will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing (*i.e.* a non-frivolous allegation) that a protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to