Investigator's Desk Aid to the Criminal Antitrust Anti-Retaliation Act of 2020 (CAARA) Whistleblower Provision

15 U.S.C. 7a-3

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This Desk Aid represents the Occupational Safety and Health Administration's (OSHA's) summary of the scope of coverage and protected activity and the procedures for investigating and adjudicating retaliation complaints under CAARA as of the "last revised" date listed below. This Desk Aid is intended for OSHA's use and the guidance herein is subject to change at any time. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Federal Register, the Code of Federal Regulations, and decisions of the Department of Labor's Administrative Review Board (ARB) remain the official sources for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.

Abbreviations Used in this Desk Aid:

CAARA	Criminal Antitrust Anti-Retaliation Act, specifically the Act's whistleblower protection provision at 15 U.S.C. 7a-3.
DOJ	Department of Justice
DOL	Department of Labor
FTC	Federal Trade Commission
OSHA	Occupational Safety and Health Administration
Sherman Act	Sherman Antitrust Act, specifically 15 U.S.C. 1 or 3.

I. CAARA in a Nutshell

The Sherman Act, codified in 15 U.S.C. §§ 1 to 7, is the federal antitrust law prohibiting unreasonable restraints of trade. The Criminal Antitrust Anti-Retaliation Act (CAARA) created whistleblower protections for employees reporting what they reasonably believe are criminal antitrust violations of section 1 or 3 of the Sherman Act. CAARA does not apply to **civil** antitrust violations.

Criminal violations can occur when there is an **agreement** between **competitors** to fix prices, rig bids, fix wages and make no-poach agreements in a specific labor market, or divvy up markets by geography, customers, etc.

Under the CAARA whistleblower protection provision, no employer may discharge or otherwise retaliate against a covered individual in the terms and conditions of employment because the covered individual engaged in CAARA protected activity. CAARA protects covered individuals from retaliation, for among other things, providing information to the employer or the Federal Government, or filing, testifying in, participating in, or otherwise assisting a Federal Government investigation or proceeding relating to an alleged violation of federal criminal antitrust law, specifically section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3).

The DOJ and the FTC jointly enforce U.S. antitrust laws under the Sherman Act. Although DOJ and FTC enforcement may overlap in civil antitrust prosecutions, only the DOJ prosecutes criminal antitrust violations.

The CAARA whistleblower provision can be found at 15 U.S.C. 7a-3. The procedures for the investigation and resolution of CAARA whistleblower complaints can be found at 29 CFR 1991. Most of the definitions relevant to CAARA whistleblower complaints can be found at 15 U.S.C. 7a-3 and 29 CFR 1991.101.

A. Coverage

CAARA prohibits retaliation by any **employer** against any **covered individual**. An **employer** is any person, or any officer, employee, contractor, subcontractor, or agent of the employer.

For purposes of CAARA, a **person** includes individuals as well as corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

CAARA protects **covered individuals** against retaliation. A **covered individual** is any employee, contractor, subcontractor, or agent of an employer.

Covered individuals include an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.

B. Protected Activity

A covered individual is protected from retaliation under CAARA for having:

1. Provided or caused to be provided, to the Federal Government or a person with supervisory authority over the covered individual (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) information relating to:
    a. any violation of, or any act or omission which the covered individual **reasonably believes** to be a violation of the antitrust laws; or
    b. any violation of, or any act or omission the covered individual **reasonably believes** to be a violation of, another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the DOJ of a potential violation of the antitrust laws;

OR

2. Caused to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to such violations.

Note: Under CAARA, the term antitrust laws refers to section 1 or 3 of the Sherman Act and "[t]he term 'violation', with respect to the antitrust laws, shall not be construed to include a civil violation of any law that is not also a criminal violation."

What types of complaints are protected?

To be protected, the complainant must provide information or cause information to be provided to the employer (person with supervisory authority over the covered individual or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) or the Federal Government regarding conduct that they reasonably believe violates the antitrust laws or is a violation of another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the DOJ of a potential violation of the antitrust laws. Complainants are also protected from retaliation for causing to be filed, testifying in,

participating in, or otherwise assisting a Federal Government investigation or a Federal Government proceeding relating to such violations.

