



# OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

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**DIRECTIVE NUMBER:** CPL 02-03-011

**EFFECTIVE DATE:** April 29, 2022

**SUBJECT:** Whistleblower Investigations Manual

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## ABSTRACT

**Purpose:** This Instruction is the OSHA Whistleblower Investigations Manual and supersedes the January 28, 2016, Instruction. This manual outlines procedures and other information relative to the handling of retaliation complaints under the various whistleblower statutes for which responsibility was delegated to OSHA, and may be used as a ready reference.

**Scope:** OSHA-wide.

**References:** See [Chapter 1, section III](#).

**Cancellations:** See [Chapter 1, section IV](#).

**State Plan Impact:** Notice of Intent and Equivalency Required. See [Chapter 1, section VI](#).

**Action Offices:** National, Regional, and Area Offices.

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By and Under the Authority of

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## **Executive Summary**

This Instruction updates OSHA Instruction CPL 02-03-007, Whistleblower Investigations Manual, dated January 28, 2016, and incorporates policies already implemented via numerous previously issued policy memoranda and pilot programs. Items such as letter/document templates and the statute-specific chapters were removed from this Instruction. The statute-specific chapters have been replaced by statute-specific desk aids.

## **Significant Changes**

- Policies initiated by previously-issued memoranda and pilot programs were incorporated into this Instruction. This incorporation affected all chapters.
- Formal investigative correspondence, including notifications and determinations, may now be sent by email, delivery receipt required.
- Notification letters to Complainants must now include a copy of the complaint.
- All letter/document templates were removed to avoid any confusion as templates are periodically updated.
- Statute-specific chapters were removed and converted into statute-specific desk aids. Remaining chapters were renumbered accordingly.
- The manual as a whole has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were introduced throughout the manual.

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# Whistleblower Investigations Manual

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## **Disclaimer**

**This manual is intended to provide instruction regarding some of the internal operations of the Occupational Safety and Health Administration (OSHA) and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor or the United States. Statements which reflect current Administrative Review Board or court precedents do not necessarily indicate acquiescence with those precedents.**

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# Chapter 1

## PRELIMINARY MATTERS

### I. Purpose

This version of the OSHA Whistleblower Investigations Manual (WIM) supersedes the January 28, 2016, version. This manual outlines legal concepts, procedures, and other information related to the handling of retaliation complaints under the various whistleblower statutes for which responsibility was delegated to OSHA, and may be used as a ready reference. Any divergence from procedures established in the WIM must be approved by DWPP as a pilot before a Region may implement it.<sup>1</sup>

### II. Scope

OSHA-wide.

### III. References

The whistleblower provisions of the following statutes:

- Affordable Care Act (ACA), [29 U.S.C. § 218C](#)
- Anti-Money Laundering Act (AMLA), [31 U.S.C. § 5323a\(5\) & \(g\) & \(j\)](#)
- Asbestos Hazard Emergency Response Act (AHERA), [15 U.S.C. § 2651](#)
- Clean Air Act (CAA), [42 U.S.C. § 7622](#)
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), [42 U.S.C. § 9610](#)
- Consumer Financial Protection Act of 2010 (CFPA), [12 U.S.C. § 5567](#)
- Consumer Product Safety Improvement Act (CPSIA), [15 U.S.C. § 2087](#)
- Criminal Antitrust Anti-Retaliation Act (CAARA), [15 U.S.C. § 7a-3](#)
- Energy Reorganization Act (ERA), [42 U.S.C. § 5851](#)
- FDA Food Safety Modernization Act (FSMA), [21 U.S.C. § 399d](#)
- Federal Railroad Safety Act (FRSA), [49 U.S.C. § 20109](#)
- Federal Water Pollution Control Act (FWPCA), [33 U.S.C. § 1367](#)
- International Safe Container Act (ISCA), [46 U.S.C. § 80507](#)
- Moving Ahead for Progress in the 21st Century Act (MAP-21), [49 U.S.C. § 30171](#)
- National Transit Systems Security Act (NTSSA), [6 U.S.C. § 1142](#)

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<sup>1</sup> See [CPL 02-03-010](#), Whistleblower Protection Program Pilot Procedures, July 20, 2020.

- Occupational Safety and Health Act (Section 11(c)), [29 U.S.C. § 660\(c\)](#)
- Pipeline Safety Improvement Act (PSIA), [49 U.S.C. § 60129](#)
- Safe Drinking Water Act (SDWA), [42 U.S.C. § 300j-9\(i\)](#)
- Sarbanes-Oxley Act (SOX), [18 U.S.C. § 1514A](#)
- Seaman's Protection Act (SPA), [46 U.S.C. § 2114](#)
- Solid Waste Disposal Act (SWDA), [42 U.S.C. § 6971](#)
- Surface Transportation Assistance Act (STAA), [49 U.S.C. § 31105](#)
- Taxpayer First Act (TFA), [26 U.S.C. § 7623\(d\)](#)
- Toxic Substances Control Act (TSCA), [15 U.S.C. § 2622](#)
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), [49 U.S.C. § 42121](#)

The whistleblower regulations implementing the above statutes:

- [29 CFR Part 24](#) - Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Federal Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended
- [29 CFR Part 1977](#) - Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970
- [29 CFR Part 1978](#) - Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended
- [29 CFR Part 1979](#) - Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
- [29 CFR Part 1980](#) - Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002; Title VIII of the Sarbanes-Oxley Act of 2002
- [29 CFR Part 1981](#) - Procedures for the Handling of Discrimination Complaints Under Section 6 of the Pipeline Safety Improvement Act of 2002
- [29 CFR Part 1982](#) - Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act
- [29 CFR Part 1983](#) - Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008
- [29 CFR 1984](#) - Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act

- [29 CFR Part 1985](#) - Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010
- [29 CFR Part 1986](#) - Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Seaman's Protection Act, as Amended
- [29 CFR Part 1987](#) - Procedures for Handling Retaliation Complaints Under Section 402 of the FDA Food Safety Modernization Act
- [29 CFR Part 1988](#) - Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act
- [29 CFR Part 1989](#) - Procedures for Handling Retaliation Complaints Under the Taxpayers First Act
- 29 CFR Part 1991 - Procedures for Handling Retaliation Complaints Under the Criminal Antitrust Anti-Retaliation Act [Pending]
- 29 CFR Part 1992 - Procedures for Handling Retaliation Complaints Under the Anti-Money Laundering Act [Pending]

Additional relevant regulations, instructions, and memoranda:

[29 CFR 1913.10](#) - Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records.

[29 CFR 1954.20](#) - Complaints About State Program Administration.

[Memorandum of Understanding](#) Concerning the Sharing of Information Between the Consumer Financial Protection Bureau and the Occupation Safety and Health Administration, August 20, 2021.

[Memorandum of Understanding](#) between The National Labor Relations Board and The Occupational Safety and Health Administration/U.S. Department of Labor, January 12, 2017.

OSHA Instruction [CPL 02-03-010](#), Whistleblower Protection Program Pilot Procedures, July 20, 2020.

OSHA Instruction [CPL 02-03-009](#), Electronic Case File System Procedures for the Whistleblower Protection Program, June 18, 2020.

OSHA Instruction [CSP 01-00-005](#), State Plan Policies and Procedures Manual, May 6, 2020.

OSHA Instruction [CPL 02-00-164](#), OSHA Field Operations Manual (FOM), April 14, 2020.

OSHA Instruction [CPL 02-03-008](#), Alternative Dispute Resolution (ADR) Processes for Whistleblower Protection Program, February 4, 2019.

OSHA Instruction [CSP 01-00-005](#), State Plan Policies and Procedures Manual, May 6, 2020, or subsequent guidance.

OSHA Instruction [CPL 02-02-072](#), Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, August 22, 2007.

OSHA Instruction [ADM 03-01-005](#), OSHA Compliance Records, August 3, 1998.

Memorandum [Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35\(b\)\(1\)\(iv\)](#), October 11, 2018.

Memorandum [Clarification of Procedures for Closing Investigations Based on a "Kick-Out" to Federal District Court](#), January 26, 2018.

Memorandum [IMIS Recording of Whistleblower Complaints Initially Filed with Agencies Other Than OSHA](#), January 9, 2018.

Memorandum [Coordination with Federal Partner Agencies](#), October 3, 2017.

Memorandum [Expanded Administrative Closure Guidance: Updated Procedures to Close Administrative Law Judge \(ALJ\) Cases that OSHA Lacks Authority to Investigate](#), September 28, 2017.

Memorandum [Clarification of Streamlined Procedures to Close Cases that OSHA Lacks Authority to Investigate \("Docket and Dismiss memo"\)](#), January 12, 2017.

Memorandum [Interim Investigation Procedures for Section 29 CFR 1904.35\(b\)\(1\)\(iv\)](#), November 10, 2016.

Memorandum [Interpretation of 1904.35\(b\)\(1\)\(i\) and \(iv\)](#), October 19, 2016.

Memorandum [Updated Guidelines on Sharing Complaints and Findings with Partner Agencies](#), October 12, 2016.

Memorandum [New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases](#), August 23, 2016.

Memorandum [Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews](#), July 15, 2016.

Memorandum [Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers](#), May 11, 2016.

Memorandum [Procedures for Significant or Novel Whistleblower Cases](#), February 2, 2016.

Memorandum [Tolling of Limitation Periods Under OSHA Whistleblower Laws by Private Agreements and for Other Reasons](#), January 28, 2016.

Memorandum [Clarification of the Work Refusal Standard Under 29 CFR 1977.12\(b\)\(2\)](#), January 11, 2016.

Memorandum [Policy for Enforcing Settlement Agreements, Preliminary Reinstatement Orders, and Final ALJ and ARB Orders](#), December 21, 2015.

Memorandum [Taxability of Settlements Chart](#), October 1, 2015.

Memorandum [Clarification of the Investigative Standard for OSHA Whistleblower Investigations](#), April 20, 2015.

Memorandum *Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs*, August 14, 2014.

Memorandum *Whistleblower Complainants and Safety and Health Referrals*, June 27, 2014.

Memorandum *Referring Untimely 11(c) Complainants to the NLRB*, March 6, 2014.

Memorandum *Revised Whistleblower Disposition Procedures*, April 18, 2012.

Memorandum *Employer Safety Incentive and Disincentive Policies and Practices*, March 12, 2012.

#### Statute-Specific Investigator's Desk Aids:

- Affordable Care Act Whistleblower Protection Provision (ACA): Section 1558 of the ACA, Section 18C of the Fair Labor Standards Act, 29 U.S.C. 218C [Update Pending]
- Anti-Money Laundering Act (AMLA) Whistleblower Protection Provision: 31 U.S.C. § 5323(g) & (j) [Pending]
- Asbestos Hazard Emergency Response Act (AHERA) Whistleblower Protection Provision: 15 U.S.C. §2651 [[PDF](#)]
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) Whistleblower Protection Provision: 49 U.S.C. 42121 [[PDF](#)]
- Consumer Financial Protection Act of 2010 (CFPA) Whistleblower Protection Provision: Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5567 [[PDF](#)]
- Consumer Product Safety Improvement Act (CPSIA) Whistleblower Protection Provision: 15 U.S.C. § 2087 [[PDF](#)]
- Criminal Antitrust Anti-Retaliation Act (CAARA) Whistleblower Protection Provision: 15 U.S.C. § 7a-3 [Pending]
- Energy Reorganization Act (ERA) Whistleblower Protection Provision: 42 U.S.C. 5851 [[PDF](#)]
- Investigator's Desk Aid to the Whistleblower Protection Provisions of Six Environmental Statutes: [[PDF](#)]
- FDA Food Safety Modernization Act (FSMA) Whistleblower Protection Provision: Section 1013 of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. 399d [[PDF](#)]
- Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision: 49 U.S.C. § 20109 [[PDF](#)]
- International Safe Container Act (ISCA) Whistleblower Protection Provision: 46 U.S.C. § 80507 [[PDF](#)]

- Moving Ahead for Progress in the 21st Century Act (MAP-21) Employee Protection Provision: 49 U.S.C. § 30171 [[PDF](#)]
- National Transit Systems Security Act (NTSSA) Whistleblower Protection Provision: 6 U.S.C. § 1142 [[PDF](#)]
- Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision: Section 11(c) of the OSH Act of 1970, 29 U.S.C. § 660(c) [[PDF](#)]
- Pipeline Safety Improvement Act (PSIA) Whistleblower Protection Provision: 49 U.S.C. § 60129 [[PDF](#)]
- Sarbanes-Oxley Act (SOX) Whistleblower Protection Provision: 18 U.S.C. 1514A [[PDF](#)]
- Seaman’s Protection Act (SPA) Whistleblower Protection Provision: 46 U.S.C. 2114 [[PDF](#)]
- Surface Transportation Assistance Act (STAA) Whistleblower Protection Provision: 49 U.S.C. § 31105 [[PDF](#)]
- Taxpayer First Act (TFA) Whistleblower Protection Provision: 26 U.S.C. § 7623(d) [Pending]

#### **IV. Cancellations**

- OSHA Instruction CPL 02-03-007, Whistleblower Investigations Manual, January 28, 2016.
- OSHA Instruction CPL 02-03-004, Section 11(c), AHERA, and ISCA Appeals Program, September 12, 2012.
- OSHA Instruction CPL 02-03-001, Referral of Section 11(c) Discrimination Complaints to “State Plan” States, February 27, 1986.
- OSHA Instruction IRT 01-00-016, The IMIS Whistleblower User’s Guide, date unknown.
- OSHA Regional Notice [2021-001](#), Whistleblower Complaint Screening Pilot, Dallas Regional Office (Region 6), August 10, 2020.
- OSHA Regional Notice [CPL 2020-12](#), Complaint Intake Pilot, New York Regional Office (Region 2), May 1, 2020.
- OSHA Regional Notice [CPL 02-03-006](#), Settlement Agreement Template, Boston Regional Office (Region 1), October 1, 2019.
- OSHA Regional Notice [2017-WB-001](#), Non-Public Disclosure Pilot – 11(c) Complaints Only, Chicago and San Francisco Regional Offices (Regions 5 and 10), March 1, 2017.
- OSHA Regional Notice [CPL 2016-30](#), Administrative Dismissals ROI Pilot, New York Regional Office (Region 2), August 22, 2016.

- OSHA Regional Notice [CPL 02-03-01](#), Regional Whistleblower Protection Program Expedited Case Processing Pilot, San Francisco Regional Office (Region 9), August 1, 2016.
- OSHA Regional Notice [CPL 02-03-005A](#), Whistleblower Electronic Case File, Boston Regional Office (Region 1), June 7, 2016.
- OSHA Regional Notice [CPL 02-03-002](#), Streamlined Uniform ROI Pilot (SLURP), Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Instruction [CPL 02-03-003](#), Region 1 Whistleblower Program Complaint Screening Instruction, Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Notice [CPL 02-03-004](#), Streamlined Investigation Pilot (SIP), Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Notice CPL Unknown, Regional Whistleblower Protection Closing Letter Pilot, New York and Chicago Regional Offices (Regions 2 and 5), April 1, 2015.

## **V. Action Information**

### **A. Responsible Office**

Directorate of Whistleblower Protection Programs (DWPP).

### **B. Action Offices**

National, Regional, and Area Offices.

### **C. Information Offices**

State Plans and OSHA Training Institute.

## **VI. State Plan Impact**

### **A. Notice of Intent and Equivalency Required**

This Whistleblower Investigations Manual is a Federal Program Change that establishes procedures for the investigation of whistleblower complaints. All State Plans are required to have in their statutes a provision analogous to section 11(c) of the OSH Act. This manual supersedes the January 28, 2016 Instruction. States with OSHA-approved State Plans are required to establish, and include as part of their State Plan, policies and procedures for whistleblower protection that are at least as effective as the federal section 11(c) implementing policies. This requirement is particularly important for the effective implementation of the referral/deferral policy established in [Chapter 8](#). State Plan implementing procedures need not address the other whistleblower protection statutes enforced solely by federal OSHA except as set out in paragraph E below.

### **B. Review Process**

State Plans must include in their policies and procedures manual, or other implementing documents, a procedure for review of an initial retaliation case

determination which is at least as effective as the federal procedure in [Chapter 5.VI.B.2](#) of this Instruction. This may be a process similar to OSHA’s review by a DWPP as set out in [Chapter 5](#), an adjudicatory proceeding, or another at least as effective mechanism. However it is accomplished, Complainants must be afforded the opportunity for reconsideration of an initial dismissal determination within the state. Complainants will be required to exhaust this remedy before federal OSHA will accept a “request for federal review” of a dually filed complaint or a Complaint About State Program Administration (CASPA) regarding a retaliation case filed only with the state.

### **C. Dual Filing**

State Plans must include in their policy document(s) a description of their procedures for informing private-sector Complainants of their right to concurrently file a complaint under section 11(c) with federal OSHA within 30 calendar days of the alleged retaliatory action. Dual filing preserves Complainant’s right to seek a federal remedy should the state not grant appropriate relief.

### **D. Reopening cases**

State Plans must have the authority to reopen cases based on the discovery of new facts, the results of a federal review, a CASPA, or other circumstances, as discussed in [Chapter 8.II.I.3.b](#) and [II.J.5](#). Both the authority and procedures for implementing this requirement must be documented in the state’s section 11(c) analog procedures.

### **E. Coordination on OSHA Whistleblower Provisions Other Than Section 11(c)**

In addition to section 11(c) of the OSH Act, federal OSHA administers, at the time of this publication, over 20 other whistleblower statutes. Although these statutes are administered solely by federal OSHA, State Plans are expected to ensure that their personnel are familiar with these statutes so that they are able to recognize allegations which may implicate these laws and inform complainants of their rights to file with federal OSHA. State Plans are expected to include whistleblower complaint coordination procedures in their manuals to reflect federal OSHA’s administration of these laws.

### **F. Action**

State Plans are required to submit notice of intent to adopt within 60 days of the issuance of this Instruction, and must indicate whether their policies and procedures will be identical to, or different from, the provisions of this Instruction which are relevant to the enforcement of section 11(c). State Plans must complete adoption within six months. If adopting identically, the State Plan must provide the date of adoption to OSHA, due within 60 days of adoption. If the State Plan adopts or maintains policies that differ from this Instruction, the State Plan must either post its different policies on its State Plan website and provide a link to OSHA, or provide OSHA with an electronic copy of the policies. This action must occur within 60 days of the date of adoption.

## **VII. Significant Changes**

### **A. General**

1. All letter/document templates were removed.
2. All statute-specific chapters (Chapters 7 – 22 in prior editions) were removed and the information contained in those chapters is currently or will be available as statute-specific investigator desk aids. Although Chapter 8 deals specifically with section 11(c), it only discusses the interface with State Plans.
3. The manual as a whole has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were introduced throughout the manual.
4. Policies initiated by previously-issued memoranda and pilot programs were incorporated into this Instruction. This instruction supersedes all prior memoranda. This incorporation affected all chapters. Please refer to the memorandum itself if you wish to learn the background of a specific policy.
5. Formal investigative correspondence, including notifications and determinations, may now be sent by email, delivery receipt required. While use of email for formal investigative correspondence is now allowed, care should be taken to ensure it is a method regularly used by Complainant and/or Respondent, or else a party's responses may not be timely.
6. OSHA must now consult with RSOL on all merit ALJ-statute cases and on all deferrals.
7. All references to the Regional Administrator (RA) include the RA's designee, except as otherwise noted. The RA's responsibilities may be delegated to a Deputy Regional Administrator, ARA, or an RSI (see below), except as otherwise noted.

### **B. Chapter 1: Preliminary Matters**

1. A glossary of common terms and acronyms used in the WIM has been added. See [Chapter 1.IX](#) "Definitions, Acronyms, and Terminology."
2. [Chapter 1.X](#) "Functional Responsibilities" now specifies responsibilities related to coordinating with partner agencies.

### **C. Chapter 2: Legal Concepts**

1. Chapter 2 is new. It consolidates discussion of the legal concepts relevant to whistleblower investigations that were previously introduced throughout the manual.
2. Chapter [2.V.A.7](#) "Work Refusal" incorporates the memorandum *Clarification of the Work Refusal Standard Under 29 CFR 1977.12(b)(2)*, issued January 11, 2016.
3. Chapter [2.VIII](#) "Policies and Practices Discouraging Injury Reporting"

incorporates as applicable the memorandum *Employer Safety Incentive and Disincentive Policies and Practices*, issued March 12, 2012.

#### **D. Chapter 3: Intake and Initial Processing of Complaints**

1. Chapter 3.II.C “Complaints Forwarded by Partner Agencies” specifies how the timeliness of complaints initially filed with partner agencies will be evaluated.
2. Chapter 3.III.D.4.f “Tolling (Extending) the Complaint Filing Deadline” incorporates the memorandum *Tolling of Limitation Periods under OSHA Whistleblower Laws by Private Agreements and for Other Reasons*, issued January 28, 2016.
3. Chapter 3.IV “Untimely Complaint or Incomplete Allegations: Administrative Closures and Docket-and-Dismissals; Withdrawal” incorporates the memorandum *Expanded Administrative Closure Guidance: Updated Procedures to Close Administrative Law Judge (ALJ) Cases that OSHA Lacks Authority to Investigate*, issued September 28, 2017, such that now administrative closure procedures include ALJ-statute complaints.
4. Chapter 3.IV.A.1 “Administrative Closures with Complainant’s Agreement” allows complaints screened by a supervisor to be closed without review by a second supervisor. Also, delivery confirmation of administrative closure letters is now required.
5. Chapter 3.IV.A.4 “Partner Agencies” instructs when and how untimely complaints should be referred to partner agencies.
6. Chapter 3.VIII “Named Respondents” incorporates the memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, issued May 11, 2016.
7. Chapter 3.IX “Notification Letters” requires notification letters to include the request that the parties provide each other with a copy of all their submissions to OSHA related to the complaint. Information on ADR should be included with the letter if ADR is available and appropriate.
8. Chapter 3.IX.A “Complainant” requires notification letters to Complainants include a copy of the complaint.

#### **E. Chapter 4: Conduct of the Investigation**

1. Chapter 4.II.E “Supervisor Review is Required” explains who must review documents and decisions when a supervisor is the investigator on a case.
2. Chapter 4.III.D “Investigative Correspondence” defines the allowable methods for sending investigative correspondence, including by email.
3. Chapter 4.III.E “Investigative Research” explains how information and documents obtained during investigative research must be placed in the case file.
4. Chapter 4.IV “Referrals and Notifications” incorporates the memorandum

*Whistleblower Complaints and Health and Safety Referrals*, issued June 27, 2014, which explains that investigators must refer all allegations related to safety and health hazards to the appropriate office.

5. Chapter 4.V.E “Amended Complaints Distinguished from New Complaints” clarifies when a new allegation should be docketed as a new complaint rather than amending the original one.
6. Chapter 4.VII “On-site Investigation, Telephonic and Recorded Interviews”: The requirement to conduct on-site interviews has been deleted.
7. Chapter 4.VIII “Confidentiality” updates the procedures detailed in the memorandum *Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews*, issued July 15, 2016, which describes the procedures for witness confidentiality and express promises of confidentiality.
8. Chapter 4.XVIII.D “Medical Records” explains the proper handling of medical records.

#### **F. Chapter 5: Case Disposition**

1. Chapter 5.III.A “No ROI Required” explains when a Report of Investigation (ROI) is not required, and attendant procedures.
2. Chapter 5.VII.F “Requests for Expedited Case Processing in Administrative Cases” incorporates the regional pilot directive CPL 02-03-01, *Regional Whistleblower Protection Program Expedited Case Processing Pilot*, issued August 1, 2016, establishing procedures for Complainants in administrative cases to request that the OSHA investigation be terminated in order to allow Complainants to request a hearing before an ALJ more expeditiously.
3. Chapter 5.VIII.B “Abbreviated Secretary’s Findings” incorporates the memorandum *Revised Whistleblower Disposition Procedures*, issued April 18, 2012, which explains when the Secretary’s Findings may be abbreviated, and the attendant procedures.
4. Chapter 5.XII.B “Deferral” requires the supervisor to obtain the concurrence of SOL before deferring to another agency’s or tribunal’s final determination.
5. Chapter 5.XIV “Significant or Novel Whistleblower Cases” references the memorandum *Procedures for Significant or Novel Whistleblower Cases*, issued February 2, 2016.
6. The end of the chapter now includes a table summarizing the closing actions and documents required depending on the disposition.

#### **G. Chapter 6: Remedies**

1. Chapter 6.IV.A “Lost Wages” incorporates the memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, issued May 11, 2016, which addresses analyzing back pay for temporary workers.
2. Chapter 6.VI.B “Determining When Punitive Damages are Appropriate” updates OSHA’s policies relating to awarding punitive damages to account for

developments in case law.

#### H. Chapter 7: Settlement Agreements

1. Chapter 7.IV.D “Tax Treatment of Amounts Recovered in a Settlement” incorporates the *Taxability of Settlements Chart*, issued October 1, 2015, which details the recommended practices in alerting Complainant to tax implications.
2. Chapter 7.VI “Employer-Employee Settlement Agreements” incorporates the memorandum *New Policy Guidelines for Approving Settlement Agreements in Whistleblower Case*, issued August 23, 2016, which details the types of settlement provisions that OSHA will not approve. Also, agreements previously known as “private” or “third-party” agreements are now known as Employer-Employee Agreements.
3. Chapter 7.VIII “Enforcement of Settlements” incorporates the memorandum *Policy for Enforcing Settlement Agreements, Preliminary Reinstatement Orders, and Final ALJ and ARB Orders*, issued December 21, 2015, which details procedures for enforcing settlement agreements.
4. The end of the chapter now includes a [decision flow chart](#) for actions to be taken when Respondent breaches the settlement.

#### I. Chapter 8: OSHA/State Plan Coordination

1. OSHA/State Plan coordination was formerly in the OSH Act-specific Chapter 7. Chapter 8 now focuses solely on coordination between OSHA and State Plans.

#### J. Chapter 9: Information Disclosure

1. The relevant sections regarding confidential business information (CBI) were updated to reflect the decision in *Food Marketing Institute v. Argus Leader Media*, [U.S.](#), 139 S.Ct. 2356 (2019).

### VIII. Background

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (“OSH Act”), is a federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the Nation. By the terms of the OSH Act, every person engaged in a business affecting interstate commerce who has employees is required to furnish each employee employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm and, further, to comply with occupational safety and health standards and regulations promulgated under the OSH Act.

The OSH Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, recordkeeping requirements, the issuance of citations and notifications of

proposed penalties, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and judicial review. In addition, states seeking to assume responsibility for development and enforcement of standards may submit plans to the Secretary of Labor and receive approval for such development and enforcement, including protection against retaliation for occupational safety or health activities.

Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the OSH Act. Moreover, effective implementation of the OSH Act and achievement of its goals depend in large measure upon the active and orderly participation of employees, individually and through their representatives, at every level of safety and health activity. Such participation and employee rights are essential to the realization of the fundamental purposes of the OSH Act.

Section 11(c) of the OSH Act provides, in general, that no person shall discharge or in any manner discriminate (retaliate) against any employee because the employee has filed complaints under or related to the OSH Act or has exercised other rights under the OSH Act, among other things. Regional Administrators have overall responsibility for the investigation of retaliation complaints under section 11(c). They have authority to recommend litigation to the Regional Solicitor of Labor (RSOL) in merit cases, dismiss non-meritorious complaints subject to DWPP's review, approve acceptable withdrawals, and negotiate voluntary settlement of complaints.

#### **A. Additional Statutes**

In addition to the overall responsibility for enforcing section 11(c) of the OSH Act, the Secretary of Labor has delegated to OSHA the responsibility for investigating and enforcing the whistleblower provisions of the following statutes, which, together with section 11(c) of the OSH Act, constitute the Whistleblower Protection Program (WPP):

1. Affordable Care Act (ACA), 29 U.S.C. § 218C
2. Anti-Money Laundering Act (AMLA), 31 U.S.C. § 5323(g) & (j)
3. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651
4. Clean Air Act (CAA), 42 U.S.C. § 7622
5. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610
6. Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. § 5567
7. Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087
8. Criminal Antitrust Anti-Retaliation Act (CAARA), 15 U.S.C. § 7a-3
9. Energy Reorganization Act (ERA), 42 U.S.C. § 5851
10. FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d
11. Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109
12. Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367

13. International Safe Container Act (ISCA), 46 U.S.C. § 80507
14. Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171
15. National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142
16. Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129
17. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j- 9(i)
18. Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A
19. Seaman's Protection Act (SPA), 46 U.S.C. § 2114
20. Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971
21. Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105
22. Taxpayer First Act (TFA), 26 U.S.C. § 7623(d)
23. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622
24. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121

**B. Partner Agencies**

The following is a non-exclusive list of the agencies the WPP regularly coordinates with, and their corresponding statutes:

<b>Statutes</b>	<b>Partner Agencies</b>
<b><i>Environmental and Nuclear Safety</i></b>	
<i>Asbestos Hazard Emergency Response Act (AHERA)</i> <i>Clean Air Act (CAA)</i> <i>Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)</i> <i>Safe Drinking Water Act (SDWA)</i> <i>Federal Water Pollution Control Act (FWPCA)</i> <i>Toxic Substances Control Act (TSCA)</i> <i>Solid Waste Disposal Act (SWDA)</i>	Environmental Protection Agency (EPA)
<i>Energy Reorganization Act (ERA)</i>	Nuclear Regulatory Commission (NRC) U.S. Department of Energy (DOE)
<b><i>Transportation Industry</i></b>	
<i>Federal Railroad Safety Act (FRSA)</i>	Federal Railroad Administration (FRA)
<i>International Safe Container Act (ISCA)</i> <i>Seaman's Protection Act (SPA)</i>	U.S. Coast Guard (USCG)
<i>National Transit Systems Security Act (NTSSA)</i>	Federal Transit Administration (FTA)
<i>Pipeline Safety Improvement Act (PSIA)</i>	Pipeline and Hazardous Material Safety Administration (PHMSA)
<i>Surface Transportation Assistance Act (STAA)</i>	Federal Motor Carrier Safety Administration (FMCSA)
<i>Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)</i>	Federal Aviation Administration (FAA)
<b><i>Consumer and Investor Protection</i></b>	
<i>Affordable Care Act (ACA)</i>	Employee Benefits Security Administration (EBSA) U.S. Department of Health and Human Services (HHS) Internal Revenue Service (IRS)
<i>Consumer Financial Protection Act (CFPA)</i>	Consumer Financial Protection Bureau (CFPB) U.S. Department of Justice (DOJ)-Civil Frauds
<i>Consumer Product Safety Improvement Act (CPSIA)</i>	U.S. Consumer Product Safety Commission (CPSC)
<i>Food Safety Modernization Act (FSMA)</i>	U.S. Food and Drug Administration (FDA)
<i>Moving Ahead for Progress in the 21st Century Act (MAP-21)</i>	National Highway Traffic Safety Administration (NHTSA)
<i>Sarbanes-Oxley Act (SOX)</i> <i>Criminal Antitrust Anti-Retaliation Act (CAARA)</i>	U.S. Securities and Exchange Commission (SEC) U.S. Department of Justice (DOJ)-Antitrust Division
<i>Taxpayer First Act (TFA)</i> <i>Anti-Money Laundering Act (AMLA)</i>	Internal Revenue Service (IRS) U.S. Department of the Treasury (TREAS)-FinCen

## IX. Definitions, Acronyms, and Terminology

- **Administrative Statutes:** Administrative statutes (also sometimes referred to as “ALJ statutes”) are laws under which cases are litigated before DOL ALJs (see below). Parties may seek review of an ALJ’s decisions by the ARB (see below).

The administrative statutes are:

- Environmental and nuclear safety statutes: CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA; ERA;
- Fraud prevention, consumer and investor protection statutes: ACA, AMLA, CAARA, CFPA, CPSIA, FSMA, MAP-21, SOX, TFA;
- Transportation statutes: AIR21, FRSA, NTSSA, PSIA, SPA, STAA.

Every whistleblower provision that has been assigned to OSHA for enforcement is an administrative statute, except for section 11(c) of the OSH Act, AHERA, and ISCA.

- **Administrative Law Judge (ALJ):** Hears and decides cases arising under the administrative statutes.
- **Adverse Action:** See [Chapter 2.V.C](#), *Adverse Action*.
- **Alternative Dispute Resolution (ADR):** A consensual process that utilizes a third-party neutral to assist parties in resolving their conflict.
- **Assistant Regional Administrator (ARA)** of Whistleblower Protection Programs. The official under the RA (see below) responsible for overseeing whistleblower investigations and enforcement.
- **Administrative Review Board (ARB):** Reviews ALJ decisions in whistleblower cases under administrative statutes when it accepts a party’s petition for review. The Secretary of Labor may review ARB decisions at the Secretary’s discretion. Under most administrative statutes, an adversely affected complainant or respondent may petition a court of appeals to review a final decision by the Department of Labor, or an unreviewed ALJ decision if the ARB declines to accept a petition for review of an ALJ decision.<sup>2</sup>
- **Bilateral Agreements:** Settlement agreements under section 11(c), AHERA, or ISCA between OSHA and Respondent without Complainant’s consent. See [Chapter 7.VII](#).
- **Cat’s Paw Theory:** See [Chapter 2.V.B](#).
- **Complaints About State Program Administration (CASPA):** Complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program

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<sup>2</sup> CERCLA provides for district court review, although in cases involving CERCLA and another administrative statute, a party may petition for review of the decision by a court of appeals.

deficiencies. They are not designed to afford individual relief to section 11(c) complainants. See [Chapter 8.II.J](#).

- **Complainant:** Any person who believes that they have suffered an adverse action in violation of an OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with OSHA. When this manual discusses investigatory communication and coordination, the term “Complainant” also includes the Complainant’s designated representative.
- **Compliance Safety and Health Officer (CSHO):** This term refers to OSHA Safety Engineers, Safety Compliance Officers, and Industrial Hygienists.
- **Confidential Business Information (CBI):** See [Chapter 9.III.B](#).
- **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in OSHA’s investigation of a whistleblower complaint. If a representative has been designated, OSHA typically communicates with the Complainant or the Respondent through the designated representative, although OSHA may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. Secretary’s Findings are sent to both the parties and their representatives.
- **District Court Statutes:** Section 11(c) and the whistleblower provisions of AHERA and ISCA. Merit cases are litigated in the U.S. district courts while cases dismissed as non-merit are reviewed upon request by DWPP.
- **Directorate of Whistleblower Protection Programs (DWPP):** The directorate in the OSHA National Office that is responsible for establishing policies and providing support for the Regional OSHA Whistleblower Protection Program.
- **Employer-Employee Agreements:** Settlement agreements between Complainant and Respondent, subject to OSHA’s approval. See [Chapter 7.VI](#).
- **Enforcement Case:** Refers to an inspection or investigation conducted by a CSHO or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.
- **Environmental Statutes:** OSHA whistleblower statutes protecting activities related to statutes enforced by the Environmental Protection Administration, i.e., CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA.
- **Federal Review:** Complainants who have concerns about a State Plan’s investigation of their dually filed section 11(c) whistleblower complaints may request a review by OSHA of the State Plan investigation in order to afford them the opportunity for reconsideration of the state’s dismissal determination and, in merit cases, to have the Secretary file suit in federal district court. See [Chapter 8.II.I](#).
- **Field Office:** Any OSHA Regional or Area Office.

- **Investigator:** An OSHA employee assigned to investigate and prepare an ROI (see below) in an OSHA whistleblower case.
- **Kick-Out:** Certain statutes (ACA, AMLA, CAARA, CFPA, CPSIA, ERA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, TFA) include a “kick-out” provision, which allows Complainant to file suit in federal district court if the Secretary of Labor has not issued a final decision in the case and a certain number of days specified in the relevant whistleblower statute have passed since the filing of the whistleblower complaint with OSHA. See [Chapter 5.XIII](#).
- **Lack of Cooperation (LOC):** A complainant’s failure to provide information necessary for a whistleblower investigation.
- **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU):** An agreement between two agencies regarding the coordination of related activities.
- **National Solicitor of Labor (NSOL):** The divisions in the National Office of the Solicitor of Labor responsible for advising OSHA and RSOLs (see below) on the OSHA whistleblower statutes and conducting appellate litigation under those statutes.
- **Nexus:** See [Chapter 2.V.D](#), *Nexus*.
- **Non-Public Disclosure:** A disclosure of information from the investigative case file made to Complainant or Respondent during the investigation in order to resolve the complaint.
- **OITSS-Whistleblower:** The OSHA IT Support System – Whistleblower, or subsequent whistleblower case management system. OITSS-Whistleblower is the case management system used to process complaint data for OSHA’s WPP, formerly known as *WebIMIS*.
- **Personal Identifiable Information (PII):** Information about an individual which may identify the individual, such as a Social Security number or a medical record. See [Chapter 9.III.A.4.a](#).
- **Protected Activity:** See [Chapter 2.V.A](#), *Protected Activity*.
- **Regional Administrator (RA):** The RA is responsible for the investigations and enforcement under the OSHA whistleblower statutes in their region. **References to the RA include the RA’s designee**, except as otherwise noted. **The RA’s responsibilities may be delegated** only to a Deputy Regional Administrator, ARA, or an RSI (see below).
- **Respondent:** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term “Respondent” also includes Respondent’s designated representative.
- **Report of Investigation (ROI):** The report prepared by an Investigator in an OSHA whistleblower case, setting forth the facts, analyzing the evidence, and making recommendations.

