

# Investigator’s Desk Aid to the Taxpayer First Act (TFA) Anti-Retaliation Provision

## Section 1405(b) of the Taxpayer First Act, 26 U.S.C. 7623(d)

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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 handling investigations of retaliation complaints under the anti-retaliation provision of the Taxpayer First Act (TFA) as of the “last revised” date listed below. This Desk Aid is internal guidance directed to OSHA personnel and 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 anti-retaliation provision and modification of the Desk Aid. The Federal Register, Code of Federal Regulations, and decisions of the Department of Labor’s Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of this anti-retaliation provision. The contents of this Desk Aid do not constitute interpretations of the Internal Revenue Service (IRS).*

Abbreviations Used in this Desk Aid:

<b>TFA</b>	the anti-retaliation provision of the Taxpayer First Act, codified at 26 U.S.C. § 7623(d)
<b>IRS</b>	Internal Revenue Service
<b>OSHA</b>	Occupational Safety and Health Administration
<b>SEC</b>	Securities and Exchange Commission
<b>SOX</b>	the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (as amended)

## **I. TFA in a Nutshell**

The Taxpayer First Act anti-retaliation provision protects employees from retaliation for providing information regarding potential underpayment of taxes, tax fraud, or any conduct which the employee reasonably believes may have violated internal revenue laws to their supervisor or to the Internal Revenue Service (IRS), or engaging in other activities protected by the statute, including testifying, assisting, or participating in any administrative or judicial action taken by the Internal Revenue Service (IRS) relating to such underpayment or violations.

TFA's anti-retaliation provision<sup>1</sup> can be found at 26 U.S.C. § 7623(d). The procedures for the investigation and resolution of TFA retaliation complaints can be found at 29 CFR Part 1989. Most of the definitions relevant to TFA retaliation complaints can be found at 29 CFR 1989.101.

### **A. Coverage**

Under TFA, no **employer**, or any **officer, employee, contractor, subcontractor, or agent of such employer** may discharge or otherwise retaliate against an **employee** in the terms and conditions of employment in reprisal for engaging in any TFA-protected activity.

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<sup>1</sup> TFA contains other provisions which are administered by the Internal Revenue Service. Furthermore, its employee protection provision complaints are distinct from the IRS whistleblower awards program under 26 U.S.C. §§ 7623(a) and (b). The IRS administers the whistleblower awards program under 26 U.S.C. §§ 7623(a) and (b) and that program is not addressed in this Desk Aid.

*Who is an “employer” under TFA?*

TFA broadly prohibits retaliation by an employer, officer, employee, contractor, subcontractor, or agent of an employer against an employee for engaging in TFA-protected activity. The statute does not define the term “employer.” There is personal liability under TFA.

*Who is an “employee” under TFA?*

A complainant must be an “employee” to be covered under TFA, although the statute does not define the term. OSHA’s TFA regulations define “employee” as “an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.”<sup>2</sup>

Consistent with TFA’s language protecting employees from retaliation for providing information regarding any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws, TFA may cover a complainant who alleges retaliation for complaining that they were illegally misclassified as an independent contractor in violation of internal revenue laws, or that their employer failed to deduct the employee’s share and/or pay the employer’s share of required employment taxes (FICA and FUTA).

In such cases, OSHA will have to investigate whether it is possible or likely that there was an employer-employee relationship under the law applicable to TFA whistleblower complaints, including any evidence that the respondent exercised control over the terms and conditions of their employment or other factors tending to demonstrate that an employer-employee relationship exists. In such a case, OSHA may also have to determine whether the complainant reasonably believed that the employer underpaid taxes or violated tax laws by misclassifying them as an independent contractor rather than as an employee.

*Who is a “person” under TFA?*

TFA permits filing of complaints against a “person.” OSHA’s TFA regulations define “person” as “an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate.”

*Can a federal agency be a respondent under TFA?*

The definition of “person” under TFA does not include the federal government. TFA does not waive or abrogate federal sovereign immunity. As a result, federal agencies cannot be proper respondents under TFA.

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<sup>2</sup> This definition of “employee” is for the purposes of determining who is protected as an “employee” for purposes of being entitled to the anti-retaliation protections of the TFA. The finding that a complainant was likely an employee for the purposes of determining whether they are protected under the TFA does not necessarily mean they will be determined to have been an employee under the tax code. The IRS has its own standards and processes relating to the classification of employees for income tax purposes, 26 CFR § 31.3121(d)-1, *See also*, [Worker Classification 101: employee or independent contractor, Internal Revenue Service \(irs.gov\)](#). The IRS’s rules and procedures are not addressed in this desk aid.