For purposes of CAARA, the term "antitrust laws" refers to section 1 or 3 of the Sherman Act and the complaint must relate to conduct (acts or omissions) that the complainant reasonably believes is a potential criminal violation of the antitrust laws. The criminal prohibitions in sections 1 and 3 of the Sherman Act are explained in detail below in Section II.

Must the covered individual report an actual violation?

No. CAARA protects a covered individual who provides information related to any violation, or any act or omission, which the covered individual "**reasonably believes**" to be a violation of criminal antitrust laws, or a violation of another criminal law committed in conjunction with a potential violation of criminal antitrust laws or in conjunction with an investigation by the DOJ of a potential violation of criminal antitrust laws. To have a reasonable belief, a covered individual must have a *subjective belief* (i.e., actually believe that a violation has occurred, is occurring, or is likely to occur), *and* the belief must be *objectively reasonable* (i.e., a reasonable person in the covered individual's position could share this belief). A reasonable but mistaken belief is protected.

In determining whether the covered individual had an objectively reasonable belief, the covered individual's training, experience, and educational background are relevant. The covered individual will be protected so long as a reasonable person with the same training and experience could believe that the relevant activity constitutes a violation of the relevant law.

Must the covered individual cite the specific law allegedly violated?

No. The covered individual need not refer to or cite any provision of law in their complaint, and there are no "magic words" the complainant must use to report an alleged violation. Rather, the information that the covered individual provides to the employer or the Federal Government must be specific enough in relation to a given practice, condition, directive, or event for the employer or the Federal Government to investigate it.

Are there any circumstances in which a covered individual would not be protected under CAARA?

A covered individual **is not** protected from retaliation under CAARA if the individual:

- Planned and initiated a violation or an attempted violation of the antitrust laws or a violation of another criminal law in conjunction with a violation or an attempted violation of the antitrust laws; or
- Planned and initiated an obstruction or an attempted obstruction of an investigation by the DOJ of a violation of the antitrust laws.

II. The Sherman Act: How to Spot Allegations Related to Criminal Antitrust Violations

As mentioned above, the Sherman Act, codified in 15 U.S.C. §§ 1 to 7, is the federal antitrust law prohibiting unreasonable restraints of trade. Under CAARA, a covered individual is protected from retaliation for making disclosures regarding information that the protected individual reasonably believes is a **criminal** violation of section 1 or 3 of the Sherman Act. CAARA does not apply to **civil** antitrust violations.

Criminal violations of antitrust laws are also referred to by the DOJ as "*per se*" violations. A *per se* violation is established when there is an **agreement** between **competito**rs to:

- Fix prices
- Rig bids
- Allocate markets: By customer, workers, agency, geography, share, etc., or
- Labor market offenses: Wage fixing & No-Poach Agreements

What are *per se* violations?

Per se violations are general intent crimes, meaning that the moment competitors enter into an agreement to fix prices/wages, prevent poaching of workers, allocate markets, rig bids, or engage in joint boycotts, a crime has been committed. It is irrelevant whether the agreement was carried out, whether there is loss or harm, or whether an economic justification is provided.

Three-Part Analysis		
1) Is an **agreement** alleged?	2) Is the agreement between **competitors**?	3) Is it a ***per se*** Violation?

What is an Agreement?

An agreement is a meeting of the minds or a conscious commitment to a common scheme. An agreement does not need to be formal, legally enforceable, or an express verbal or written contract or understanding—an agreement can be formed with a simple wink or a nod! An agreement can be established through **Direct Evidence** (e.g., testimony or written agreement) or **Circumstantial Evidence** (e.g., bids that establish a pattern of business being rotated among competitors).

Who are competitors?

The Sherman Act does not define competitor. Two entities that compete in a horizontal market are generally competitors. For example, two grocery store chains that are in the same market selling groceries would be competitors.

However, a competitor can be broader than two entities that are currently competing. It could include a potential competitor. For instance, a company paying another company to

not enter into its market or two companies agreeing not to enter each other's markets are market allocation offenses involving potential competitors.

Competitors could also include a company representing itself as a competitor. For instance, in a bid rigging scheme, a company that cannot seriously fulfill the contract might agree to submit a sham bid.

