

The FRSA In A Nutshell

What Is the FRSA?

The Federal Rail Safety Act, 49 U.S.C. Section 20109, is a powerful new law that protects railroad workers who engage in certain "protected activity." FRSA prohibits railroads from firing, laying off, demoting, disciplining, reprimanding, intimidating, denying promotion or benefits, or in any other way retaliating or discriminating against any employee who engages in certain "protected activity."

Who is Protected Under the FRSA?

All railroad employees and employees of railroad contractors or subcontractors who engage in *protected activity*.

What Is Considered *Protected Activity* Under the FRSA?

Protected Activity includes:

- Notifying the railroad of your own or a co-worker's work-related injury or occupational illness
- Reporting a hazardous safety condition
- Following the orders or treatment plan of your treating physician*
- Providing information regarding any violation of any federal law, rule, or regulation relating to railroad safety or security
- Refusing to violate or assist in violating any federal law, rule, or regulation relating to railroad safety or security
- Filing an FRSA complaint with OSHA's Whistleblower Office
- Testifying regarding a FRSA complaint
- Refusing to authorize the use of unsafe railroad equipment, track, or structures
- Refusing to work under hazardous safety or security conditions
- Cooperating with a safety or security investigation by the FRA, NTSB, or Homeland Security
- Furnishing information to the FRA, NTSB, or any regulatory or law enforcement agency relating to any railroad incident that results in injury, death, or property damage
- Providing information regarding any gross fraud, waste, or abuse of public funds intended to be used for transportation safety or security
- Accurately reporting your hours on duty pursuant to the Hours of Service Act

*** Medical Treatment**

A railroad may not discipline or threaten to discipline an employee for following the orders or treatment plan of a treating physician for any work or non-work related medical condition or injury. Also, a railroad may not deny, delay, or interfere with the entire course of medical treatment for an employee's work related injury.

Who Must I Inform or Notify?

As far as reporting or furnishing information to a railroad employer is concerned, employees receive protection when they report or furnish that information to any railroad person who has supervisory authority over the employee or who has the authority to investigate, discover, or terminate the matter or conduct involved.

What Remedies Are Available Under the FRSA?

FRSA Section 20109 is a "make whole" statute. When a railroad has violated the FRSA, the fact finder (be it OSHA, a judge, or a jury) has the power to order any and all remedies necessary to make the employee whole, including:

- voiding and expunging discipline
- reinstatement with all seniority and benefits restored
- back pay with interest
- compensatory damages, including special damages for:
 - -mental distress or emotional suffering
 - -any economic losses stemming from the railroad's actions
- punitive damages up to \$250,000, and
- attorney fees and costs (including expert costs)

How Do I File A Complaint And What Does the Process Entail?

A railroad employee must file a FRSA complaint with a United States Department of Labor's Regional OSHA Office of Whistleblower Protection within 180 days of the date when the employee knew or should have known the railroad took an adverse action based in whole or in part on the employee's protected activity. There may be more than one adverse action involved. For example, OSHA considers the first notice of a disciplinary charge to be an adverse action that opens a 180 day window. The subsequent holding of a disciplinary trial and the imposition of formal discipline will open their own 180 day windows.

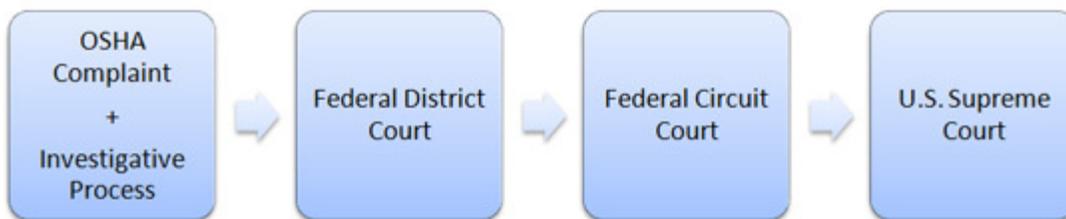
After the Complaint is filed, OSHA's Office of Whistleblower Protection assigns an investigator to the file who conducts an investigation by: obtaining a written response from the railroad; interviewing the complainant, co-workers, managers, and any other relevant witnesses; and collecting all relevant documentation. OSHA then issues a written Finding explaining whether or not a violation occurred. If OSHA finds a violation occurred, OSHA orders all remedies necessary to make the employee whole.

How does the Appeals Process Work?

After OSHA issues a Finding against a railroad, the railroad has 30 days to either comply with the Order or to file an Objection. If either the railroad or the employee objects, the case proceeds to *ade novo* evidentiary hearing before a federal administrative law judge (ALJ). Any appeal from a decision of an ALJ goes to the federal Administrative Review Board (ARB) in Washington, D.C.



However, if OSHA has not issued a final decision within 210 days (and a decision is not final if it is still pending before OSHA, an ALJ, or the ARB), the FRSA allows the employee the option of filing his or her FRSA complaint in federal district court for a jury trial on all the issues, including the amount of punitive damages.



Any appeal from a district court jury verdict or ARB decision is to a United States Circuit Court of Appeals, and then to the United States Supreme Court only if a petition for certain is granted.

What Is the FRSA Standard of Proof?

A railroad employee must show the following:

- (1) the complainant employee engaged in a *protected activity* under the FRSA (see above for a list of protected activities);
- (2) the railroad knew or suspected the employee engaged in the protected activity;
- (3) the railroad subjected the employee to some form of adverse action (e.g., discipline or discriminatory treatment); and
- (4) the employee's protected activity was a "contributing factor" to the adverse action.

What is a Contributing Factor?

A *contributing factor* is a factor which, alone or in connection with other factors, affected in any way the railroad's adverse action. A protected activity was a contributing factor if the railroad's adverse action was based "in whole or in part" on the protected activity--that is, if the protected activity affected the railroad's action to any extent.

No Proof Of Retaliatory Motive Is Necessary

A railroad employee does not have to prove the existence of a retaliatory motive on the part of the manager or supervisor who took the adverse action. Regardless of a manager's motives, adverse actions simply cannot be based in whole or in part on the protected activity of an employee.

What If I Engaged in Activity That Results in Discipline?

A railroad can have a valid reason for firing an employee and still violate the FRSA if the discipline also is based in part on the employee's protected activity (such as raising a safety concern, reporting an injury, or following a treating doctor's orders). In the words of OSHA:

"In proving that protected activity [such as reporting an injury, raising a safety concern, or following a treating doctor's orders] was a contributing factor in the adverse action, an employee need not necessarily prove that the railroad's articulated reason was a pretext in order to prevail, because an employee alternatively can prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct, and that another reason was the employee's protected activity."

75 Federal Register 53521-53533 (August 31, 2010) (explaining 29 CFR Section 1982.104). Thus, a railroad manager can have a valid reason for taking disciplinary action against an employee and still be in violation

of the FRSA as long as the employee shows that another reason was his or her protected activity (such as reporting an injury, raising a safety concern, or following a treating doctor's orders).

Railroad Defense

Once an employee establishes that his or her protected activity was a contributing factor in the adverse action, the only way a railroad can escape liability under the FRSA is to prove by "clear and convincing evidence" (which is a higher standard of proof than a preponderance of the evidence) that it would have taken the same action in the absence of the protected activity.