## **B. Protected Activity**

*Who can an employee complain to?*

An employee is protected from retaliation under TFA for any lawful act done by the employee to:

1. Provide information, cause information to be provided, or otherwise assist in an investigation:
  - Regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud
  - to the Internal Revenue Service, the employer, Congress, or certain other federal government authorities or law enforcement agencies.

**OR**

2. Testify, participate in, or otherwise assist in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

Employees are protected against retaliation for providing information, causing information to be provided, or otherwise assisting in an investigation, when the information or assistance is provided to:

- the Internal Revenue Service (IRS),
- the Secretary of the Treasury,
- the Treasury Inspector General for Tax Administration (TIGTA),
- the Comptroller General of the United States, the Department of Justice,
- the United States Congress,
- or a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

*Complaints about what?*

An employee is protected if the employee provides information relating to underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

*What is a reasonable belief that a violation has occurred? Does the employee need to prove an employer's actions violated the law to be protected from retaliation?*

An employee does not need to prove that the employer's actions **actually violated** internal revenue law or constituted tax fraud. However, when the employee's protected activity consists of providing information, causing information to be provided, or assisting in an investigation regarding alleged violations of internal revenue law or a provision of Federal law relating to tax fraud, the employee must **reasonably believe** the conduct at issue would violate such laws. A report based on a reasonable but mistaken belief that conduct violates the law is protected.

To have a "**reasonable belief**," an employee 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., it must be possible that a reasonable person in the employee's position would share this belief). In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. The employee's report will be considered a protected activity so long as a **reasonable person with the same training and experience** could believe the relevant activity constitutes a violation.

*How specific does the employee's report of a violation or alleged violation need to be?*

The employee does not have to specifically identify the tax law, regulation, or violation in communicating their concerns to the employer, the IRS, or another government agency. However, the information that the employee provides must be specific enough for the employer or the federal government to investigate it, and not conclusory or overly broad.

*What are some examples of protected activities under TFA?*

TFA-protected activities may include:

- Reporting misclassification of employees for tax purposes to the IRS
- Complaining to management regarding inaccuracies on W-2 or other tax forms
- Providing information regarding tax fraud to a supervisor.

Other conduct that may give rise to TFA-protected activity includes, but is not limited to, allegations of: improper tax withholdings, inaccurate tax filings, underreporting of tax obligations, and tax fraud.

*The following are examples of situations that could involve TFA coverage and protected activity:*

- An executive director of a nonprofit association discovered that the association was delinquent in paying sales taxes, did not file a current and accurate IRS Form 990T, and had improperly failed to report certain income. Shortly after expressing concerns to the officers and Board of Directors, the executive director was terminated. Both the employer and the employee are covered. The complaints regarding potential tax violations appear to be protected activity, although OSHA would need to evaluate during the investigation whether complainant's belief that tax law violations had occurred was reasonable.

- A driver complains to a company’s human resources department that they were illegally misclassified as an independent contractor, and that the company failed to pay the employer’s share of required employment taxes (FICA and FUTA). They may be covered as an employee, and the employer may be covered as an employer, if the evidence shows that it is likely they had an employer-employee relationship. OSHA will also have to determine whether the driver reasonably believed that the company underpaid taxes, committed tax fraud, or violated tax laws by misclassifying them as an independent contractor rather than as an employee.
- An employee in the accounting department of a company was preparing financial statements, when she noticed that certain expenses of one of the company’s business entities were being systematically and improperly attributed to another of the company’s business entities, resulting in improper comingling of funds between the two entities and a tax deduction that the employee believed was fraudulent. She advised the controller and upper management of the issue, told them the company needed to cease comingling funds immediately to avoid tax and legal consequences from the IRS, and recommended a process to avoid the comingling in the future. Both the employee and the employer are covered. The complaints regarding comingling and the potential tax fraud may be protected activity, although OSHA would need to evaluate during the investigation whether the complainant’s belief of potential tax law violations or tax fraud was reasonable.
- Complainant was controller for a medical practice organized as a partnership. He raised concerns verbally and by email to the managing partner that the date on which physicians attained partnership had been backdated in the partnership’s financial records, which he reasonably believed was allowing the partnership to hide taxable compensation from federal tax authorities. When the partnership was audited, the controller provided documents and was interviewed by the IRS. Both the complainant and the partnership are covered under TFA and the controller’s complaints to management and his participation in the IRS investigation are both TFA-protected activity.

