

## 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."

### What Is Protected Activity Under the FRSA?

All railroad employees (and employees of railroad contractors or subcontractors) engage in "protected activity" when they:

- report a hazardous safety condition
- notify the railroad of their work-related injury or occupational illness
- notify the railroad of a co-worker's work-related injury or occupational illness
- furnish 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
- cooperate with a safety or security investigation by the FRA, NTSB, or Homeland Security
- provide information regarding any violation of any federal law, rule, or regulation relating to railroad safety or security
- provide information regarding any gross fraud, waste, or abuse of public funds intended to be used for transportation safety or security
- refuse to violate or assist in violating any federal law, rule, or regulation relating to railroad safety or security
- refuse to work under hazardous safety or security conditions
- refuse to authorize the use of unsafe railroad equipment, track, or structures
- accurately report their hours on duty pursuant to the Hours of Service Act
- follow the orders or treatment plan of their treating physician
- file a FRSA complaint with OSHA's Whistleblower Office
- testify regarding a FRSA complaint

As far as reporting or furnishing information to their 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.

### Medical Treatment

A railroad may not discipline or threaten to discipline an employee for following the orders or treatment plan of a treating physician. Also, a railroad may not deny, delay, or interfere with the initial medical treatment of a work related injury.

### What Remedies Can Be Ordered Under the FRSA?

The FRSA is a "make whole" statute. When OSHA's Whistleblower Office finds a railroad has violated the FRSA, it 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 of up to \$250,000, and
- attorney fees and costs (including expert costs)

### How Does It Work?

A railroad employee must file a FRSA complaint with the appropriate United States Department of Labor's Regional OSHA Whistleblower Office within 180 days of when the employee knew or should have known of the adverse action taken by a railroad. 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 starts its own 180 window. The subsequent holding of a disciplinary trial and the imposition of formal discipline will start their own 180 day windows.

After the Complaint is filed, OSHA's Whistleblower Office 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 decision finding a violation or not. If there is a violation, OSHA orders all remedies necessary to make the employee whole.

After OSHA issues its Merit Finding, a railroad has 30 days to either comply with the Order or to file an objection to the Order, in which case it proceeds to a de 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 complainant the option of filing his or her FRSA complaint in federal district court for a jury trial on all the issues, including 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 if certiorari is granted.

### What Is the FRSA Standard of Proof?

#### FRSA Four Elements of Proof

- (1) the complainant employee engaged in activity protected by the FRSA (e.g., reported an injury or a hazardous safety condition);
- (2) the railroad knew or suspected the employee engaged in the 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.

#### Meaning of 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.

### FRSA Can Override Valid Reasons For 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 of 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.

OSHA's Interim Final Rule regarding 29 CFR 1982.104, published at 75 Federal Register 53521-53533 (8/31/10). 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 of reporting an injury, raising a safety concern, or following a treating doctor's orders.

### Railroad Defense

Once an employee established 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.

For a very general description of the FRSA, see OSHA's FRSA Fact Sheet <http://www.osha.gov/Publications/OSHA-factsheet-whistleblower-railroad.pdf>

For more detailed information and resources regarding the FRSA, see the FRSA Library at <http://www.trainlaw.com/FRSA-library/> and the FRSA blog at [www.trainlawblog.com](http://www.trainlawblog.com)