

# Retaliation against injured employees



**Manuel L. Peralta Jr.**

**I**t has been quite a while since I have addressed the issue of whistleblower protection, so here we go.

In April 2022, the Occupational Safety and Health Administration (OSHA) revised its *Whistleblower Investigations Manual*, and in reviewing it, I want to address a few items.

The NALC has bargained a very sophisticated grievance procedure that requires us to identify what happened, which rule was violated and what we seek as a remedy. The membership of the NALC has been well represented by its shop stewards, branch officers and regional representatives in the processing of their grievances. Further, we have

developed a well-trained cadre of arbitration advocates who present these cases to the assigned arbitrator. Our advocates have done an outstanding job upholding the contract.

If you are terminated and you believe that your rights have been violated, you have the right to file a grievance, and the union has the right to move that grievance forward if it, too, believes that your rights were violated.

If you suffer an injury and management issues you discipline, or retaliates against you in other ways, you again have access to the grievance procedure.

If, however, you are a new city carrier, your right to protest a termination begins after 90 days for a PTF, and if you are a CCA, your right to protest a termination through the grievance procedure is conditioned on your completion of 90 workdays or 120 calendar days (see page 16-12 of the 2021 *Joint Contract Administration Manual [JCAM]*).

What if you have not completed your 90/120, suffer an on-the-job injury and are then terminated? If you are in such a situation, management often believes that it is free to wash its hands of you and it takes the action simply because it thinks it is free to do so. Are you without any rights? Is there anything that the NALC can do?

The answer to the latter is yes, but it is limited.

There are times that the law and/or federal regulations protect us beyond the reach of the grievance procedure, as I'll explain below.

## OSH Act of 1970

The Occupational Safety and Health (OSH) Act of 1970 created OSHA for the purpose of promulgating and en-

forcing standards. This law also established the National Institute for Occupational Safety and Health (NIOSH) for the purpose of conducting research and recommending occupational safety and health standards. When this law was written, it contained a section intended to protect employees against retaliation. That rule is found in Section 11(c) of the OSH Act and reads as follows:

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

So, what does that mean?

It means that you have the right to file a whistleblower complaint through OSHA, to protest retaliation by management (any adverse action), that you believe violates the law as written. Once a complaint is filed, OSHA's team is responsible for conducting an investigation. What do they investigate?

Best to turn to the *Investigative Manual* beginning at page 23, in Chapter 2, which explains:

...In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of an OSHA whistleblower statute has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., butfor, motivating factor, or contributing factor).

Elements of a violation (page 24):

An investigation focuses on the elements of a violation and the employer's defenses. The four basic elements of a

whistleblower claim are that: (1) Complainant engaged in protected activity; (2) Respondent knew or suspected that Complainant engaged in the protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (a.k.a. nexus).

**A. Protected Activity:** The evidence must establish that Complainant engaged in activity protected under the specific statute(s). Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities. Specific information on the protected activities under a specific statute can be found in the desk aid for the specific statute. If there is any inconsistency between this general information and the information in the desk aid, follow the more specific information in the desk aid.

1. Reporting potential violations or hazards to management – Reporting a complaint to a supervisor or someone with the authority to take corrective action.
2. Reporting a workrelated injury or illness – Reporting a workrelated injury or illness to management personnel.
3. Providing information to a government agency.
4. Filing a complaint – Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to OSHA under the OSH Act’s section 8(f).
5. Instituting or causing to be instituted any proceeding under or related to the relevant act... – Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue (or other issue covered by the OSHA-enforced whistleblower protection laws), and communicating with the media about an unsafe or unhealthful workplace condition.
6. Assisting, participating, or testifying in proceedings...

**B. Employer Knowledge:** The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that Complainant or someone closely associated with Complainant, such as a spouse or coworker, engaged in protected activity

**C. Adverse Action:** An adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the employee. The evidence must demonstrate that Complainant suffered some form of adverse action. An adverse action usually must relate to employment, but under statutory provisions like section 11(c) which do not specify that the retaliation must affect the terms or conditions of employment, adverse action need not be related to employment.

**D. Nexus:** There must be reasonable cause to believe that the protected activity caused the adverse action at least in part (i.e., that a nexus exists). As explained below, depending on which law is involved in the case, the protected

activity must have been either a “butforcause” of the adverse action, a contributing factor in the decision to take adverse action, or a motivating factor in the decision to take adverse action.

The above is a simplified listing of what the investigator needs to look into to determine if the four required elements of a whistleblower violation are in fact present.

### How can you help?

From your first day of employment forward, keep track of the work you are assigned and the time it takes you to do that work.

Keep track of your working relationship with your supervisors and managers, taking note of any feedback they give you.

If you suffer an injury and report it, and then things go sour, you may need to file a whistleblower complaint and be at the ready to explain how things changed when you reported the injury.

If you need to file a whistleblower complaint, go to [whistleblowers.gov/complaint\\_page](http://whistleblowers.gov/complaint_page).

Remember, you have a 30-day time limit (from the date of the adverse action) to initiate a complaint.

**I would like to take a moment to say farewell to a close friend of over 30 years. Al Apfelbaum passed away on Oct. 12.**

Al started his USPS career in 1968 and served as a shop steward, union activist and officer of Santa Clara, CA Branch 1427. In December 1990, Al was appointed as a regional administrative assistant (RAA) in Region 1 by President Vincent Sombrotto. Al served in that position until President Sombrotto appointed him as an assistant to the president at NALC Headquarters beginning in 2001. Al retired in early 2012, after serving the NALC at the regional and national level for 22 years. Upon his retirement, he returned to serving his branch until his death last month.

Al is survived by his wife, Dinna; his daughter, Danielle; and his grandson, Joseph.

In closing, merry Christmas and happy holidays to all.