*How are allegations involving tax misclassification of employees evaluated under TFA?*

Under federal law, employees and independent contractors are treated differently for tax purposes. Specifically, employers are required to pay and withhold certain taxes for employees but not for independent contractors. Employers sometimes misclassify employees as independent contractors. Misclassifying workers as independent contractors adversely affects employees because the employer's share of taxes is not paid, and the employee's share is not withheld. If a business misclassified an employee, the business can be held liable for employment taxes for that worker. Generally, an employer must withhold and pay income taxes, Social Security and Medicare taxes, as well as unemployment taxes.<sup>3</sup>

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<sup>3</sup> IRS Tax Tip 2022-117, Worker Classification 101: Employee or Independent Contractor (Aug. 2, 2022), available at [Worker Classification 101: employee or independent contractor | Internal](#)

If a complainant alleges that they are an employee, and have suffered retaliation for having reported that their employer violated tax laws by misclassifying them and thus failing or refusing to make required withholdings, deductions, and/or contributions on their behalf, OSHA should consider whether the respondent exercises control over the terms and conditions of their employment or any other factors tending to demonstrate that an employer-employee relationship exists under ARB precedent sufficient to establish coverage under the TFA anti-retaliation provision.<sup>4</sup> See *Green v. OPCON, Inc.*, ARB Case No. 2018-0007, 2020 WL 2319031, at \*3 (Apr. 9, 2020) (explaining the ARB’s case law applying a “right-to-control” test and the common law test in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-23 (1992) in whistleblower cases).

If OSHA’s analysis suggests that complainant likely was an employee, OSHA should find that there is TFA coverage and protected activity and proceed to analyze whether the employer retaliated against complainant for complaining of misclassification.

## **II. Procedures for Handling TFA Anti-Retaliation Complaints**

Procedures for handling TFA complaints are contained in 29 C.F.R. Part 1989. TFA generally incorporates the rules, procedures, and burdens of proof in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121. As described below, however, TFA differs from AIR21 in that it provides complainants with 180 (rather than 90) days to file and allows complainants to “kick out” their complaint to federal district court under certain circumstances. Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available on OSHA’s [Whistleblower Protection for Employees Who Report Federal Tax Law Violations fact sheet](#), in the “[What to expect during an OSHA Whistleblower Investigation](#)” section of OSHA’s website and in the [OSHA Whistleblower Investigations Manual](#).

### **A. Complaint**

*Who may file:* An employee who believes that they have been retaliated against in violation of TFA may file a complaint with OSHA. The employee may also have a representative file a complaint on their behalf.

*Form:* The complaint need not be in any particular form. A complaint may be filed orally or in writing, including via [OSHA's Online Complaint form](#). Oral complaints will be reduced to

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[Revenue Service \(irs.gov\) \(setting forth the IRS standards for determining worker status for tax purposes\)](#).

<sup>4</sup> Such a finding of an “employer-employee relationship” pertains to the determination of whether there is TFA coverage and TFA protected activity. This does not reclassify the complainant as an “employee” in the eyes of the IRS for tax purposes.

writing by OSHA. If the complainant cannot make a complaint in English, OSHA will accept the complaint in any language.

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

*Distribution of complaints and findings to partner agencies:* Complaints and findings in TFA cases should be sent to the IRS.

## **B. Investigation**

Upon receiving a complaint, OSHA will evaluate the complaint 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:

1. The employee engaged in TFA-protected activity;
2. The respondent knew or suspected that the employee engaged in TFA-protected activity;
3. The employee suffered an adverse action;<sup>5</sup> and
4. The 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, 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 Department of Labor administrative law judge (ALJ).

TFA 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 TFA-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 an order requiring

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<sup>5</sup> 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.



respondent to provide reinstatement with the same seniority status that the complainant would have had but for the retaliation, double (200%) back pay with interest, 100% of lost benefits, 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.

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 Department of Labor'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 a respondent may obtain review of a final decision by appealing to the appropriate U.S. court of appeals.

### **D. Kick-Out Provision**

The TFA permits a complainant to file a *de novo* TFA action in federal district court if the Department of Labor has not reached a final decision on the complainant's administrative TFA complaint within 180 days of the filing of the complaint with OSHA, and there is no showing that the delay is due to the bad faith of the complainant.

### **III. Miscellaneous Issues**

#### **A. Predispute Arbitration Agreements**

The TFA states that the rights and remedies provided in the TFA anti-retaliation provision may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. The TFA also prohibits the enforcement of predispute arbitration agreements to require arbitration of TFA retaliation claims. An arbitration agreement that the complainant and respondent entered into before the adverse action (e.g., in the employment agreement between the complainant and the respondent or in the respondent's employee handbook) does not preclude OSHA from investigating a complainant's TFA claim.