- **Regional Supervisory Investigator (RSI):** The RSI is the immediate supervisor of the investigators.
- **Regional Solicitor of Labor (RSOL):** The office of the Solicitor of Labor in each Region of the Solicitor's Office, including a sub-office, which advises the OSHA Region on OSHA whistleblower cases and litigates cases in federal district courts and before ALJs.
- **Request for Review (RFR):** Complainants may request that OSHA review its non-merit determinations (i.e., dismissals) in cases under the district court statutes. These dismissals are reviewed by DWPP. See [Chapter 5.VI.B.2](#).
- **Supervisor:** The RA, or the Deputy Regional Administrator, ARA, or RSI, to whom the RA has delegated any of the RA's responsibilities, such as the responsibility to oversee OSHA whistleblower investigations, sign subpoenas (as applicable), issue findings and orders, recommend cases for litigation by RSOL, and approve settlements.
- **Whistleblower complaint or complaint:** A complaint filed with OSHA alleging unlawful retaliation for engaging in protected activity. For example, a roofing employee complains to OSHA that she was suspended for reporting a lack of fall protection to OSHA. The whistleblower complaint is the complaint to OSHA regarding the suspension for reporting a safety violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to OSHA regarding the lack of fall protection.
- **Whistleblower Protection Program (WPP):** OSHA's Whistleblower Protection Program as a whole.

## **X. Functional Responsibilities**

The following describes the functions and responsibilities of the various positions and offices within OSHA's WPP. These descriptions are intended neither to be all-inclusive nor to describe actual position descriptions and/or job functions. Rather, the following descriptions are intended to provide a general overview of OSHA and DOL functions that may be different depending on the needs or staffing of each office or unit.

### **A. Regional Offices**

Each Regional Office within OSHA is responsible for promptly processing whistleblower retaliation complaints. This process includes, but is not limited to: conducting the investigation, issuing findings and orders, notifying federal partner agencies of the outcome of investigations, referrals to the Regional Solicitor's Office of meritorious OSH Act, AHERA, and ISCA cases, and referrals to other governmental organizations where appropriate.

Additionally, the Regional Offices are responsible for monitoring and evaluating State Plan whistleblower programs and investigating Complaints About State Program Administration (CASPA) involving these programs.

**B. Regional Administrator (RA) and Deputy Regional Administrator (DRA)**

The RA and DRA are responsible for administering the Whistleblower Protection Program in each Region and for ensuring that OSHA's whistleblower provisions are appropriately implemented.

**C. Assistant Regional Administrator for Whistleblower Protection Programs (ARA)**

The ARA is responsible for the overall implementation of approved policies and procedures for all whistleblower investigations, ensuring quality investigations and customer service, collaboration with the Directorate of Whistleblower Protection Programs (DWPP) and the Regional Office of Solicitor (RSOL), communication with federal partner agencies, and coordination of all outreach activities.

**D. Regional Supervisory Investigator (RSI)**

The RSI is responsible for implementing and supervising the day-to-day whistleblower protection operations of the investigators and other personnel in the Regional Office. The RSI is responsible for ensuring that all complaints are received and processed in accordance with OSHA policy and procedures and that investigators receive proper guidance in order to adequately investigate retaliation complaints. The RSI may conduct investigations of whistleblower cases as needed.

**E. Investigator**

Under the direct guidance and ongoing supervision of the RSI, the investigator conducts investigations, which include responsibilities such as:

1. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
2. Reviewing investigative and/or enforcement case files in field offices for background information concerning any other proceedings that relate to a specific complaint.
3. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
4. Following up on leads resulting from interviews and statements.
5. Interviewing and obtaining statements from respondent's officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
6. Applying knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzing the evidence, drafting an investigative report, and recommending appropriate action to the supervisor.
7. Composing draft Secretary's Findings for supervisory review.
8. Negotiating with the parties to obtain a written settlement agreement that provides prompt resolution and satisfactory remedies to Complainant where appropriate.

9. Assisting and acting on behalf of the ARA or RSI in whistleblower matters involving other agencies or OSHA Area Offices as assigned, and interacting with the general public to perform outreach activities as assigned.
10. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.
11. Monitoring and evaluating State Plan whistleblower programs and investigating CASPAs as assigned.
12. Organizing and maintaining whistleblower investigation case files.

**F. Directorate of Whistleblower Protection Programs (DWPP)**

DWPP develops program policies and procedures, provides assistance to the field on both the program and the statutes, approves regional pilot programs, promulgates procedural and interpretive rules to implement the whistleblower statutes, reviews RFRs and significant whistleblower cases, assists in commenting on proposed whistleblower legislation, serves as liaison with the whistleblower program's partner agencies, performs audits of investigations, maintains statistical information on the nation-wide program, and performs outreach.

**G. Compliance Safety and Health Officer (CSHO)**

Each CSHO maintains a basic understanding of the whistleblower protection provisions administered by OSHA, in order to advise employers and employees of their responsibilities and rights under these laws. Each CSHO must accurately record information about potential whistleblower complaints on an OSHA-87 form or the appropriate regional intake worksheet and immediately forward it to the ARA/RSI. In every instance, the date of the initial contact must be recorded. Additionally, as noted in the FOM, CSHOs should instruct employers and employees about section 11(c) rights during opening and closing conferences.

**H. National Solicitor of Labor (NSOL)**

The National Office of the Solicitor of Labor provides assistance to RSOL, advises DWPP, and represents the Assistant Secretary before the ARB, and the Secretary and the ARB before the courts of appeals. The Division of Occupational Safety and Health (OSH) provides legal services under section 11(c) of the OSH Act, AHERA, ISCA, SPA, and STAA. The Division of Fair Labor Standards (FLS) provides legal services under ACA, AIR21, AMLA, CAA, CAARA, CERCLA, CFPA, CPSIA, ERA, FRSA, FSMA, FWPCA, MAP-21, NTSSA, PSIA, SDWA, SOX, SWDA, TFA, and TSCA.

**I. Regional Solicitor of Labor (RSOL)**

The Regional Offices of the Solicitor of Labor provide legal advice to the OSHA Regional Offices. RSOL reviews OSHA whistleblower cases submitted by the RAs for their legal merit and litigates, as appropriate, those cases RSOLs deem meritorious. Where the Secretary of Labor is authorized to file suit in federal district court, RSOL, after obtaining approval from the U.S. Department of Justice, represents the Secretary. Where the Assistant Secretary for Occupational

Safety and Health is a prosecuting party or otherwise participates in a proceeding before a DOL ALJ, RSOL ordinarily represents the Assistant Secretary.

## **XI. Languages**

OSHA Regional Offices are encouraged to communicate with complainants, respondents, and witnesses in the language in which they understand, both orally or in writing. Online translators may be used. If any communication, including Secretary's Findings, is written in a language other than English, an English-language version must also be written. Oral and written communication in any language must be grammatically correct.

## Chapter 2

### LEGAL PRINCIPLES

#### I. Scope

This Chapter explains the legal principles applicable to investigations under the whistleblower protection laws that OSHA enforces, including:

- the requirement to determine whether there is reasonable cause to believe that unlawful retaliation occurred;
- the prima facie elements of a violation of the whistleblower protection laws;
- the standards of causation relevant to each law;
- the types of evidence that may be relevant to determine causation and to detect pretext (a.k.a. “pretext testing”) in whistleblower retaliation cases; and
- other applicable legal principles.

#### II. Introduction

The OSHA-enforced whistleblower protection laws (a.k.a. OSHA whistleblower statutes) prohibit a covered entity or individual from retaliating against an employee for the employee’s engaging in activity protected by the relevant whistleblower protection law. 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., but-for, motivating factor, or contributing factor).

#### III. Gatekeeping

Upon receipt, an incoming whistleblower complaint is screened to determine whether the prima facie elements of unlawful retaliation (a “prima facie allegation”) and other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and – as appropriate – the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of one of the whistleblower laws? The elements of a retaliation claim are described below and the procedures for screening whistleblower complaints are described in detail in [Chapter 3](#).

#### IV. Reasonable Cause

If the case proceeds beyond the screening phase, OSHA investigates the case by gathering evidence to determine whether there is reasonable cause to believe that retaliation in violation of the relevant whistleblower statute(s) occurred. Reasonable cause means that the evidence gathered in the investigation would lead OSHA to believe that unlawful retaliation occurred –

i.e. that there could be success in proving a violation at an ALJ or district court hearing based on the elements described in more detail below.

A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent, but does not generally require as much evidence as would be required at trial. Although OSHA will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred.<sup>3</sup> Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a hearing.

If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, OSHA will issue merit findings (under the administrative statutes) or consult with RSOL to ensure that the investigation captures as much relevant information as possible so that the RSOL can evaluate whether the case is appropriate for litigation (in cases under district court statutes or as applicable in cases under administrative statutes). If the investigation does not establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed.

Procedures for conducting the investigation, requirements for issuing merit and non-merit (dismissal) findings in whistleblower cases, the requirement to consult with RSOL in cases that OSHA believes are potentially meritorious, and the standards for determining appropriate remedies in potentially meritorious whistleblower cases are discussed in Chapters 4 through 6.

## **V. Elements of a Violation**

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.

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<sup>3</sup> See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (plurality opinion) (noting that an OSHA investigator may not be in a position to determine the credibility of witnesses or confront all of conflicting evidence, because the investigator does not have the benefit of a full hearing).

2. **Reporting a work-related injury or illness** – Reporting a work-related injury or illness to management personnel. In some instances, these injury-reporting cases may be covered through OSHA enforcement under 29 CFR 1904.35(b)(1)(iv). For additional information, refer to the memorandum *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35(b)(1)(iv)*, October 11, 2018, and related memoranda. See also [Chapter 2.VIII, Policies and Practices Discouraging Injury Reporting](#) for related information.
3. **Providing information to a government agency** – Providing information to a government entity such as OSHA, OSHA State Plans, FMCSA, EPA, NRC, DOE, FAA, SEC, CFPB, NHTSA, FRA, FTA, CPSC, HHS, USCG, PHMSA, EBSA, IRS, FDA, health department, police department, fire department, Congress, or the President.
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.<sup>4</sup> Communicating such complaints through social media may also be considered protected activity, in which case, the Regional Office should consult with RSOL.
6. **Assisting, participating, or testifying in proceedings** – Testifying in proceedings, such as hearings before DOL and the Occupational Safety and Health Review Commission ALJs, or congressional hearings. Assisting or participating in inspections or investigations by agencies such as OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, CFPB, NHTSA, FRA, FTA, CPSC, HHS USCG, PHMSA, EBSA, IRS, or FDA.
7. **Work Refusal** – Whistleblower statutes, such as section 11(c), AIR21, STAA, SPA, ERA, NTSSA, FRSA, CPSIA, ACA, FSMA, and CFPA generally protect employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected). If the work refusal is determined to be invalid, the investigator must still investigate any other protected activities alleged in the complaint. See memorandum *Clarification of the Work Refusal Standard under 29 CFR 1977.12(b)(2)*, January 11, 2016, and the relevant desk aid for statute specific considerations. If the protected work refusal includes ambiguous action by Complainant that Respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, Complainant's subsequent lack of employment may constitute a discharge. If it is ambiguous whether Complainant quit or was discharged, consultation with RSOL may be appropriate. See [Chapter 2.V.C.1, Discharge](#).

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<sup>4</sup> Donovan v. R.D. Andersen Construction Company, Inc., 552 F.Supp. 249 (D. Kansas, 1982).

Generally, Complainant only needs a good faith, reasonable belief that the conduct about which Complainant initially complained - for example, wire fraud under SOX – violated or would have violated the substantive (i.e., non-whistleblower) provisions of the referenced statute(s). As long as Complainant had reasonable belief that there was a violation or hazard, depending on the statute, this element has been satisfied. The exception to this are STAA cases involving refusal to operate a vehicle because operation would violate a commercial motor vehicle safety or security regulation. In those STAA cases, the refusal to operate is justified only if operation would have violated such a regulation.

The investigator should look at protected activity not only under the statute named by Complainant, but any other OSHA whistleblower statutes where there appears to be coverage. For example, if a driver of a commercial motor vehicle files a complaint and only mentions section 11(c), the investigator should also look at possible protected activity under STAA.

The investigator should also review Complainant's complaint and interview statement for protected activity beyond the particular protected activity identified by Complainant. For example, while Complainant may note in the complaint only the protected activity of reporting a workplace injury, Complainant might also mention in passing during the screening interview that they had complained to the employer about the unsafe condition or had refused to work before the injury occurred. That hazard complaint/work refusal should be included in the list of Complainant's protected activities.

## **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.<sup>5</sup> For example, one of Respondent's managers need not know that Complainant contacted a regulatory agency if their previous internal complaints would cause Respondent to suspect Complainant initiated a regulatory action.

If Respondent does not have actual knowledge, but could reasonably deduce that Complainant engaged in protected activity, it is called ***inferred knowledge***. Examples of evidence that could support inferred knowledge include:

- An OSHA complaint is about the only lathe in a plant, and Complainant is the only lathe operator.
- A complaint is about unguarded machinery and Complainant was recently injured on an unguarded machine.
- A union grievance is filed over a lack of fall protection and Complainant had recently insisted that his foreman provide him with a safety harness.
- Under the ***small plant doctrine***, in a small company or small work group where everyone knows each other, knowledge can generally be attributed to the employer.

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<sup>5</sup> *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (section 11(c)) (an employer's mere suspicion or belief that an employee had engaged in protected activity was sufficient to sustain an action alleging a violation of the OSH Act's anti-retaliation provision) ; see also rules under the administrative statutes, for example 29 CFR 1978.104(e) (STAA), 29 CFR 1980.104(e)(SOX), 29 CFR 1982.104(e)(FRSA).

If Respondent's decision maker takes action based on the recommendation of a lower level supervisor who knew of and was motivated by the protected activity to recommend action against Complainant, employer knowledge and motive are imputed to the decision maker. This concept is known as the **cat's paw theory**.

### 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.<sup>6</sup>

It may not always be clear whether Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the action at issue might have dissuaded a reasonable employee from engaging in protected activity.<sup>7</sup> The investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

Some examples of adverse actions are:

1. Discharge – Discharges include not only straightforward firings, but also situations in which the words or conduct of a supervisor would lead a reasonable employee to believe that they had been terminated (e.g., a supervisor's demand that the employee clear out their desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge. If it is ambiguous whether the action was a quit or a discharge, consultation with RSOL may be appropriate.
2. Demotion
3. Suspension
4. Reprimand or other discipline
5. Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when the employer participates in the harassment or knowingly or recklessly allows the harassment to occur and the harassment is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive such that it would dissuade a reasonable person from engaging in protected activity.

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<sup>6</sup> *Burlington Northern and Santa Fe Ry, Co. v. White*, 548 U.S. 53, 63-64 (2006) (where not otherwise specified retaliation need not be related to employment; e.g., filing a false criminal charge against a former employee is adverse action).

<sup>7</sup> *Id.*

6. Hostile work environment – Separate adverse actions that occur over a period of time may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. A hostile work environment typically involves ongoing severe and pervasive conduct, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
7. Lay-off
8. Failure to hire
9. Failure to promote
10. Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.
11. Failure to recall
12. Transfer to different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and should be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, and reduced opportunities for promotion and training. In such cases, it is important to gather evidence indicating what positions Respondent(s) had available at the time of the transfer and whether any of Complainant's similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments. See [Memorandum Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers](#) issued May 11, 2016, for further information.
13. Change in duties or responsibilities
14. Denial of overtime
15. Reduction in pay or hours
16. Denial of benefits
17. Making a threat
18. Intimidation
19. Constructive discharge – The employee quitting after the employer has *deliberately*, in response to protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
20. Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.

21. Reporting or threatening to report an employee to the police or immigration authorities.

#### **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 “but-for-cause” 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.

Regardless of which causation standard applies, nexus can be demonstrated by direct or circumstantial evidence. Direct evidence is evidence that directly proves the fact without any need for inference or presumption. For example, if the manager who fired the employee wrote in the termination letter that the employee was fired for engaging in the protected activity, there would be direct evidence of nexus.

Circumstantial evidence is indirect evidence of the circumstances surrounding the adverse action that allow the investigator to infer that protected activity played a role in the decision to take the adverse action. Examples of circumstantial evidence that may support nexus include, but are not limited to:

- **Temporal Proximity** – A short time between the protected activity (or when the employer became aware of the protected activity or the agency action related to the protected activity, such as the issuance of an OSHA citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action;
- **Animus** – Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager’s attitude towards Complainant following the protected activity, can be important circumstantial evidence of nexus;
- **Disparate Treatment** – Evidence of inconsistent application of an employer’s policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity can support a finding of nexus;
- **Pretext** – Shifting explanations for the employer’s actions, disparate treatment of the employee as described above, evidence that Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer’s explanation for taking adverse action against the employee is pretext and that the employer’s true motive for taking the adverse action was to retaliate against the employee for the protected activity.

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on OSHA’s evaluation of the facts and the strength of the evidence supporting both the employer and the employee through “pretext testing” described below (See [Chapter 2.VII, Testing Respondent’s Defense](#)).

## VI. Causation Standards

The causation standard is the type of causal link (a.k.a. nexus), required by statute, between the protected activity and the adverse action. That causal link will be either: (1) that the adverse action would not have occurred **but for** the protected activity; (2) that the protected activity was a **contributing factor** in the adverse action; or (3) that the protected activity was a **motivating factor** in the adverse action, depending on the whistleblower statute(s) which may have been violated.

### A. Cases Under District Court Statutes

The district court statutes, i.e., section 11(c) and the whistleblower provisions of AHERA and ISCA, simply use the word “because” to express the causation element. The Supreme Court has found that similar language requires the plaintiff to show that the employer would not have taken the adverse action but for the protected activity. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Thus, causation exists in a section 11(c), AHERA, or ISCA case only if the evidence shows that Respondent would not have taken the adverse action but for the protected activity. A good explanation of but-for causation is found in *Bostock v. Clay County, Georgia*, \_\_U.S.\_\_, 140 S. Ct. 1731 (2020). As the Supreme Court ruled, but-for causation analysis directs the courts to change one thing at a time and see if the outcome changes; if it does, there is but-for causation. This test does not require that the illegal motive (in whistleblower cases, the protected activity) be the sole reason for the adverse action. It also does not require that illegal motive (protected activity) be the primary reason for the adverse action. *Id.* at 1739. The but-for causation test is more stringent than the contributing factor or the motivating factor tests. Even so, it does not require a showing that the protected activity was the sole reason for the adverse action, only that it was independently sufficient. *Id.* See 29 CFR § 1977.6(b) (but-for causation test for section 11(c)).

### B. Cases Under Administrative Statutes

#### 1. Contributing Factor Statutes

ACA, AIR21, AMLA, CAARA, CFPA, CPSIA, ERA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, and TFA use the *contributing factor* burden of proof and thus require a lower standard for Complainant to establish causation. They also have a higher standard of proof for Respondent to establish an affirmative defense, as discussed below.

Under the *contributing factor* standard, in order for OSHA to issue a merit finding, there must be reasonable cause to believe that the protected activity was a *contributing factor* in the adverse action. A *contributing factor* is “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.” See *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks omitted). Thus, the protected activity, alone or in connection with other factors, must have affected in some way the outcome of the employer’s decision.

Under the *contributing factor* standard, Complainant therefore need only demonstrate that their protected activity contributed *in any way* to the adverse action; the protected

activity does not need to be the sole or even predominant cause of the adverse action.

Under these statutes, even if there is reasonable cause to believe that protected activity was a *contributing factor* to the adverse action, Respondent may escape liability (and OSHA will issue non-merit findings) if there is clear and convincing evidence that Respondent would have taken the same action in the absence of the protected activity. The clear and convincing evidence standard requires that, based on the evidence gathered in the investigation, it is highly probable or reasonably certain that Respondent would have taken the same action absent the protected activity.

Thus, the possible outcomes of an investigation of a complaint under a *contributing factor* statute are:

- a. There is reasonable cause to believe that protected activity was a contributing factor in the employer's decision, and Respondent has not demonstrated by clear and convincing evidence that Respondent would have taken the same adverse action even if Complainant had not engaged in protected activity: thus the complaint is meritorious; or
- b. There is reasonable cause to believe that protected activity was a contributing factor in the employer's decision, but Respondent has demonstrated by clear and convincing evidence that Respondent would have taken the same adverse action even in the absence of the protected activity, so the complaint must be dismissed; or
- c. There is no reasonable cause to believe that the protected activity was a contributing factor in the decision to take the adverse action, and therefore the complaint must be dismissed.

## 2. Motivating Factor Statutes

Under the six environmental statutes, OSHA uses a *motivating factor* standard of causation.<sup>8</sup> A *motivating factor* is a substantial factor in causing an adverse action. It is a higher standard of causation than the contributing factor standard of causation, but a lower standard of causation than the "but for" standard.

Under the environmental statutes, OSHA should issue merit findings if there is reasonable cause to believe that protected activity was a *motivating factor* in the adverse action and Respondent has not shown that it would have taken the same action absent the protected activity. Unlike under the "contributing factor" statutes, to escape liability Respondent need not show by *clear and convincing* evidence that it would have taken the same action absent the protected activity. Rather, OSHA should issue non-merit findings if it believes that even if protected activity was a *motivating factor* in the adverse action, it is *more likely than not* that Respondent would have taken the same action in the absence of the protected activity.

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<sup>8</sup> *DeKalb County v. U.S. Dep't of Labor*, 812 F.3d 1015, 1021 (11th Cir. 2016).

Thus, the possible outcomes of an investigation of a complaint under a *motivating factor* statute are:

- a. There is reasonable cause to believe that protected activity was a motivating factor in the employer's decision, and Respondent has not demonstrated that Respondent more likely than not would have taken the same adverse action even if Complainant had not engaged in protected activity: thus the complaint is meritorious; or
- b. There is reasonable cause to believe that protected activity was a motivating factor in the employer's decision, but Respondent has demonstrated that Respondent more likely than not would have taken the same adverse action even in the absence of the protected activity, so the complaint must be dismissed; or
- c. There is no reasonable cause to believe that the protected activity was a motivating factor in the decision to take the adverse action, and therefore the complaint must be dismissed.

## VII. Testing Respondent's Defense (a.k.a. Pretext Testing)

Testing the evidence supporting and refuting Respondent's defense is a critical part of a whistleblower investigation. OSHA refers to this testing loosely as "pretext testing" although a showing that the employer's explanation for the adverse action was pretextual is not, strictly speaking, required under all whistleblower statutes.<sup>9</sup> Investigators are required to conduct pretext testing of Respondent's defense.

- A **pretextual position** or argument is a statement that is put forward to conceal a true purpose for an adverse action.
- Thus, **pretext testing** evaluates whether the employer took the adverse action against the employee for the legitimate business reason that the employer asserts or whether the action against the employee was in fact retaliation for Complainant's engaging in protected activity.

Proper pretext testing requires the investigator to look at any direct evidence of retaliation (such as statements of managers that action is being taken because of Complainant's protected activity) and the circumstantial evidence that may shed light on what role, if any, the protected activity played in the employer's decision to take adverse action. As noted above, relevant circumstantial evidence can include a wide variety of evidence, such as:

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<sup>9</sup> For example, under the contributing factor statutes, OSHA does not necessarily need to find that a respondent's articulated reason for an adverse action was a pretext in order to issue merit findings. A complaint can have merit if the employer's "reason, while true, is only one of the reasons for its conduct," and another reason was the complainant's protected activity. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04-149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (discussing contributing factor test under the whistleblower protection provisions of the Sarbanes-Oxley Act) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)). In such cases, OSHA will issue merit findings unless there is clear and convincing evidence that the respondent would have taken the same action absent the protected activity.

- An employer's shifting explanations for its actions;
- The falsity of an employer's explanation for the adverse action taken;
- Temporal proximity between the protected activity and the adverse action;
- Inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity;
- A change in the employer's behavior toward Complainant after they engaged (or were suspected of engaging) in protected activity; and
- Other evidence of antagonism or hostility toward protected activity.

For example, if Respondent has claimed Complainant's misconduct or poor performance was the reason for the adverse action, the investigator should evaluate whether Complainant engaged in that misconduct or performed unsatisfactorily and, if so, how the employer's rules deal with this and how other employees engaged in similar misconduct or with similar performance were treated.

Lines of inquiry that will assist the investigator in testing Respondent's position will vary depending on the facts and circumstances of the case and include questions such as:

- Did Complainant actually engage in the misconduct or unsatisfactory performance that Respondent cites as its reason for taking adverse action? If Complainant did not engage in the misconduct or unsatisfactory performance, does the evidence suggest that Respondent's actions were based on its actual but mistaken belief that there was misconduct or unsatisfactory performance?
- What discipline was issued by Respondent at the time it learned of the Complainant's misconduct or poor performance? Did Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did Complainant's productivity, attitude, or actions change after the protected activity?
- Did Respondent's behavior toward Complainant change after the protected activity?
- Did Respondent discipline other employees for the same infraction and to the same degree?

In circumstances in which witnesses or relevant documents are not available, the investigator should consult with the supervisor. Consultation with RSOL may also be appropriate in order to determine how to resolve the complaint. In cases decided based on the nexus element of the prima facie case, a description of the investigator's pretext testing (or reason(s) it was not performed) must be included in the ROI. See [Chapter 5.III.B.4](#), *Employer Defense/ Affirmative Defense and Pretext Testing*.

## **VIII. Policies and Practices Discouraging Injury<sup>10</sup> Reporting**

There are several types of workplace policies and practices that could discourage injury reporting and thus violate section 11(c) and a variety of other whistleblower protection statutes, including FRSA, SPA, and STAA. Some of these policies and practices may also violate OSHA's recordkeeping regulations at 29 CFR 1904.35 where there is coverage under the OSH Act. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

### **A. Injury-Based Incentive Programs and Drug/Alcohol Testing**

For guidance on evaluating injury-based incentive programs and drug/alcohol testing after an accident under analogous whistleblower statutes, investigators should refer to the following memorandum: [\*Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under CFR Section 1904.35 \(b\)\(1\)\(iv\)\*](#), October 11, 2018. Testing only the injured employees involved in an incident, and not the uninjured ones as well, is a discriminatory policy.

### **B. Employer Policy of Disciplining Employees Who Are Injured on the Job, Regardless of the Circumstances Surrounding the Injury**

Reporting an injury is a protected activity. This includes filing a report of injury under a worker's compensation statute. Disciplining all employees who are injured, regardless of fault, is a discriminatory policy. Discipline imposed under such a policy against an employee for reporting an injury is therefore a direct violation of section 11(c), FRSA, SPA, and STAA. In addition, such a policy is inconsistent with the employer's obligations under 29 CFR 1904.35(b), and where it is encountered in an OSH Act case, a referral for a recordkeeping investigation will be made.

**Note:** Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.

If an employee covered by STAA files a complaint which involves a work-related injury/illness, it would be appropriate to refer them to the FMCSA only to report the injury/illness or a failure to report or record such, not the retaliation. OSHA may also report such to the FMCSA.

If a seaman files a SPA complaint which involves a work-related injury/illness, it would be appropriate to refer them to the Coast Guard to report the injury/illness or a failure to report such, not the retaliation. OSHA may also report such to the Coast Guard.

### **C. Discipline for Violating Employer Rule on Time and Manner for Reporting Injuries**

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, most especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating

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<sup>10</sup> For the purposes of this section the word "injury" also includes "illness."

section 11(c), FRSA, STAA, or SPA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statutes, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

In investigating such cases, the following factors should be considered:

- Whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate.
- Whether the employee had a reasonable basis for acting as they did.
- Whether the employer can show a substantial interest in the rule and its enforcement.
- Whether the employer genuinely and reasonably believed the employee violated the rule.
- Whether the discipline imposed appears disproportionate to the employer's asserted interest.

Where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, not only may application of the employer's reporting rules be a pretext for unlawful retaliation, but also the reporting rules may have a chilling effect on injury reporting that may result in inaccurate injury records, and a referral for a recordkeeping investigation of a possible 1904.35(b)(1) violation or a violation of FRA recordkeeping rules should be made if applicable.

#### **D. Discipline for Violating Safety Rule**

In some cases, an employee is disciplined after disclosing an injury purportedly because the employer concluded that the injury resulted from the employee's violation of a safety rule. Such cases warrant careful evaluation of the facts and circumstances. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. A careful investigation is warranted, however, when an employer might be attempting to use a work rule as a pretext for discrimination against an employee for reporting an injury.

Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer's treatment of similarly-situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule

more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section 11(c), FRSA, STAA, or SPA.

## Chapter 3

### INTAKE AND INITIAL PROCESSING OF COMPLAINTS

#### I. Scope

This Chapter explains the general process for receipt of whistleblower complaints, screening and docketing of complaints, initial notification to Complainants and Respondents, and recording the case data in OSHA's OITSS-Whistleblower. The procedures outlined in this chapter are designed to ensure that cases are efficiently evaluated to determine whether an investigation is appropriate; that OSHA achieves a reasonable balance between accuracy in screening decisions and timeliness of screening; and to determine when it is appropriate to investigate complaints in which unlawful retaliation may have occurred.

#### II. Incoming Complaints

##### A. Flexible Filing Options

##### 1. Who may file

Any employee or other individual<sup>11</sup> covered by a relevant OSHA whistleblower statute, including any applicant for employment or former employee or their authorized representative, is permitted to file a whistleblower complaint with OSHA. Please see the relevant statute-specific desk aid for further information.

##### 2. How to file

No particular form of complaint is required.

OSHA will accept the complaint in any language.

A complaint under any statute may be filed orally or in writing.<sup>12</sup>

##### a. Written Complaints

OSHA accepts electronically-filed complaints at <https://www.osha.gov/whistleblower/WBComplaint.html>. OSHA also accepts written complaints delivered by other means.

Complaints where the initial contact is in writing do not require the completion of an OSHA-87 form or other appropriate intake worksheet, as the written filing will constitute the complaint.

##### b. Oral Complaints

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<sup>11</sup> For instance, the term "employee" includes a "seaman" under SPA, who may be an independent contractor. 29 CFR 1986.101(j). For other examples of non-employees, see the investigator desk aids.

<sup>12</sup> Although the implementing regulations for AIR21 and PSIA indicate that complaints must be filed in writing, that requirement is satisfied by OSHA's longstanding practice of reducing all orally-filed complaints to writing.

For oral complaints, when a complaint is received, the receiving officer must accurately record the pertinent information on an OSHA-87 form or other appropriate intake worksheet and immediately forward it to a whistleblower supervisor or designated whistleblower e-mail box to complete the filing. Whenever possible, the minimum complaint information on the OSHA Form 87 or other appropriate intake worksheet should include for each Complainant and Respondent: full name, mailing address, email address, and phone number; date of filing; and date of the adverse action. In every instance, the **date of the initial contact must be recorded**.

## **B. Receiving Complaints**

All complaints received by the WPP must be logged in OITSS-Whistleblower to ensure delivery and receipt by the appropriate investigative unit. Even those complaints that on their face are untimely or have been wrongly filed with OSHA (e.g., a complaint alleging racial discrimination) must be logged. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets. Per government recordkeeping rules, electronically scanned copies of these documents are acceptable. Complaints are usually received at the field office level but may be referred by the National Office or other government offices.

Upon receipt of a complaint, a diary sheet (which will become the Case Activity Log should the complaint be docketed) documenting all contact with Complainant must be initiated and maintained.

## **C. Complaints Forwarded by Partner Agencies**

When OSHA receives a complaint alleging retaliation in violation of an OSHA whistleblower statute that an employee originally filed with another agency (i.e., the partner agency has sent OSHA a referral rather than a courtesy notification), OSHA must contact the employee to verify whether the employee wishes to pursue a retaliation complaint with OSHA. In determining whether such a complaint is timely, OSHA will first evaluate whether the partner agency or OSHA has received the complaint within the applicable filing period (e.g., 30 days for section 11(c), 90 days for AIR21, or 180 days for STAA). If OSHA has received the complaint within the filing period, the complaint is timely and will be handled normally.

If the partner agency received the complaint within the applicable filing period but OSHA did not (i.e., the complaint would be untimely based on the date OSHA received it), OSHA will consider whether the agency that originally received the complaint has authority to provide personal remedies to the employee for the retaliation.

1. **If the other agency cannot award personal remedies** for the retaliation alleged in the complaint, OSHA will regard the complaint as mistakenly filed in the wrong forum and, under equitable tolling principles (see [Chapter 3.III.D.4.d](#), *Tolling (Extending) the Complaint Filing Deadline*), will regard the date of filing with the other agency as the date of filing.
2. **If the other agency can award personal remedies** to the employee for the retaliation alleged in the complaint, OSHA will regard the complaint as untimely

(unless there is some other basis for equitable tolling (see [Chapter 3.III.D.4.d](#), *Tolling (Extending) the Complaint Filing Deadline*)). DOE and NLRB are examples of agencies that in some circumstances may be able to provide personal remedies for unlawful retaliation alleged in a whistleblower complaint.

#### **D. Complaint Requirements**

The complaint, supplemented as appropriate with information obtained in the screening interview (described below) and any additional information, should ultimately contain the following:

1. Complainant's name and contact information, and if applicable, name and contact information of Complainant's representative. If represented, OSHA should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.
2. Respondents' name(s) and contact information (if multiple Respondents, then all contact information should be present).
3. Worksite address (if different from employer address).
4. The current or final job Complainant performed for Respondent(s).
5. An allegation of retaliation for having engaged in activity that is at least potentially protected by an OSHA whistleblower protection statute (i.e., a *prima facie* allegation). That is, the complaint, supplemented as appropriate by the screening interview and any additional information, should contain an allegation of:
  - a. Some details that could constitute protected activity under an OSHA whistleblower statute;
  - b. Some details indicating that the employer knew or suspected that Complainant engaged in protected activity;
  - c. Some details indicating that an adverse action occurred and the date of the action; and
  - d. Some details indicating that the adverse action was taken at least in part because of the protected activity.

If any of the above information is missing after the screening interview (or after reasonable attempts (see [Chapter 3.IV.A.2](#) below for guidance on reasonable attempts) to contact Complainant for a screening interview), OSHA will preserve the filing date for timeliness purposes and inform Complainant that Complainant needs to provide the missing information (OSHA should be specific as to what is missing).

- If Complainant provides the missing information, OSHA will either docket the complaint or administratively close the complaint if Complainant agrees.
- If Complainant does not provide the missing information within a reasonable amount of time (usually 10 days),<sup>13</sup> OSHA may administratively close the complaint. See

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<sup>13</sup> In some circumstances, a reasonable period of time may be more than 10 days; for instance, if medical issues prevented Complainant from responding to OSHA's inquiry within 10 days.

[Chapter 3.IV.A.2](#) below for the requirements to administratively close a complaint in these conditions.

- If Complainant resumes communication with OSHA after a complaint has been administratively closed and indicates a desire to pursue the complaint, see [Chapter 3.IV.A.2.c](#) for instructions on how to proceed.

### **III. Screening Interviews and Docketing Complaints**

#### **A. Overview**

OSHA is responsible for properly determining whether a complaint is appropriate for investigation. All complaints must be evaluated (“screened”) before they can be docketed except those complaints that on their face implicate only section 11(c) and a State Plan’s section 11(c) analog and no other whistleblower statute enforced by OSHA. See [Chapter 8.II.E.1, \*Referral of Private-Sector Complaints\*](#), for more information regarding complaints that are to be handled by State Plans.

Complaints will be docketed for investigation if the complaint (as supplemented by the screening interview and any additional information) complies with statutory time limits (including time limits as modified by equitable tolling), meets coverage requirements, and sufficiently sets forth all four elements of a prima facie allegation.

Complaints that are not filed within statutory time limits (including time limits as modified by equitable tolling), fail to meet coverage requirements, or do not adequately contain all four elements of a prima facie allegation will be administratively closed if Complainant agrees. If Complainant does not agree to administrative closure, the complaint may be docketed and dismissed with notification of the right to object or request review. See [Chapter 3.IV.A, \*Administrative Closures\*](#), below for more information.

Complainant need not explicitly state the statute(s) implicated by the complaint. OSHA is responsible for properly determining the statute(s) under which a complaint is filed. For example, a truck driver may mistakenly file a complaint under STAA regarding whistleblower activities that are in reality covered by an environmental statute and not STAA. In another example, Complainant may cite only one OSHA whistleblower statute, such as section 11(c), when multiple statutes may apply. If a complaint indicates protected activities under multiple statutes, it is important to process the complaint in accordance with the requirements of each of those statutes in order to preserve the parties’ rights under each individual statute. OSHA will notify the parties of all statutes under which the complaint is docketed.

#### **B. Complaint/Case Assignment**

It is the supervisor’s responsibility to ensure that the complaint is evaluated to determine whether all elements of a prima facie allegation are addressed, the complaint is timely, and OSHA has coverage.

The supervisor will approve the case for docketing and assign for investigation based on the needs of the region. It is recommended that one investigator handle the case from screening interview to closing conference. While the case assignment may happen before or after the screening interview, the case must be assigned to an investigator no later than the completion of the screening.

### C. Initial Contact/Screening Interviews

As soon as possible upon receipt of a complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a prima facie allegation. OSHA must contact Complainant to confirm the information stated in the complaint and, if needed, to conduct a screening interview to obtain additional information. Screening interviews will typically be conducted by phone or video conference. Whenever possible, the evaluation of a complaint should be completed by the investigator whom the supervisor assigns, or anticipates assigning, to the case. If the investigator determines before or during the screening interview that the complaint is likely to be docketed, the investigator may conduct the more detailed complainant interview at that time. See [Chapter 4.IX, Complainant Interview and Contact](#), for more information.

The screening interview must be properly documented by either a memorandum of interview, a signed statement, a region's screening worksheet, or a recording. Recorded interviews must be documented in the file (e.g., noted in the phone/chronology log, or in a memo to file). If the screening interview is recorded, OSHA personnel will advise Complainant that the interview is being recorded and document Complainant's acknowledgement that the interview is being recorded.