In addition, it is important to keep in mind that competitors can have more complex relationships. They could compete in one market and have a more vertical relationship (i.e., supplier and customer) in another industry. For instance, in a bid rigging scheme, one of the members of the conspiracy might be paid off through awarding of a subcontract. That vertical relationship does not take away from the horizontal bid rigging conspiracy.

What are the *per se* violations under CAARA:

1. **Price Fixing**
   Price fixing violations occur when competitors agree to "to raise, fix, or otherwise maintain the price at which their products or services are sold. Price fixing can take many forms, such as an agreement among manufacturers of a particular product to establish a minimum price, or an agreement among competing buyers of a product to lower the prices they will pay. Price fixing is any agreement among competitors that affects the ultimate price or terms of sale. It is not necessary that the conspirators agree to charge the same price for a given item; for example, an agreement to raise individual prices or maintain a profit margin violates the law even if the resulting prices are not the same."[1]

   Examples of unlawful practices:

   - Raise, lower, or maintain prices or price ranges.
   - Establish minimum or floor prices.
   - Establish a standard pricing formula.
   - Notify others before reducing prices.
   - Add fees or other surcharges (i.e., components of overall price).
   - Eliminate discounts or have uniform discounts.
   - Coordinate and not compete on other commercial terms (i.e., credit terms, warranties, etc.).

2. **Bid Rigging**
   Bid-rigging violations occur when competitors "agree in advance who will submit the winning bid on a contract that a public or private entity wants to award through a formal or informal competitive bidding process. In other words, competitors agree to eliminate competition for some piece of defined business, whether it be a sale, a

[1] DOJ, Federal Antitrust Crime: A primer for Law Enforcement Personnel, (Updated October 2023), https://www.justice.gov/atr/page/file/1091651/dl.

contract, or a project. Bid rigging allows conspiring businesses to effectively raise prices when purchasers—often federal, state, or local governments—acquire products or services by soliciting bids."[2]

Bid Rigging: Common Types[3]		
Bid Rotation	**Bid Suppression**	**Complementary Bidding**
Competitors agree to take turns being the winner of the bid. In other words, one competitor "sits out" on the bid to reduce competition.	Competitor agrees not to bid, which ensures each competitor wins a bid over time.	Competitor agrees to submit bid that is designed to be disqualified to give false appearance of competition.

3. **Market Allocation**

Market allocation violations occur when competitors agree "to divide the market among themselves, usually by customer or geography. For example, in a customer allocation, competing firms may agree to divide up specific customers or types of customers so that only one competitor will be allowed to sell to, buy from, or bid on contracts let by those customers. In return, the other competitor will not sell to, buy from, or bid on contracts let by customers allocated to its co-conspirator. Territorial market allocation is also illegal. Its effects are comparable to customer allocation, but geographic areas are divided up instead of customers. The conspirators thereby insulate themselves from competition and are collectively able to raise prices to all customers."[3]

Market Allocation Red Flags:

- Competitors suddenly stop selling in a territory
- Competitors suddenly stop selling to a specific customer
- Competitor refers customer to other competitors
- Salesperson or prospective bidder says that a particular customer or contract "belongs" to a certain competitor

4. **Labor Market Offenses: Wage Fixing & No-Poach Agreements**

Wage-fixing and no-poach agreements are also *per se* violations of the Sherman Act.[4]

[2] DOJ, Federal Antitrust Crime: A primer for Law Enforcement Personnel, (Updated October 2023), https://www.justice.gov/atr/page/file/1091651/dl.

[3] *Id*.

[4] In 2016, the DOJ and the FTC jointly announced that "DOJ intends to proceed criminally against naked wage-

Wage Fixing violations occur when competing employers agree "not to compete on employee salary, benefits, or other terms of compensation."[5]

No-poach violations occur when competing employers agree "not to solicit (including cold calling or recruiting), hire, or otherwise compete for each other's employees. These are market allocation agreements, but instead of allocating a corporation's output (its customers or territory), labor allocation agreements allocate a corporation's input (its employees)."[6] The DOJ criminal division prosecutes no-poach conspiracies "that are not reasonably necessary to a separate, legitimate transaction or collaboration between the employers."[7] No-poach agreements can be "reasonably necessary" for legitimate business practices such as joint ventures, mergers and acquisitions, settlement of legal disputes, and contracts with consultants or recipients of consulting services.