#### **B. Overlap Between the TFA and Sarbanes-Oxley Act (SOX) Anti-Retaliation Provisions**

In some cases, anti-retaliation complaints filed under TFA may also allege violations of the anti-retaliation (whistleblower protection) provision of SOX, 18 U.S.C. § 1514A. Among other things, the SOX whistleblower protection provision prohibits publicly traded companies and others from discharging or otherwise retaliating against an employee for reporting conduct that the employee reasonably believes constitutes mail, wire, bank, or securities fraud, a violation of any SEC rule or regulation, or a violation of a provision of federal law relating to fraud against shareholders. For more information on SOX, see OSHA's [Filing Whistleblower Complaints Under the Sarbanes-Oxley Act](#) fact sheet, [SOX desk aid](#), and other resources available on OSHA's website.

Employees working for publicly traded companies may complain to OSHA regarding retaliation for raising concerns related to mail, wire, bank, or securities fraud or violations of SEC rules in addition to tax fraud or federal tax law violations. For example, an employee could report that a publicly traded company engaged in tax fraud which led to financial misreporting in the company's securities filings. If the complaint alleges retaliation for having engaged in activity that would be protected under both TFA and SOX, OSHA should docket and investigate the case under both statutes.

*Example of a case that may require investigation under both TFA and SOX:*

An accountant at a publicly traded company complained internally to their supervisor and to the IRS that the company's accounting policies failed to adequately account for "business expenses" incurred by employees using corporate credit cards because:

- Employees failed to submit required documentation per company policy and IRS regulations; and
- The company failed to properly document the "business purpose" for claimed expenses.

The accountant asserted that these shortcomings resulted in misreporting of the company's business expenses on its securities filings and allowed the company to take fraudulent tax deductions for business expenses.

Both the employer and the employee are covered under TFA. The complaint is protected under TFA as long as the complainant reasonably believed that the company was committing tax fraud or federal tax law violations. The complaint would also be protected under Sarbanes-Oxley if the complainant reasonably believed that the conduct reported also violated SEC rules or regulations and/or constituted mail, wire, or securities fraud.

## **IV. Resources**

The IRS website contains a wide variety of information that may be helpful to OSHA investigators in evaluating whether the coverage and protected activity requirements of the TFA anti-retaliation provision are met in a particular case. *See, e.g.*, resources on major topics related to various TFA provisions at [https://www.irs.gov/newsroom/taxpayer-first-act-resources-and-guidance; Worker Classification 101: employee or independent contractor | Internal Revenue Service \(irs.gov\)](https://www.irs.gov/newsroom/taxpayer-first-act-resources-and-guidance; Worker Classification 101: employee or independent contractor | Internal Revenue Service (irs.gov)). For more information on the OSHA whistleblower process, see OSHA's [Whistleblower Protection for Employees Who Report Federal Tax Law Violations](#) fact sheet, the [OSHA Whistleblower Investigations Manual](#), and other resources available on OSHA's website.

Attachment 1: Optional Worksheet: Analyzing TFA Retaliation Complaints

In order to issue merit findings, answers 1 to 9 must be “yes” and answer 10 must be “no.”

	Yes	No
<b>Timeliness</b>		
1. Was the complaint filed within 180 days of the alleged adverse action (or does tolling apply)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Coverage</b>		
2. Is respondent an employer, officer, employee, contractor, subcontractor, or agent of such employer? (See Desk Aid pp. 2-3)	<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of TFA? (See Desk Aid pp. 2-3)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Protected Activity</b>		
4. Has complainant (pick at least one): (See Desk Aid pp. 4-5)		
a. Provided information, caused information to be provided, or otherwise assisted in an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, to the to the Internal Revenue Service, the employer, Congress, or certain other federal government authorities or specified law enforcement agencies.	<input type="checkbox"/>	<input type="checkbox"/>
b. Testified, participated in, or otherwise assisted in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.		
5. For item 4a., did complainant have a subjective belief that there was an underpayment of tax or that the conduct at issue violated the law? (See Desk Aid p. 5)	<input type="checkbox"/>	<input type="checkbox"/>
6. For item 4a., could a reasonable person with similar training, knowledge, and experience believe that there was an underpayment of tax or that the conduct complained of violated the law? (See Desk Aid p. 5)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Employer Knowledge</b>		
7. Did respondent know or suspect that complainant engaged in the protected activity?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Adverse Action</b>		
8. Did respondent discharge or take other adverse action against complainant (such as firing, demoting, or disciplining them, or taking other retaliatory action)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Nexus (Contributing Factor)</b>		
9. Was complainant’s TFA-protected activity a <i>contributing factor</i> in respondent’s decision to take adverse action against 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.	<input type="checkbox"/>	<input type="checkbox"/>
• Changes in respondent’s treatment of complainant after the protected activity.		
• Indicators that respondent’s stated reasons for the adverse action are pretext. (See Desk Aid p. 8)		
<b>Affirmative Defense</b>		
10. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity? (See Desk Aid p. 8)	<input type="checkbox"/> No	<input type="checkbox"/> Yes