### D. Evaluating Whether a Prima Facie Allegation Exists and Other Threshold Issues

As noted above, the primary purpose of the screening interview is to ensure that (a) a prima facie allegation of unlawful retaliation exists and (b) that the complaint is timely and that coverage requirements have been met.<sup>14</sup> During the complaint screening process, it is important to confirm that the complaint was timely filed and that a prima facie allegation has been made under one or more of the statutes enforced by OSHA. Other threshold issues may also need to be verified depending on the statute and circumstances. The following is a list of the threshold issues that most commonly arise when evaluating the sufficiency of a whistleblower complaint:

#### 1. Coverage by Statute

The investigator must ensure that Complainant and Respondent(s) are covered under the statute(s) at issue. Detailed information regarding coverage under each statute can be found in the statute and applicable regulations, and coverage requirements are summarized in the [DWPP Whistleblower Statutes Summary Chart](#) and in the statute-specific desk aids. It may be necessary for the investigator to consult with their supervisor in order to identify and resolve issues pertaining to coverage. Occasionally, OSHA needs further information from Respondent to verify coverage under a whistleblower statute. In these circumstances, OSHA may docket a complaint based on Complainant's allegation of coverage in order to obtain further information from Respondent.

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<sup>14</sup> The screening interview ensures that OSHA complies with the "gatekeeping" provisions contained in many of the whistleblower statutes and their corresponding regulations. *See, e.g.*, 49 U.S.C. 42121(b)(2)(B)(i) (providing threshold requirements for investigation under AIR21, STAA, SOX, and FRSA); 29 CFR 24.104(e) & (f) (ERA and environmental whistleblower laws); 29 CFR 1978.104(e) (STAA); 29 CFR 1979.104(b) (AIR21); 29 CFR 1980.104(e) (SOX); 29 CFR 1982.104(e) (FRSA & NTSSA).

## 2. Commerce

Some of the statutes may require that the entity employing Complainant be “engaged in a business affecting commerce” (section 11(c), STAA); “engaged in interstate or foreign commerce” (FRSA); or fulfill similar interstate commerce requirements in order to qualify for coverage under the requisite statute. Respondent’s effect on commerce is generally not difficult to establish and is typically not disputed. For instance, the use of supplies and equipment from out-of-state sources is generally sufficient to show that the business “affects commerce.” See, e.g., *United States v. Dye Const. Co.*, 510 F.2d 78, 83 (10th Cir. 1975). In the rare circumstance that Respondent’s connection to interstate commerce appears questionable, the investigator must advise the supervisor, who may consult with RSOL or DWPP. It may also be appropriate to docket the complaint in such circumstances to seek further information from Respondent.

## 3. Timeliness of Filing

Whistleblower complaints must be filed within specified statutory time frames (see Table III-1 below), which generally begin when the adverse action takes place. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to Complainant. Generally, the date of the postmark, facsimile transmittal, email communication, online complaint, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at a Department of Labor office will be considered the date of filing. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if the relevant OSHA Office is closed, then the next business day will count as the final day.

Table III-1: Specific statutes and their filing deadlines	
Statute	Filing Deadline (Calendar Days)
OSH Act section 11(c)	30 days
CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA	30 days
ISCA	60 days
AHERA, AIR21, AMLA	90 days
ACA, CAARA, CFPA, CPSIA, ERA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, TFA	180 days

## 4. Tolling (Extending) the Complaint Filing Deadline

The following is a non-exclusive list of reasons that may justify the tolling (extending) of the complaint filing deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. Tolling suspends the running of the filing period and allows days during which Complainant was unable to file a complaint to be added to the regular filing period. If in doubt, the investigator should consult the supervisor, RSOL, or DWPP.

- a. The employer has actively concealed or misled the employee regarding the existence of the adverse action. Examples of concealed adverse actions would be:
- After the employee engaged in protected activity, the employer placed a note in the personnel file that will negate the employee's eligibility for promotion but never informed the employee of the notation; and
  - The employer purports to lay off a group of employees, but immediately rehires all of the employees who did not engage in protected activity.

Mere misrepresentation about the reason for the adverse action is insufficient for tolling.

- b. The employee is unable to file due to a debilitating illness or injury which occurred within the filing period. This tolling is usually more appropriate in cases under statutes with short filing periods, e.g., 30 days, than in cases under statutes with long filing periods, e.g., 180 days.
- c. The employee is unable to file due to a natural or man-made disaster, such as a major snowstorm or flood, which occurred during the filing period. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with OSHA within the filing period. This tolling is usually more appropriate in cases under statutes with short filing periods, e.g., 30 days, than in cases under statutes with long filing periods, e.g., 180 days.
- d. The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant individual relief (e.g., filing an AIR21 complaint with the Federal Aviation Administration or filing a FRSA complaint with the Federal Railroad Administration). See [Chapter 3.II.C](#), *Complaints Forwarded by Partner Agencies*, above.
- e. The employer's acts or omissions have lulled the employee into foregoing prompt attempts to vindicate their rights. For example, tolling may be appropriate when an employer had repeatedly assured Complainant that they would be reinstated so that Complainant reasonably believed they would be restored to their former position. However, the mere fact that settlement negotiations were ongoing between Complainant and Respondent is not sufficient for tolling the time for filing a whistleblower complaint. *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010).
- f. OSHA will recognize private agreements between the employer and employee that expressly toll (extend) the filing deadline. The agreement must be (a) in writing, (b) operate to actually extend the deadline to file a whistleblower complaint, and (c) reflect the mutual assent of both parties. The agreement will only toll the limitations period with respect to the parties that are actually covered by the agreement.
- g. Conditions which do not justify extension of the filing period include:
- i. Ignorance of the statutory filing period.
  - ii. Filing of unemployment compensation claims.

- iii. Filing a workers' compensation claim.
- iv. Filing a private lawsuit.
- v. Filing a grievance or arbitration action.
- vi. Filing a retaliation complaint with a State Plan state or another agency that has the authority to grant the requested relief.

#### **IV. Untimely Complaint or Incomplete Allegations: Administrative Closures and Docket-and-Dismissals; Withdrawal**

Following the screening interview (or reasonable attempts to conduct one), complaints that do not meet threshold requirements (i.e., do not contain a prima facie allegation or fail for some other threshold reason such as untimeliness or lack of coverage under an OSHA whistleblower statute) will be either administratively closed (if the complainant agrees) or docketed and dismissed.

Section 11(c) complaints that are to be handled by an OSHA State Plan and do not implicate any other OSHA whistleblower protection statutes also will be administratively closed upon referral to the relevant OSHA State Plan. See [Chapter 8](#) for State Plan referral procedures.

##### **A. Administrative Closures**

###### **1. Administrative Closures with Complainant's Agreement**

Complaints that do not meet the threshold requirements following a screening interview will be administratively closed provided that Complainant agrees. The supervisor must also agree, and that agreement must be documented in the case file. If a supervisor has conducted the screening, no further supervisory review is necessary. When a complaint is administratively closed in these circumstances, the following must be completed by the investigator:

- a. Obtain Complainant's agreement: The investigator will notify Complainant, verbally or in writing, that the complaint does not meet threshold requirements for investigation and that, if Complainant agrees, OSHA will administratively close the case. The notification can be done as part of a screening interview and should include:
  - i. A brief explanation of the reason(s) the complaint cannot be investigated and the opportunity for the complainant to provide any pertinent information that might lead OSHA to docket the case;
  - ii. An explanation that if the case is administratively closed, the complaint will not be forwarded to Respondent and Complainant will not have the opportunity to object to or request review of OSHA's decision; and
  - iii. An explanation that if Complainant does not agree to allow OSHA to administratively close the case, OSHA will docket and dismiss the case so that Complainant can object or request review of OSHA's decision. Complainant will also be informed that Respondent will be notified of the complaint if it is docketed and dismissed.
- b. Send Complainant confirmation of the administrative closure or dismissal of the complaint and document the administrative closure in the case file:

- i. **If Complainant agrees**, OSHA will send (email or mail, delivery confirmation required) an administrative closure letter to Complainant, stating that Complainant has agreed to the administrative closure.
  - ii. **If Complainant disagrees** with the administrative closure, OSHA will docket and dismiss the case.
  - iii. **If Complainant changes their mind** after initially agreeing to the administrative closure of the case and contacts OSHA within a reasonable amount of time (usually 10 days), OSHA should reopen the case and docket and dismiss unless Complainant provides information that would allow OSHA to docket the case for investigation.
2. **Administrative Closures where Complainant has not responded to OSHA's reasonable attempts to conduct a screening interview or obtain information that OSHA needs to docket the case**

If Complainant does not respond to OSHA's reasonable attempts to conduct a screening interview or obtain information needed to docket the complaint, OSHA may administratively close the complaint.

- a. Reasonable attempts include attempting to contact Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information, and allowing Complainant 48 hours to respond. In the case of phone calls, at least two attempts should be made at different hours of the day during allowed work-band hours. OSHA's attempts to contact Complainant must be documented in the case file.
- b. OSHA will inform the complainant that it has administratively closed the complaint and that if Complainant wishes to pursue the complaint, Complainant should contact OSHA within 10 days or before the filing period ends, whichever is later. Where possible, this notification should be done in writing and sent by methods that allow OSHA to confirm delivery. The notification will specify direct contact information for the Regional Office or the investigator including: mailing address, telephone number, and email.
- c. If Complainant contacts OSHA and indicates a desire to pursue the complaint, OSHA will reopen the case, complete the screening interview, and either docket the case or seek Complainant's concurrence with administratively closing the case if it does not meet the necessary threshold requirements.
  - i. If Complainant contacts the investigator within 10 days, the original filing date will normally be used.
  - ii. If Complainant contacts the investigator after 10 days, but still within the statutory filing period, the date of Complainant's new response may be used as the filing date.
  - iii. If Complainant contacts the investigator after 10 days and the statutory filing period has ended, the investigator will, in the screening interview, determine if (1) Complainant received the letter, and (2) if circumstances exist that could excuse the Complainant's failure to pursue their case in a timely manner. The

investigator shall then consult with their supervisor, the ARA, and RSOL, as appropriate, to determine whether the complaint should be reopened or if the complaint should remain closed due to Complainant's failure to pursue their case in a timely manner. This determination is fact-specific to each complaint. The original filing date must be used.

3. Administratively closed complaints will not be forwarded to the named respondent.
4. **Partner Agencies:** Informational copies of all complaints (supplemented as appropriate by a summary of allegations added during the screening interview), administrative closures and other determinations will be sent to the relevant partner agency(s) (e.g., AIR21 cases to the FAA) promptly. Complainant's identifying information may be redacted as appropriate (e.g., if Complainant indicates a desire to remain anonymous or the partner agency is the named Respondent).

#### 5. **Documenting Administrative Closures**

As noted above, the decision to administratively close a complaint and communications with Complainant related to administratively closing a complaint must be appropriately documented on the case activity log. The investigator must:

- a. Appropriately enter the administrative closure in OITSS-Whistleblower.
- b. Preserve, in the same manner as investigation case files and in accordance with the current Agency records retention schedule, a copy of the administrative closure letter and the complaint, along with any other related documents such as emails and interview statements/recordings. Typical documents to be included in the screening file record are:
  - i. The complaint;
  - ii. Complaint assignment memo or email;
  - iii. All internal and external emails and other correspondence;
  - iv. Documentation of contacts/attempted contacts with Complainant (e.g., case activity log) and supervisor's approval of actions taken;
  - v. Complainant interview (e.g., recording, statement, or memo to file);
  - vi. Administrative closure letter to Complainant; and
  - vii. OITSS-Whistleblower Summary page.

#### **B. Docket and Dismiss**

If the complaint is not administratively closed and the complaint does not meet the threshold requirements, OSHA will docket and dismiss the complaint without conducting an investigation. In those cases, OSHA will follow its case disposition procedures, including notifying relevant partner agencies and the ALJ. See [Chapter 4.VI, Lack of Cooperation/ Unresponsiveness](#), and Chapter 5 for more information on non-merit findings procedures.

**Notification:** In docket and dismiss cases, Complainant and Respondent will not receive notification letters. Instead, the parties will be sent a copy of the complaint and the Secretary's Findings. The Secretary's Findings will indicate that the case has been

received and docketed, briefly explain the basis for the dismissal, and will include a description of the applicable rights of Complainant to file objections to, or request review of, the dismissal.

### **C. Election Not To Proceed, a.k.a. Withdrawal Before Docketing or Before Notification Letters are Issued**

When Complainant elects not to pursue their complaint before docketing or before OSHA issues notification letters, the investigator will document Complainant's withdrawal request in the case file and administratively close the complaint. Follow administrative closure procedures beginning at [Chapter 3.IV.A.1.a](#) above. The administrative closure letter will indicate Complainant did not wish to pursue the case.

## **V. Referral of Section 11(c) Complainants to the NLRB**

If an employee files a section 11(c) complaint with OSHA and the safety or health activity appears to have been undertaken in concert with or on behalf of co-workers, including, but not limited to, the filing of a grievance under a collective bargaining agreement, the following procedures will be followed:<sup>15</sup>

- A. If the complaint is timely, OSHA shall inform the employee of the additional right to file a charge with the NLRB, as well as provide contact information for the appropriate NLRB Regional Office. OSHA shall notify the appropriate NLRB Regional Director or their designee in writing that it has informed an employee of their NLRB rights and provide the names and contact information of the employee and the employer. If the employee subsequently files a charge with the NLRB, the Regional Director will inform the ARA in the appropriate OSHA Regional Office of this filing and of significant developments in the case.
- B. If the complaint is untimely, OSHA will advise Complainant that they may file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than OSHA's (30 days). OSHA, therefore, will recommend that Complainant contact the NLRB as soon as possible to discuss their rights. OSHA personnel should then give Complainant the contact information for the appropriate NLRB Field Office.

In both situations, OSHA should also provide Complainant the NLRB's toll-free number, 1-844-762-NLRB (1-844-762-6572). Closing letters for administratively closed complaints will also include information regarding contacting the NLRB.

## **VI. Referral of Substantive Complaints to the Partner Agencies and the United States Postal Service (USPS) OIG**

OSHA personnel generally should advise Complainants who have filed, or attempted to file, a complaint under a statute other than section 11(c) that they may wish to contact the appropriate partner agency to report the underlying safety and health hazards, or other regulatory violations, if Complainant has not already done so.

USPS employees should be informed that they may wish to contact the USPS Office of the Inspector General about safety or health hazards. Docketing notification letters and closing

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<sup>15</sup> As required by the [Memorandum of Understanding between The NLRB and OSHA](#) (Jan. 12, 2017).

letters for administratively closed complaints should also include information regarding contacting the USPS OIG.

## VII. Docketing

The term “to docket” means to open a case for an investigation, document the case as an open investigation in OITSS-Whistleblower, and formally notify both parties in writing of OSHA’s receipt of the complaint and intent to investigate. Alternatively, a case will be docketed and dismissed if, for example, it is untimely or lacks coverage or a prima facie allegation and Complainant does not consent to administrative closure of the complaint. See Chapter [3.IV.A.1.b.ii – iii](#), and [3.IV.B](#), *Docket and Dismiss*, above.

The appropriate case file identification format for electronic case files is “*Local Case Number[space]Respondent[space] –[space]Complainant.*”<sup>16</sup> The appropriate case identification format in correspondence is “*Respondent/Complainant/Local Case Number.*”

OITSS-Whistleblower automatically designates the case number when a new complaint is entered into the system. All case numbers follow the 1-2222-33-444 format, where each series of numbers designates the following:

- The number for the Region in which the investigator is located (Region 10 is 0);
- The four-digit area office city number;
- The fiscal year; and
- The serial number of the complaint for the area office and fiscal year.

This case numbering format applies only to federal records.

Cases involving multiple Complainants will be docketed under separate case numbers.

Cases involving multiple Respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.

## VIII. Named Respondents

All relevant employers should be named as Respondents in all docketed cases for all statutes unless Complainant refuses. This includes contractors, subcontractors, host employers, and relevant staffing agencies, as well as individual company officials as discussed below. Failing to name a Respondent may create confusion regarding whether Complainant has properly exhausted administrative remedies which could impede future settlement of the case, impede relevant interviews, or unnecessarily delay or prevent Complainant from obtaining reinstatement and other remedies. For more information on temporary workers and host employers, see Memorandum, [Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers](#), issued May 11, 2016 and OSHA’s [Protecting Temporary Workers](#) webpage for further information.

Under some statutes, including section 11(c), AHERA, ISCA, STAA, SPA, SOX, FRSA, and NTSSA, an individual company official who carries out the retaliatory adverse action may be

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<sup>16</sup> See OSHA Instruction [CPL 02-03-009](#), Electronic Case File System Procedures for the Whistleblower Protection Program, June 18, 2020, for more information.

liable if they have the authority to hire, transfer, promote, reprimand, or discharge Complainant. *Anderson v. Timex Logistics*, 2014 WL 1758319 (ARB 2014). Additional information regarding individual liability under each whistleblower statute is available in the relevant statute-specific desk aid.

## **IX. Notification Letters**

### **A. Complainant**

As part of the requisite docketing procedures when a case is opened for investigation, a notification letter will be sent notifying Complainant of the complaint's case number and the assigned investigator. The contact information of an investigator will be included in the docketing letter. The letter will also request that the parties provide each other with a copy of all submissions they make to OSHA related to the complaint. The letter packet will include at minimum:

- A copy of the whistleblower complaint, supplemented as appropriate by a summary of allegations added during the screening interview.
- A Designation of Representative Form to allow Complainant the option of designating an attorney or other official representative.
- Information on ADR, including the ADR Request Form, if ADR is available and appropriate.
- For administrative-statute cases, information on expedited case processing.
- If the case is under a statute which allows kick-out, information on kick-out procedures.

Complainant will be notified using a method that permits OSHA to confirm receipt. This includes, but is not limited to: email or U.S. mail, delivery confirmation required, or hand delivery.

### **B. Respondent**

At the time of docketing, or as soon as appropriate if an inspection is pending, a notification letter will be sent notifying Respondent(s) that a complaint alleging unlawful retaliation has been filed by Complainant and requesting that Respondent submit a written position statement.

The letter will notify the Respondent(s) to retain and maintain all records, documents, e-mail, correspondence, memoranda, reports, notes, video, and all other evidence relating to the case.

The letter will also request that the parties provide each other with a copy of all submissions they make to OSHA related to the complaint. The letter packet will include at minimum:

- A copy of the whistleblower complaint, redacted as appropriate and supplemented as appropriate by a summary of allegations added during the screening interview.
- A Designation of Representative Form to allow Respondent the option of designating an attorney or other official representative.

- Information on ADR, including the ADR Request Form, if ADR is available and appropriate.

Respondent will be notified using a method that permits OSHA to confirm receipt. This includes, but is not limited to: email or U.S. mail, delivery confirmation required, or hand delivery.

Prior to sending the notification letter, the supervisor should determine whether it appears from the complaint and/or the initial contact with Complainant that an inspection/investigation may be pending with an OSHA Area Office or with a federal partner agency. If it appears that an inspection/investigation may be pending, the supervisor or investigator should contact the appropriate office/agency to inquire about the status of the inspection or investigation. If a delay is requested, then the notification letter should not be issued until such inspection/investigation has commenced in order to avoid giving advance notice of a potential inspection/investigation.

### **C. Partner Agencies**

Informational copies of all docketed complaints, findings, and orders must be sent to the relevant partner agency(s) (e.g., AIR21 cases to the FAA). Copies of complaints are to be sent to each relevant partner agency no later than the date that notification letters are sent to the parties. Copies of the case closure documentation are to be sent to each relevant partner agency on the same day that the documentation is sent to the parties. Please see [Chapter 3.IV.A.4, \*Partner Agencies\*](#), regarding whether to forward an administratively closed complaint to any relevant partner agencies.

## **X. Early Resolution**

OSHA will work to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact Respondent soon after completing the intake interview and docketing the complaint if they believe an early resolution may be possible. However, the investigator must first determine whether a safety/health inspection is pending with OSHA. The investigator must wait until the commencement of the safety and health inspection (or partner agency inspection) before contacting Respondent.

## **XI. Geographical Coverage**

The following guidelines are not hard and fast rules. As long as the statute applies, there is no geographical restriction on the authority of an OSHA Regional Office to investigate a case. The purpose of these guidelines is to assign a case to the Region in which most of the witnesses and documents would probably be located and to ensure that the case is assigned for investigation to an OSHA Regional Office that regularly works with the Regional Solicitor's Office that is authorized to file suit in the appropriate federal district court if the case proceeds to federal court litigation.

In general, a case will be assigned to the Region with geographical coverage over Complainant's assigned work station. However, if Complainant conducted all or most of the relevant work activities remotely (for instance, Complainant's work was 100 percent telework) so that few relevant witnesses are located in the Complainant's region, the investigators in the Region where the decision maker works will be assigned to investigate.

For STAA cases, the Complainant's work station will be considered to be Complainant's home terminal. This instruction applies whether Complainant is a driver, mechanic, freight handler, dispatcher, or any other employee whose work directly affects commercial motor vehicle safety or security.

For SPA cases, the Complainant's work station will be considered to be where the headquarters of Complainant's shipping line is located. However, if the headquarters is located outside of the United States or its territories, the Region in which the Complainant resides should be assigned to investigate the case. If neither the headquarters of the shipping line nor Complainant's residence are in the United States or its territories, the Region in which the SPA complaint was filed should conduct the investigation.

In cases involving temporary worksites, such as construction sites, applying the above rules may not be sufficient to ensure that the proper Region investigates the case. In cases under section 11(c), AHERA, and ISCA involving temporary worksites, the case should be investigated by the Region which covers a State where Respondent may be served with a district court complaint should the case proceed to litigation. Thus, the OSHA Region that includes the Respondent's State of incorporation or the Respondent's principal place of business should investigate the case. For example, if an employee of a construction company engaged in protected activity in State A, but the company's principal place of business is in State B, the investigators located in the Region covering State B should investigate the case.

In general, section 11(c) cases which are referred to State Plan agencies should be referred to the State of the employee's work site at the time of the protected activity. However, exceptions to this general rule may exist and, if questions arise, consult with DWPP.

The supervisor should make the geographical coverage determination as quickly as possible. Investigators should consult with their supervisor when additional guidance is needed, and DWPP or RSOL should be consulted if additional guidance is needed in a particular case.

## **XII. Case Transfer**

If a case file has to be transferred to another investigator, whether within a Region or between regions, the transfer must be documented in the case file and the parties notified. Only supervisors are authorized to transfer case files. Every attempt to limit the number of transfers should be made.

## **XIII. Investigative Assistance**

When assistance from an investigator located in another Region is needed to interview witnesses or obtain evidence, the supervisor will coordinate with the supervisor in the other region. Such assistance will be noted in the Case Activity Log.

## Chapter 4

### CONDUCT OF INVESTIGATION

#### I. Scope

This chapter sets forth the policies and procedures investigators must follow during the course of an investigation. The policies and procedures are designed to ensure that complaints are efficiently investigated and that the investigation is well documented. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. If there is a conflict between the relevant statutes or regulations and the procedures set out in this Chapter, the statutory and/or regulatory provisions take precedence. Investigators should consult with their supervisor when additional guidance is needed.

#### II. General Principles

##### A. Reasonable Balance

The investigative procedures described in this chapter are designed to ensure that a reasonable balance is achieved between the quality and timeliness of investigations. The procedures outlined in this chapter will help investigators complete investigations as expeditiously as possible while ensuring that each investigation meets OSHA's quality standards. **Reasonable balance** is achieved when further evidence is not likely to change the outcome. These procedures reflect the best practices developed across all OSHA regions.

##### B. Investigator as Neutral Party

The investigator should make clear to all parties that DOL does not represent either Complainant or Respondent. Rather, the investigator acts as a neutral party in order to ensure that both the Complainant's allegation(s) and the Respondent's positions are adequately investigated. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination in the case.

##### C. Investigator's Expertise

The investigator, not Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by OSHA. The investigator will review all relevant documents and interview relevant witnesses in order to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of Complainant, Respondent, and witnesses.

#### **D. Reasonable Cause to Believe a Violation Occurred**

For all administrative statute cases, after consulting with RSOL, OSHA will issue merit findings when there is reasonable cause to believe that a violation of the relevant whistleblower statute has occurred.

For district court statute cases, when OSHA believes that there may be reasonable cause to believe that a violation occurred (i.e., the case may be a merit case), OSHA should consult informally with the RSOL in order to ensure that the investigation captures as much relevant information as possible for RSOL to evaluate whether the case is suitable for litigation. See [Chapter 2.IV](#), *Reasonable Cause*, for more information.

#### **E. Supervisor Review is Required**

Supervisory review and approval are required before docketed case files can be closed.

If a supervisor has conducted the investigation, a second OSHA manager must agree that closure is appropriate and the second manager's agreement should be documented in the case file.

### **III. Case File**

Upon assignment, the investigator will begin preparing the investigation's case file. A standard case file contains the complaint and/or the OSHA-87 form or the appropriate regional intake worksheet, all documents received or created during the intake and evaluation process (including screening notes and the assignment memorandum), copies of all required opening letters, and any original evidentiary material initially supplied by Complainant or Respondent. All evidence, records, administrative material, photos, recordings, and notes collected or created during an investigation must be organized and maintained in the case file.

#### **A. File Format**

##### **1. Electronic Case Files**

All Regions are transitioning to electronic case files per the Office of Management and Budget (OMB) directive, dated August 24, 2012, requiring the use of electronic recordkeeping and eliminating paper to the fullest extent possible. See Instruction [CPL 02-03-009](#), *Electronic Case File System Procedures for the Whistleblower Protection Program*, dated June 18, 2020.

##### **2. Paper Case Files**

As noted above, OSHA regions are transitioning to keeping electronic case files as a general rule. As noted in the *Electronic Case File System Procedures* cited above, Regions should encourage both Complainants and Respondents to submit materials in electronic format. Parties are not however, required, to submit materials in electronic format.

When a party submits evidence in paper format, the Region should scan and save the document as a PDF. Once the paper document has been converted to

a PDF, the PDF becomes the official government record, although Regions should retain the paper submissions until the case is closed at the OSHA level.

To the extent a paper file is kept, the file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.

## **B. Documenting the Investigation**

With respect to all activities associated with the investigation of a case, investigators must fully document the case file to support their findings. A well-documented case file assists reviewers of the file. Documentation should be arranged chronologically by date of receipt where feasible.

## **C. Case Activity Log**

All telephone calls made and voice mails received during the course of an investigation, other than those with OSHA Whistleblower personnel, must be accurately documented and notation of calls and voice mails must be typed in the case activity log. If a telephone conversation with one of the parties or witnesses is lengthy and includes a significant amount of pertinent information, the investigator should document the substance of this contact in a “Memo to File” to be included as an exhibit in the case file.

In addition to telephone calls, the case activity log must, at a minimum, note the key steps taken during the investigation. For example, investigative research and interviews conducted, notifications sent, and documents received from the parties should be noted in the activity log.

## **D. Investigative Correspondence**

Templates for complaint notifications, due process letters, Secretary’s Findings, and 10-day contact letters are available on the DWPP intranet page. The templates will be used to the extent possible. Correspondence must be sent (either by mail, third party carrier, or electronic means) in a way that provides delivery confirmation. Delivery receipts will be preserved in the case file. Findings in all cases may be sent by electronic means.

**Correspondence by Email.** Subject lines of emails delivering formal investigative correspondence should be appropriately descriptive (e.g., “Respondent/Complainant/Case Number” or “Respondent/Complainant/Case Number – Notification”). The formal correspondences are sent as letters attached to the emails. These emails should also be new emails, not sent as responses to other emails. Formal investigative correspondence emails must provide delivery confirmation. The original email of any email sent with the delivery confirmation option engaged must be placed in the relevant correspondence folder separately from the delivery confirmation (i.e., do not place in the folder just the delivery confirmation email with the original email attached; any attachments to the original email are lost this way).

## **E. Investigative Research**

It is important that investigators adequately plan for each investigation. The investigator should research whether there are prior or current retaliation and/or safety and health cases related to either Complainant or Respondent. Such information normally will be available from OITSS-Whistleblower, OIS, and the Area Office. Examples of information sought during this investigation may include copies of safety and health complaints filed with OSHA, inspection reports, and citations. Research results must be documented in the case file. When research reveals no relevant results, the investigator must still note in the case activity log the pre-investigation research that was performed (for example, by listing the searches that the investigator did in OITSS-Whistleblower) and that no relevant results were found.

## **IV. Referrals and Notifications**

Allegations of safety and health hazards, or other regulatory violations, will be referred promptly to the appropriate office or agency through established channels. This includes new allegations that arise during witness interviews. Allegations of occupational safety and health hazards covered by the OSH Act, for example, will be referred to the appropriate OSHA Area Director as soon as possible.

### **A. Partner Agencies**

Informational copies of all incoming complaints, determinations, and orders, as well as notification of all other case closure actions, will be sent to the relevant partner agency(s) (e.g., AIR21 cases to the FAA) promptly.

### **B. Coordination with Other Agencies**

If information received during the investigation indicates that Complainant has filed a concurrent retaliation complaint, safety and health complaint, or any other complaint with another government agency, the investigator should consider whether to request from Complainant any other agency investigative documents or information regarding contact persons and should consider contacting such agency to determine the nature, status, and results of that complaint. This coordination may result in the discovery of valuable information pertinent to the whistleblower complaint, and may, in certain cases, preclude unnecessary duplication of government investigative efforts.

### **C. Other Legal Proceedings**

The investigator should also gather information concerning any other current or pending legal actions that Complainant may have initiated against Respondent(s) related to the protected activity, the adverse action and/or other aspects of Complainant's employment with Respondent, such as lawsuits, arbitrations, and grievances.<sup>17</sup> Obtaining information related to such actions could result in the

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<sup>17</sup> In some circumstances, such as complaints filed with another agency or an action under the False Claims Act that is under seal, the confidentiality of the proceeding may be protected by statute and the investigator may not be able to obtain information about the proceeding.

postponement of the investigation or deferral to the outcome of the other proceedings. See [29 CFR 1977.18](#) and [Chapter 5.XII](#), *Postponement/Deferral*.

## **V. Amended Complaints**

After filing a retaliation complaint with OSHA, Complainant may wish to amend the complaint to add additional allegations and/or additional Respondents. It is OSHA's policy to permit the liberal amendment of complaints, provided that the original complaint was timely, and the investigation has not yet concluded.

### **A. Form of Amendment**

No particular form of amendment is required. A complaint may be amended orally or in writing. OSHA will reduce oral amendments to writing. If Complainant is unable to file the amendment in English, OSHA will accept the amendment in any language.

### **B. Amendments Filed within Statutory Filing Period**

At any time prior to the expiration of the statutory filing period for the original complaint, a complainant may amend the complaint to add additional allegations and/or additional Respondents.

### **C. Amendments Filed After the Statutory Filing Has Expired**

If amendments are received after the limitations period for the original complaint has expired, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional Respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint and the investigation remains open, then it must be accepted as an amendment unless the exception noted in the last sentence of paragraph E below applies. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with the implicated statute.

### **D. Processing of Amended Complaints**

Whenever a complaint is amended, regardless of the nature of the amendment, the Respondent(s) must be notified in writing of the amendment by a method that allows OSHA to confirm delivery and be given an opportunity to respond to the new allegations contained in the amendment. The amendment and notification to Respondent of the amendment must be documented in the case file.

### **E. Amended Complaints Distinguished from New Complaints (i.e., what "reasonably relates")**

The mere fact that the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean that new allegations should be considered an amendment. If the alleged retaliation involves a new or separate adverse action that is unrelated to the active investigation, then the complaint may be docketed with its own unique case number and processed as a new case. A new allegation should also be docketed as a new complaint when an amendment to the original complaint would unduly delay a determination of the original complaint.

## **F. Deceased Complainant**

If Complainant passes away during the OSHA investigation, OSHA should consult Complainant's designated representative or a family member to determine whether Complainant's estate will continue to pursue the retaliation claim. In such circumstances, Complainant's estate will be automatically substituted for Complainant. OSHA should consult with RSOL regarding potential remedies and other pertinent issues as needed in these circumstances.

## **VI. Lack of Cooperation/Unresponsiveness**

Complaints may be dismissed for Lack of Cooperation (LOC) on the part of Complainant. These circumstances may include, but are not limited to, Complainant's:

- Failure to be reasonably available for an interview;
- Failure to respond to repeated correspondence or telephone calls from OSHA
- Failure to attend scheduled meetings; and
- Other conduct making it impossible for OSHA to continue the investigation, such as excessive requests for extending deadlines.
- **Harassment, inappropriate behavior, or threats of violence** may also justify dismissal for LOC.
- When Complainant fails to provide requested documents in Complainant's possession or a reasonable explanation for not providing such documents, OSHA may draw an adverse inference against Complainant based on this failure unless the documents may be acquired from Respondent. If the documents cannot be acquired from Respondent, then Complainant's failure to provide requested documents or a reasonable explanation for not doing so may be included as a consideration with the factors listed above when considering whether a case should be dismissed for LOC.

### **A. Dismissal Procedures for Lack of Cooperation/Unresponsiveness**

In situations where an investigator is having difficulty locating Complainant following the docketing of the complaint to initiate or continue the investigation, the following steps must be taken:

1. Telephone Complainant during normal work hours and contact Complainant by email. Notify Complainant that they are expected to respond within 48 hours of receiving this phone message or email.
2. If Complainant fails to contact the investigator within 48 hours, OSHA will notify Complainant in writing that it has unsuccessfully attempted to contact Complainant to obtain information needed for the investigation and that Complainant must contact the investigator within 10 days of delivery of the correspondence. Complainant will be notified using a method that permits OSHA to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. The notification will specify direct contact information for the Regional Office or the investigator including: mailing

address, telephone number, and email address. If no response is received within 10 days, the supervisor may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the communication must be preserved in the file.

3. Complainant has an obligation to provide OSHA with all available methods of contact, including a working telephone number, email address, or mailing address of record. Complainant also has an obligation to update OSHA when contact information changes. OSHA may dismiss a complaint for lack of cooperation if OSHA is unable to contact Complainant due to the absence of up-to-date contact information.
4. Consistent with the applicable regulations, when OSHA dismisses a case for lack of cooperation, an abbreviated Secretary's Findings letter, with an explanation of the right to request review by DWPP (district court statutes) or file an objection with the DOL OALJ (ALJ statutes), will be provided to the Complainant. Unless an objection has been filed with the DOL OALJ (under statutes providing for ALJ hearings), OSHA has discretion to reopen the investigation within 30 days of delivery of the dismissal letter to Complainant if Complainant contacts OSHA, indicates a desire to pursue the case, and provides a reasonable explanation for the failure to maintain contact with OSHA.<sup>18</sup>

## **VII. On-site Investigation, Telephonic and Recorded Interviews**

At the beginning of all interviews, the investigator will inform the interviewee in a tactful and professional manner that 18 USC §1001 make it a criminal offense to knowingly make a false statement or misrepresentation to a government representative during the course of the investigation. If the interview is recorded electronically, this notification and the interviewee's acknowledgement must be on the recording.

Respondent's designated representative generally has the right to be present for all interviews with currently employed managers, but interviews of non-management employees are to be conducted in private.<sup>19</sup> The witness may request that an attorney or other personal representative be present at any time and, if the witness does so, the investigator should obtain a signed "Designation of Representative" form and include it in the case file. Witness statements and evidence may be obtained by telephone, mail, or electronically.

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<sup>18</sup> See, e.g., 29 CFR 1978.111(b) (providing under STAA that OSHA "may withdraw the findings . . . at any time before the expiration of the 30-day objection period . . . provided that no objection has been filed yet"); 29 CFR 1979.111(b) (same under AIR21); 29 CFR 1980.111(b) (same under SOX); 29 CFR 1982.111(b) (same under FRSA and NTSSA).

<sup>19</sup> OSHA's regulations provide that "[i]nvestigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant. . . ." See, e.g., 29 CFR 1978.104(d) (STAA); 29 CFR 1979.104(d) (AIR21); 29 CFR 1980.104(d) (SOX); 29 CFR 1982.104(d) (FRSA and NTSSA). Thus, OSHA will interview a managerial employee in private if the managerial employee requests confidentiality.

If an interview is recorded electronically, the investigator must be a party to the conversation, and it is OSHA's policy to have the witness acknowledge at the beginning of the recording that the witness understands that the interview is being recorded. At the RA's discretion, in consultation with RSOL, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and must be included in the case file.

### **VIII. Confidentiality**

The informer privilege allows the government to withhold the identity of individuals who provide information about violations of laws, including retaliation in violation of OSHA's whistleblower statutes. The informer privilege also protects the contents of witness statements to the extent that disclosure would reveal the witness's identity.

When interviewing a witness (other than Complainant and current management officials representing Respondent), the investigator should inform the witness that their identity will remain confidential to the extent permitted by law. This pledge of confidentiality should be clearly noted in any interview statement, memo to file, or other documentation of the interview and should be included in any audio recording of the interview. The investigator also should explain to the witness that the witness's identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the existence and content of the interview may need to be disclosed. Indeed, a court or ALJ may require the disclosure of the names of witnesses at or near trial. Furthermore, the witness should be advised that their identity might be disclosed to another federal agency, under a pledge of confidentiality from that agency.

Under OSHA's whistleblower statutes, any witness (other than the Complainant) may provide information to OSHA confidentially. *See e.g.*, OSH Act section 8(a)(2), 29 U.S.C. 657(a)(2); 29 C.F.R. 1978.104(d)(STAA); 29 C.F.R. 1980.104(d) (SOX). There may be circumstances where there is reason to interview current management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the above procedures for handling confidential witness interviews should be followed.

### **IX. Complainant Interview and Contact**

The investigator must attempt to interview Complainant in all docketed cases. This interview may be conducted as part of the screening process. If a full Complainant interview is not conducted as part of the complaint screening process, OSHA will endeavor to interview Complainant within 30 days of receiving Respondent's position statement or two months of the docketing of the complaint, whichever is sooner. It is highly desirable to record the Complainant interview (if Complainant agrees) or obtain a signed interview statement from Complainant during the interview. Complainant may have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "Designation of Representative" form.