Examples of unlawful practices:

- Competing nursing homes agree to not hire workers from one another.[8]
- Competing home health agencies agree to fix the wages at which their home health workers are paid.[9]
- Competing aerospace companies agree to restricting the hiring and recruiting of engineers between both companies.[10]

What are some examples of reports of other violations of criminal law that may be protected under CAARA?

CAARA protects covered individuals from retaliation for reporting conduct they reasonably believe to be a violation of another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with a DOJ investigation of a potential violation of the antitrust laws. CAARA also protects covered individuals from retaliation for causing to be filed, testifying in, participating in, or otherwise assisting a Federal Government investigation or a Federal Government proceeding relating to such violations. The following are examples of the types of conduct that may constitute violations of another criminal law committed in conjunction with an antitrust violation or DOJ investigation of an antitrust violation:

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fixing or no-poaching agreements."

[5] DOJ, Federal Antitrust Crime: A primer for Law Enforcement Personnel, (Updated October 2023), https://www.justice.gov/atr/page/file/1091651/dl.

[6] *Id*.

[7] *Id*.

[8] *See, e.g.*, Plea Agreement, *United States v. ADA OC, LLC*, No. 21-CR-98 (D. Nev. Oct. 27, 2022) (defendant healthcare staffing company pleaded guilty to agreeing with a competitor not to raise nurse wages and not to hire from each other).

[9] *See, e.g.*, Indictment, *United States v. Manahe*, No. 22-CR-13 (D. Me. Jan 27, 2022) (defendants conspired to fix wages of personal support specialists and not hire each other's workers).

[10] *See, e.g.*, Indictment, *United States v. Patel*, No. 21-CR-220 (D. Conn. Dec. 15, 2021) (manager and executives of outsource engineering supplier charged with conspiring to restrict hiring and recruiting of engineers and other skilled-labor employees).

Examples:

- Attempts to hinder or obstruct DOJ investigations (including lying to the government, encouraging others to lie, and destroying documents) can give rise to perjury, false statements, and obstruction of justice charges.
- Frauds (including wire and mail fraud) - frequently antitrust crimes also involve misrepresentations to the victims (a common example is in submitting rigged bids, where the conspirators will often be required to certify that they did not coordinate their bids or pricing with anyone else) which can give rise to various fraud offenses.[11]
- Payoffs within the conspiracy can give rise to kickback and money laundering offenses.
- Bribery and similar offenses can occur when paying off insiders in bid rigging and other schemes.

III. Procedures for Handling CAARA Complaints

Procedures for handling CAARA whistleblower complaints are set forth in 29 CFR Part 1991. Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the What to expect during an OSHA Whistleblower Investigation section of OSHA's website, OSHA's CAARA Fact Sheet, and in the OSHA Whistleblower Investigations Manual.

A. Complaint

Who may file: A covered individual who believes that they have been fired or experienced other retaliation by an employer in violation of CAARA may file a complaint with OSHA. The covered individual may also have a representative file on their behalf.

Form: The complaint does not need to be in any particular format. We accept submissions in English and Spanish via our online complaint form. Services are available for the individual to provide an oral or written complaint in any language. Oral complaints will be transcribed by OSHA.

Timing: The complaint must be filed within 180 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with guidance in OSHA's Whistleblower Investigations Manual.

[11] Note that in cases in which the employer is a publicly traded company or other respondent covered by the Sarbanes-Oxley Act, 18 U.S.C. 1514A, and the complainant alleges that they reported mail or wire fraud in conjunction with an antitrust crime, OSHA should docket the case and investigate potential violations of both CAARA and the Sarbanes-Oxley Act.

B. Investigation

Upon receiving a complaint, OSHA will evaluate it to determine whether the complaint contains a *prima facie* allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, must allege that the:

1. covered individual engaged in CAARA-protected activity;
2. respondent knew or suspected that the covered individual engaged in CAARA-protected activity;
3. covered individual suffered an adverse action;[12] and
4. circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not meet these requirements, and the complainant does not agree to administrative closure of the case, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a DOL administrative law judge (ALJ).