The investigator must attempt to obtain from Complainant all documentation legally in their possession that is relevant to the case. Relevant records may include:

- Copies of any termination notices, reprimands, warnings, or other personnel actions
- Performance appraisals
- Earnings and benefits statements
- Grievances
- Unemployment or worker's compensation benefits, claims, and determinations
- Job position descriptions
- Company employee policy handbooks
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Emails, voice mails, phone records, texts, and other relevant correspondence related to Complainant's employment, as well as relevant social media posts.
- Medical records. Most often medical records should not be obtained until it is determined that those records are needed to proceed with the investigation. Because medical records require special handling, investigators must familiarize themselves with the requirements of OSHA Instruction [CPL 02-02-072](#), *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records* (or its successor), and [29 CFR 1913.10](#), *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*. See [Chapter 4.XVIII.D](#), *Medical Records – Handling and Storage of Medical Records in Whistleblower Case Files*, below for more information on the handling of medical records.

The relief sought by Complainant should be determined during the interview. If discharged or laid off by Respondent, Complainant should be advised of their obligation to seek other employment (a.k.a. "mitigate," see [Chapter 6.IV.D](#), *Mitigation Considerations*), and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which Complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. Complainant should be advised that Respondent's back pay liability ordinarily ceases only when Complainant refuses a bona fide, unconditional offer of reinstatement. See [Chapter 6.IV.A](#), *Lost Wages*.

The Investigator must also inform Complainant that Complainant must preserve all records that relate to the whistleblower complaint, such as documents, emails, texts (including preserving texts, photographs, and other documentation from a prior cell phone if Complainant replaces it), photographs, social media posts, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies Complainant seeks. Thus, for instance, Complainant should retain documentation supporting Complainant's compensation with Respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting from the adverse action,

such as medical bills, pension plan losses and fees, repossessed property, moving or job search expenses, etc.

After obtaining Respondent's position statement, the investigator will contact Complainant to conduct a rebuttal interview to resolve any discrepancies between Complainant's allegations and Respondent's defenses. In cases where the investigator has already conducted the complainant interview, the Complainant may decide to submit a written rebuttal in lieu of the rebuttal interview.

## **X. Contact with Respondent**

- A. In many cases, following receipt of OSHA's notification letter, Respondent forwards a written position statement, which may or may not include supporting documentation. The investigator should not rely on assertions in Respondent's position statement unless they are supported by evidence or are undisputed. Even if the position statement is accompanied by supporting documentation, the investigator should still contact Respondent to interview witnesses, review records, and obtain additional documentary evidence to test Respondent's stated defense(s). See [Chapter 2.VII](#), *Testing Respondent's Defense (a.k.a. Pretext Testing)*, for example, for information on pretext testing.

In all circumstances, at a minimum, copies of relevant documents and records should be requested, including disciplinary records if the complaint involves a disciplinary action or the relevant policy where Respondent claims Complainant was terminated or disciplined for violating a policy.

- B. If Respondent requests time to consult legal counsel, the investigator must advise Respondent that future contact in the matter will be through such representative and that this does not alter the 20-day time to respond to the complaint. A reasonable extension to the deadline may be granted, but the investigator must be mindful that for any leeway given to Respondent, substantially equivalent leeway should also be granted to Complainant for the rebuttal if needed. A Designation of Representative form should be completed by Respondent's representative to document Respondent's representative's involvement.

If Respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.

- C. In the absence of a signed Designation of Representative form, the investigator is not bound or limited to making contacts with Respondent through any one individual or other designated representative (e.g., safety director). If a position statement was received from Respondent, the investigator's initial contact should be the person who signed the letter unless otherwise specified in the letter.
- D. The investigator should, in accordance with the reasonable balance standard, interview all relevant Respondent witnesses who can provide information relevant to the case. The investigator should attempt to identify other witnesses at Respondent's facility that may have relevant knowledge. Witnesses must be

interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality.

Witnesses must be advised of their rights regarding protection under the applicable whistleblower statute(s), and advised that they may contact OSHA if they believe that they have been subjected to retaliation because they participated in an OSHA investigation. See also [Chapter 4.XII.B](#), *Early Involvement of the RSOL*.

There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the procedures for handling confidential witness interviews must be followed. See [Chapter 4.VIII](#), *Confidentiality*.

[Section 8\(a\)\(2\)](#) of the OSH Act authorizes whistleblower investigators to question **any employee privately** during regular working hours or at other reasonable times. The purpose of such interviews is to obtain whatever information whistleblower investigators deem necessary or useful in carrying out investigations effectively. Thus, under the OSH Act, OSHA has a statutory right to interview non-management, non-supervisory employees in private.<sup>20</sup>

Under the administrative statutes, OSHA's regulations provide that investigations will be conducted in a manner that preserves the confidentiality of any person who provides information on a confidential basis, other than the complainant.

Thus, under both the district court and the administrative statutes, Respondent's attorney does not have the right to be present, and should not be permitted to be present, during interviews of non-management or non-supervisory employees. If Respondent's attorney insists on being present during interviews of non-management or non-supervisory employees, OSHA should consult with RSOL.

- E. The investigator should make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which Respondent offers and which the investigator believes is relevant to the case.
- F. Per [Chapter 4.III.C](#), *Case Activity Log*, if a telephone conversation with Respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a Memo to File to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the case diary may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

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<sup>20</sup> However, note that under 5 U.S.C. 555(b), a witness appearing pursuant to a subpoena is entitled to be accompanied, represented, and advised by counsel or another qualified representative.

## **XI. Unresponsive/Uncooperative Respondent**

Below is a non-exclusive list of examples of unresponsive or uncooperative Respondents and related procedures.

### **A. Respondent Bankruptcy**

When investigating a Respondent that has filed for bankruptcy, the investigator should promptly consult with their ARA, RSI, and RSOL. Otherwise, complainants and DOL may lose their rights to obtain any remedies.

### **B. Respondent Out-of-Business**

When investigating a Respondent that has gone out of business, the investigator should consult with the ARA, RSI, and RSOL, as appropriate. OSHA should determine whether there are legal grounds to continue the investigation against successors in interest of the original Respondent.

### **C. Uncooperative Respondent**

When conducting an investigation under section 11(c) of the OSH Act, AHERA, or ACA, subpoenas may be obtained for witness interviews or records. See [Chapter 4.XII.A](#) below for procedures for obtaining subpoenas.

When dealing with a nonresponsive or uncooperative Respondent under any statute, it will frequently be appropriate for the investigator, in consultation with the supervisor and/or RSOL, to draft a letter informing Respondent of the possible consequences of failing to provide the requested information in a timely manner. Specifically, Respondent may be advised that its continued failure to cooperate with the investigation may lead OSHA to reach a determination without Respondent's input. Additionally, Respondent may be advised that OSHA may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

### **D. Uncooperative Respondent Representative**

When a Respondent is cooperating with an investigation but their representative is not, the investigator should send a letter or email to both Respondent and the representative requesting them to affirm the designation of representation in the case file. If the designation of representation is not affirmed within **10** business days, the investigator may treat Respondent as unrepresented. OSHA should not decline to accept written information received directly from a represented Respondent.

## **XII. Subpoenas, Document and Interview Requests**

### **A. Subpoenas**

When conducting an investigation under section 11(c) of the OSH Act, AHERA, or ACA, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the RA. OSHA has two types of subpoenas for use in these cases. A Subpoena *Ad Testificandum* is used to obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to

obtain documentary evidence. They can be served on the same party at the same time, and OSHA can require the named party to appear at a designated office for production. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present).

An administrative subpoena can be signed by either the Regional Administrator, or Authorized Area Director, ARA, or RSI to whom the RA in writing has delegated authority to sign subpoenas.

The subpoena must contain language mandating a reasonable timeframe for the witness to comply, identify the statutory provision(s)<sup>21</sup> under which the subpoena is issued, use broad language for requests, and identify the investigator responsible for delivery and completion of the service form. Before issuing a subpoena, OSHA should consult with RSOL regarding the appropriate time frames and language. If the witness decides to cooperate, the supervisor can choose to lift the subpoena requirements.

A designated representative may accept service of the subpoena. If the designated representative has not accepted service of the subpoena, the subpoena will be served to the party named by personal service. Leaving a copy at a place of business or residence is not personal service. In exceptional circumstances, service may be by certified mail with return receipt requested. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

OSHA shall pay witnesses the same fees and mileage that are paid witnesses in United States courts. 29 U.S.C. § 657(b) (for section 11(c) and AHERA, which refers to section 11(c)); 15 U.S.C. § 49 (for ACA) (referenced in 29 U.S.C. § 209, a provision of the Fair Labor Standards Act, of which the ACA whistleblower provision is a part). The witness fees and mileage to which these provisions refer are set forth in 28 U.S.C. § 1821. OSHA should consult with RSOL as needed on the calculation of witness fees.

If the witness fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the supervisor regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The other option is to request that RSOL enforce the subpoena in federal district court.

## **B. Early Involvement of the RSOL**

In general, OSHA should consult RSOL as early as possible in the investigative process for all instances where OSHA believes that there is a potential that the case will be referred for litigation, that OSHA will issue merit findings, or that RSOL may otherwise be of assistance. For example, RSOL may be of assistance in cases

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<sup>21</sup> If the investigation is conducted under a statute which authorizes subpoenas and under statute(s) which do not authorize subpoenas, the information requested must be limited to information relating to the whistleblower claim under the statute authorizing the subpoena.

where settlement discussions reach an impasse, where assistance is needed to determine the appropriate remedy (see [Chapter 6, Remedies](#)), or where a case presents a novel question of statutory coverage or protected activity. When OSHA has reasonable cause to believe that a violation occurred, OSHA should consult informally with RSOL, if it has not already done so. Consulting early with RSOL is particularly important in cases that OSHA anticipates referring to RSOL for litigation as early consultation helps to ensure that the investigation captures as much relevant information as possible so that RSOL can evaluate whether the case is suitable for litigation.

### **C. Further Interviews and Documentation**

It is the investigator's responsibility, in consultation with the supervisor, to determine and pursue all appropriate investigative leads deemed pertinent to the investigation with respect to Complainant's and Respondent's positions. Contact must be made whenever possible with relevant witnesses, and reasonable attempts must be made to gather pertinent data and materials from available sources.

The investigator must document all telephone conversations with witnesses or party representatives in the case activity log and, if the conversation is substantive, in a Memo to File. (See [Chapter 9](#) on handling requests for disclosure of case activity logs and Memos to File.)

## **XIII. Party Representation at Witness Interviews**

Respondent and Complainant do not generally have the right to have a representative present during the interview of a non-managerial employee. Where either party is attempting to interfere with the rights of witnesses to request confidentiality, investigators should coordinate with their RSI, ARA, and RSOL and insist on private interviews of non-management witnesses. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and personal telephone numbers and contact these witnesses later, outside of the workplace.

## **XIV. Records Collection**

The investigator must attempt to obtain copies of appropriate records, including pertinent documentary materials as required. Such records may include safety and health inspections, or records of inspections conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be produced later during proceedings.

## **XV. Resolve Discrepancies**

After obtaining Respondent's position statement, the investigator will contact Complainant to conduct a rebuttal interview and will contact other witnesses as necessary to resolve any relevant discrepancies between Complainant's allegations and Respondent's defenses.

## **XVI. Analysis**

After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions to support a recommended outcome based on the evidence and the law using the guidance given in [Chapter 2](#) and in accordance with the requirements of the statute(s) under which the complaint was filed.

## **XVII. Closing Conference**

Upon completion of the field investigation and after discussion of the case with the supervisor, the investigator will conduct a closing conference with Complainant (in cases in which OSHA anticipates issuing non-merit findings) or Respondent (in administrative cases in which OSHA anticipates issuing merit findings).<sup>22</sup> The closing conference may be conducted in person, by telephone, or via videoconference, depending on the circumstances of the case. In addition, depending on the case's investigative stage, the closing conference may be conducted in conjunction with the rebuttal interview, if warranted.

- A. During the closing conference, the investigator will provide a brief verbal summary of the recommendation and basis for the recommendation.
- B. It is unnecessary and improper to reveal the identity of witnesses interviewed. Complainant (or Respondent) should be advised that OSHA does not normally reveal the identity of witnesses, especially if they requested confidentiality.
- C. Although OSHA anticipates that in most cases no new evidence or argument will be raised in the closing conference, if Complainant (or Respondent) attempts to offer any new evidence, argument, or witnesses, this information should be discussed as appropriate to ascertain whether it is relevant; might change the recommended determination; and, if so, what further investigation might be necessary prior to the issuance of findings.
- D. During the closing conference, the investigator must inform Complainant/Respondent of his/her rights to object and request a hearing before an ALJ in administrative statute cases or request review in district court statute cases, as well as the time limitation for filing the objection or request for review.
- E. The investigator should also advise Complainant (or Respondent) that the decision at this stage is a recommendation subject to review and approval by higher management.
- F. Where OSHA anticipates issuing merit findings, the closing conference may be used to explore the possibility of settlement with Respondent.
- G. Where Complainant (or Respondent) cannot be reached despite OSHA's reasonable attempts to conduct a closing conference, OSHA will document its attempts to reach Complainant/Respondent in the file and proceed to issue Secretary's Findings. Reasonable attempts include attempting to contact

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<sup>22</sup> In section 11(c), AHERA, and ISCA cases referred to RSOL where RSOL plans to file suit, any post-investigation contact with Respondent and Complainant will generally be made by RSOL.

Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information, and allowing Complainant 48 hours to respond. In the case of phone calls, at least two attempts should be made at different hours of the day during allowed work-band hours. OSHA's attempts to contact Complainant must be documented in the case file.

- H. If Complainant becomes combative during the course of the closing conference, the investigator may end the conference. The investigator will document their attempt to hold a closing conference in the file and proceed to issue Secretary's Findings. Combativeness is not the simple questioning of the evidence and OSHA's determination. Combativeness includes cursing the investigator and making threats.

## **XVIII. Document Handling and Requests**

### **A. Requests to Return Documents Upon Completion of the Case**

All documents received by OSHA from the parties during the course of an investigation become part of the case file and will not be returned. At the beginning of the investigation it is important to tell Complainants to keep originals of their documents because any documents they provide will not be returned. Encourage Complainant to only submit OSHA-requested documents as well as those documents they believe OSHA should consider.

### **B. Documents Containing Confidential Information**

If Complainant or Respondent submits documents containing confidential information, such as confidential business information of Respondent or information that reveals private information about employees other than Complainant, OSHA must mark that information appropriately in the file, take care to avoid inadvertent disclosure of the information, and follow the procedures in [Chapter 9](#) for evaluating whether the information may be disclosed either to the other party (under OSHA's non-public disclosure policy) or in response to a FOIA request.

### **C. Witness Confidentiality**

Confidential witness statement must be clearly marked as "Confidential Witness Statement" in the file.

### **D. Medical Records – Handling and Storage of Medical Records in Whistleblower Case Files**

Ensure that medical records are handled in keeping with OSHA Instruction CPL 02-02-072, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records (or its successor), and 29 CFR 1913.10, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records. These instructions provide guidance to OSHA personnel when accessing personally identifiable employee medical records.

In rare instances where a case file includes medical information, the medical information must be password protected. If stored on external media, the records must be encrypted and kept in a secure manner. See OSHA Instruction [CPL 02-03-009](#), *Electronic Case File (ECF) System Procedures for the Whistleblower Protection Program*.

## Chapter 5

### CASE DISPOSITION

#### I. Scope

This chapter sets forth the policies and procedures for arriving at a determination on the merits of a whistleblower case; policies regarding withdrawal, dismissal, postponement, deferrals, reviews, and litigation; and agency tracking procedures for timely completion of cases.

These policies and procedures are designed to ensure that OSHA arrives at the appropriate determination for each whistleblower complaint by achieving a **reasonable balance** between an investigation's timeliness and quality. Attention to the proper balance between quality and timeliness will ensure that each investigation receives the appropriate level of supervisory review, and that a final determination is reached as expeditiously as possible while ensuring that each investigation meets OSHA's standards for quality and thoroughness. These procedures reflect the best practices developed by OSHA regions.

#### II. Review of Investigative File and Consultation Between the Investigator and Supervisor

During the investigation, the investigator must regularly review the file to ensure all pertinent information is considered. The investigator will keep the supervisor apprised of the progress of the case, as well as any novel issues encountered. The supervisor will advise the investigator regarding any unresolved issues and assist in reaching a recommended determination and deciding whether additional investigation is necessary.

#### III. Report of Investigation

Except as provided below, the investigator must report the results of the investigation in a Report of Investigation (ROI). The ROI is OSHA's internal summary of the investigation written as a memo from the investigator to the supervisor.

The first page of the ROI must note the names and titles of the investigator and the reviewing supervisor, and the OSHA whistleblower statute(s) implicated by the complaint. It must also list the parties' and their representatives' (if any) names, addresses, phone numbers, fax numbers, and email addresses, and nothing else. The remainder of the ROI must follow the policies and format described below.

The ROI must contain the elements listed below in [Chapter 5.III.B](#), *Elements of the ROI*, that are relevant to the case, as well as a chronology of events. It may also include, as needed, a witness log and any other information required by the Regional Administrator. The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate supervisory review of the case file. The citations must note the page number of the exhibit. Using abbreviations for the citations, which should be explained, is helpful to reduce writing time. If a witness log is included in the ROI, any witnesses who were suggested by the Complainant or Respondent but who OSHA

did not interview should be identified with contact information (if it exists) and the reason for not interviewing.

The ROI must be signed by the investigator. It must be reviewed and approved in writing by the supervisor before the findings are issued.

#### A. No ROI Required

Complaints that result in a settlement, withdrawal, kick-out, dismissal due to expedited case processing, or dismissal for lack of cooperation/unresponsiveness will require only an entry into the OITSS-Whistleblower database (or a successor database) in lieu of a Report of Investigation. The notation in the OITSS-Whistleblower case comment section must contain the reasons why the case is being closed and reference any supporting documents (i.e., exhibits). Upon closing the case, the OITSS-Whistleblower Case Summary will be added to the case file. The issuance of a signed determination letter in these case disposition types signifies supervisory approval.

#### B. Elements of the ROI

The ROI must include a chronology of the **relevant** events of the case and, **as applicable**,<sup>23</sup> analysis of the following issues:

##### 1. Coverage

Give a brief statement of the basis for coverage. This statement includes information about Respondent and Complainant relevant to the implicated statutes, including, in section 11(c) and STAA cases, how interstate commerce is affected. Delineate the information that brings the case under the applicable statute(s) (e.g. in STAA cases: gross vehicle weight or weight rating). Also explain the coverage of Complainant (e.g., in SPA cases whether Complainant is a seaman). If coverage was disputed, this is where OSHA's determination on the issue should be addressed. **If it is determined that there is no coverage, then no further discussion of the elements is required in the ROI.** In addition, this section should note the location of the company and the nature of the business, if not already addressed.

##### 2. Timeliness

Indicate the actual date that the complaint was filed and whether or not the filing was timely under the relevant statute(s), including any equitable tolling. **If it is determined that the complaint is untimely, then no further discussion of the elements is required in the ROI.**

##### 3. The Elements of a Violation

Discuss and evaluate the facts as they relate to the four elements of a

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<sup>23</sup> For example, if no protected activity is found after analysis of Complainant's alleged protected activity, the investigator may proceed to the recommended disposition and need not analyze the remaining elements of the case (knowledge, adverse action, and nexus).

violation, following [Chapter 2.V](#), *Elements of a Violation*, and [2.VI](#), *Causation Standards*.

- a. Protected Activity
- b. Respondent Knowledge or Suspicion
- c. Adverse Action
- d. Nexus

If there is conflicting evidence about a relevant matter, the investigator must make a determination and explain the reasoning supporting the conclusion.

#### 4. **Employer Defense/Affirmative Defense and Pretext Testing**

Respondent must produce evidence to rebut Complainant's allegations of retaliation in order for a case to be dismissed for lack of nexus. For example, if Respondent alleges that it discharged Complainant for excessive absenteeism, misconduct, or poor performance, Respondent must provide evidence to support its defense. The investigator must analyze such evidence in the ROI and explain the reasoning supporting the investigator's conclusion.

Below is an example of a pretext evaluation (with pretext found), placed in the *Nexus* analysis section of the ROI:

*Respondent claimed that Complainant was laid off to conform with the CBA provision that required seven journeymen on the job before hiring a second apprentice. However, interviews and Respondent's employee roster revealed that this provision in the CBA was routinely disregarded and that second apprentices had been hired on several occasions in recent years, even with less than seven journeymen present. Therefore, Respondent's defense is not believable and is a pretext for retaliation.*

An example where pretext is not found is:

*Respondent claimed that Complainant was laid off to conform with the CBA provision that required seven journeymen on the job before hiring a second apprentice. Interviews and Respondent's employee roster revealed that this provision in the CBA was routinely followed. Therefore, Respondent's reason for laying off Complainant is not pretext; it laid Complainant off for this legitimate business reason.*

#### 5. **Remedy**

In merit cases, this section should describe all appropriate relief due to Complainant, consistent with the guidance for determining and documenting remedies in Chapter 6. Any remedy that will continue to accrue until payment, such as back wages, insurance premiums, and other remedies that continue to accrue should be stated as a formula when practical; that is, amounts per unit of time, so that the proper amount to be paid to Complainant is calculable as of the date of payment. For example, "Back wages in the amount of \$13.90 per hour, for 40 hours per week, from January 2, 2007 through the date of payment, less the customary deductions, must be paid by

Respondent.”

**6. Recommended Disposition**

The investigator will put the recommendation for the disposition of the case and reason for it here. The ROI must include the recommended disposition.

**7. Other Relevant Information**

Any novel legal or other unusual issues, information about related complaints, the investigator’s assessment of a proposed settlement agreement, or any other relevant consideration(s) in the case may be addressed here.

For instance, if the investigator is recommending that OSHA defer to another proceeding, discussion of the other proceeding and why deferral is appropriate should be contained in this section of the ROI.

Elements of a ROI	
Standard first page:	
1) Names & titles of investigator and reviewing supervisor 2) Implicated Act(s) 3) Parties’ and their representatives’ (if any) full contact information	
Chronology with citations to evidence (Fact/Assertion notation optional)	
Analysis of: (as applicable)	
	Coverage. If coverage found, then: (write-up can be same as Findings)
	Timeliness. If timely, then: (write-up can be same as Findings)
	Elements of violation, as applicable:
	Protected activity
	Respondent’s knowledge
	Adverse action
	Nexus
If all elements are found, then:	
Respondent’s defense/pretext testing	
Remedy, only if merit has been found.	
Recommended disposition	
Other relevant information, if any.	
Signatures of investigator and reviewing supervisor	

## **IV. Case Review and Approval by the Supervisor**

### **A. Review**

The investigator will notify the supervisor when the completed case file, including, if applicable, the ROI and draft Secretary's Findings or other draft case closing documents (such as approvals of withdrawal requests, settlements, and "kick-out" actions), is ready for review on the shared drive. The supervisor will review the file to ensure technical accuracy, the thoroughness and adequacy of the investigation, the correct application of law to the facts, and completeness of the Secretary's Findings or other closure letter. Such a review will be completed as soon as practicable after receipt of the file.

### **B. Approval**

If the supervisor determines that appropriate issues have been explored and concurs with the analysis and recommendation of the investigator, the supervisor will sign on the signature block on the last page of the ROI and record the date the review was completed. If the supervisor does not concur with the analysis and recommendation of the investigator, the supervisor will make a note on the Case Activity Log of the reason for non-concurrence and return the case file to the investigator for additional work. The supervisor's signature on the ROI serves as initial approval of the recommended determination. Depending on the RA's policy and procedures, the supervisor's approval may be the final approval in most cases. The ARA's review of the case file and final approval is required for all merit and novel cases. Cases in which the ARA is providing final approval will be reviewed by the ARA once the supervisor approves the ROI and draft Secretary's Findings or other case closing documents, and notifies the ARA that the case is ready for review.

## **V. Case Closing Alternatives**

Docketed whistleblower cases may be resolved by a variety of means. Completed whistleblower investigations will be resolved through one of the following:

1. A referral to RSOL for litigation (in cases under section 11(c), AHERA and ISCA where OSHA, working with RSOL, has reasonable cause to believe that unlawful retaliation has occurred and the case is appropriate for litigation), or
2. The issuance of Secretary's Findings in merit cases under the administrative statutes and non-merit cases under all statutes.
  - a. Additionally, under the administrative statutes, complainants may request expedited case processing as described in [Chapter 5.VII.F, Requests for Expedited Case Processing in Administrative Cases](#).
3. Several administrative statutes also contain "kick-out" provisions. Under these provisions, Complainant may file suit in federal district court if the Secretary of Labor has not issued a final decision in the case and a certain number of days specified in the relevant whistleblower statute have passed since the filing of the whistleblower complaint with OSHA. See [Chapter 5.XIII, Kick-Out to Federal District Court](#).

4. Complainants may also request to withdraw their whistleblower claims at any point in the investigation. See [Chapter 5.X, Withdrawal](#).
5. OSHA may close a case due to a settlement. See [Chapter 5.XI, Settlement](#).
6. OSHA may determine that a deferral to the results of another proceeding is appropriate under the circumstances. OSHA will issue findings noting the deferral in these circumstances. See [Chapter 5.XII.B, Deferral](#).

Each case disposition option, along with the applicable procedures, is discussed below.

## **VI. Cases Under District Court Statutes (Section 11(c), AHERA, and ISCA)**

### **A. Recommendation to Litigate**

Where OSHA believes that a case is meritorious under section 11(c), AHERA, or ISCA, the case must be forwarded to RSOL for review. The RA (or designee) and other OSHA staff will work with RSOL prior to and after the referral, so that the case may be fully reviewed for legal sufficiency prior to filing a complaint in district court.

If RSOL approves a section 11(c), AHERA, or ISCA case for litigation and obtains the permission of the DOJ, RSOL generally litigates the case on behalf of the Secretary in federal district court. For merit cases under these statutes, the district court complaint filed by RSOL constitutes the Secretary's Findings. RSOL ordinarily will send a copy of the filed district court complaint to Complainant.

If RSOL determines that additional investigation is required prior to approving a case for litigation, the supervisor normally will assign such further investigation to the original investigator.

If RSOL or DOJ determines that a section 11(c), AHERA, or ISCA case is not suitable for litigation, Secretary's Findings will be issued dismissing the case and Complainant will be notified of the right to request review.

### **B. Dismissals Under District Court Statutes**

#### **1. Issuance of Non-Merit Secretary's Findings**

For all dismissal determinations, the parties must be notified of the results of the investigation by the issuance of Secretary's Findings addressed to Complainant (or Complainant's counsel if applicable, with a copy to Complainant), and copied to Respondent (and Respondent's counsel if applicable). The Secretary's Findings must advise Complainant of the right to request a review of the determination pursuant to OSHA's long-standing policy to provide complainants with the right to seek review of dismissals under section 11(c), AHERA, and ISCA.

The Secretary's Findings must be sent to the parties by a method that can be tracked. This includes, but is not limited to email, certified mail, or hand delivery. Proof of delivery will be preserved in the file with copies of the Secretary's Findings to maintain accountability.

See [Chapter 5.VIII.A, Format of Secretary's Findings](#), for instructions on

drafting the Secretary's Findings.

OSHA retains the right to reopen a regional dismissal or an RFR determination upholding a regional dismissal for further investigation or review, where appropriate.

## 2. Requests for Review (RFRs)

If a section 11(c), AHERA, or ISCA complaint is dismissed, Complainant may seek review of the dismissal by DWPP. The request for review must be made in writing to DWPP within **15** calendar days of Complainant's receipt of the region's dismissal letter (unless equitable tolling applies; see [Chapter 3.III.D.4, Tolling \(Extending\) the Complaint Filing Deadline](#)), with a copy to the RA. The request may be mailed, faxed, or emailed (RFR@dol.gov). Verbal requests for review are not accepted.

The first day of the request period is the day after Complainant's receipt of the region's dismissal letter. Generally, the request date is the date of the postmark, facsimile transmittal, or email communication. If the postmark is absent or illegible, the request date is three days prior to the date the request for review is received. If the last day of the request period falls on a weekend or a federal holiday, or if the relevant OSHA Office is closed, then the next business day will count as the final day.

Upon DWPP's receipt of a request for review under section 11(c), AHERA, or ISCA, the regional supervisor must promptly make available a copy of the case file and any additional comments regarding the request for review to DWPP for review. The request for review must be preserved in the file.

DWPP reviews the case file and findings for proper application of the law to the facts:

- If the decision is supported by the evidence and is consistent with the law, DWPP will uphold the Regional determination.
- If not, the case will be returned to the Region for further investigation.
  - After additional investigative efforts are completed and, if the original determination (e.g., dismissal) does not change, the Region will send a written report of its findings, accompanied by any new evidence it obtained during the reinvestigation, to DWPP for further review and analysis. DWPP will then determine if it will affirm or not affirm the original Regional determination.
  - If another determination is made (e.g., merit referral to RSOL, settlement, withdrawal, etc.), the Region will notify DWPP of this outcome.
- Alternatively, if DWPP, after consultation with the Division of Occupational Safety and Health in SOL (NSOL/OSH), determines that the case has merit, it will return the case to the Region with instructions to refer the case to RSOL for litigation consideration.

- If the Department of Justice<sup>24</sup> determines that the suit should not be filed, the RA (or designee) will generally dismiss the case and no further request for review of that dismissal is permitted. However, on a case-by-case basis, the RA, in consultation with RSOL, may delay the dismissal of an individual case to permit SOL to consult with the Department of Justice. Next steps, e.g., dismissal or litigation, will be based on the results of that consultation.

## VII. Cases Under Administrative Statutes

### A. Merit Secretary's Findings Under Administrative Statutes

Merit Secretary's Findings under administrative statutes must be signed by the RA (or designee) and addressed to Respondent (or Respondent's counsel if applicable, with a copy to Respondent), with a copy to Complainant (and Complainant's counsel if applicable). The Secretary's Findings must adhere to the format described below and must advise the parties of the right to object to the Secretary's Findings and request a hearing before an ALJ. See [Chapter 5.VIII.A](#).

The Secretary's Findings must be sent to the parties by a method that can be tracked. This includes, but is not limited to: email; U.S. Mail, return receipt requested; a third-party commercial carrier that provides delivery confirmation; or hand delivery. Proof of delivery will be preserved in the file with copies of the Secretary's Findings to maintain accountability.

In all administrative statute cases, OSHA will **consult** with RSOL prior to issuing merit Secretary's Findings. In STAA and SPA cases, and any other administrative cases that RSOL anticipates litigating, RSOL must **concur** in the findings.

If a hearing is requested in STAA and SPA cases, RSOL represents OSHA (referred to as the Assistant Secretary in the applicable regulations) in litigation before a DOL ALJ, unless it decides not to do so in its prosecutorial discretion, such as in situations in which Complainant is represented by counsel.

In cases under the other administrative statutes, OSHA normally does not participate in the administrative litigation after issuing Secretary's Findings. However, OSHA, represented by the Office of the Solicitor, may, at its discretion, participate as a party or amicus curiae before the ALJ or the ARB.

#### 1. Cases Requiring Orders of Preliminary Reinstatement

- a. In ACA, AIR21, AMLA, CAARA, CFPA, CPSIA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, and TFA cases involving discharge, demotion, or adverse transfer where a bona fide offer of reinstatement has not been made, OSHA generally must order immediate, preliminary reinstatement upon finding reasonable cause to believe that unlawful retaliation occurred. In limited circumstances, after consulting

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<sup>24</sup> Litigation in federal district courts under the OSH Act may be conducted by the Solicitor of Labor, but it is "... subject to the direction and control of the Attorney General." 29 U.S.C. § 663.

with RSOL, OSHA may order front pay (sometimes referred to as “economic reinstatement”). For the purposes of the procedures below, front pay is a form of reinstatement. See [Chapter 6, Remedies](#).

- b. In cases involving a potential order of preliminary reinstatement, to ensure Respondent’s due process rights under the Fifth Amendment to the Constitution, a “due process letter” ordinarily must be sent to Respondent prior to OSHA issuing merit Secretary’s Findings. In some cases, however, it may be appropriate to provide “due process” notification through other means such as through a conference between Respondent (and/or Respondent’s counsel, if applicable) and OSHA that is recorded or documented in the case file. RSOL must be consulted prior to issuing any due process letter or other due process notification so that RSOL can review the case file.
- c. Due process rights are afforded by giving Respondent notice of the substance of the relevant evidence supporting Complainant’s allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants. If the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided.
- d. The letter or other due process notification must also indicate that Respondent may submit a written response, meet with the investigator, and present rebuttal witness statements within 10 calendar days of receipt of OSHA’s letter (or at an agreed-upon date, if the interests of justice so require). Due process letters must be sent by a method that can be tracked, such as certified U.S. Mail, return receipt requested, third-party commercial carrier that provides delivery confirmation, or by email. Complainant must also be sent the materials that Respondent will receive. These materials may require redaction in order to be consistent with the Privacy Act and other applicable law. Proof of delivery must be preserved in the file with copies of all correspondence and documents sent to the parties to maintain accountability.
- e. Any information received in response to the due process letter or other due process notification from Respondent (or Complainant) will be considered. Based on consideration of such information, merit Secretary’s Findings may be issued or, if the information adequately rebuts the conclusion that there is reasonable cause to believe unlawful retaliation occurred, the case may be dismissed.

## **2. Cases Not Requiring Orders of Preliminary Reinstatement**

For merit recommendations under the remaining statutes, or in cases under the statutes noted in [Chapter 5.VII.A.1.a](#) above where reinstatement (including front pay) is not ordered, the supervisor must finalize and the RA (or designee) sign the Secretary's Findings and Order issued to Respondent, with a copy sent to Complainant. No "due process" letter or notification is required prior to issuing merit Secretary's Findings in these cases.

### **B. Non-Merit Findings Under Administrative Statutes**

For non-merit cases, the parties must be notified of the results of the investigation by the issuance of Secretary's Findings signed by the RA (or designee) and addressed to Complainant (or Complainant's counsel if applicable, with a copy to Complainant), and copied to Respondent (and Respondent's counsel if applicable). The Secretary's Findings must adhere to the format described below and advise the parties of the right to object to the Secretary's Findings and request a hearing before an ALJ. If the case was docketed under both district court and administrative statutes, the Secretary's Findings must advise the parties of rights to object under both types of statutes (i.e., to request DWPP review under the district court statutes and to request a hearing before an ALJ under the administrative statutes).

The Secretary's Findings must be sent to the parties by a method that can be tracked. This includes, but is not limited to email; U.S. Mail, return receipt requested; a third-party commercial carrier that provides delivery confirmation; or hand delivery. Proof of delivery will be preserved in the file with copies of the Secretary's Findings to maintain accountability.

In cases under the administrative statutes, non-merit Secretary's Findings, including findings in docket-and-dismissal cases (discussed in [Chapter 3.IV.B, Docket and Dismiss](#)), must include a brief description of the rationale for the dismissal decision in the format below (see [Chapter 5.VIII.A, Format of Secretary's Findings](#)). The level of detail required in non-merit Secretary's Findings will vary depending on the facts of the case. In cases in which the Region is dismissing a case due to Complainant's unresponsiveness, the Region's attempts to contact Complainant and Complainant's unresponsiveness must be documented in the non-merit Secretary's Findings.

### **C. Multi-Respondent Mixed Determinations Under Administrative Statutes**

In some cases, Complainant alleges retaliation by multiple respondents and OSHA finds that one Respondent violated the relevant administrative whistleblower statute but another Respondent did not. In those cases, OSHA will address both Respondents in a single Secretary's Findings. OSHA will issue merit findings against the Respondent found to have violated the law and, in the same set of findings, indicate that it has determined that the allegations against the other Respondent(s) are not meritorious.

The Secretary's Findings in such cases should be addressed to the Complainant and all Respondents. The Secretary's Findings must be sent to all of the parties by a method that can be tracked. This includes, but is not limited to email, delivery

receipt required; U.S. Mail, return receipt requested; a third-party commercial carrier that provides delivery confirmation; or hand delivery. Proof of delivery to each party should be preserved in the file with copies of the Secretary's Findings to maintain accountability.

In addition to containing a full explanation of OSHA's basis for finding retaliation with respect to at least one Respondent, the Secretary's Findings must include a brief description of the rationale for the decision to dismiss the case with respect to the Respondent(s) that OSHA concludes did not violate the law.

**D. Service of Secretary's Findings on the Office of Administrative Law Judges (OALJ) and Partner Agencies**

1. When Secretary's Findings are issued in administrative statute cases, a copy of the complaint, the first page of the ROI (containing the names and contact information of the parties and their representatives) or, if a ROI was not drafted, the OITSS-Whistleblower summary page, and a copy of the Secretary's Findings will be emailed to the Chief Administrative Law Judge.
2. The relevant partner agency or agencies also must be promptly provided with a copy of the Secretary's Findings.

**E. Objections and Requests for a Hearing Under Administrative Statutes**

1. Any party may object to the Secretary's Findings and Order, or both and request a hearing on the record. A written objection must be submitted to the Chief Administrative Law Judge within thirty (30) calendar days of receipt of the Secretary's Findings (60 calendar days under PSIA), with copies of the written objection provided to the RA and the other parties as described in the applicable regulations.
2. If a party objects to the Secretary's Findings and requests a hearing before an ALJ, all remedies in the Secretary's Findings and Order are suspended except for any order of preliminary reinstatement.
3. If no objection is filed within thirty (30) calendar days of the receipt (or 60 calendar days under PSIA), the Secretary's Findings and Order, if applicable, will become the final order of the Secretary of Labor and not subject to judicial review.
4. Under statutes providing for orders of preliminary reinstatement (ACA, AIR21, AMLA, CAARA, CFPA, CPSIA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, and TFA), regardless of whether an objection is filed by any party, any portion of an Order requiring reinstatement will be effective immediately upon the receipt of the Secretary's Findings and Order (unless an alternative compliance date is set forth in the order).
5. The Secretary of Labor, represented by RSOL or DOJ, may bring an action to enforce an order of preliminary reinstatement or a final DOL order in U.S.

## **F. Requests for Expedited Case Processing (ECP) in Administrative Cases**

Complainants in administrative cases have the option of requesting that OSHA terminate its investigation and issue Secretary's Findings based on the information obtained to date if the timeframe stated for investigations in the statute (30 or 60 days depending on the statute) has passed and OSHA has not completed the investigation.

In order for OSHA to grant a request for expedited case processing, the following prerequisites must have been met:

1. Complainant has received at least a screening interview;
2. Both Complainant and Respondent have been notified of the complaint and had a reasonable opportunity to submit a response, meet with an investigator, and present statements from witnesses; and
3. OSHA has provided Complainant with a copy of any respondent submissions that are relevant to the complaint, with any necessary redactions, and Complainant has had the opportunity to respond to those submissions.

When OSHA receives a request for expedited case processing, the investigator, in consultation with the supervisor, should evaluate the request for expedited case processing and the information in the case file within two weeks.

### **1. When ECP May Be Granted**

The request may be granted in cases in which, after the procedures outlined above are followed: (a) the information gathered does not indicate that there is reasonable cause to believe that a violation occurred; or (b) Complainant's evidence is so strong and/or Respondent's evidence is so weak (i.e., a likely merit case) that further investigation would be unlikely to change the determination that it has merit.

- a. If a case is dismissed as a result of Complainant's request for expedited processing, the abbreviated Secretary's Findings will discuss Complainant's allegations, timeliness, and coverage, and contain the following sentence or similar language without discussing any evidentiary findings or analysis:

*Complainant has requested that OSHA terminate its investigation and issue a determination. Based on the information gathered thus far in its investigation, OSHA is unable to conclude that there is reasonable cause to believe that a violation of the statute occurred. OSHA hereby dismisses the complaint.*

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<sup>25</sup> ACA, AIR21, AMLA, CAA, CPFA, CPSIA, CAARA, ERA, FSMA, MAP-21, NTSSA, PSIA, SOX, and TFA permit a person on whose behalf an enforceable order was issued to enforce the order.

After this sentence, the applicable rights to object and request a hearing before an ALJ will be explained.

In addition, no ROI will be drafted for cases that are dismissed as a result of a request for expedited case processing. Rather, an OITSS-Whistleblower summary will be drafted indicating (1) that the complainant requested expedited case processing after 30-60 days from the date the complaint was filed (depending on the statute); and (2) all of the basic procedural requirements, as discussed above, were met.

- b. In some cases after a request for expedited processing, e.g. where Complainant's evidence is very strong and/or Respondent's case is very weak, OSHA may grant the request to terminate the investigation and issue a due process letter, where required, and/or merit findings after appropriate consultation with RSOL.

## **2. When ECP May Be Denied**

Examples of reasons that the request may be denied include: (1) the Region has a policy interest in continuing the investigation (e.g., the case involves particularly egregious facts or raises an important or novel issue); (2) the case is part of a corporate-wide enforcement effort; or (3) employees other than Complainant are affected, such as when there is a retaliatory policy. This is not an exhaustive list.

- a. **State Agencies:** ECP is not appropriate for cases against state agencies unless state sovereign immunity has been waived. OSHA should refer merit cases involving state agencies to RSOL.
- b. **Mixed-Statute Cases:** Generally, it is not appropriate to allow ECP if a case includes claims under both a district court statute and one or more ALJ statutes. ECP is primarily available for cases that raise claims only under ALJ statutes. If a complainant in a case containing claims under district court and ALJ statutes wishes to pursue ECP, they may request to withdraw their claim under the district court statute in order to pursue ECP. Alternatively, if evidence gathered indicates that the claim under the district court statute is clearly non-merit, for instance if the claim is untimely or there is no coverage, the claim under the district court statute may be dismissed, and Complainant may pursue ECP for the ALJ-statute claim. However, if the evidence in the district court case is strong enough to consider litigation, please consult with RSOL to determine whether it is preferable to deny ECP and develop the case for litigation on the district court case.

Where a request for expedited case processing is not granted, OSHA will send a letter to Complainant indicating that it was unable to grant the request at that time, explaining the reason or reasons that the request was not be granted, and indicating that the request may be granted at a future date. Investigation of the case will proceed in the normal course.

## **VIII. Secretary's Findings**

Secretary's Findings are written in the form of a letter, rather than a report, and generally must follow the format described below.

### **A. Format of Secretary's Findings**

Secretary's Findings should contain the following elements, as applicable:

#### **1. Introduction**

In the opening paragraph, identify the parties, the statute(s) under which the complaint was filed, and include a brief sentence summary of the allegation(s) made in the complaint.

The second paragraph will contain standard language such as:

*Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through [his/her] agent, the Regional Administrator for the Occupational Safety and Health Administration, Region [XX], pursuant to [insert statute], finds that there is [not] reasonable cause to believe that Respondent [violated/did not violate] [insert statute] [insert cite to U.S.C.] and issues the following findings.*

The findings generally need not recount the details of the investigation, such as listing the witnesses interviewed or documents requested. However, if preliminary reinstatement is ordered, the findings should note that a due process letter was issued or other due process notification was given and that Respondent had the opportunity to meet with the investigator and offer statements from witnesses.

#### **2. Coverage**

Explain whether Complainant and each Respondent are covered by the statute(s) and if so, why. If there is no coverage, no further findings are required.

#### **3. Timeliness**

Explain whether the whistleblower complaint was filed within the applicable statute of limitations. If the complaint was not timely filed but the late filing is being tolled for any of the reasons set forth in [Chapter 3.III.D.4, Tolling \(Extending\) the Complaint Filing Deadline](#), the reasons must be stated. If the complaint was not timely filed and Complainant's request for tolling was denied despite Complainant's explicit request for tolling, the denial should be explained. If the complaint was untimely, no further findings are required.

#### **4. Narrative**

Findings should contain a brief description of Complainant's allegation, a brief description of Respondent's defense, and a brief explanation of the events relevant to the determination.

Tell the story in terms of the facts that have been established by the investigation, addressing disputed facts only if they are critical to the determination. Often, recounting the events in chronological order is clearest

to the reader. Only unresolved discrepancies should be presented as assertions. The findings generally should not state that a witness saw, heard, testified, or stated to the investigator, or that a document showed something. **In other words, the findings must not be summaries of each witness's testimony.** For example, a finding might be: "Complainant complained to the dispatcher that the brakes on the truck were defective." An improper finding would be: "Complainant told the investigator that he had complained to the dispatcher about defective brakes on the truck." The dates for the protected activity and the adverse action should be stated to the extent possible. Care should be taken not to reveal or identify confidential witnesses or detailed witness information in the Secretary's Findings.

In cases where the protected activity relates to a potential violation of a regulation, the findings generally should cite the relevant regulation whenever possible. This reference is particularly important in STAA cases where the protected activity is refusal to operate a vehicle because the operation would violate a federal commercial motor vehicle safety or security regulation. See [49 U.S.C. 31105\(a\)\(1\)\(B\)\(i\)](#). This reference must be made even if Complainant did not refer to the specific regulation in the course of engaging in the protected activity or in providing information to OSHA.

In cases in which compensatory or punitive damages are ordered, the narrative should include relevant facts in support of the type and amount of damages (see [Chapter 6](#) for discussion of the facts and factors relevant to ordering compensatory and/or punitive damages).

## 5. Analysis and Conclusion About Violation

Following the narrative, Secretary's Findings should contain a brief summary of OSHA's analysis on each element or issue relevant to the determination and OSHA's conclusion regarding whether there has been a violation of the relevant whistleblower statute. If compensatory damages or punitive damages are ordered, the findings should contain a brief summary of OSHA's basis for awarding such damages.

For instance, non-merit findings would contain analysis and a conclusion similar to one of the following options:

*Based on the foregoing, OSHA dismisses this complaint because [choose one]:*

- *Complainant or Respondent [or both] is not covered by [insert acronym for statute and reason that there is no coverage];*
- *Complainant did not file the complaint within the [insert days] allowed by [insert acronym for statute] and there is no basis for tolling the filing period;*
- *OSHA has no reasonable cause to believe that Complainant engaged in protected activity under [insert acronym for statute and reason that there is no protected activity];*

- *OSHA has no reasonable cause to believe that Complainant suffered an adverse action; [insert reason for OSHA’s conclusion]; or*
- *(District court statutes) OSHA has no reasonable cause to believe that but for Complainant’s protected activity the adverse action would not have been taken against Complainant. [Insert brief explanation for OSHA’s conclusion that there is no nexus between the protected activity and the adverse action]; or*
- *(Most administrative statutes) OSHA has no reasonable cause to believe that Complainant’s protected activity was a contributing factor in the adverse action taken against Complainant. [Insert brief explanation for OSHA’s conclusion that there is no nexus between the protected activity and the adverse action];<sup>26</sup> or*
- *There is reasonable cause to believe that Complainant’s protected activity was a contributing factor in the adverse action taken against Complainant. [Insert explanation for why OSHA believes that there is nexus]. However, Respondent has shown clear and convincing evidence that it would have taken the same action absent the protected activity. [Insert explanation of the basis for concluding that the affirmative defense was met].<sup>27</sup>*

Merit findings in administrative statute cases would contain analysis and a conclusion similar to the following:

*On the basis of the findings above, OSHA has reasonable cause to believe that Respondent[s] violated [insert acronym for statute and U.S. Code cite] in that Complainant’s protected activity was a contributing factor in the adverse action taken against Complainant and Respondent has not shown by clear and convincing evidence that it would have taken the same action absent the protected activity. [Insert brief explanation of analysis on each element, and, if compensatory and/or punitive damage are awarded, include brief explanation for why the damages awarded are appropriate in the case].<sup>28</sup>*

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<sup>26</sup> In cases under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, the Secretary of Labor uses a motivating factor standard of causation. Where applicable, findings should say that: *OSHA has [or has no] reasonable cause to believe that Complainant’s protected activity was a motivating factor in the adverse action taken against Complainant.* See discussion of motivating factor standards of causation ([Chapter 2.VI.B.2](#)).

<sup>27</sup> In cases under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, this discussion should refer to the “motivating factor” standard of causation, rather than the “contributing factor” standard, and the phrase “the preponderance of the evidence” should be substituted for “clear and convincing evidence” in the discussion of Respondent’s affirmative defense. See discussion of motivating factor standards of causation ([Chapter 2.VI.B.2](#)).

<sup>28</sup> As noted above, in CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA case, this discussion should refer to the “motivating factor” standard of causation rather than the “contributing factor” standard,” and

**6. Punitive and Non-Pecuniary Compensatory Damages**

In merit administrative statute cases, the rationale for ordering any punitive damages or any non-pecuniary compensatory damages (such as damages for emotional distress, mental anguish, loss of reputation) should be concisely stated here. See [Chapter 6.VI.B, \*Determining When Punitive Damages are Appropriate\*](#), for a discussion of when punitive damages and non-pecuniary compensatory damages may be appropriate.

**7. Order (Including Order of Preliminary Reinstatement)**

In merit administrative statute cases only, list all relief being awarded. The reinstatement order will generally state: “Respondent shall immediately reinstate [the term “immediately” is not used in cases under CAA, CERCLA, ERA, FWPCA, SDWA, SWDA, and TSCA] Complainant to their former position with all the terms, conditions, and benefits of that position.” Relief should be determined and documented in the case consistent with the guidance in [Chapter 6, \*Remedies\*](#). When back pay is awarded, it should be stated in terms of earnings per hour (or other appropriate wage unit) covering the time missed minus interim earnings. This allows for the possibility that damages may continue to accrue after the Order. The exact amount of compensatory damages (pecuniary and non-pecuniary) and punitive damages must be stated. The interest on back pay and pecuniary damages will be stated in terms of the interest rate described in [Chapter 6.VIII, \*Interest\*](#). The order will also set forth non-monetary remedies, as appropriate (see [Chapter 6.X, \*Non-Monetary Remedies\*](#)).

**8. The Right to File an Objection**

In district court statute cases, the Secretary’s Findings must advise Complainant of the right to request a review of the determination pursuant to OSHA’s long-standing policy to provide complainants with the right to seek review of dismissals under section 11(c), AHERA, and ISCA.

In ALJ statute cases, the Secretary’s Findings must explain the right to object and request a hearing before an ALJ under the applicable statute and regulations.

**9. Signature**

The RA (or designee) must sign the Secretary’s Findings.

**B. Abbreviated Secretary’s Findings**

When a case is dismissed due to deferral, expedited case processing, lack of cooperation/unresponsiveness, or without an investigation (e.g., complaint is untimely, contains no prima facie allegation, or there is no coverage), the Secretary’s Findings may be abbreviated. The abbreviated Secretary’s Findings must state why the case is being closed (e.g., that Complainant has not cooperated

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the discussion of Respondent’s affirmative defense should refer to “the preponderance of the evidence” rather than “clear and convincing evidence.”

with the investigation; the complaint was untimely). Where the complaint was untimely, the date of the adverse action and the date of the filing of the complaint must be included in the findings. Where a complaint is dismissed for lack of cooperation/unresponsiveness, OSHA's attempts to contact Complainant should be documented in the Secretary's Findings. The abbreviated Secretary's Findings must inform the parties of the right to object to the Secretary's Findings and request either a review (district court statute cases) or a hearing before an ALJ (administrative statute cases).

## **IX. Dismissals for Lack of Cooperation/Unresponsiveness**

See [Chapter 4.VI](#), *Lack of Cooperation/Unresponsiveness*, for the requirements and procedures for dismissing complaints for LOC.

## **X. Withdrawal**

Complainant, with OSHA's approval, may withdraw the complaint at any time during OSHA's processing of the complaint.<sup>29</sup> However, it must be made clear to Complainant that by entering a withdrawal, they are forfeiting all rights to seek review or object, and the case will not be reopened.

Withdrawals may be requested either orally or in writing. It is advisable, however, for the investigator to obtain a signed withdrawal request whenever possible. In cases where the withdrawal request is made orally, the investigator will either record the withdrawal conversation or confirm in writing the Complainant's desire to withdraw. As part of the request, Complainant must also indicate whether the withdrawal is due to a settlement. If Complainant is seeking to withdraw a complaint due to settlement under a statute requiring OSHA's review and approval of the settlement, OSHA must inform Complainant of the requirement to submit the settlement for OSHA's approval. See, e.g., 29 CFR 1978.111 (STAA); 29 CFR 1980.111 (SOX); 29 CFR 1982.111 (FRSA). More information regarding OSHA's review and approval of settlement agreements is available in [Chapter 7](#).

Once the supervisor reviews and approves the request to withdraw the complaint, a letter will be sent to Complainant, clearly indicating that the case is being closed based on Complainant's request for withdrawal and that Complainant has forfeited all rights to seek review or object. The withdrawal approval letter will be sent using a method that permits OSHA to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. Proof of delivery must be preserved in the file with copies of the letters.

Although Complainant's request to withdraw is usually granted, there may be situations in which approval of the withdrawal is not warranted. See, e.g. 29 CFR 1977.17 (approval of Secretary required for withdrawal of section 11(c) complaint; Secretary's authority not affected by Complainant's request to withdraw); 29 CFR 1978.111(a) (STAA) and the section .111(a) under the regulations for all other administrative statutes

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<sup>29</sup> Exception: OSHA will not accept a withdrawal when the parties have reached a private settlement until OSHA has obtained and reviewed the settlement.

(the Assistant Secretary determines whether to accept withdrawal). Situations in which approval for withdrawal may be denied include, but are not limited to, a withdrawal made under duress, the existence of similarly situated complainants other than Complainant requesting withdrawal, adverse effects on employees in the workplace other than Complainant if the case is not pursued, and the existence of a discriminatory policy or practice.

When Complainant elects not to pursue their complaint before docketing, the complaint will be administratively closed. See [Chapter 3.IV.C](#), *Election Not To Proceed, a.k.a. Withdrawal Before Docketing*.

## **XI. Settlement**

Voluntary resolution of disputes is desirable and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it. Additional resources to assist the parties in reaching a settlement may be available through OSHA's ADR Program. Settlement requirements and procedures, including the requirement to submit the settlement agreement for OSHA's review and approval, are discussed in detail in [Chapter 7](#).

## **XII. Postponement/Deferral**

Due regard should be paid to the determination of other forums established to resolve disputes which may also be related to complaints under the OSHA whistleblower statutes. Thus, postponement and/or deferral may be advised when there is a proceeding that meets the criteria below. This policy on postponement and deferral is based on [29 CFR 1977.18](#), which governs section 11(c) cases, and on case law articulating analogous standards for postponement and deferral in cases under other OSHA whistleblower statutes.

### **A. Postponement**

The Agency may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement, arbitration agreement, a statute, or common law. The rights asserted in the other proceeding must be substantially the same as the rights under the relevant OSHA whistleblower statute and those proceedings must not violate the rights of Complainant under the relevant OSHA whistleblower statute. The factual issues to be addressed by such proceedings must be substantially similar to those raised by the complaint under the relevant whistleblower statute. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective state whistleblower statute but not when the proceeding is under an unemployment compensation statute, which typically does not address retaliation. The investigator must consult with RSOL to make these determinations. To postpone the OSHA case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that OSHA must be notified of the results

of the proceeding upon its conclusion. The case must remain open during the postponement.

## **B. Deferral**

When another agency or tribunal has issued a final determination regarding the same adverse action(s) alleged in an OSHA whistleblower complaint, the investigator will review the determination and assess, based upon the requirements listed below, whether or not OSHA should defer to the agency's or tribunal's conclusion and dismiss the case. The investigator and supervisor must review the results of the proceeding to ensure that:

1. All relevant issues were addressed;
2. The proceedings were fair, regular, and free of procedural infirmities; and
3. The outcome of the proceedings was not repugnant to the purpose and policy of the relevant OSHA whistleblower statute.

The supervisor must obtain the concurrence of RSOL for this determination. This assessment will be documented in an ROI prepared for the case.

As noted above, for all relevant issues to have been addressed, the forum hearing the matter must have the power to determine the ultimate issue of retaliation. In other words, the adjudicator in the other proceeding must have considered whether the adverse action was taken, at least in part, because of Complainant's alleged protected activity.

Repugnancy deals not only with the violation, but also the completeness of the remedies. Thus, if for instance, Complainant was reinstated as a result of the other proceeding but back pay was not awarded, deferral would not be appropriate.

If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. However, if a settlement was approved or entered into by a State Plan agency or another government agency, such as the NLRB, or another third party entity such as a labor union, deferral could be appropriate if the criteria for deferral above are met. Employer-employee settlements that release an OSHA whistleblower claim must be approved by OSHA in accordance with [Chapter 7](#).

In cases where the investigator recommends a deferral to another agency's or tribunal's decision, grievance proceeding, arbitration, or other appropriate determination, abbreviated Secretary's Findings based on the deferral will be issued dismissing the case. The parties will be notified of their right to object or request a review, depending on the whistleblower statute. The case will be considered closed at the time of the deferral and will be recorded in OITSS-Whistleblower as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in [Chapter 7](#).

## **XIII. Kick-Out to Federal District Court**

Many of OSHA's whistleblower statutes contain a "kick-out" provision that allows Complainant to file the retaliation claim in federal district court if the Secretary of Labor

has not issued a final decision, if the number of days prescribed by the statute from the time of the filing of the complaint with OSHA have passed, and the delay was not due to the bad faith of Complainant. A final decision means a decision by the Administrative Review Board (ARB), a decision of an ALJ that has become a final order, or OSHA findings and order which have become final due to the lack of a timely objection. These kick-out provisions do not apply to filings in state courts. Postponement and deferral procedures apply where there are filings in state courts. If Complainant wishes to withdraw their case, they may request approval of a withdrawal in accordance with withdrawal procedures.

#### **A. Kick-Out Statutes**

The statutes that include a kick-out provision as of the date of this instruction are:

- Affordable Care Act (ACA), 29 U.S.C. § 218C
- Anti-Money Laundering Act (AMLA), 41 U.S.C. § 5323(g)
- Consumer Financial Protection Act (CFPA), 12 U.S.C. § 5567
- Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087
- Criminal Antitrust Anti-Retaliation Act (CAARA), 15 U.S.C. § 7a-3
- Energy Reorganization Act (ERA), 42 U.S.C. § 5851.
- Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109
- Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d
- National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142
- Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), 49 U.S.C. § 30171
- Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129
- Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A
- Seaman’s Protection Act (SPA), 46 U.S.C. § 2114
- Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105
- Taxpayer First Act (TFA), 26 U.S.C. § 7623(d)

#### **B. Timeframe**

The time periods Complainant must wait before “kicking out” the complaint and filing a claim in federal district court are as follows:

<b><u>Statute</u></b>	<b><u>Days</u></b>
AMLA, CAARA, SOX, TFA	180
ACA <sup>30</sup> , CFPA, CPSIA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SPA, STAA	210
ERA	365

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<sup>30</sup> CPSIA, ACA, CFPA, and FSMA also provide that a complainant may “kick-out” within 90 days of OSHA’s issuance of findings. However, in such cases, Complainant may need to file objections to OSHA’s findings in order to preserve the ability to “kick-out.” See Procedures for Handling Retaliation Complaints under Section 219 of the Consumer Product Safety Improvement Act of 2008, 77 Fed. Reg. 40494, 40502 (July 10, 2012) (Explaining the relationship between CPSIA’s “kick-out” provision and the requirement to object to OSHA’s findings).

## C. Procedure

The regulations under the various statutes require that, within seven (7) days after filing a complaint in federal court, Complainant must file a copy of the file-stamped complaint with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending. See, e.g., 29 CFR 1980.114(c); 29 CFR 1982.114(c). A file-stamped copy is a copy of the filing that has been submitted to a court and stamped by that court. The stamp generally includes a case or file number and the date that the document was filed with the court.

1. Complainants or their attorneys often inform OSHA of their intention to file in federal district court before exercising their rights under the kick-out provisions. When Complainant or Complainant's attorney informs OSHA that Complainant intends to file the claim in district court pursuant to a kick-out provision and the requisite number of days have passed under the relevant whistleblower statute, the case should not be closed until OSHA has received confirmation that the complaint has been filed in district court, usually by receiving a file-stamped copy of the complaint.<sup>31</sup>
2. In those instances when Complainant provides notice of Complainant's intent to file in federal district court prior to actually doing so, the Region may suspend the investigation. If so, the investigator will inform Complainant or Complainant's attorney in writing that OSHA will suspend the investigation because Complainant wishes to pursue the claim in district court and will remind Complainant or complainant's counsel to send OSHA a file-stamped copy of the district court complaint within seven days of filing the complaint. This communication must be documented in the case file. This information may also be communicated through email.
3. If the file-stamped copy of Complainant's district court complaint is not received within a reasonable amount of time, such as 30 days, the investigator should follow up with Complainant or Complainant's counsel to ensure that Complainant still intends to pursue the claim in federal court. If Complainant no longer intends to kick out, OSHA should resume its investigation. Otherwise, OSHA may continue to suspend the investigation while regularly communicating with Complainant or Complainant's counsel to ensure that there has been no change in Complainant's plans to kick out. If the investigator is unsuccessful in contacting Complainant or Complainant's counsel after following the WIM's guidelines for inability to locate a Complainant (see [Chapter 4.VI](#), *Lack of Cooperation/Unresponsiveness*) or if Complainant or their counsel is not responsive to the investigator's requests for updates on the status of the case, OSHA may consider dismissing the case

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<sup>31</sup> If a complaint includes multiple claims under different statutes or is amended to add new Respondents or new adverse actions, Complainant is responsible for calculating the time periods for each claim and each Respondent for "kick-out" purposes. However, if there are questions regarding whether Complainant has exhausted administrative remedies in a particular case, OSHA may consult with the Regional Solicitor's Office.

for lack of cooperation.

4. Upon receiving a file-stamped copy of Complainant's district court complaint, the investigator will close the case in OITSS-Whistleblower (or subsequent database), and will notify Complainant, Respondent, and the relevant partner agency that OSHA has closed its case because Complainant has filed a complaint in federal district court. Documentation of these communications must be preserved in the case file. This information may also be communicated through email.
5. **Complaints Filed Under Both Kick-Out and Non-Kick-Out Statutes:** For complaints filed under both kick-out (e.g., SOX, STAA, ERA) and non-kick-out statutes (e.g., AIR21, environmental, or 11(c)), if Complainant kicks out under the kick-out statute, then OSHA should consider postponing the investigation and then deferring the remainder of the complaint (i.e., the claim under the non-kick-out statute) to the decision of the district court. See [Chapter 5.XII, Postponement/Deferral](#), above.

However, there may be some circumstances where postponing would not be appropriate. For instance, in some circumstances in the ALJ statute context, the claim under the non-kick-out statute may be significantly different from or stronger and more straightforward than the claim under the kick-out statute or Complainant's counsel may have made clear that Complainant wants to pursue both claims expeditiously in separate forums (i.e., before an ALJ and before the district court). In a circumstance like that, OSHA should proceed with the investigation and issue its findings so that Complainant can pursue the non-kick-out claim before the ALJ.

Unless there is a clear indication from Complainant or Complainant's counsel that Complainant wants to withdraw the non-kick-out claim, OSHA should not treat the kick-out as a withdrawal of the non-kickout claim. In no instance should OSHA make a unilateral decision that a kick-out is a withdrawal of other claims under statutes that do not have a kick-out.

#### **XIV. Significant or Novel Whistleblower Cases**

In order to ensure consistency among the Regions and to alert the National Office about any significant or novel issues, Secretary's Findings in all significant and novel merit cases must be reviewed by DWPP. The Assistant Secretary will establish criteria and procedures for significant and novel cases from time to time. For current criteria and procedures, see memorandum [Procedures for Significant or Novel Whistleblower Cases](#) (February 2, 2016).

#### **XV. Agency Determination and Partner Notification**

The relevant partner agency(s) must be notified of OSHA's closure of a case regardless of disposition (e.g. merit, dismissed, withdrawn, settled, or kicked out). Please see [Chapter 3.IV.A.4, Partner Agencies](#), regarding partner agency notifications in the case of an administrative closure. A copy of the findings and order will be distributed to the relevant partner agency(s). The case closure documentation (e.g. findings, settlement

approval letters (but not the settlement agreement itself), or confirmation of withdrawals and kick-outs) will be sent on the same day it is sent to the parties or as soon as possible thereafter. The Regions should transmit kick-out information to the relevant partner agency(s) when OSHA receives a copy of the district court complaint from Complainant or otherwise learns that Complainant has filed an action in district court. The subject line of the notification email should be “*Respondent/Complainant/Case Number.*”

## **XVI. Documenting Key Dates in OITSS-Whistleblower**

For purposes of documenting case disposition, key dates must be accurately recorded in OITSS-Whistleblower in order to maintain data integrity and measure program performance.

### **A. Date Complaint Filed**

The date a complaint is filed is the date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office. If tolling applies, the basis for tolling should be explained in the OITSS-Whistleblower case comments. See [Chapter 3.III.D.3](#), *Timeliness of Filing*, and [3.III.D.4](#), *Tolling (Extending) the Complaint Filing Deadline*.

### **B. ROI Dates**

The date upon which the investigator submitted the ROI to the supervisor for review and the date upon which the supervisor approved the ROI must be recorded in OITSS-Whistleblower.

### **C. Determination Date**

The date upon which the Secretary’s Findings or closing letter is dated is the determination date.

### **D. Date Request for Review or Objection Filed**

The date a section 11(c), AHERA, or ISCA request for review is filed is the date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the National Office. DWPP will enter the RFR filing date into OITSS-Whistleblower. If the filing with DWPP is untimely but the copy filed with the Region is earlier and timely, then the date the request for review was filed is the earlier date. The date an objection is filed with the OALJ is the date of the postmark, facsimile transmittal, or email communication; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The relevant regional office is responsible for entering the OALJ filing date into OITSS-Whistleblower.

### **E. Date of Key Post-OSHA Events**

For cases filed under the District Court statutes, RSOL generally litigates merit cases on behalf of the Secretary in federal district court and appeals are heard in the U.S. Court of Appeals. The relevant regional office is responsible for entering the following dates into OITSS-Whistleblower: the date on which RSOL files suit, the date on which the district court decides the case, the date on which an appeal is

filed, and the date on which the court of appeals decides the case.

For cases filed under the Administrative statutes, any party may object to an OSHA determination and request a hearing before an ALJ, petition for review of an ALJ decision by the ARB, and petition the Secretary of Labor for review of an ARB decision. Further petitions for review can then be filed with a U.S. Court of Appeals. The key dates for these actions and decisions must be documented in OITSS-Whistleblower. The relevant regional office must document the date a party objects to an OSHA determination and requests a hearing before an ALJ, the date of the ALJ decision, the date a party petitions for review of the ALJ decision by the ARB or the Secretary, along with the dates of the subsequent ALJ/ARB (and, rarely, Secretary of Labor) decisions. The relevant regional office must document the date Complainant “kicks out” from the Department of Labor to federal district court, i.e., files a district court complaint.

Required Documents for Disposition				
Disposition	OITSS-Whistleblower	Report of Investigation	Secretary's Findings	Parties Receive
<b>Administratively Closed (e.g. prior to docketing, complaint determined to be untimely or contains no <i>prima facie</i> allegation)</b>	Entry of complaint information	N/A	N/A	Complainant receives written explanation and confirmation of the screen-out. <a href="#">Ch. 3.IV.A</a>
<b>Settled (OSHA approved)</b>	Summary in Case Comments field	None Required <a href="#">Ch. 5.III.A</a>	None Required	Copy of signed settlement <a href="#">Ch. 7.V.B.4</a>
<b>Settled – Other (OSHA approved)</b>	Summary in Case Comments field	None Required <a href="#">Ch. 5.III.A</a>	None Required	Settlement approval letter <a href="#">Ch. 7.VI.B</a>
<b>Withdrawn/ Kicked out</b>	Summary in Case Comments field	None Required <a href="#">Ch. 5.III.A</a>	None Required	Written confirmation of the withdrawal/ kick-out Withdrawal: <a href="#">Ch. 5.X</a> Kick-Out: <a href="#">Ch. 5.XIII.C.4</a>
<b>Expedited Case Processing</b>	Summary in Case Comments field	None Required <a href="#">Ch. 5.III.A</a>	Abbreviated <a href="#">Ch. 5.VIII.B</a>	Abbreviated Secretary's Findings, with rights to object <a href="#">Ch. 5.VII.F</a>
<b>Dismissal: Lack of Cooperation (LOC)/ Unresponsiveness</b>	Summary in Case Comments field	None Required <a href="#">Ch. 5.III.A</a>	Abbreviated <a href="#">Ch. 5.VIII.B</a>	Abbreviated Secretary's Findings, with rights to object or request review. <a href="#">Ch. 5.VI.B</a> (district court) <a href="#">Ch. 5.VIII.B</a> (Admin. Statutes)

Continued next page.

Required Documents for Disposition (continued)				
Disposition	OITSS-Whistleblower	Report of Investigation	Secretary's Findings	Parties Receive
<b>Dismissed without investigation (e.g. after docketing, complaint determined to be untimely or contains no <i>prima facie</i> allegation)</b>		Required Ch. 5.III	Abbreviated Ch. 3.IV.B Ch. 5.VIII.B	Abbreviated Secretary's Findings, with rights to object or request review. Ch. 3.IV.B
<b>Deferral</b>		Required Ch. 5.III	Abbreviated Ch. 5.VIII.B Ch. 5.XII.B	Abbreviated Secretary's Findings, with rights to object or request review. Ch. 5.XII.B
<b>Administrative Statute Dismissals after investigation</b>		Required Ch. 5.III	Required -ALJ statutes: Ch. 5.VII.B	Secretary's Findings, with rights to object. Ch. 5.VII.B
<b>District Court Statute Dismissals after investigation</b>		Required Ch. 5.III	Required -District Court statutes: Ch. 5.VI.B	Secretary's Findings, with rights to request review. Ch. 5.VI.B.1
<b>Merit (Administrative Statutes)</b>		Required Ch. 5.III	Required Ch. 5.VII.A & C	Secretary's Findings with rights to object or request review. Ch. 5.VII.A

## Chapter 6

### REMEDIES

#### I. Scope

This chapter provides guidance on gathering evidence and determining appropriate remedies in whistleblower cases where a violation has been found. Investigators should consult with their supervisor in designing the appropriate remedies. RSOL also should be consulted on determining potential remedies in any case that OSHA anticipates referring for litigation or issuing merit findings.

#### II. General Principles

The OSHA whistleblower statutes are designed to compensate complainants for the losses caused by unlawful retaliation and to restore to complainants the terms, conditions, and privileges of their employment as they existed prior to Respondent's adverse actions. The remedies available under the whistleblower statutes are also designed to mitigate the deterrent or "chilling" effect that retaliation has on employees other than the Complainant, who may be unwilling to report violations or hazards if they believe the employer will retaliate against whistleblowers.

All of OSHA's whistleblower statutes provide for reinstatement, back pay, and compensatory damages for pecuniary losses<sup>32</sup> and non-pecuniary damages.<sup>33</sup> Where appropriate, Complainant's remedies also include other remedies designed to make Complainant whole, such as receipt of a promotion that Complainant was denied, expungement of adverse references in the employment record, or a neutral employment reference. A number of the statutes permit punitive damages and recovery of attorney fees. Please refer to OSHA's [Whistleblower Statutes Summary Chart](#).

#### III. Reinstatement and Front Pay

##### A. Reinstatement and Preliminary Reinstatement

Reinstatement of Complainant to their former position is the presumptive remedy in merit whistleblower cases involving a discharge, demotion, or an adverse transfer and is a critical component of making Complainant whole. Where reinstatement is not feasible for reasons such as those described in the following paragraph, front pay in lieu of reinstatement may be awarded from the date of the findings up to a reasonable amount of time for Complainant to obtain another comparable job.

Some of the whistleblower statutes (ACA, AIR21, AMLA, CAARA, CFPA, CPSIA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, and TFA) require OSHA to

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<sup>32</sup> These are damages that are readily quantified-- for example, job search expenses, medical bills that Complainant would not have incurred absent the unlawful retaliation, and health insurance premiums.

<sup>33</sup> These damages are not readily quantifiable and include, for example, pain and suffering, emotional distress, and loss of quality of life.

issue an order of preliminary reinstatement in appropriate cases. See [Chapter 5.VII.A.1](#) for a discussion of the procedures for ordering preliminary reinstatement. An order of preliminary reinstatement requires Respondent to make a bona fide job offer upon receipt of OSHA's findings.

## **B. Front Pay**

Front pay, which OSHA considers to be economic reinstatement, is a substitute for actual reinstatement in rare cases where actual reinstatement, the presumptive remedy in cases of discharge, demotion, or adverse transfer, is not possible. Because front pay is a form of reinstatement, it is also a form of preliminary reinstatement under the ALJ statutes which allow preliminary reinstatement (see paragraph A above). Situations where front pay may be appropriate include those in which Respondent's retaliatory conduct has caused Complainant to be medically unable to return to work, or Complainant's former position or a comparable position no longer exists. Similarly, front pay may be appropriate where it is determined that a respondent's offer of reinstatement is not made in good faith or where returning to the workplace would result in debilitating anxiety or other risks to Complainant's mental health. Front pay also may be available in the rare case where such extreme hostility exists between Respondent and Complainant that Complainant's continued employment would be unbearable.

In cases where front pay may be a remedy, the investigator should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors such as the length of time that Complainant expects to be out of work and Complainant's compensation prior to the retaliation. Front pay should be adjusted to account for any income Complainant is earning. For example, if Complainant has a new job, front pay should be adjusted to account for any difference in pay between Complainant's old job and the new job. RSOL should be consulted when considering an award of front pay.

## **IV. Back Pay**

Back pay is available under all whistleblower statutes enforced by OSHA.<sup>34</sup>

### **A. Lost Wages**

Lost wages generally comprise the bulk of the back pay award. Investigators should compute back pay by deducting Complainant's interim earnings (described below) from gross back pay. Investigators should support back pay awards with documentary evidence in the case file, including evidence of pay and bonuses at Complainant's prior job and evidence of interim earnings. Relevant documentary evidence includes documents such as pay stubs, W-2 forms, and statements of benefits.

Gross back pay is defined as the total earnings (before taxes and other deductions) that Complainant would have earned during the period of unemployment. Generally, this gross back pay is calculated by multiplying the hourly wage by the number of hours per week that Complainant typically worked. If Complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be converted into a daily rate and then

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<sup>34</sup> TFA and AMLA provide for double back pay.

multiplied by the number of days that a complainant typically would have worked. Depending on the circumstances, other methods for calculating back pay may be appropriate and RSOL should be consulted as needed for assistance in determining the method for calculating back pay.

In cases under the administrative statutes, if Complainant has not been reinstated, the gross back pay figure should be calculated up to the time of the Secretary's Findings but should not be stated in the Secretary's findings as a finite amount, but rather as a formula, such as x dollars per hour times x hours per week minus interim earnings.

In cases under the district court statutes, the formula that OSHA proposes using to compute back pay should be provided to RSOL.

In cases under both administrative and district court statutes, back pay should include any cost-of-living increases or raises that Complainant would have received if they had continued to work for Respondent. The investigator should ask Complainant for evidence of such increases or raises and keep the evidence in the case file. If Complainant requests a tax gross up and supports the request with appropriate evidence, OSHA's back pay calculation may include it. A "tax gross up" is an adjustment to back pay to compensate for the increased tax burden on complainant of a lump sum award of back pay.

A respondent's cumulative liability for back pay ceases when a complainant rejects (or does not accept within a reasonable amount of time) a bona fide offer of reinstatement, which must afford Complainant reinstatement to a job substantially equivalent to the former position. Whether a reinstatement offer meets this requirement sometimes requires an evaluation of the facts and circumstances of the offer as compared to the complainant's previous position, and consultation with RSOL may be necessary to determine whether an offer is a bona fide offer of reinstatement. A respondent's liability for back pay can also cease in other circumstances, such as when Respondent goes out of business, when Respondent closes the location where Complainant worked without retaining the employees who worked at the location, or when Complainant becomes totally disabled or otherwise unable to perform their former job.