CAARA uses a "contributing factor" standard of causation. Thus, following the investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that CAARA-protected activity was a contributing factor in the decision to take adverse action against the complainant and the respondent has not shown by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. A contributing factor is a factor which, alone or with other factors, in any way affects the outcome of a decision.

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), and reasonable attorney fees and costs.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

[12] Courts have held under analogous OSHA-enforced whistleblower protection laws that an adverse action is an action that might dissuade a reasonable employee from engaging in protected activity. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

If the complainant and respondent agree to settle their case during the investigation, they must submit the settlement agreement for OSHA's review and approval.

C. Administrative and Judicial Review

Either the complainant or the respondent may object to OSHA's findings within 30 days and request a hearing before an ALJ. Filing objections will stay OSHA's order for all relief except reinstatement, which is *not* automatically stayed. If no objections are filed, OSHA's findings become the final order of the Secretary of Labor, not subject to review.

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding.

Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA's investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ's decision in the case to the DOL's Administrative Review Board (ARB), which may either accept or reject the case for review. The ARB's decision is subject to discretionary review by the Secretary of Labor. A complainant or respondent may obtain review of an ARB decision or an ALJ decision that the ARB has declined to review by appealing to the appropriate U.S. court of appeals.

D. Kick-out Provision

CAARA permits a complainant to bring a *de novo* CAARA action in federal district court if the DOL has not reached a final decision on the complainant's CAARA claim within 180 days of the filing of the complaint with OSHA and the delay is not due to the bad faith of the complainant.

IV. Resources

The DOJ Antitrust Division Criminal Enforcement website contains a variety of resources that may be helpful to OSHA investigators in evaluating whether the coverage and protected activity requirements of the CAARA whistleblower provision are met in a particular case. Two helpful resources from the DOJ are Price Fixing, Bid Rid Rigging, and Market Allocation Schemes: What They are and What to Look for, An Antitrust Prime (February 24, 2021) and An Antitrust Primer for Federal Law Enforcement Personnel (October 2023).

Attachment 1: Optional Worksheet: Analyzing CAARA Whistleblower Complaints

In order to issue merit findings, answers 1 to 9 must be "yes" and answer 10 must be "no."	Yes	No
Timeliness (See Desk Aid p. 10)		
1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)?	☐	☐
Coverage – (See Desk Aid pp. 2-3).		
2. Is respondent an employer covered under the CAARA whistleblower provision?	☐	☐
3. Is complainant a covered individual within the meaning of the CAARA whistleblower provision?	☐	☐
Protected Activity (See Desk Aid pp. 3-4)		
4. Has the complainant (or is complainant about to): a. Provided information/caused information to be provided to the Federal Government or a person with supervisory authority over the individual, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, regarding: 1. any violation of, or any act or omission the complainant reasonably believes to be a violation of, the antitrust laws; or 2. any violation of, or any act or omission the complainant reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the DOJ of a potential violation of the antitrust laws; or b. Caused to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or proceeding filed or about to be filed relating to such violations? Note: In CAARA, the term antitrust laws refers to sections 1 and 3 of the Sherman Act and the term violation of the antitrust laws does not include a civil violation that is not also a criminal violation.	☐	☐
5. For items 4a., or 4b., does the complainant have a subjective, good faith belief that the conduct complained of violated the law?	☐	☐
6. For items 4a., or 4b., would a reasonable person with similar training, knowledge, and experience believe that a defect, noncompliance, or violation exists or is likely to occur?	☐	☐
Employer Knowledge		
7. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to the respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)	☐	☐
Adverse Action		
8. Did respondent discharge or take other adverse action against the covered individual? (Adverse action is any action that could dissuade a reasonable employee from engaging in CAARA-protected activity. Common examples include firing, demoting, or disciplining the employee.)	☐	☐
Nexus (Contributing Factor)		
9. Was complainant's CAARA-protected activity a *contributing factor* in respondent's decision to take adverse action against the complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to: • Close timing (temporal proximity) between the protected activity and the adverse action • Evidence of hostility towards the protected activity. • Disparate treatment of complainant as compared to other employees following the protected activity. • Changes in respondents' treatment of complainant after the protected activity. • Indicators that respondent's stated reasons for the adverse action are pretext.	☐	☐
Affirmative Defense		
10. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	☐ No	☐ Yes