**NOTE: Temporary Employees.** A complainant who is a temporary employee may receive back pay beyond the length of the temporary assignment from which they were terminated if there is evidence indicating that Complainant would either have continued their employment beyond the seasonal work or that they would otherwise have been rehired for the next season. Thus, in cases with temporary employees, the investigator must determine whether Complainant's coworkers were offered new assignments. In addition, the investigator should ask Complainant whether Complainant applied for an alternate assignment. If Complainant reapplied and was not rehired and the complaint is still pending, Complainant may amend the complaint to include failure to rehire. See memorandum [\*Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers\*](#), issued May 11, 2016 for further information.

## **B. Bonuses, Overtime and Benefits**

Investigators should also include lost bonuses, overtime, benefits, raises, and promotions in the back pay award when there is evidence to determine those figures.

### **C. Interim Earnings and Unemployment Benefits**

Interim earnings obtained by Complainant will be deducted from a back pay award. Interim earnings are the total earnings (before taxes and other deductions) that Complainant earned from interim employment subsequent to Complainant's termination and before assessment of the damages award.

Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job, assuming the expenses would not have been incurred at the former job. Such expenses may include special tools and equipment, necessary safety clothing, union fees, mileage at the applicable IRS rate per driving mile for any increase in commuting distance from the distance travelled to Respondent's location, special subscriptions, mandated special training and education costs, special lodging costs, and other related expenses.

Interim earnings should be deducted from back pay using the periodic mitigation method. Under this method, the time in which back pay is owed is divided into periods. The period should be the smallest possible amount of time given the evidence available. Interim earnings in each period are subtracted from the lost wages attributable to that period. This yields the amount of back pay owed for that period. If the interim earnings exceed the lost wages in a given period, the amount of back pay owed for that period would be \$0.00, not a negative amount. The back pay owed for each period is added together to determine a total back pay award.

Unemployment benefits received are not deducted from gross back pay.<sup>35</sup> The investigator should determine whether workers' compensation benefits that replace lost wages during a period in which back pay is owed should be deducted from gross back pay after consultation with RSOL.

### **D. Mitigation Considerations**

Complainants have a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a complainant must exercise reasonable diligence in seeking alternate employment, except as noted below. However, complainants need not succeed in finding new employment; they are required only to make an honest, good faith effort to do so. The investigator should ask Complainant for evidence of their job search and keep the evidence in the case file. Complainant's obligation to mitigate their damages does not normally require that Complainant go into another line of work or accept a demotion. However, generally, complainants who are unable to secure substantially equivalent employment after a reasonable period of time should consider other available and suitable employment. In certain circumstances, such as when retaliation or the underlying safety issue causes disabling physical ailments, complainants do not need to look for substantially equivalent employment.

After preliminary reinstatement is ordered, Complainant mitigates their damages simply by being available for work. Under these circumstances, Complainant does not have a duty to seek other work for at least some period of time after the preliminary reinstatement order is

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<sup>35</sup> Complainants should be reminded that they may need to reimburse unemployment benefits received, depending on their State of residence.

issued.

#### **E. Reporting of Back Pay to the Social Security Administration/Railroad Retirement Board**

Respondents are required to submit appropriate documentation to the Social Security Administration or, in cases filed under FRSA, the Railroad Retirement Board, allocating the back pay award to the appropriate periods. Secretary's Findings where applicable must include this requirement.

### **V. Compensatory Damages**

#### **A. Pecuniary or Monetary Damages**

Pecuniary damages (a.k.a. monetary damages) may be awarded under all OSHA-administered whistleblower statutes. Pecuniary damages are Complainant's out-of-pocket losses that result from or are likely to result from unlawful retaliation. Investigators must support awards of these types of damages with documentary evidence in the case file.

Pecuniary damages can include, but are not limited to, losses such as: (1) out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy; (2) medical expenses for treatment of symptoms directly related to the unlawful retaliation (e.g., post-traumatic stress disorder, depression, etc.); (3) credit card interest paid as a result of the unlawful retaliation; (4) fees, penalties, lost-interest, or other losses related to withdrawals from savings or retirement accounts made as a result of the unlawful retaliation; or (5) moving expenses if Complainant had to move as a result of the retaliation.

Complainants may also recover expenses incurred as a result of searching for interim employment. Such expenses may include, but are not limited to, mileage at the current IRS rate per driving mile, employment agencies' fees, meals and lodging when traveling for interviews, bridge and highway tolls, moving expenses, and other documented expenses.

#### **B. Non-Pecuniary Damages**

Non-pecuniary damages include compensation for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish resulting from Respondent's adverse action. Courts regularly award compensatory damages for demonstrated mental anguish, loss of reputation, emotional distress, and pain and suffering in employment retaliation and discrimination cases. Such damages may be awarded under all OSHA-administered whistleblower statutes although they are not necessarily appropriate in every case. OSHA, with guidance from RSOL, will evaluate whether compensation for these damages is appropriate.

Entitlement to non-pecuniary damages is not presumed. Generally, Complainant must demonstrate both (1) objective manifestations of harm, and (2) a causal connection between the retaliation and the harm. Objective manifestations of harm include, but are not limited to, depression, post-traumatic stress disorder, and anxiety disorders. Objective manifestations may also include conditions that are not classified as medical conditions, such as sleeplessness, harm to relationships, and reduced self-esteem.

Complainant's own statement may be sufficient to prove objective manifestations of harm.

Similarly, Complainant's statement may be corroborated by statements of family members, friends, or coworkers if credible. Although evidence from healthcare providers is not required to recover non-pecuniary damages, statements by healthcare providers can strengthen Complainant's case for entitlement to such damages.

Evidence from a healthcare provider is required if Complainant seeks to prove a specific and diagnosable medical condition. Investigators should contact RSOL to explore the possibility of obtaining a written waiver from Complainant to communicate with their health care provider to ensure compliance with HIPAA and Complainant's privacy rights. To comply with privacy laws, any medical evidence must be marked as confidential in the case file and should not be disclosed except in accordance with OSHA's Freedom of Information Act and Privacy Act policies set forth in [Chapter 9](#) or otherwise required by law.

In addition to proof of objective manifestations of harm, there must be evidence of a causal connection between the harm and Respondent's adverse employment action. A respondent also may be held liable where Complainant proves that Respondent's unlawful conduct aggravated a pre-existing condition, but only the additional harm should be considered in determining damages.

### C. Factors to Consider

Investigators should consider a number of factors when determining the amount of an award for non-pecuniary damages. Investigators should seek guidance from their supervisor and RSOL. The factors to consider include:

1. **The severity of the distress.** Serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships justify higher damage awards for emotional distress or other forms of non-pecuniary damages.
2. **Degradation and humiliation.** Generally, courts have held that when Respondent's actions were inherently humiliating and degrading, somewhat more conclusory evidence of emotional distress or other non-pecuniary harm is acceptable to support an award for damages.
3. **Length of time out of work.** Often, long periods of unemployment contribute to Complainant's mental distress. Thus, higher amounts may be awarded in cases where individuals have been out of work for extended periods of time as a result of Respondent's adverse employment action and thus were unable to support themselves and their families.
4. **Comparison to other cases.** Under the administrative statutes, a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases, particularly those decided by the ARB. Relevant cases can include those decided by the ARB or the courts under the various OSHA whistleblower statutes and cases decided by the courts under section 11(c) and other discrimination or anti-retaliation provisions, such as the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3a. In section 11(c), AHERA, and ISCA cases, comparison with court decisions under those statutes or other discrimination or anti-retaliation provisions, such as the Title VII anti-retaliation provision and 42 U.S.C. § 1983, is

appropriate.

## **VI. Punitive Damages**

### **A. General**

Punitive damages, also known as exemplary damages, are awards of money used to punish violations and deter future violations in cases where respondents were aware that they were violating the law or where the violations involved egregious misconduct. Punitive damages are available only under certain statutes, i.e., section 11(c) of the OSH Act, AHERA, ISCA, STAA, SDWA, TSCA, FRSA, NTSSA, and SPA. Punitive damages are subject to a statutory cap of \$250,000 in complaints under STAA, FRSA, NTSSA, and SPA. Section 11(c), ISCA, AHERA, SDWA, and TSCA provide no statutory caps.

Punitive damages are not appropriate in every meritorious retaliation case. Punitive damages are awarded when Respondent knew or should have known that the adverse action was illegal under the relevant whistleblower statute or where Respondent engaged in egregious misconduct related to the violation. In determining whether to award punitive damages, investigators should focus on the character of Respondent's conduct and consider whether it is of the sort that calls for deterrence and punishment. In all cases where OSHA seeks to order payment of punitive damages, OSHA first should consult with RSOL.

### **B. Determining When Punitive Damages are Appropriate**

To decide whether punitive damages are appropriate, investigators should look for (1) Respondent's awareness that the adverse action was illegal, or (2) evidence that indicates that Respondent's conduct was particularly egregious, or both.

#### **1. Respondent Was Aware that the Adverse Action Was Illegal**

Punitive damages may be appropriate when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before it occurred, or the official perceived there was a risk that the action was illegal but did not stop or prevent the conduct. Supporting evidence may include statements of company officials or other witness statements, previous complaints regarding retaliation, training received by Respondent's staff, and corporate policies or manuals. A manager must have been acting within the scope of their authority for the manager's knowledge or actions to serve as the basis for assessing punitive damages.

#### **2. Respondent's Conduct Was Egregious**

Examples of egregious conduct meriting punitive damages can include, but are not limited to, situations in which:

- a. A discharge was accompanied by previous or simultaneous harassment or subsequent blacklisting.
- b. Complainant has been discharged because of their association with a whistleblower.
- c. A group of whistleblowers has been discharged.
- d. There has been a pattern or practice of retaliation in violation of a statute that

OSHA administers and the case fits the pattern.

- e. There is a policy contrary to rights protected by the statute (for example, a policy requiring safety complaints to be made to management before filing them with OSHA or restricting employee discussions with OSHA compliance officers during inspections) and the retaliation relates to this policy.
- f. A manager has committed, or has threatened to commit, violence against Complainant.
- g. The adverse action is accompanied by public humiliation, threats of violence, or other retribution against Complainant, or by violence, other retribution, or threats of violence or retribution against Complainant's family, coworkers, or friends.
- h. The retaliation is accompanied by extensive or serious violations of the substantive statute, e.g., serious violations of OSHA standards in a section 11(c) case or serious violations of commercial motor carrier safety regulations in a STAA case.

### **C. Respondent's Good Faith Defense**

Respondent may be able to successfully defend against punitive damages if it can demonstrate good faith; in other words, the managers were acting on their own and Respondent had a clear and effectively-enforced policy against retaliation. Punitive damages may not be appropriate if Respondent had a clear-cut policy against retaliation that was subsequently used to mitigate the retaliatory act.

### **D. Calculating the Punitive Damages Award**

Once it is determined that Respondent's conduct warrants a punitive damages award, investigators should consider a number of factors in assessing the final amount of the award. Any award of punitive damages must always recite evidence supporting the determination that punitive damages are warranted and explain the basis for determining the amount awarded.

#### **1. Statutory Caps**

A number of statutes include provisions capping punitive damages at \$250,000, i.e., STAA, FRSA, NTSSA, and SPA. Other statutes do not have statutory caps, i.e., section 11(c) of the OSH Act, AHERA, ISCA, SDWA, and TSCA. See Chapter 6.VI.D.2, *Guideposts*, below. Although these caps do not strictly apply under the other statutes, they are relevant because they indicate what damages are available under similar whistleblower statutes.

#### **2. Guideposts**

In addition to the statutory caps mentioned above, there are several guideposts, listed below, that should be considered in determining how much to award in punitive damages.

##### **a. Egregiousness of Respondent's Conduct**

This factor is the most important factor in determining the amount of a punitive damages award. More egregious conduct generally merits a higher punitive

damage award and a number of variables may be considered to determine how this factor affects the size of the award, including but not limited to:

- i. The degree of Respondent's awareness that its conduct was illegal (see discussion above);
- ii. The duration and frequency of the adverse action;
- iii. Respondent's response to the complaint and investigation: for example, whether Respondent admitted wrongdoing, cooperated with the investigation, offered remedies to Complainant on its own, or disciplined managers who were at fault. On the other hand, it is appropriate to consider whether Respondent was uncooperative during the investigation, covered up retaliation, falsified evidence, or misled the investigator;
- iv. Evidence that Respondent tolerated or created a workplace culture that discouraged or punished whistleblowing; in other words, whistleblowers were deterred from engaging in protected activity;
- v. The deliberate nature of the retaliation or actual threats to Complainant for their complaints to management;
- vi. Whether OSHA has found merit in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, so as to suggest a pattern of retaliatory conduct; and/or
- vii. Other mitigating or aggravating factors.

**b. Ratios**

The ratio of punitive to compensatory damages should be considered in all cases, including cases under the four statutes with punitive damages caps (STAA, SPA, FRSA, NTSSA). The ratio of punitive damages to other monetary relief (back pay and compensatory damages) generally should not exceed 9 to 1 except in extraordinary circumstances, such as when there are nominal compensatory damages and back pay but highly egregious or reprehensible conduct. If there is no other monetary relief, punitive damages still may be awarded on the basis of the factors above.

**c. Comparison to Awards in Comparable Cases**

It is also important to consider whether the amount of punitive damages awarded is comparable to the amount awarded in comparably egregious retaliation cases by OSHA, ALJs, the ARB, or courts under OSHA whistleblower statutes or other anti-retaliation provisions. Consultation with DWPP or RSOL can be helpful for identifying comparable cases.

## **VII. Attorney's Fees**

Attorney's fees are specifically authorized by all whistleblower statutes enforced by OSHA, except for section 11(c), AHERA, and ISCA. OSHA will award reasonable attorney's fees in merit cases under statutes authorizing attorney's fees if Complainant has been represented by an attorney and requests attorney's fees.

In most instances, OSHA's findings and order may simply state that OSHA is awarding "reasonable attorney fees" without stating the specific amount of fees awarded. However, in some cases, such as when it is anticipated that neither party will request a hearing before an ALJ and OSHA's order will become the final order of the Secretary of Labor in the case, a more specific order may be warranted.

In those instances, attorney's fees are calculated using the "lodestar method." Under this method, the attorney's fees owed equal the product of the number of hours worked by the attorney(s) and support staff, such as paralegals, on the case and the prevailing market rates for attorneys and support staff of comparable experience in the relevant community. Thus, OSHA will not order attorney's fees based on alternative methods of compensation, such as a contingency arrangement.

Complainant's attorney should be consulted regarding the hourly rate and the number of hours worked. The number of hours worked would include, for example, hours spent on the attorney's preparation of the complaint filed with OSHA, the submission of information to the investigator, and time spent with Complainant preparing for and attending interviews with the investigator. However, the hours worked must involve the specific investigation in question and cannot include hours worked on related cases that are not pending before OSHA. For example, a complainant's attorney who filed an STAA complaint and an EEOC claim may be eligible for the STAA portion of the attorney's fees only.

OSHA may reduce the fee to reflect a reasonable number of hours worked if the hours an attorney claims to have worked on an investigation appear excessive based on the investigator's interaction with the attorney during the investigation. Similarly, OSHA may reduce the hourly rate at which it will order compensation if the hourly rate appears excessive compared to the hourly rate of other practitioners with a similar level of experience in the same geographic area.

Attorneys should submit documentation with their request for fees to substantiate that the number of hours worked and the prevailing hourly rate are reasonable. Examples of documentation supporting an award of attorney's fees include contracts, spreadsheets, invoices, statements of other attorneys in the same market regarding their own hourly rates, other whistleblower cases awarding attorney's fees to attorneys in the same market, and other documents. Investigators should consult with their supervisor and RSOL if there are questions regarding whether a request for attorney's fees is reasonable.

## **VIII. Interest**

Interest on back pay will be computed by compounding daily the IRS interest rate for the underpayment of taxes. That underpayment rate can be determined for each quarter by visiting [www.irs.gov](http://www.irs.gov) and entering "federal short-term rate" in the search expression. The press releases for the interest rates for each quarter will appear. The relevant rate is generally the Federal short-term rate plus three percentage points. A definite amount should be computed for the interim (the time up to the date of the award), but the findings should state that interest at the IRS underpayment rate at 26 U.S.C. § 6621, compounded daily, also must be paid on back pay for the period after the award until actual payment is made. Interest typically is not awarded on damages for emotional distress or on any punitive damages. However, interest may be awarded on compensatory damages of a pecuniary nature.

## **IX. Evidence of Damages**

Investigators must collect and document evidence in the case file to support any calculation of damages. It is especially important to adequately support calculation of compensatory (including pain and suffering) and punitive damages. Types of evidence include bills, receipts, bank statements, credit card statements, or any other documentary evidence of damages. Witness and expert statements also may be appropriate in cases involving non-pecuniary compensatory damages. In addition to collecting evidence of damages, it is important to have a clear record of total damages calculated and itemized compensatory damages.

In addition to including this evidence in the case file, Secretary's Findings should include an explanation of the basis for awarding any punitive damages or non-pecuniary compensatory damages (such as damages for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish). As discussed above, the basis for such damages should be something beyond the basis for finding that Respondent violated the statute.

## **X. Non-Monetary Remedies**

**A.** OSHA may order non-monetary remedies authorized by the relevant whistleblower statute. Non-monetary remedies may include:

1. Expungement of warnings, reprimands, and derogatory references which may have been placed in Complainant's personnel file as a result of the protected activity.

In some instances, for example where respondent has a legal obligation to maintain certain records, it may be appropriate to limit an expungement order. This may be done, for instance, by stating that the requirement to expunge records is fulfilled by maintaining information in a restricted manner such that physical and electronic access to it is limited, and by refraining from relying on the information in future personnel actions or referencing it to prospective employers or others.

2. Providing Complainant with at least a neutral reference for future employers and others.
3. Requiring Respondent to correct information submitted to self-regulatory organizations, licensing authorities, or others (for example, requiring respondent to correct information submitted to FINRA, or announcements made in a public filing with the SEC, such as an 8k, in SOX cases, or correcting a DAC report in STAA cases).
4. Requiring Respondent to provide employee or manager training regarding the rights afforded by OSHA's whistleblower statutes. Training may be appropriate particularly where Respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation.
5. Posting of an informational poster about the relevant whistleblower statute.
6. Posting of a notice regarding the OSHA order.

**B.** Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact their supervisor and RSOL for guidance on these and other non-monetary remedies.

## **XI. Enforcement of Preliminary Reinstatement Orders and Final Department of Labor Orders for Any Merit Case Under Statutes Other Than Section 11(c), AHERA, or ISCA**

When OSHA is notified that a respondent has failed to comply with either a preliminary reinstatement order or a final order of OSHA, the ALJ, the ARB, or the Secretary of Labor, including an order approving a settlement, the supervisor should refer the case to RSOL so that RSOL can consider enforcing of the order in the appropriate federal district court. The supervisor is encouraged to consult with RSOL before formally referring the matter. In cases under statutes allowing enforcement of the order by Complainant in federal district court, Complainant should be advised of their rights.<sup>36</sup>

In such instances, under normal circumstances, the enforcement action should not be treated as a new retaliation complaint, but rather as a continuation of the existing whistleblower claim. If, however, the supervisor, in consultation with RSOL and DWPP, determines that the particular situation calls for a new case to be opened, the supervisor may do so and an investigation will be conducted.

## **XII. Undocumented Workers**

Undocumented workers are not entitled to reinstatement, front pay, or back pay. *Cf. Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) (under National Labor Relations Act, undocumented workers are not entitled to reinstatement or back pay). Other remedies, including compensatory and punitive damages, and conditional reinstatement,<sup>37</sup> may be awarded, as appropriate.

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<sup>36</sup> The statutes that provide for enforcement of orders by Complainant (as well as by the Secretary of Labor) are: ACA, AIR21, AMLA, CAARA, CAA, CFPA, CPSIA, ERA, FSMA, MAP-21, NTSSA, PSIA, SOX, and TFA.

<sup>37</sup> With conditional reinstatement the worker is given a reasonable period of time to present or acquire work authorization and, if they are able to do so, the employer must offer reinstatement.

## Chapter 7

### SETTLEMENTS

#### I. Scope

This chapter provides guidance on the following topics: (1) alternative dispute resolution (ADR); (2) standard OSHA settlement agreements; (3) OSHA's approval of settlement agreements negotiated between Complainant and Respondent where applicable; (4) terms that OSHA believes are inappropriate in whistleblower settlement agreements because they are contrary to the public interest and the policies underlying the whistleblower protection statutes enforced by OSHA; (5) bilateral agreements; and (6) enforcement of agreements.

#### II. Settlement Policy

Voluntary resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. Additional resources to assist the parties in reaching a settlement may be available through OSHA's ADR program. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. OSHA will not enter into or approve a settlement agreement unless it determines that the settlement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement is not repugnant to the relevant whistleblower statute and does not undermine the protection that the relevant whistleblower statute provides.

As discussed below, Complainant and Respondent should be encouraged whenever possible to use the OSHA standard settlement agreement (see [Chapter 7.V](#), *OSHA Settlement Agreement*). However, the parties may negotiate their own settlement agreement and submit it for OSHA's approval (see [Chapter 7.VI](#), *Employer-Employee Settlement Agreements*). Such settlement agreements are referred to as employer-employee settlement agreements in this manual. In most cases, a claim may be settled only with the consent of both Complainant and Respondent. However, in limited circumstances, OSHA may enter into an agreement with Respondent to settle claims under section 11(c) of the OSH Act, AHERA or ISCA without Complainant's consent (see [Chapter 7.VII](#), *Bilateral Agreements*). Such settlement agreements are referred to as bilateral agreements in this manual.

#### III. Alternative Dispute Resolution

In addition to traditional settlement negotiation methods, regions may offer the parties the opportunity to resolve complaints using the settlement techniques of the Alternative Dispute Resolution (ADR) process. ADR is a consensual process that utilizes a third-party neutral to assist parties in resolving their conflict. Both parties must agree to participate in ADR, and either party may choose to terminate the ADR process at any time and proceed with a full field investigation.

The ADR neutral has no involvement in OSHA's investigation of the merits of the whistleblower case and does not represent either party. For procedures on resolving complaints through ADR, see the instructions outlined in OSHA Instruction [CPL 02-03-008](#), Alternative Dispute

Resolution (ADR) Processes for Whistleblower Protection Program – February 2, 2019 (or its successor). Please note that any settlement agreement reached as a result of ADR must be approved by the RA (or designee).

#### **IV. Settlement Procedure**

##### **A. Requirements**

Requirements for settlement agreements are:

1. The settlement agreement must be in writing and the settlement must be knowing and voluntary, provide appropriate relief to Complainant, and be consistent with public policy, i.e., the settlement agreement must not be repugnant to the relevant whistleblower statute and must not undermine the protection that the relevant whistleblower statute provides.
2. Every OSHA settlement agreement must be signed by the appropriate OSHA official.
3. In every employer-employee agreement, the settlement approval letter must be signed by the appropriate OSHA official.
4. Every settlement agreement must be signed by Respondent(s).
5. Every settlement agreement must be signed by Complainant, except in bilateral agreements under section 11(c), AHERA, and ISCA.
6. The relevant partner agency or agencies must be promptly notified that the parties have settled the complaint and that the case is closed.
7. Employer-employee settlements must be submitted to OSHA for review and approval (as explained in [Chapter 7.VI.A](#) below).

##### **B. Adequacy of Settlements**

The standards outlined below are designed to ensure that settlement agreements in whistleblower cases meet OSHA's requirements. The appropriate remedy in each case should be explored and, if possible, documented. A complainant may accept less than full restitution to resolve the case more quickly. Concessions by both Complainant and Respondent are inevitable to accomplish a mutually acceptable and voluntary resolution of the matter.

###### **1. Knowing and Voluntary**

Except in the case of a bilateral agreement (described below at [Chapter 7.VII](#)), Complainant and Respondent must enter into the settlement agreement voluntarily, with an understanding of the terms of the settlement agreement and, if desired, an opportunity to consult with counsel or other representative prior to signing the settlement agreement.

###### **2. Reinstatement & Monetary Remedies**

The settlement agreement must specify the remedies for Complainant, which may include reinstatement, back pay, front pay, damages, attorney fees, or other monetary relief. Alternatively, the settlement agreement may specify payment of a lump sum amount to Complainant or the payment of separate lump sum amounts to

Complainant and Complainant's counsel. It is recommended that the settlement agreement expressly state the allocation of payment between wages and other amounts.<sup>38</sup>

### **3. Other Remedies**

A variety of non-monetary remedies may be appropriate to include in a settlement agreement to make the employee whole and/or to remedy the chilling effect of retaliation in the workplace. Common non-monetary remedies that OSHA may seek in a settlement include the following, although additional non-monetary remedies may be appropriate as well:

- a. The expungement of any warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in Complainant's personnel file or other records, and/or requiring the employer to change a complainant's personnel file to simply state that employment ended and to note the date employment ended rather than that Complainant was discharged;
- b. The agreement of Respondent, and those acting on Respondent's behalf, to provide at least a neutral reference (e.g., title, dates of employment, and pay rate) to potential employers of Complainant, to refrain from any mention of Complainant's protected activity, and to refrain from saying or conveying to any third party anything that could be construed as damaging the name, character, or the employment prospects of Complainant.
- c. Posting of a notice to employees stating that Respondent agrees to comply with the relevant whistleblower statute and/or posting of an informational poster or fact sheet about that statute. Postings should be readily available to all employees, e.g., posted on a bulletin board or distributed electronically.
- d. Training of managers and employees regarding employees' right to report potential violations of the law without fear of retaliation under the relevant whistleblower statute.

### **C. Consistent With the Public Interest**

As explained below (see [Chapter 7.VI.E](#), *Criteria for Reviewing Employer-Employee Settlement Agreements*), OSHA will not enter into or approve a settlement agreement that contains provisions that it believes are inconsistent with the relevant whistleblower protection statute or contrary to public policy.

### **D. Tax Treatment of Amounts Recovered in a Settlement**

Complainant and Respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with

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<sup>38</sup> Failure to expressly identify the payments that are made for restitution or to come into compliance with the law (e.g., wages, compensatory damages) may affect the tax treatment of such payments. See 26 U.S.C. § 162(f)(2)(A)(ii).

applicable tax law.<sup>39</sup> OSHA is not responsible for advising the parties on the proper tax treatment or tax reporting of payments made to resolve whistleblower cases.

1. The investigator should inform parties that OSHA cannot provide Complainants or Respondents with individual tax advice and that the parties are responsible for compliance with applicable tax law and may need to seek advice from their own tax advisers.
2. The investigator can talk with parties generally about the potential taxability of settlement amounts, including (1) the possibility of the employer withholding applicable taxes for settlement payments made for restitution or to come into compliance with the law (e.g., wages, compensatory damages) and (2) the parties' responsibility to report and pay any applicable taxes on settlement amounts.
3. The investigator should try to ensure that the settlement agreement expressly states the allocation of payment that is made for restitution or to come into compliance with the law (e.g., wages, compensatory damages). This will help determine the taxability of settlement amounts later if it becomes an issue.

## **V. OSHA Settlement Agreement**

### **A. General Principles**

Whenever possible, the parties should be encouraged to use the OSHA settlement agreement containing the elements outlined below.

### **B. Specific Requirements**

An OSHA settlement agreement:

1. Must be in writing.
2. Must stipulate that Respondent agrees to comply with the relevant statute(s).
3. Must document the agreed-upon relief.
4. Must be signed by Complainant, Respondent, and the RA (or designee), except in bilateral agreements under section 11(c), ISCA, or AHERA where Complainant's concurrence is not required. OSHA will send a copy of the signed agreement to each of the parties.
5. Should include whenever possible measures to address the chilling effect of the alleged retaliation in the workplace. Remedies to address the chilling effect of the alleged retaliation are particularly important in instances in which Complainant does not return to the workplace as a result of the settlement agreement. Appropriate

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<sup>39</sup> For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to *IRS Counsel Memorandum*, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at: <https://www.irs.gov/pub/irsoia/pmta2009-035.pdf>. Further additional information is also available on the IRS's website: <https://www.irs.gov/government-entities/tax-implications-of-settlements-and-judgments>. The parties may also wish to refer to OSHA's *Taxability of Settlements Desk Aid* (Sept. 30, 2015), available at <https://www.whistleblowers.gov/memo/2015-09-30>. However, OSHA notes that these guidance documents may change in the future.

remedial provisions to alleviate the chilling effect of retaliation in the workplace, such as postings and training of employees and managers are discussed further below (see next section, [Chapter 7.V.C, Provisions of the Agreement](#)) and model provisions are contained in OSHA's standard settlement template.

6. Should include a single payment of all monetary relief due to Complainant whenever possible. If Respondent sends the payment directly to Complainant (e.g., as a direct deposit), the investigator will obtain a confirmation of payment (e.g., a deposit slip or copy of the check) from Complainant or Respondent. If Respondent sends the payment to OSHA, the investigator will promptly note receipt of any check, copy the check for inclusion in the case file, and mail or otherwise deliver the check to Complainant.

### **C. Provisions of the Agreement**

In general, much of the language of the OSHA settlement agreement should not be altered, but certain sections may be altered or removed to fit the circumstances of the complaint or the stage of the investigation. The following are the typical provisions in an OSHA settlement agreement.

1. **POSTING OF NOTICE.** A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirements of the applicable whistleblower law pursuant to a settlement agreement. (Optional)
2. **COMPLIANCE WITH NOTICE.** A provision stating that Respondent will comply with all of the terms and provisions of the Notice. (Optional)
3. **POSTING OF AN INFORMATIONAL POSTER.** A provision requiring Respondent to post an appropriate poster, which may include the mandatory OSH Act poster or, for respondents covered by the ERA, the mandatory ERA whistleblower poster, or any appropriate fact sheet that summarizes the rights and responsibilities under the relevant OSHA-enforced whistleblower statute.<sup>40</sup> (Optional)
4. **TRAINING.** A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under the relevant whistleblower protection statute. (Optional)
5. **NON-ADMISSION.** A provision stating that, by signing the agreement, Respondent does not admit or deny violating any law, standard, or regulation enforced by OSHA. (Optional)
6. **REINSTATEMENT.** This section may be omitted if reinstatement is not a possible remedy in the case. Otherwise, the settlement agreement should include one of the two options below:
  - a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have had but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [If

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<sup>40</sup> The OSH Act poster, which provides information about section 11(c) and other rights under the OSH Act, is mandatory. 29 CFR 1903.2(a). Employers covered by the ERA are required to display the ERA whistleblower poster. 42 U.S.C. § 5851(i).

accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].

- b. Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.
7. MONIES. This section may be omitted if monetary relief is not a part of the settlement. The parties should choose one of the options for monetary relief in the standard settlement agreement to indicate either:
- a. the payment of a specified amount of back pay;
  - b. the payment of a specified lump sum amount; or
  - c. a combination of a specified payment of back pay and a specified payment of a lump sum.

In unique circumstances, with supervisory approval, it may be appropriate for the parties and OSHA to craft alternative provisions regarding the payment of money to Complainant. The settlement agreement should expressly identify the payments that are made for restitution or to come into compliance with the law (e.g., wages). See 26 U.S.C. § 162(f)(2)(A)(ii).

8. PERSONNEL RECORD. The settlement should include a provision expunging Respondent's records of references to Complainant's protected activities as well as any adverse actions taken against Complainant and requiring that Respondent provide Complainant with at least a neutral reference. The precise terms of this provision may vary depending on the facts of the case.
9. ENFORCEABILITY. In all cases other than those under section 11(c), AHERA, and ISCA, the settlement agreement must include language such as the following:

*This agreement constitutes findings and an order under [the relevant whistleblower statute]. Complainant's and Respondent's signatures below constitute assent and the failure to object to the findings and the order under [the relevant whistleblower statute]. Therefore, the settlement agreement is a final order of the Secretary of Labor, enforceable in an appropriate United States district court under [the relevant whistleblower statute].*

In section 11(c), AHERA, and ISCA cases, the settlement must state the following:

*Respondent's violation of any terms of the settlement may prompt further investigation and the filing of an action by the Secretary in an appropriate United States district court under the statute. This Agreement shall be admissible in such an action. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court. [In bilateral settlement agreements add the following: Complainant is a third-party beneficiary of this agreement.]*

10. CONFIDENTIALITY. Settlement agreements must not contain provisions that state or imply that DOL is a party to a confidentiality agreement. Complainant and

Respondent may agree that each of them will keep the settlement agreement confidential and may ask OSHA to regard the agreement as potentially containing confidential business information exempt from disclosure under FOIA. In those circumstances, the agreement should contain a statement such as the following:

*Complainant and Respondent have agreed to keep the settlement confidential. The settlement agreement is part of OSHA's records in this case and is subject to disclosure under FOIA, unless an exemption applies. Complainant and Respondent have requested that OSHA designate the agreement as containing potentially confidential information and request predisclosure notification of any FOIA request pursuant to 29 CFR 70.26.*

The agreement must be maintained in the case file and should be clearly marked as potentially containing business confidential information exempt from disclosure under FOIA (see [Chapter 9.III.B.2](#), *Traditional CBI*).

11. NON-WAIVER OF RIGHTS. The standard language reaffirming Complainant's right to engage in activity protected under the relevant OSHA's whistleblower statute may be included in the agreement:

*Nothing in this Agreement or in any separate agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program (such as, but not limited to, the SEC or IRS whistleblower award programs) for providing information directly to a government agency.*

In some cases, it may also be appropriate to add:

*Nothing in this agreement or in any separate agreement is intended to or shall prevent, impede, or interfere with Complainant's filing of a future claim related to an exposure to a hazard, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date Complainant signed this agreement.*

#### **D. Side Agreements**

In some instances, Complainant and Respondent in a whistleblower case may negotiate to resolve multiple claims arising from Complainant's employment, including a claim under one of OSHA's whistleblower statutes. In those instances, OSHA prefers that the parties use the OSHA settlement agreement to resolve the whistleblower claim pending before OSHA. If the parties' separate agreement contains terms relevant to settlement of the whistleblower case, the separate agreement must be submitted to OSHA for approval (see [Chapter 7.VI](#), *Employer-Employee Settlement Agreements*) and the OSHA standard settlement agreement may incorporate the relevant (approved) parts of the employer-employee agreement by reference. This is achieved by inserting the following paragraph in the OSHA standard settlement agreement:

*Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration's (OSHA's) authority. OSHA's authority over that agreement is limited to the statutes within its authority. Therefore, OSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to the [name of the statute(s) under which the complaint was filed].*

It may be necessary to modify the last sentence to identify the specific sections or paragraph numbers of the agreement that are under the Secretary's authority.

#### **E. OITSS-Whistleblower Recording and Partner Agency Notifications for OSHA Settlements**

All cases utilizing the OSHA settlement agreement, including those that also contain a side agreement as explained above ([Chapter 7.V.D, Side Agreements](#)), must be recorded in OITSS-Whistleblower as "Settled."

As previously noted, the relevant partner agency(s) must be notified that the case has settled.

### **VI. Employer-Employee Settlement Agreements**

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, even in cases in which OSHA does not take an active role in the settlement negotiations. Because voluntary resolution of disputes is desirable, OSHA's policy is to defer to adequate employer-employee settlements (previously known as "third party agreements").

In most circumstances, an OSHA settlement agreement is optimal. As explained above, if the parties are amenable to signing one, the OSHA settlement agreement may incorporate the relevant (approved) parts of an employer-employee agreement by reference. See [Chapter 7.V.D, Side Agreements](#) above.

#### **A. Review Required**

Settlement agreements reached between the parties must be reviewed and approved by the RA (or designee) to ensure that the settlement agreement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement must not be repugnant to the relevant whistleblower statute and not undermine the protection that the relevant whistleblower statute provides.<sup>41</sup> OSHA's authority over settlement agreements is limited to the statutes within its authority. Therefore, OSHA's approval only relates to the terms of the agreement pertaining to the referenced statute(s) under which the complaint was filed. Investigators should make every effort to explain this process to the parties early in the investigation to ensure that they understand OSHA's involvement in any resolution reached after a complaint has been initiated.

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<sup>41</sup> OSHA encourages but does not require parties to submit employer-employee settlements under FWPCA, CERCLA, and SWDA. See 29 CFR 24.111(a). For cases under all other whistleblower statutes, parties must submit employer-employee settlements for review and approval. See, e.g., 29 CFR 1978.111(a) & (d) (STAA); 29 CFR 1979.111(a) & (d) (AIR21); 29 CFR 1980.111(a) & (d) (SOX); 29 CFR 1982.111(a) & (d) (FRSA & NTSSA).

If the parties do not submit their agreement to OSHA or will not submit an agreement that OSHA can approve, OSHA may dismiss the complaint. The dismissal will state that the parties settled the case independently, but that the settlement agreement was not submitted to OSHA or that the settlement agreement did not meet OSHA's criteria for approval, as the case may be. The dismissal will not include factual findings. Alternatively, if OSHA's investigation has already gathered sufficient evidence for OSHA to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than Complainant, OSHA may issue merit findings or continue the investigation. The findings will note the failure to submit the settlement to OSHA or OSHA's decision not to approve the settlement. The determination should be recorded in OITSS-Whistleblower as either dismissed or merit, depending on OSHA's determination.

## **B. Required Language**

If OSHA approves an employer-employee settlement agreement in a case under a whistleblower statute other than section 11(c), AHERA, or ISCA,<sup>42</sup> the agreement constitutes the final order of the Secretary and may be enforced in an appropriate United States district court according to the provisions of OSHA's whistleblower statutes. OSHA's settlement approval letter must contain relevant enforcement language, such as:

*This settlement agreement constitutes findings and an order under [cite the relevant whistleblower statute]. Complainant's and Respondent's agreement to this settlement constitute failures to object to the findings and the order under [cite the relevant whistleblower statute]. Therefore, the settlement agreement is a final order of the Secretary of Labor enforceable in an appropriate United States district court under [cite the relevant whistleblower statute].*

In section 11(c), AHERA, and ISCA cases, the settlement agreement must state the following:

*Respondent's violation of any terms of the settlement may prompt further investigation and the filing of a civil action by the Secretary in an appropriate United States district court under the statute. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. This Agreement shall be admissible in such an action. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.*

The approval letter for employer-employee settlement agreements under any whistleblower statute must include the following statement:

*The Occupational Safety and Health Administration's authority over this agreement is limited to the statutes it enforces. Therefore, the Occupational Safety and Health Administration approves only the terms of the agreement pertaining to the [insert the name of the relevant OSHA whistleblower statute[s]].*

This last sentence may identify the specific sections or paragraph numbers of the agreement

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<sup>42</sup> Section 11(c), AHERA, and ISCA provide for litigation in United States district court and do not involve final orders of the Secretary.

that are relevant, that is, under OSHA's authority.

A copy of the reviewed agreement must be retained in the case file and the parties should be notified that OSHA will disclose settlement agreements in accordance with the FOIA, unless one of the FOIA exemptions applies.

### **C. Complaint Withdrawal Request**

If Complainant requests to withdraw the whistleblower complaint, the investigator should inquire whether the withdrawal is due to settlement.<sup>43</sup> If the withdrawal is due to settlement, the investigator must inform the parties that the settlement agreement must be submitted for approval. Upon review, OSHA may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The investigator should also advise the parties that upon OSHA's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed.

### **D. OITSS-Whistleblower Recording and Partner Agency Notifications for Employer-Employee Settlements**

Any case in which OSHA approves an employer-employee settlement agreement must be recorded in OITSS-Whistleblower as "Settled – Other."

As previously noted, the relevant partner agency(s) must be notified that the case has settled.

### **E. Criteria for Reviewing Employer-Employee Settlement Agreements**

To ensure that settlement agreements are entered into knowingly and voluntarily, provide appropriate relief to Complainant, and are consistent with public policy, OSHA must review unredacted settlement agreements in light of the particular circumstances of the case. The criteria below provide examples rather than an all-inclusive list of the types of terms that OSHA will not approve in a settlement agreement negotiated between Complainant and Respondent. As previously noted, OSHA prefers that parties use the OSHA settlement agreement whenever possible, as that agreement does not contain **terms that OSHA cannot approve**:

1. **PARTY TO A CONFIDENTIALITY AGREEMENT.** OSHA will not approve a provision that states or implies that OSHA or DOL is party to a confidentiality agreement. Complainant and Respondent may agree that each of them will keep the settlement agreement confidential and may ask OSHA to regard the agreement as potentially containing confidential business information exempt from disclosure under FOIA. In those circumstances, the settlement or OSHA's approval letter will contain a statement such as the following:

*Complainant and Respondent have agreed to keep the settlement confidential. The parties are advised that the settlement agreement is part of OSHA's records in this case and is subject to disclosure under FOIA unless an exemption applies. The parties have requested that OSHA designate the agreement as containing potentially confidential information and request predisclosure notification of any*

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<sup>43</sup> See Chapter 5.IX, *Withdrawal*. Complainant must provide the reason for the withdrawal request.

*FOIA request pursuant to 29 CFR 70.26.*

The approval letter should be maintained in the case file with the settlement agreement and the settlement agreement should be clearly marked as potentially containing business confidential information exempt from disclosure under FOIA (see [Chapter 9.III.B.2](#), *Traditional CBI*).

2. GAG PROVISIONS. OSHA will not approve a “gag” provision that prohibits, restricts, or otherwise discourages Complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. Potential “gag” provisions often arise from broad confidentiality or non-disparagement clauses, which Complainants may interpret as restricting their ability to engage in protected activity. Other times, they are found in specific provisions, such as the following:
  - a. A provision that restricts Complainant’s ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on Respondent’s past or future conduct. For example, OSHA will not approve a provision that restricts Complainant’s right to provide information to the government related to an occupational injury or exposure.
  - b. A provision that requires Complainant to notify their employer before filing a complaint or communicating with the government regarding the employer’s past or future conduct.
  - c. A provision that requires Complainant to affirm that they have not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.
  - d. A provision that requires Complainant to waive their right to receive a monetary award (sometimes referred to in settlement agreements as a “reward”) from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will not approve a provision that requires Complainant to waive their right to receive a monetary award from the Securities and Exchange Commission, under section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws.<sup>44</sup> Such an award waiver may discourage Complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires Complainant to remit any portion of such an award to Respondent. For

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<sup>44</sup> Other statutes that establish award programs for individuals who provide information directly to a Government agency include the Commodity Exchange Act, 7 U.S.C. 26(b); Foreign Corrupt Practices Act, 15 U.S.C. 78u-6(b); Internal Revenue Code, 26 U.S.C. 7623(b); and the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172.

example, OSHA will not approve a provision that requires Complainant to transfer award funds to Respondent to offset payments made to Complainant under the settlement agreement.

When these types of provisions are encountered, or settlements have broad confidentiality and non-disparagement clauses that apply “except as provided by law,” employees may not understand their rights under the settlement. Accordingly, OSHA will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement:

*Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant’s non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent’s past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program (such as, but not limited to, the SEC or IRS whistleblower award programs) for providing information directly to a government agency.*

In some cases, it may also be appropriate to add:

*Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainants filing a future claim related to an exposure, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date they signed this Agreement.*

3. **LIQUIDATED DAMAGES.** OSHA occasionally encounters settlement agreements that require a breaching party to pay liquidated damages. OSHA may refuse to approve a settlement agreement where the liquidated damages are clearly disproportionate to the anticipated loss to Respondent from a breach. OSHA may also consider whether the potential liquidated damages would exceed the relief provided to Complainant, or whether, owing to Complainant’s position and/or wages, they would be unable to pay the proposed amount in the event of a breach.
4. **OVERLY BROAD TERMS.**
  - a. **CLAIMS AND PARTIES RELEASED.** OSHA will typically approve a settlement agreement that contains a general release of employment-related claims against Respondent with the understanding that OSHA’s approval is limited to the settlement of the claims under the whistleblower statutes that it enforces. Because a general release cannot apply to future claims, OSHA prefers that a general release explicitly state that Complainant is releasing only employment-related claims that Complainant knew of as of the date of the settlement agreement. In addition, OSHA occasionally encounters settlement agreements that are extremely broad as to the parties released by the agreement or the claims released by the agreement, such as settlements containing terms that would release affiliates of Respondent unconnected to either Complainant’s

employment with Respondent or the protected activity alleged in the complaint or claims unconnected to Complainant's employment with Respondent. In order to ensure that Complainant's consent to the settlement is knowing and voluntary, OSHA may require that Respondent clearly list in the agreement the entities and/or individuals (e.g. the subsidiaries, affiliates, partners, directors, agents, attorneys, insurers, etc.) that are being released or provide more specific information regarding the claims that are being released.

- b. **TAX ISSUES.** OSHA occasionally encounters settlement agreements that have broad language relating to tax issues, e.g., requiring Complainant to indemnify and/or hold Respondent harmless for all taxes except those for which Respondent is solely liable. In order to ensure that the settlement agreement is not so vague regarding Complainant's potential liability that Complainant's consent cannot be regarded as knowing and voluntary, when OSHA encounters such a term, OSHA will request that the parties (1) omit the term from their agreement, or (2) substitute a term that states that both parties are solely responsible for their own tax obligations on monies paid under the settlement agreement and/or (3) substitute a term that states that Complainant is solely liable for Complainant's tax obligations and will hold Respondent harmless if Complainant fails to comply with any legal obligations to report and pay taxes on the amount that Complainant is receiving under the settlement agreement.
5. **CHOICE OF LAW.** Employer-employee settlement agreements sometimes contain a "choice of law" provision that states that the settlement is to be governed by the laws of a particular state. OSHA may approve an agreement that contains this term as long as the choice of law provision states that it does not limit the applicability of federal law under the relevant OSHA whistleblower statute. Where OSHA encounters a choice of law provision, it will request that the parties insert the following language:

*This provision does not limit the applicability of federal law under the [insert relevant OSHA whistleblower statute(s)].*

If the parties do not revise the agreement to include the language above, OSHA's approval letter should note that the settlement agreement contains a choice of law provision and that this provision does not limit the applicability of federal law under the relevant OSHA whistleblower statute(s).

6. **WAIVER OF FUTURE EMPLOYMENT.** If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file:
  - a. **The breadth of the waiver.** Does the employment waiver effectively prevent Complainant from working in their chosen field and/or in the locality where they reside? Consideration should include whether Complainant's skills are readily transferable to other employers or industries. Waivers that narrowly restrict future employment for a limited time to a single, discrete employer may be less problematic than broader waivers. Thus, an agreement limiting Complainant's future employment for a limited time from a single employer is less problematic than a waiver that would prohibit Complainant from working for any companies with which Respondent does business.

- b. **Fairness.** The investigator must ask Complainant: “Do you feel that, by entering into this agreement, your ability to work in your field is restricted?” If the answer is yes, then the following question must be asked: “Do you feel that the monetary payment fairly compensates you for that?” Complainant also should be asked whether they believe that there are any other concessions made by Respondent in the settlement that, taken together with the monetary payment, fairly compensate for the waiver of employment. The case file must document Complainant’s replies and any discussion thereof.
- c. **The amount of the remuneration.** Does Complainant receive adequate consideration in exchange for the waiver of future employment?
- d. **The strength of Complainant’s case.** How strong is Complainant’s retaliation case and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver, unless it is very well remunerated. Consultation with RSOL may be advisable.
- e. **Complainant’s consent.** OSHA must ensure that Complainant’s consent to the waiver is knowing and voluntary. The case file must document Complainant’s replies and any discussion thereof.
- f. **Comprehension and acceptance of the waiver.** If Complainant is not represented, the investigator must ask Complainant if they understand the waiver and if they accepted it voluntarily. Particular attention should be paid to whether there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, threats made to persuade Complainant to agree, or additional monies or forgiveness of debt promised as an additional incentive.
- g. **Other relevant factors.** Any other relevant factors in the particular case also must be considered. For example, does Complainant intend to leave their profession, to relocate, to pursue other employment opportunities, or to retire? Have they already found other employment that is not affected by the waiver? In such circumstances, Complainant may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

## VII. Bilateral Agreements

A bilateral settlement is one between the U.S. Department of Labor (DOL), signed by the RA (or designee) and Respondent—*without Complainant’s consent*—to resolve a complaint filed under section 11(c), AHERA, or ISCA. It is an acceptable remedy to be used only under the following conditions:

- The settlement offer by Respondent is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. Although the desired goal is to obtain reinstatement and all back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
- Complainant refuses to accept the settlement offer by Respondent. The case file must fully set out Complainant’s objections in the discussion of the settlement to ensure that the information is available when the case is reviewed by the supervisor.

- When presenting the proposed agreement to Complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and DOL may settle the case without Complainant's participation. This is also the time to explain that, once settled, Complainant may not request review of the case by DWPP because the settlement resolves the case.
- All potential bilateral settlement agreements must be reviewed and approved in writing by the RA (or designee) and RSOL. The bilateral settlement is then signed by both Respondent and the RA (or designee). Once settled, the case is entered in OITSS-Whistleblower as "Settled."
- Complaints filed under statutes other than section 11(c), AHERA or ISCA may not be settled without the consent of Complainant.

#### **A. Documentation and Implementation of Bilateral Agreements**

1. Although each agreement will be unique in its details by necessity, in settlements negotiated by OSHA the general format and wording of the OSHA standard settlement agreement should be used.
2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.
3. Back pay computations should be included in the case file, with explanations of calculating methods and relevant circumstances as necessary.
4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily.
5. Any check from Respondent must be sent to Complainant even if they did not agree with the settlement. If Complainant returns the check to OSHA, the Area or Regional Office will record this fact and return it to Respondent.

### **VIII. Enforcement of Settlements**

If there is a breach of a settlement agreement that OSHA has entered into or approved, depending on the whistleblower statute involved and the status of OSHA's investigation or any subsequent proceedings at the time the settlement was reached, OSHA staff may either reopen the whistleblower investigation or refer the matter to RSOL to pursue court-ordered enforcement. The additional work is a continuation of the original case. OSHA does not open a new case to deal with the breach of a settlement agreement.

#### **A. Cases Settled Under Section 11(c), AHERA, or ISCA**

If there is a breach of a settlement agreement in a section 11(c), AHERA, or ISCA case, the supervisor generally should consult with RSOL. OSHA may also inform the parties that violation of a settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.

OSHA staff will, after appropriate consultation with RSOL, evaluate the case to determine how to proceed.

1. If the case settled before the merits of the complaint could be determined, the case

may be reopened and investigated.

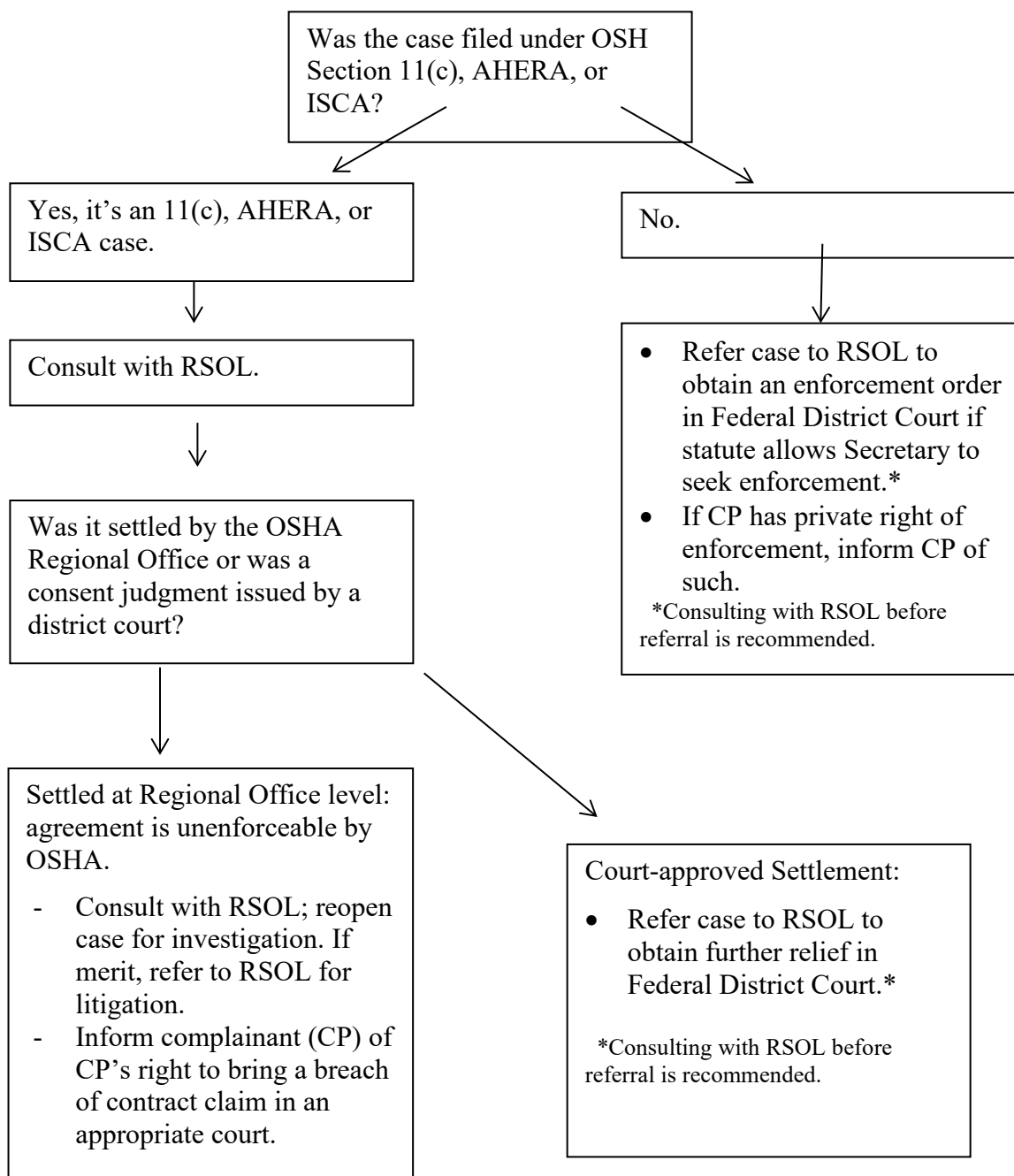
2. If the case had already been determined to have merit before the settlement was reached, the case may be referred to RSOL for litigation.
3. If the case was settled after the case had been determined to have merit and the settlement agreement was approved by the court, then OSHA generally will refer the case to RSOL to obtain further relief from the court.

For reference, please see the flow chart below.

#### **B. Cases Settled Under Statutes Other Than Section 11(c), AHERA, or ISCA**

If there is a breach of the settlement agreement, the case may be referred to RSOL with a recommendation to file for enforcement of the order in federal district court where the statute authorizes the Secretary to file suit. What constitutes a failure to comply will vary from case to case depending on the terms of the settlement, and the supervisor is encouraged to consult with RSOL before formally referring the matter. In cases under statutes allowing enforcement of the order by Complainant in federal district court, the parties should be advised of their right to enforce the settlement agreement in federal district court.

## Case Analysis Upon Respondent's Settlement Breach



## Chapter 8

### STATE PLAN – FEDERAL OSHA COORDINATION

#### I. Scope

Section 11(c) of the OSH Act mandates: “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.”

Section 11(c) generally provides employees protection from retaliation for engaging in activity related to safety or health in the workplace. The Secretary of Labor is represented by RSOL in any litigation deemed appropriate, and cases are heard in United States district court.

The purpose of this chapter is to describe the procedures for the coordination of cases involving section 11(c) and State Plan analogs to section 11(c). An explanation of the substantive and procedural provisions of section 11(c) can be found in the section 11(c) desk aid. The other chapters of this manual provide guidance on the investigation of OSHA whistleblower cases, including section 11(c) cases, and making determinations in those cases.

Regulations pertaining to the administration of section 11(c) of the OSH Act are contained in 29 [CFR Part 1977](#). The regulations most pertinent to Federal-State coordination on occupational safety or health retaliation cases are at [29 CFR 1977.18](#) (arbitration or other agency proceedings) and [29 CFR 1977.23](#) (State Plans).

#### II. Relationship to State Plans

##### A. General

Section 18 of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 667, provides that any State<sup>45</sup> wishing to assume responsibility for the development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a State Plan for the development of such standards and their enforcement. Approval of a State Plan under section 18 does not affect the Secretary of Labor’s authority to enforce section 11(c) of the Act in any State; additionally, [29 CFR 1977.23](#) and [1902.4\(c\)\(2\)\(v\)](#) require that each State Plan include a whistleblower provision as effective as OSHA’s section 11(c) (“section 11(c) analog”). Therefore, in State Plans that cover the private sector, employees may file occupational safety and health whistleblower complaints with federal OSHA, the State Plan, or both.

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<sup>45</sup> Under the OSH Act the term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. 29 U.S.C. § 652(7). Pursuant to the *Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Article V, section 502(a), as contained in Pub. L. 94-24, 90 Stat. 263 (Mar. 24, 1976) [citations to amendments omitted], generally applicable laws applicable to Guam apply to the Northern Marianas as they do to Guam. Therefore, the Commonwealth of the Northern Mariana Islands is also a “State” under the OSH Act.

## B. State Plan Coverage

Section 11(c) does not cover state and local government employees. All State Plans cover state and local government employees. Twenty-two State Plans cover both state and local governments, as well as most private sector employees.<sup>46</sup> There are six jurisdictions operating State Plans that cover state and local government employees only: Connecticut, Illinois, New Jersey, New York, Maine, and the U.S. Virgin Islands. In these six jurisdictions, all private-sector 11(c) coverage remains solely under the authority of federal OSHA. In State Plans, complaints from state and local government employees are covered only by the State Plan's section 11(c) analog. In addition, issues arising from the State Plan's handling of retaliation cases are eligible for review under Complaint About State Program Administration (CASPA) procedures.

## C. Overview of the Section 11(c) Referral Policy

Under [29 CFR 1977.23](#), OSHA may refer section 11(c) complaints to the appropriate state agency. It is OSHA's long-standing policy to refer section 11(c) complaints to the appropriate state agency for investigation under its section 11(c) analog; thus, rarely do both federal OSHA and a State Plan investigate a complaint.

## D. Exemptions to the Referral Policy

Utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

1. **Multi-Statute Complaint:** If federal OSHA receives a complaint that is covered by section 11(c) and another OSHA whistleblower statute, federal OSHA will not refer the case to the State Plan. However, federal OSHA should notify the State Plan that it has received the complaint and will be conducting the investigation.  
  
However, if the occupational safety or health retaliation portion of the complaint is untimely under section 11(c) but timely under the State Plan analog, OSHA will split the case and refer that portion to the State Plan. OSHA will continue its investigation under the other statute(s).
2. **Certain Federal and Non-Federal Public Employees:** Complaints from federal employees and complaints from state and local government employees in states without State Plans will not be referred to a state and will be administratively closed with concurrence or dismissed for lack of section 11(c) coverage, unless the complaint falls under another OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA. See [Chapter 8.II.B](#), *State Plan Coverage*, above regarding whistleblower protections for other state and local government employees.
3. **Exceptions to State Plan Coverage:** Most State Plans have carved out exceptions to State Plan coverage, and in these areas federal OSHA retains coverage of both safety and health complaints and section 11(c) complaints. Such areas include complaints

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<sup>46</sup> The State Plans which cover both private-sector and state and local government employees are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

from: employees of USPS, employees of contractor-operated facilities engaged in USPS mail operations, employees of tribal enterprises or Indian-owned enterprises on reservations or trust lands, employees working in workplaces on federal enclaves where the state has not retained authority, maritime employees not covered by the State Plan<sup>47</sup> (generally, longshoremen, shipyard workers, marine terminal workers, and seamen), and employees working in aircraft cabins in flight (as defined by the FAA Policy Statement). Complaints from such employees received by federal OSHA will not be referred to the State Plans. For details about the areas of State Plan coverage, see each State Plan's webpage at: <https://www.osha.gov/>.

4. **Multi-State Contacts:** When federal OSHA encounters a section 11(c) case with multi-state contacts and one or more of the states is a State Plan, it is best to avoid the complexities a State Plan may face in attempting to cover the case. For example, if the unsafe conditions which the employee complained about are not within the State Plan, the State Plan may have a coverage problem. Another problem relates to the possible inability of the State Plan to serve process on the employer because the employer is headquartered in another state; this may often happen with construction businesses. The nation-wide applicability of section 11(c) solves these problems. Federal OSHA must take such cases and should communicate with the State Plan when it does so.
5. **Inadequate Enforcement of Whistleblower Protections:** When federal OSHA receives a section 11(c) complaint concerning an employee covered by a State Plan, the RA may determine, based on monitoring findings or legislative or judicial actions, that a State Plan does not adequately enforce whistleblower protections or fails to provide protection equivalent to that provided by federal OSHA policies, e.g., a State Plan that does not protect internal complaints. In such situations, the RA may elect to process private-sector section 11(c) complaints from employees covered by the affected State Plan in accordance with procedures in non-plan states.

#### E. Referral Procedures: Complaints Received by Federal OSHA

In general, federally filed complaints alleging retaliation for occupational safety or health activity under State Plan authority, i.e., complaints by private-sector and state and local government employees, will be referred to the appropriate State Plan official for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. Generally, the complaint shall be referred to the State Plan where Complainant's workplace is located. The federal OSHA referral is a filing of the complaint with the State Plan. The referral must be made promptly, preferably by e-mail, fax, or expedited delivery. It should be made within the State Plan's filing period if possible (see [Chapter 8.II.E.3, Filing Periods in State Plans](#), below). The administratively closed federal case file will include a copy of the complaint, the referral email (or letter) to the State Plan, and the OITSS-Whistleblower case summary.

##### 1. Referral of Private-Sector Complaints

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<sup>47</sup> California, Minnesota, Vermont, and Washington have maintained coverage of on-shore maritime employees, and retaliation complaints from those employees will be referred to those four State Plans.

A private-sector employee may file an occupational safety and health whistleblower complaint with both federal OSHA under section 11(c) and with the State Plan under the State Plan's section 11(c) analog. Except as otherwise provided, when such a complaint is received by federal OSHA, the complaint will be administratively closed as a federal section 11(c) complaint. The date of the filing with federal OSHA will be recorded in OITSS-Whistleblower. The case will then be referred to the State Plan, generally where Complainant's workplace is located, for handling. If the adverse action or protected activity took place in another state (see [Chapter 8.II.D.4, Multi-State Contacts](#), above), the supervisor should consult with RSOL to determine if the case should be referred to the State Plan or handled by federal OSHA.

Complaints that on their face implicate only section 11(c) and a State Plan's section 11(c) analog should be immediately referred to the State Plan. The requirement of a screening interview is waived with such complaints (see [Chapter 3.III.A, Overview](#)).

The complaint will be referred to the State Plan for screening and, if the complaint was timely filed with federal OSHA, the OSHA Regional Office will consider the complaint dually filed so that the complaint can be acted upon under the federal review procedures, if needed.

## **2. Referral of Public-Sector Complaints**

All occupational safety and health whistleblower complaints (i.e., section 11(c) complaints) from state and local government employees will be administratively closed for lack of federal authority and referred to the State Plan, if one exists. If the complaint falls under both section 11(c) as well as an OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA, OSHA will refer the section 11(c) portion to the state plan, if one exists, while continuing to process/investigate the component of the complaint falling under the other statute. See [Chapter 8.II.D.2, Certain Federal and Non-Federal Public Employees](#), above for additional information about how to handle complaints from federal, state and local government employees.

## **3. Filing Periods in State Plans**

As of the date of this publication, the period to file in the State Plans, as established by statute or regulation, is 30 days, with the following exceptions: California (1 year); Connecticut (180 days); Hawaii (60 days); Kentucky (120 days); New Jersey (180 days); North Carolina (180 days); Oregon (90 days); and Virginia (60 days). Please refer to the individual State Plan statutes for current filing periods and potential extensions.

## **F. Procedures for Complaints Received by State Plans**

In general, a section 11(c) analog complaint received directly from a Complainant by a State Plan will be investigated by the State Plan and will not be referred to federal OSHA, unless it falls under one of the exceptions to State Plan coverage as stated above in [Chapter 8.II.D.3, Exceptions to State Plan Coverage](#). The State Plan may not request federal OSHA to handle a section 11(c) case after the expiration of the section 11(c) filing period if the complaint was not timely dually filed by Complainant with federal OSHA.

### **1. Notifying Complainants of Right to File Federal Section 11(c) Complaint**

Because employers in State Plans do not use the federal OSHA poster, the State Plans must advise private-sector Complainants of their right to file a federal section 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to federal protection. This may be accomplished through such means as the following language in the letter of acknowledgment or a handout sent or given to Complainant:

*If you are or were employed in the private sector, you may also file a retaliation complaint under section 11(c) of the federal Occupational Safety and Health Act. In order to do this, you must file your complaint with the U.S. Department of Labor - OSHA within thirty (30) days of receiving notice of the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under federal OSHA's section 11(c). Although OSHA will not conduct an investigation while the State Plan is handling the case, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final determination. A final determination is a final decision of the investigating office, a settlement to which Complainant did not consent, or a decision of a tribunal (if there was litigation by the State Plan), whichever comes later. As part of the federal review, OSHA may conduct further investigation. If the U.S. Labor Department (DOL) finds merit, DOL may file suit in federal district court to obtain relief. To file such a complaint, contact the OSHA Regional Office indicated below: ....*

### **2. Notification of Federal Review Option at Conclusion of State Plan Investigation**

At the conclusion of each whistleblower investigation, the State Plan must notify Complainant of the determination in writing and inform them of the process for requesting review by the state. If a timely complaint was also filed with federal OSHA, the determination letter should inform Complainant as follows:

*Should you disagree with the outcome of the investigation, you may request a federal review of your retaliation claim under section 11(c) of the OSH Act. Such a request may only be made after a final determination has been made by the state investigation office after exercise of the right to request state review, a settlement to which Complainant did not consent, or a final decision of a tribunal, whichever comes later. The request for federal review must be made in writing to the OSHA Regional Office indicated below and postmarked within 15 calendar days after your receipt of this final decision. If you do not request a federal review in writing within the 15 calendar-day period, you will have waived your right to a federal review.*

### **3. Federal Whistleblower Statutes Other than Section 11(c)**

OSHA expects that, where applicable, State Plans will make Complainants aware of their rights under the federal whistleblower protection statutes (other than section 11(c)) enforced by federal OSHA, which protect activity dealing with other federal agencies and which remain under federal OSHA's exclusive authority. For information on Complainants' rights under other federal whistleblower statutes

enforced by federal OSHA, see the [Whistleblower Statutes Summary Chart](#).

## **G. Properly Dually Filed Complaints**

A “properly dually filed complaint” is:

- an occupational safety or health whistleblower complaint filed with federal OSHA and the State Plan within the respective filing periods of both entities, or
- an occupational safety or health whistleblower complaint that was timely filed with federal OSHA, and federal OSHA has referred the complaint to the State Plan.

## **H. Activating Properly Dually-Filed Complaints**

Complainants who have concerns about the State Plan’s investigation of their whistleblower complaints may request federal review of the State Plan investigation. Such a request may only be made after any right to request state review has been exercised and the state has issued a final decision. A final decision is either a one reached by the investigating office, a settlement to which Complainant did not consent, or a decision of a tribunal, whichever comes later.

The request for a federal review must be made in writing to the OSHA Regional Office and postmarked within 15 calendar days after receipt of the state’s final decision. If the request for federal review is not timely filed, the federal section 11(c) case will remain administratively closed.

## **I. Federal Review Procedures**

A **federal review** is the review by OSHA of a State Plan’s case file of a dually filed complaint after Complainant has met the criteria below in section 1. As part of the review, a case may be sent back to the state so that the state may attempt to correct any deficiencies. If, after the federal review of the State Plan case file, federal OSHA determines that the state’s proceedings met the criteria listed below in [section 3](#), it may simply defer to the state’s findings (see [section 4](#) below). Alternatively, if federal OSHA determines that the state’s investigation was inadequate or that the Complainant’s rights were not protected in any other way, federal OSHA will conduct a full investigation (see [section 5](#) below).

### **1. Complainant’s Request for Federal Review**

If Complainant requests federal review of their occupational safety or health retaliation case after receiving a state’s final determination, federal OSHA will first determine whether the case meets all of the following criteria:

- a. Confirm that the complaint is, in fact, a dually filed complaint. That is: Complainant filed the complaint with federal OSHA in a timely manner (see [Chapter 8.II.G](#), *Properly Dually Filed Complaints*, and [Chapter 3.III.D.3](#), *Timeliness of Filing*). Complaints submitted through the OSHA Online Complaint form are considered filed with federal OSHA.
- b. A final determination has been made by the state. A final determination is a final decision of the investigative office after a review of an initial determination or a final decision of a tribunal, such as an administrative law

judge or court, whichever comes later, except as provided in [Chapter 8.II.G, Properly Dually Filed Complaints](#), above.

- c. Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's final determination; and
- d. Complaint is covered under section 11(c).

## **2. Complaints Not Meeting Federal Procedural Prerequisites for Review**

- a. If upon request for federal review, the case does not meet the prerequisites for review, Complainant will be notified in writing that no right for review by OSHA will be available. In that notification, Complainant will be informed of the right to file a Complaint About State Program Administration (CASPA), which may initiate an investigation of the State Plan's handling of the case, but not a section 11(c) investigation and, therefore, will not afford individual relief to Complainant.
- b. If Complainant requests federal review before the state's final determination is made, Complainant will be notified that they may request federal review only after the state has made a final determination in the case. However, in cases of a delay of one year or more after the filing of the complaint with federal OSHA or misfeasance by the state, the supervisor may allow a federal review before the issuance of a state's final determination.

## **3. Federal Review**

The OSHA federal review will be conducted as follows:

- a. Under the basic principles of 29 CFR 1977.18(c), in order to defer to the results of the state's proceedings, it must be clear that:
  - i. The state proceedings "dealt adequately with all factual issues;" and
  - ii. The state proceedings were "fair, regular and free of procedural infirmities;" and
  - iii. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
- b. The federal review will entail a scrutiny of all available information, including the State Plan's investigative file. OSHA may not defer to the state's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the state case be reopened and the specific deficiencies be corrected by the state.

## **4. Deferral**

If the state's proceedings meet the criteria above, federal OSHA may simply defer to the state's findings. Complainant will be notified and requests for review by DWPP will not be available. The closing notification will use both federal OSHA's existing, administratively-closed case number and the State Plan's case number in its

subject heading. Federal OSHA shall copy Respondent on the closing notification. Federal OSHA will note the federal review and the deferral in the original, pre-existing federal OSHA OITSS-Whistleblower entry. No new case will be opened or new entry added into OITSS-Whistleblower.

#### **5. No Deferral/New Investigation**

Should state correction be inadequate and/or the supervisor determines that OSHA cannot properly defer to the state's determination pursuant to 29 CFR 1977.18(c), the supervisor will order whatever additional investigation is necessary. The Region will docket the complaint in OITSS-Whistleblower. The legal filing date remains the original filing date. However, instead of reopening the original complaint in OITSS-Whistleblower, the investigator will open a new case in the database, using as the filing date for OITSS-Whistleblower the date on which federal OSHA decided to conduct a section 11(c) investigation. The investigator will note and cross reference the cases in the tracking text of both the original and new case database entries. The case will be investigated as quickly as possible. Based on the investigation's findings, the supervisor may dismiss, settle, or recommend litigation. If there is a dismissal, Complainants have the right to request review by DWPP.

#### **6. State Plan Evaluation**

If the federal section 11(c) review reveals issues regarding state investigation techniques, policies, and procedures, recommendations will be referred to the RA for use in the overall State Plan evaluation and monitoring.

### **J. CASPA Procedures**

1. OSHA's State Plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a State Plan may file a Complaint About State Program Administration (CASPA). See [29 CFR 1954.20](#); [CSP 01-00-005](#), Chapter 9.
2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a State Plan made to OSHA by any person or group. A CASPA about a specific case may be filed only after the state has made a final determination, as defined above.
3. Because properly dually filed section 11(c) complaints may undergo federal review under the section 11(c) procedures outlined in [Chapter 8.II.F.2, Notification of Federal Review Option at Conclusion of State Plan Investigation](#), and [Chapter 8.II.H, Activating Properly Dually-Filed Complaints](#), no duplicative CASPA investigation is required for such complaints. If a private-sector retaliation complaint was not dually-filed, it is not subject to federal review under section 11(c) procedures and is only entitled to a CASPA review. Complaints about the handling of State Plan whistleblower investigations from state and local government employees will be considered under CASPA procedures only.
4. Upon receipt of a CASPA complaint relating to a State Plan's handling of a whistleblower case, federal OSHA will review the State Plan's investigative file and conduct other inquiries as necessary to determine if the State Plan's investigation was adequate and whether the State Plan's handling of the case was in accordance

with the state's section 11(c) analog and supported by appropriate available evidence. A review of the State Plan's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the State Plan's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to the State Plan and Complainant within the required 90 days.

5. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future State Plan investigation techniques, policies, and procedures. A CASPA will not be reviewed under the OSHA DWPP request for review process. If the OSHA Regional Office finds that the outcome in a specific state whistleblower case is not appropriate (i.e., final state action is contrary to federal practice and is less protective than a federal action would have been; does not follow state law, policies, and procedures; or state law, policies, or procedures are not at least as effective as OSHA's), the Region should require the state to take appropriate action to reopen the case or in some manner correct the outcome, and, whenever possible, make changes to prevent recurrence. If there is a deficiency in the state statute, the supervisor, after consultation with the DWPP Director and the Directorate of Co-operative and State Programs, should request that the State Plan recommend legislative changes.

## Chapter 9

### INFORMATION DISCLOSURE

#### I. Scope

This chapter explains the procedures for the disclosure of documents in OSHA's whistleblower investigation files. Whistleblower investigation files are subject to disclosure under OSHA's non-public disclosure policy, the Privacy Act, and the Freedom of Information Act (FOIA). Under the anti-retaliation provisions that OSHA enforces, while a case is under investigation, information contained in the case file may be disclosed to the parties in order to resolve the complaint; we refer to these disclosures as non-public disclosures. Once a case is closed and the time period for filing objections to OSHA's determination has passed (see [Chapter 9.II.B.2, Processing Requests for Records](#), for further discussion), parties to the case may seek disclosure of documents in OSHA's files under the Privacy Act and FOIA.

The disclosure of information in whistleblower investigation files is governed by: (1) the Privacy Act, the goal of which is to protect the privacy of individuals under whose names government records are kept; (2) FOIA, the goal of which is to enable public access to government records; and (3) relevant provisions in the whistleblower statutes and DOL's regulations implementing the whistleblower statutes. The guidelines below are intended to ensure that OSHA's Whistleblower Protection Program fulfills its disclosure obligations under the Privacy Act, FOIA, and the whistleblower statutes.

#### II. Overview

##### A. This Chapter Applies to OSHA's Whistleblower Investigation Records

The guidelines in this chapter apply to all investigative materials and records maintained by OSHA's Whistleblower Protection Programs. These investigative materials or records include interviews, notes, work papers, memoranda, emails, documents, and audio or video recordings received or prepared by an investigator, concerning or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original records are the property of the United States Government and must be included in the case file. Under no circumstances is a government employee to destroy, retain, or use investigation notes and work papers for any private purpose. In addition, files must be maintained and destroyed in accordance with official agency schedules for retention and destruction of records. Investigators may retain copies of final ROI and Secretary's Findings for reference.

##### B. Processing Requests for Records in Open or Closed Cases

In most cases, the first question that must be answered in order to process a disclosure request is whether the case is open or closed. The following guidance should be used in determining whether a case is considered open or closed and in processing such requests.

###### 1. Determining Whether a Case is Open or Closed

Generally, cases are open if OSHA's investigation is ongoing or OSHA is involved in litigating the case.

Cases under Section 11(c), AHERA, and ISCA should be considered closed when a final determination has been made that litigation will not be pursued. Accordingly, a case under Section 11(c), AHERA, or ISCA (district court statutes) is considered open even if Secretary's Findings have been issued, but the case is under review in DWPP. If the case is under review for potential litigation or the Department is litigating the case, the case should be considered open.

Cases that provide for administrative hearings before an Administrative Law Judge (ALJ Statutes) should generally be considered closed once OSHA has completed its investigation, issued Secretary's Findings, and the time for objecting to the Secretary's Findings has passed. However, these cases would be considered open if OSHA is participating as a party in the proceeding before the ALJ (e.g., meritorious STAA cases); recommending to the Solicitor's Office (SOL) that OSHA participate as a party in the proceeding; litigating or considering litigating the case before an appellate body; or if for any other reason, RSOL or NSOL believes that it is appropriate to invoke the continuing application of FOIA Exemption 7(A).

## **2. Processing Requests for Records**

Generally, if a case is open, information contained in the case file may not be disclosed to the public, and a Glomar response (i.e., neither confirm nor deny the existence of the requested records; refer to [Exemption 7](#) for more information) may be appropriate. In the event that the matter has become public knowledge, for example because Complainant has released information to the media, limited disclosure may be made after consultations with RSOL and, in high profile cases, with DWPP.

If a case is open, OSHA will generally respond to disclosure requests from Complainants and Respondents under its Non-Public Disclosure policy. Third-party requests for open cases and all requests for closed cases will be processed as FOIA requests. However, OSHA may make public disclosures of certain information to third parties or other government entities as set forth in the next paragraphs.

### **C. Public Disclosure of Statistical Data and Disclosure of Case Information to the Press**

Disclosure may be made to Congress, the media, researchers, or other interested parties of statistical reports containing aggregate results of program activities and outcomes. Disclosure may be in response to requests made by telephone, email, fax, or letter, by a mutually convenient method. OSHA may also post statistical data on the OSHA web page. Regional offices should refer requests for national data to DWPP.

OSHA may decide that it is in the public interest or OSHA's interest to issue a press release or otherwise to disclose to the media the outcome of a complaint. A Complainant's name, however, generally will only be disclosed with their consent. As a result, press releases generally should not include personally identifiable information about Complainant.

### **D. Sharing Records Between OSHA and Other Government Entities**

1. OSHA generally shares an unredacted copy of the whistleblower complaint and the Secretary's Findings in the case with the agency responsible for enforcing or implementing the general provisions of the statutes to which the whistleblower complaint relates. See [Chapter 4.IV.A, Partner Agencies](#), for more information.

2. Appropriate, relevant, necessary, and compatible investigative records may be shared with other federal agencies responsible for investigating, prosecuting, enforcing, or implementing the general provisions of the statutes whose whistleblower provisions are enforced by OSHA, if OSHA deems such sharing to be compatible with the purpose for which the records were collected. When sharing records, OSHA will inform the recipient agency that the records are not public and request that no further disclosures be made. If there is no MOU between OSHA and the relevant federal agency, OSHA should generally use a sharing letter when transmitting records.

### **3. Sharing Letters**

Appropriate, relevant, necessary, and compatible investigative records may be shared with another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity, if the activity is authorized by law, and if that agency or instrumentality has made a written request to OSHA, signed by the head of the agency, specifying the particular records sought and the law enforcement activity for which the records are sought.

A sharing letter makes a limited disclosure to the requesting government agency and asks the recipient government agency to make no further public disclosures. Before entering into a sharing letter agreement with another governmental agency please consult with RSOL as some agencies are required by statute to make all records public.

### **4. Memoranda of Understanding (MOU)**

An MOU can also establish a method by which OSHA and another government agency may share whistleblower complaints and findings, as well as a process for the agencies to share information from investigative files.

## **E. Subpoenas**

When OSHA receives a request for records via a subpoena in a case in which DOL is not a party, a FOIA Officer must immediately notify the appropriate Regional Office RSOL or the SOL Occupational Safety and Health Division (SOL-OSH) of its receipt, so that the subpoena may be reviewed for 29 CFR 2.21 (Third-Party Subpoena Regulation [Touhy Regs.]) compliance. The FOIA Officer should then follow SOL instructions on how to proceed with the subpoena request.

## **III. OSHA's Non-Public Disclosure Policy**

A non-public disclosure is a release by OSHA of material from a whistleblower investigation case file to a party to the whistleblower investigation to aid in the investigation or resolution of the whistleblower complaint. Non-public disclosures may occur during an open investigation, including any time during the period for filing objections to OSHA's determination. OSHA's non-public disclosure policy does not create any appeal rights or enforceable disclosure rights.

The procedures for non-public disclosures also apply to disclosure of documents made to provide due process under the preliminary reinstatement provisions of ACA, AIR21, AMLA, CAARA, CFPA, CPSIA, FRSA, FSMA, MAP-21, NTSSA, PSIA, SOX, SPA, STAA, and TFA. For more information on "due process letters" please see [Chapter 5.VII.A.1, Cases Requiring Orders of Preliminary Reinstatement](#).

During an investigation, requests for material from whistleblower investigation case files from third party requesters must be directed to the appropriate FOIA Officer who will process the request in compliance with Departmental FOIA regulations and the guidance below. See [29 CFR Part 70 and 71](#) and Department of Labor Manual Series DLMS 1-1100.

#### **A. Procedures for Non-Public Disclosures**

1. OSHA will request that the parties provide each other with a copy of all submissions they have made to OSHA related to the complaint. If a party does not provide its submissions to the other party, OSHA will follow the guidelines below so that the parties can fully respond to each other's positions and the investigation can proceed to a final resolution.
2. During an investigation, disclosure must be made to Respondent (or Respondent's legal counsel) of the filing of the complaint, the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. OSHA generally will accomplish this disclosure by providing Respondent with a copy of the complaint and any additional information provided by Complainant that is related to the complaint. In circumstances in which providing the actual documents would be inadvisable (for example, if providing the redacted versions of the documents is not possible without compromising the identity of potential confidential witnesses (such as non-management, employee witnesses identified by Complainant) or risking retaliation against employees), OSHA, in its discretion, may provide a summary of the complaint and additional information to Respondent. Before providing materials to Respondent, OSHA will redact them (see [Chapter 9.III.A.4, Information That May Be Withheld Or Redacted In a Non-Public Disclosure](#), below).
3. During an investigation, OSHA will provide to Complainant (or Complainant's legal counsel) the substance of Respondent's response. OSHA generally will accomplish this disclosure by providing Complainant with a copy of Respondent's response and any additional information provided by Respondent that is related to the complaint. In circumstances in which providing the actual documents would be inadvisable (for example, if Respondent has indicated that certain documents contain information covered by the Trade Secrets Act, 18 U.S.C. § 1905, discussed below in [Chapter 9.III.B.1, Trade Secrets](#), or if OSHA believes providing the redacted versions of the documents might lead to an incident of workplace violence), OSHA, in its discretion, may provide a summary of the response and additional information to Complainant. Before providing materials to Complainant, OSHA will redact them (see [Chapter 9.III.A.4, Information That May Be Withheld Or Redacted In a Non-Public Disclosure](#), below).

Non-public disclosure must not cite FOIA exemptions, but redactions generally should be consistent with the redactions that would be made if the documents were being released under FOIA. Copies of redacted documents sent to parties under non-public disclosure procedures should be identified and maintained as such in the case file.

#### **4. Information That May Be Withheld Or Redacted In a Non-Public Disclosure**

The following are examples of the types of information that may be withheld or

redacted in a non-public disclosure. Please note that the redactions described below need only be made when providing information to the party that did not submit the information to OSHA:

**a. Personal Identifiable Information (PII)**

Names of individuals other than Complainant and management officials representing Respondent and personal identifiable information about individuals, including management officials, may need to be redacted when such information could violate those individuals' privacy rights, or cause intimidation or harassment to those persons. PII may include:

- i. Comparative data such as wages, bonuses, and the substance of promotion recommendations;
- ii. Supervisory assessments of professional conduct and ability, or disciplinary actions;
- iii. Information related to medical conditions;
- iv. Social Security numbers;
- v. Criminal history records;
- vi. Intimate personal information; and/or
- vii. Information about gender where such information could identify an individual.

See discussion under Exemption 6 for additional identifying characteristics that may be withheld. ([Chapter 9.IV.E.4, Exemption 6](#))

**b. Witness Statements**

OSHA provides witness statements to parties prior to the close of an investigation only when OSHA is issuing a "due process letter" prior to ordering preliminary reinstatement under those statutes that provide for such an order. (For more information on "due process letters" please see [Chapter 5.VII.A.1, Cases Requiring Orders of Preliminary Reinstatement](#)). When OSHA is providing witness statements as part of a "due process letter," OSHA must take care to protect the identity of any confidential witnesses.

While confidentiality should always be determined on a case-by-case basis, witnesses' identities should be protected when they have provided information either under an express pledge of confidentiality (see [Chapter 4.VIII, Confidentiality](#)), under circumstances from which such an assurance can be reasonably inferred, and in any circumstance where RSOL determines it is appropriate for privilege purposes. Statements of witnesses (other than Complainant and current management officials representing Respondent) may be withheld or redacted as needed in order to protect those individuals' identities as confidential witnesses. OSHA officers should take care to redact all information that may be used to identify or that might tend to identify a confidential informant – not only names and addresses, but also details including (but not limited to) hire date, specific position, number of employees, geographic location, specific duties,

etc. Where OSHA cannot provide the statement itself, OSHA will need to provide summaries of such statements that do not tend to identify the witness.

In some circumstances, OSHA may need to consider whether a witness has caused a confidentiality waiver. Once confidentiality is waived, then witness information and statements should no longer be withheld as confidential, but some information may still be redacted if the document contains Personally Identifiable Information (PII) or Confidential Business Information (CBI). For example, if a non-management witness willingly provided a statement to OSHA with a management representative in the room or emailed their statement to OSHA but copied their own supervisor, then confidentiality might be waived and the statements would no longer be withheld except for any PII or CBI.

c. **Confidential Business Information (CBI) and Financial Institution Supervisory Information**

See discussions below at [Chapter 9.III.B](#), *CBI, Trade Secrets and Financial Institution Supervisory Information*, for more information regarding what constitutes protected information and the disclosure rules applicable to such information.

d. **Intra-Agency Memoranda**

Non-public disclosure generally refers to the disclosure of documents and evidence submitted by the parties to a whistleblower investigation and, in the context of a “due process letter” evidence that OSHA gathered in the investigation. Thus, intra-agency memoranda are generally not subject to non-public disclosure. However, if for some reason OSHA is considering releasing intra-agency memoranda as part of a non-public disclosure, then intra-agency deliberations, communications from SOL to OSHA, and SOL attorney work product should be withheld under OSHA’s non-public disclosure policy to the same extent that they would be withheld in response to a FOIA request. See discussion below at [Chapter 9.IV.E.3](#), *Exemption 5*, regarding FOIA Exemption 5 and intra-agency deliberations.

**B. CBI, Trade Secrets, and Financial Institution Supervisory Information**

Confidential or privileged commercial or financial information that would be protected from disclosure under FOIA Exemption 4 should also be redacted or withheld under OSHA’s non-public disclosure policy when providing the information to Complainant or Complainant’s representative. Such information is referred to as confidential business information or CBI throughout this chapter. In redacting or withholding such information from non-public disclosure, OSHA will not cite FOIA exemptions that would otherwise be applicable. The general rules applicable to the types of CBI most frequently at issue in a whistleblower investigation are discussed below:

**1. Trade Secrets**

Trade secrets are defined as a secret, commercially valuable plan, formula, process or device that is used in making, preparing, or processing a trade commodity (e.g., manufacturing descriptions, product formulations, and schematics or drawings). Trade secrets should not be disclosed to Complainants unless the trade secret has

already been made public or Respondent has permitted the release.

## 2. Traditional CBI

- a. Information is considered CBI if it is commercial or financial, obtained from a person, and privileged or confidential. Commercial or financial information that is customarily and actually withheld from the public by the person from whom it was obtained and was submitted to OSHA, under an assurance or expectation of confidentiality, is considered CBI.
- b. In the context of whistleblower investigations, much of the confidential business information in OSHA investigation files may have been submitted by Respondent or Complainant, and the party submitting the CBI may not have labeled it as such. If the investigator believes that information is CBI that has not been identified as such by the submitter, OSHA should treat the information as potential CBI, and mark those exhibits accordingly. Examples of information that may be CBI include business plans, payroll information, and technical manuals for proprietary software or machinery.

Thus, if, during the course of an investigation, the investigator obtains information that they believe is CBI or the submitter has clearly labeled and explained in writing why a document submitted is confidential commercial or financial information, the investigator should place it under a separate tab prominently labeled “Confidential Business Information,” or “CBI” or similarly segregate and secure the information in an electronic case file. This tab is separate from any “Trade Secrets” tab. If the information was obtained under subpoena, it should be under a separate tab (or otherwise segregated and secured in an electronic case file) with the subpoena under which it was obtained. If requested, assurance may be made in writing that the information will be held in confidence to the extent allowed by law, and that OSHA will comply with [Executive Order No. 12600](#), 3 CFR 235 (1988), (E.O. 12600) or any subsequent Executive Order issued in light of the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*, \_\_ U.S. \_\_, 139 S.Ct. 2356 (2019), and [29 CFR Part 70.26](#) or successor regulation. Submitters of confidential commercial or financial information will be notified in writing of a pending FOIA request for disclosure of such information and will be given an opportunity to explain why it should not be released. As required by E.O. 12600, if OSHA does not agree with the submitter that materials identified by the submitter as CBI should be protected, prior to disclosing the documents, OSHA should give the submitter written notice, which must include: a statement of the reason(s) why OSHA disagreed with each of the submitter’s disclosure objections, a description of the information to be disclosed; and a specified disclosure date (e.g., 10 days from the date of OSHA’s written notice it will disclose the documents).

- c. If a CBI issue arises in a section 11(c) case, staff should familiarize themselves with the requirements of [section 15 of the OSH Act](#). While the OSH Act generally prohibits the release of trade secrets and confidential business information, it has not been found to be an exemption 3 statute under FOIA. See the DOJ’s memorandum, [Statutes Found to Qualify Under Exemption 3 of the](#)

[FOIA](#) (September 2020). These records must be reviewed for possible redaction or withholding under [FOIA exemption 4](#) as discussed.

### **3. Information From an Attorney-Complainant**

In some cases, Complainant is a current or former attorney for Respondent. In such cases, the attorney-complainant may use privileged information to the extent necessary to prove their whistleblower claims, regardless of the employer's claims of attorney-client or work-product privilege. Such material is a type of CBI, as the submitter would not generally disclose it to the public. OSHA will generally withhold such attorney-client communications to the same extent that it withholds other CBI.

Thus, in cases involving an attorney-complainant, OSHA should assure the parties that evidence submitted during the investigation of the whistleblower's claim that the employer would normally regard as attorney-client privileged or attorney work-product will receive special handling, will be shared only with the parties, will be secured from unauthorized access, and will be withheld, to the extent allowed by law, from public disclosure under [FOIA Exemption 4](#). Generally, if Respondent has asserted that the information referred to in the complaint is privileged, the entire case file should be clearly labeled as containing information that is to be withheld because Complainant is an attorney bound by attorney-client privilege. If Respondent asserts that only certain information is privileged, then that information should be sealed in an envelope, labeled as above, and placed under a clearly labeled tab or similarly segregated in an electronic case file.

Finally, in a case in which Complainant is a current or former attorney for Respondent, a Respondent who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.

The guidance above applies only when there is an attorney-complainant. In cases where Complainant is not an attorney or former attorney for Respondent, OSHA will not accept blanket claims of privilege. Rather, Respondent will be required to make specific, document-by-document claims, which OSHA will assess according to the procedures in E.O. 12600.

### **4. Financial Institution Supervisory Information**

This category of protected information is most likely to arise in investigations under the Consumer Financial Protection Act ("CFPA") whistleblower provision where the respondent is a financial institution supervised by the Consumer Financial Protection Bureau ("CFPB").

Occasionally, a complainant or respondent may submit documents in an investigation that are prepared by or for the CFPB (or another federal financial institution supervisory agency) in its supervision of a financial institution. Such information is confidential financial institution supervisory information and may be subject to [FOIA Exemption 8](#), which protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C.

552(b)(8). It should not be disclosed without permission from the CFPB (or other relevant federal financial institution supervisory agency).

Documents that are potentially financial institution supervisory information should be segregated and clearly marked in OSHA's whistleblower case file to avoid inadvertent disclosure. Often, whether a document is financial institution supervisory information will be evident from the face of the document. For instance, the document may state that it is a compliance plan submitted to the CFPB or an examination report or supervisory letter prepared by the CFPB in its examination of a financial institution. CFPB should be consulted if questions arise regarding whether a particular document is financial institution supervisory information.

Under [OSHA's MOU with CFPB](#), OSHA regards financial institution supervisory information prepared by or for the CFPB as belonging to the CFPB even if it is submitted to OSHA by a third party, such as a complainant or respondent. *See* [12 CFR § 1070.2\(f\)](#). It should not be disclosed as part of a non-public disclosure.

#### **IV. Public Disclosure and Post-Investigation Disclosure**

If a member of the general public requests documents from a whistleblower case file at any time, or if a Complainant or Respondent requests such documents following the close of OSHA's investigation and any period for objecting to OSHA's determination, OSHA will process the request according to its procedures under the Privacy Act and FOIA.

##### **A. Privacy Act Coverage of Whistleblower Investigation Case Files**

Whistleblower investigation case files are covered by the Privacy Act. The Privacy Act applies to records about an individual maintained by any agency and retrieved by an individual's name or another personal identifier (for example, Social Security numbers, home addresses, phone numbers, bank account numbers, etc.). A collection of Privacy Act records is covered by a notice of the agency policy regarding those records, called a System of Records Notice. The Privacy Act generally allows Complainants (or their designated representatives) to gain access to their own records that are filed within a system of records. *See* [29 CFR Part 71.1](#).

Whistleblower case files are covered by Privacy Act System of Records Notice (SORN) entitled "DOL/OSHA-1," which establishes procedures for determining what information from whistleblower case files may be disclosed. Under [DOL/OSHA-1](#), unless OSHA is making a non-public disclosure in an open investigation or making a disclosure to another government agency, requests for whistleblower case files are processed under the FOIA. However, Complainant is exempt from fees for the first copy of the file under the Privacy Act. *See* <http://www.dol.gov/sol/privacy/dol-osha-1.htm> or successor webpage.

##### **B. Freedom of Information Act (FOIA) Coverage of Whistleblower Investigation Case Files**

Under FOIA, a person has a right to access federal agency records unless an exemption applies.

1. Apart from the nonpublic disclosures explained above, OSHA's policy regarding the disclosure of documents in investigation and other files is governed by the FOIA as amended (5 U.S.C. § 552), the DOL's regulations ([29 CFR Part 70](#)), interpretations of

FOIA by the Department of Justice, Executive Orders including [E.O. 12600](#), and other relevant guidance.

2. **Records.** Federal records include books, papers, maps, photographs, digital materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government, or because of the informational value of the data in them. See DLMS 1-513, citing 44 U.S.C. § 3301.
3. Please note that not all records maintained in OSHA files are OSHA records. OSHA may also be in possession of records from another agency or agency component; if so, follow the guidance at [Chapter 9.V.C.5, Reports or Other Documents Obtained From State or Local Entities or Other Federal Agencies](#). When records originate with OSHA, but contain within them information of interest to another agency, consult with that other agency prior to making a release determination.

#### **C. General Procedures for Processing FOIA Requests, Including Post-Investigation Requests for Documents from Complainant or Respondent**



The following section describes procedures for processing requests for information under FOIA, which includes the procedures for processing post-investigation requests for documents from Complainant or Respondent. If the investigation is open, OSHA generally should seek to handle a request from Complainant or Respondent for documents as a non-public disclosure.

1. Upon receipt of a request, the receiving office should make sure that the request was properly submitted by checking the following:
  - a. The request is in writing and includes the name and contact information of the requester (Post Office Boxes are acceptable). If the Region is unfamiliar with the requester or the requester's representative, the Region may ask for identification or a notarized statement;
  - b. The request arrives through permissible means. Generally this means that the request must be submitted by mail, by fax, or to an email address dedicated to receipt of FOIA requests ([foiarequests@dol.gov](mailto:foiarequests@dol.gov) is currently the email address dedicated to receiving these requests). The FOIA request may not be submitted to an OSHA staff person's work email address, although the requester may choose to copy individual OSHA staff members on an email request submitted to one of the dedicated FOIA email addresses;
  - c. The records sought are reasonably described; and
  - d. The requester agrees to pay any applicable fees. Note that under the Privacy Act, Complainant cannot be charged for the first copy of the case file (not including any records disclosed to Complainant under non-public disclosure). For subsequent requests, OSHA should inform Complainant that there may be a fee for processing the request.

2. Scan perfected FOIA requests into the FOIAXpress database (Tracking System). The Tracking System will generate a unique identifier for each FOIA request entered into the database. Indicate the applicability of the Privacy Act in the Description field. Care should be taken to check the “Restricted” box in the Description field and not to place PII, personnel identifiers, or whistleblower case numbers in the Description field:

**Description\***

☒ Restricted

Date Range for Record Search: From   To  

WB/PA request re: XYZ Corp

Notes: Only Incoming Request Letters are Searchable Attachments

Selecting the 'Restricted' checkbox will replace the field content in all the reports with '<<Restricted>>'

3. Send an acknowledgment letter to the FOIA requester providing the tracking number and URL to the DOL web portal so that the requester can track the processing of the FOIA request. When necessary, the acknowledgment letter should also alert the requester of any additional information that OSHA needs to process the request, any fee matters, whether a request for expedited processing has been granted, and whether OSHA expects any processing delays.
4. Check the status of the whistleblower complaint in OITSS-Whistleblower to determine if the investigation is an open or closed case. Additionally, check the status of any related safety and health complaint to be sure that processing the FOIA will not interfere with a related enforcement investigation.
  - a. If the investigation is open:
    - i. If the request is from Complainant or Respondent, contact the requester and explain that OSHA prefers to handle the request as a non-public disclosure, so that it may provide more information to the requester than would generally be available pursuant to FOIA in an open investigation. If the requester agrees, handle the request as a non-public disclosure and close the request as withdrawn. Emails or communications documenting the withdrawal of the FOIA request should be uploaded into the FOIAXpress. Otherwise, process the request under FOIA.
    - ii. If the request is from a Third Party Requester – review the file for information that can be released. If the request is for records involving a particular

Complainant and the existence of an investigation involving Complainant is not already publicly known, a Glomar response is appropriate. In a Glomar response, OSHA will neither confirm nor deny the existence of responsive records or existence of an investigation. Please check with your FOIA officer and/or SOL before using a Glomar response. A Glomar response is not appropriate if OSHA, Complainant, or Respondent has publicized the investigation. A Glomar response also is not appropriate if the request seeks information involving a particular Respondent.

In cases where OSHA is not making a Glomar response, review the case file for information that would impair the on-going investigation or litigation. Withhold all such information under [Exemption 7\(A\)](#). Often this review releases publically available records in the file and withholds all other remaining records under Exemption 7(A). In the rare event the processors determines a discretionary disclosure can be made, care should be taken to review the file, being sure to withhold Complainant's name, contact information (including postal tracking codes on correspondence sent to the complaint), and other contextual identifiers (e.g., job titles) under Exemption 7(A).

- b. If the investigation is closed:
  - i. FOIA request is from Complainant – release all of Complainant's documents to Complainant (or Complainant's attorney) and process the remaining documents under the FOIA.<sup>48</sup>
  - ii. FOIA request is from Respondent – release all of Respondent's documents to Respondent (or Respondent's attorney) and process the remaining documents under the FOIA.
  - iii. FOIA request is from a Third Party Requester – process the request under the FOIA. As discussed above, in some cases, a Glomar response may be appropriate even for a closed case (e.g., a broad request for investigations concerning a specific Complainant). If the FOIA request seeks whistleblower file records containing a corporate name, process the FOIA request using the appropriate FOIA exemptions.
  - iv. Follow the guidance below in [Chapter 9.V](#), *Guidance for FOIA-Processing of Documents Typically Found in Whistleblower Investigation Case Files*, in determining whether the exhibits found in the investigative file are releasable in whole or in part. Make a copy of the file and redact where appropriate.
  - v. Scan clarification letters or emails and final response to the FOIA request into the Tracking System and close out in the Tracking System database. (Refer to Tracking System manual for additional guidance).

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<sup>48</sup> Note that Complainant's documents in this circumstance would not include documents that Respondent alleges or OSHA suspects that Complainant obtained without authorization and provided to OSHA.

## 5. Time Requirements

OSHA generally has **20** working days to determine whether to grant or deny in whole or in part a FOIA request and to notify the requester. When OSHA cannot meet the 20 working day statutory time limit because of “unusual circumstances,” as defined in the FOIA, the directorate, region, or area office processing the request must notify the requester as soon as practicable in writing of the unusual circumstances and provide an estimated date by which OSHA expects to complete its processing of the request. OSHA may claim an additional ten working days (i.e., OSHA has 30 instead of 20 business days to timely process the request) when **unusual** circumstances exist. When OSHA requires an extension of more than ten working days, it must provide the requester with an opportunity to either modify the request so that it can be processed within 20 working days or arrange for an alternative time period for processing the request.

## 6. Expedited Processing

Expedited processing must be requested in writing by the requester. Requests will be taken out of order and given expedited treatment only if: (i) the failure to provide expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (ii) there will be a loss of substantial due process rights; (iii) there is widespread and exceptional media interest and there are questions about the government’s integrity that affect public confidence; or (iv) there is an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

- a. A requester may ask for expedited processing at the time of the initial FOIA request or at a later time. The requester must submit a statement, certified to be true and correct to the best of that person’s knowledge and belief, stating in detail the reason for requesting expedited processing.
- b. OSHA must notify a requester asking for expedited processing within 10 calendar days from the date that OSHA received the request whether OSHA is granting or denying their request for expedited processing. If the request for expedited processing is granted, the request should be given priority status and processed as soon as practicable. If the request is denied, the requester must be notified in writing and given the right to appeal the denial.

## 7. Tolling

If the office processing a request receives a broad request for information, such office should request clarification from the requester. The office can then initiate a one-time-only toll of the 20 working day requirement and initiate the tolling in the Tracking System.

## 8. Timing

In some circumstances, OSHA may not be able to fully process a FOIA request within the statutory timeline or an alternative timeline agreed to with the requester. In such circumstances, OSHA must contact the requester to notify them of the delay and to provide an explanation. OSHA should focus on ensuring that the FOIA request is processed properly even if doing so requires OSHA to take additional time

for processing the request. OSHA may seek additional extensions from the requester as necessary.

#### **D. FOIA Fees**

**Prefatory Note: The amounts listed in this discussion may change due to statutory or regulatory changes. DOL's FOIA regulations should always be consulted for the current amounts.**

##### **1. Agreement to Pay Fees**

DOL deems the filing of a FOIA request to constitute the requester's agreement to pay fees up to \$25, unless the requester has asked for a waiver of those fees.

Some requesters will state that they are not willing to pay more than a certain amount for FOIA processing. If the amount the requester is willing to pay is less than the amount of fees that OSHA is expecting to charge, OSHA will not be able to process the request and should ask the requester to: increase the fee to match the original scope of the request, reduce the scope of the request to match the original fee, or modify both the scope of the request and the fee so that both match.

If a requester promises to "pay the appropriate fees," provide an estimate of the proposed fees and require the requester to confirm a maximum dollar amount in writing.

- a. Offices processing such FOIA requests should contact the requester to allow them ten or fewer days to amend or reduce the scope of their requests. FOIA requests are tolled while OSHA is seeking confirmation of what fees a requester is willing to pay. In such cases, provide the requester with a deadline to respond in writing and close out the FOIA request as withdrawn if the requester does not meet the deadline.
- b. FOIA fee waivers or reductions of fees are granted on a case-by-case basis. Each request for a fee waiver must address in writing the following factors to the FOIA officer's satisfaction for a full or partial fee waiver to be granted:
  - i. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal government.
  - ii. The disclosure is not primarily in the commercial interest of the requester.

It is not enough for a requester merely to restate the fee waiver test in order for OSHA to grant a fee waiver. The burden is on the requester to demonstrate how release of the requested materials by OSHA to them is likely to contribute significantly to public understanding of the operations or activities of the federal government and that disclosure is not primarily in the requester's commercial interest.

##### **2. Exceptions on Charging Fees:**

- a. Under the Privacy Act, Complainant cannot be charged a fee for the first copy of the investigation case file (not including any documents that Complainant received during the investigation under non-public disclosure). However,

Complainant, making a subsequent request under the Privacy Act or FOIA, should be told that the Department may charge the requester fees.

- b. OSHA cannot charge search fees if OSHA misses the processing deadline and has not notified the requester of the unusual circumstances impeding a timely response. OSHA cannot charge reproduction fees if the requester is a representative of the news media or an educational or scientific institution, and OSHA misses the processing deadline.
- c. If the requester is a representative of the news media or an educational or scientific institution, OSHA cannot charge for the first 100 pages of reproductions or the first two hours of search time.
- d. OSHA cannot charge fees if the cost of collecting and processing the fees is likely to equal or exceed the amount of the fees itself (as of 2019, the Department of Labor will not charge fees if the amount of the fees would be less than \$25.00).

### 3. Fees and Fee Types May be Subject to Change

Please see 29 CFR Part 70 for the most current information on types of fees and fee categories.

## E. Common FOIA Exemptions

OSHA's policy is to disclose, to the extent possible, all documents in whistleblower case files unless disclosure is prohibited by law or if disclosure would harm an interest protected by one of the statutory exemptions. This section discusses the most common FOIA exemptions that apply to documents in whistleblower and alternative dispute resolution files. If you believe another exemption applies, contact your FOIA officer or SOL.

### 1. Exemption 3

Under Exemption 3, [5 U.S.C. § 552\(b\)\(3\)](#), an agency shall withhold matters which are specifically exempted from disclosure by another Federal statute, when that statute either:

- a. Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
- b. Establishes particular criteria for withholding or refers to particular matters to be withheld; and
- c. If enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. § 552(b)(3).

For example, 5 U.S.C. § 574 requires that certain communications exchanged pursuant to the Administrative Dispute Resolution Act be kept confidential. When parties to a whistleblower investigation participate in OSHA-sponsored ADR, OSHA segregates communications related to the ADR and documents exchanged as part of the ADR from other investigative case file materials. OSHA will generally withhold this ADR-related material under Exemption 3(B). See [Chapter 9.IV.J, ADR Case Files](#).

## 2. Exemption 4 and Executive Order 12600

Exemption 4, 5 U.S.C. § 552(b)(4), protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. This exemption is intended to protect two categories of information:

- a. **Trade Secrets:** A trade secret is defined as a secret, commercially valuable plan, formula, process or device that is used in making, preparing, or processing a trade commodity (e.g., manufacturing descriptions, product formulations and schematics or drawings). Trade secrets are not commonly found in investigation case files or safety and health inspection records.
- b. **Confidential Business Information (CBI):** CBI is commercial or financial information obtained from a person that is privileged or confidential. Information is CBI if it is: (i) confidential business data submitted to the government, either because the submission is mandated or because the person voluntarily provided it, and (ii) the information would harm an identifiable private or governmental interest if disclosed (e.g., overhead costs, unit prices, copyrighted videos, proprietary manuals or software). CBI is often found in investigation case files and in safety and health inspection records.
- c. **Processing Exemption 4 Material:** To process CBI pursuant to Exemption 4 and E.O. 12600, first, identify which documents contain CBI and/or trade secrets. Second, after categorizing these documents or materials, copy these documents and determine if they are tangential to the file. Third, notify the requester that there may be a processing delay and give the requester an opportunity to modify the request (or if the CBI/trade secrets are tangential to the file, you may segregate them from the file and process the remainder of the request). Fourth, give the submitter an opportunity under E.O. 12600 to object to the release of such documents in a reasonable time frame (e.g. 5 to 10 calendar days depending upon the volume of the material). When doing so, enclose copies of the CBI or trade secrets in question and a copy of E.O. 12600. Fifth, review the submitter's objections to disclosure under the following criteria, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) and Department of Justice Guidance:<sup>14</sup>

1. **Does the submitter customarily keep the information private or closely-held? (This inquiry may in appropriate contexts be determined from industry practices concerning the information.)**

- If no, the information is not confidential under Exemption 4 and should be released.
- If yes, answer question 2.

2. **Did the government provide an express or implied assurance of confidentiality when the information was shared with the government?**

- If no, answer question 3.
- If yes, the information is confidential under Exemption 4 (this is the situation that was present in *Argus Leader*).

**3. Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?**

- If no, the information is “confidential” under Exemption 4 (the government has effectively been silent – it hasn’t indicated the information would be protected or disclosed – so a submitter’s practice of keeping the information private will be sufficient to warrant confidential status).
- If yes, and no other sufficient countervailing factors exist, the submitter could not reasonably expect confidentiality upon submission and so the information is not confidential under Exemption 4.

Withhold or redact the documents containing CBI consistent with the above analysis. If OSHA disagrees with any of the submitter’s objections to disclosure, prior to disclosing the documents, give the submitter written notice, which must include: a statement of the reason(s) why OSHA disagreed with each of the submitter’s disclosure objections; a description of the business information to be disclosed; and a specified disclosure date (e.g., 10 days from the date of OSHA’s written notice that it will disclose the documents). The FOIA Officer must track this communication and confirm that the communication was received by the submitter.

- d. **Tangential CBI:** Note that if the CBI requested is related only tangentially to the investigation (the CBI is small in quantity and did not affect the investigation’s outcome) that is the subject of the request, use the following Exemption 4 work-around language in the determination letter:

*The file contains [LIST COMMERCIAL INFORMATION] that arguably may be protected under Exemption 4. We are taking no action on the release of this information because it relates only tangentially to the investigation that is the subject of your request. Where there is a reasonable expectation that release of information could cause substantial commercial or competitive harm, we are required by Executive Order 12600, (52 FR 23781, 3 CFR, 1987 Comp., p. 235), and the Department of Labor’s regulations at 29 CFR 70.26 to contact the submitter before releasing the information. We must allow the submitter to provide its views regarding public disclosure of this information. If we undertook this procedure in your case, it would delay this decision and likely would not result in the release of any additional relevant information. Consequently, to process your request as promptly as possible, we have not processed this information with the rest of your request. If you are interested in obtaining this commercial information, please contact us, and we will process it in accordance with Executive Order 12600 and DOL regulations.*

**3. Exemption 5**

Exemption 5, [5 U.S.C. § 552\(b\)\(5\)](#), allows an agency to withhold inter-agency or intra-agency information that normally would be privileged in the civil discovery

context. Inter-agency and intra-agency communications can be withheld for any of the following reasons:

- a. Records that are subject to the “deliberative process privilege” because they are pre-decisional and deliberative in nature. This privilege may be asserted when: (1) the information was generated prior to, and in contemplation of, a decision by a part of the Department; (2) the information is not purely factual and does not concern recommendations that the Department expressly adopted or incorporated by reference in the ultimate decision; and (3) disclosure of the privileged matter would have an inhibiting effect on the agency’s decision-making processes. The third element of the privilege is referred to as the “foreseeable harm analysis.”

As required by the FOIA Improvement Act of 2016, a foreseeable harm analysis must be performed before invoking the deliberative process privilege. In making a foreseeable harm determination, “speculative or abstract fears” are not a sufficient basis for withholding records. Instead, the agency must reasonably foresee that disclosure would harm an interest protected by Exemption 5 or disclosure is prohibited by law.

Pursuant to the FOIA Improvement Act of 2016, the deliberative process privilege of Exemption 5 cannot be invoked for records older than 25 years.

- b. “Attorney work-product privilege” includes documents that are prepared by an attorney (or under an attorney’s direction) in anticipation of litigation. Factual information may be protected in this context.
- c. “Attorney-client privilege” includes confidential communications between a client (OSHA) and an attorney (SOL). Internal OSHA communications between OSHA personnel, including those who are attorneys, generally would not qualify for the privilege. However, internal OSHA communications discussing SOL-provided guidance might be protected. Consult with SOL-OSH or SOL-FLS as appropriate.

When OSHA encounters Exemption 5 material in a whistleblower investigation case file to which any of these attorney privileges apply in paragraphs b and c above, OSHA must withhold the material.

#### **4. Exemption 6**

Exemption 6, [5 U.S.C. § 552\(b\)\(6\)](#), permits the withholding of information contained in personnel and medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

- a. Disclosure determinations under Exemption 6 require a balancing of any privacy interest (an individual’s right to privacy) against the public interest in disclosure (shedding light on an agency’s operations or activities). Individuals have a privacy interest with respect to information such as marital status, legitimacy of children, welfare payments information, family fights and reputations, medical conditions, date of birth, religious affiliation, citizenship data, genealogical history establishing membership in a Native American tribe, Social Security numbers, criminal history records, incarceration of U.S. citizens in a foreign

prison, sexual associations, financial status, and any other information connected to them.

- b. Privacy rights are limited to living individuals. The Supreme Court has recognized, however, that in some cases, surviving family members may have privacy interests in information concerning deceased individuals such as the decedent's home addresses at the time of death.

## 5. Exemption 7

Exemption 7, [5 U.S.C. § 552\(b\)\(7\)](#), allows agencies to withhold records compiled for law enforcement purposes under any one of six circumstances (identified as Exemption 7(A) through 7(F)). Law enforcement within the meaning of Exemption 7 includes enforcement of both civil and criminal statutes, including the laws enforced by OSHA.

### a. 7(A) –

Disclosure could reasonably be expected to interfere with a pending law enforcement matter (includes both pending and contemplated law enforcement proceedings where disclosure would cause some sort of identifiable harm). A Glomar (neither confirm nor deny) response may be appropriate to protect the privacy of the individuals named in investigatory files and who are the subject of a FOIA request.

### b. 7(C) –

Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy (See [Chapter 9.III.A.4.a](#), *Personal Identifiable Information (PII)*, for examples).

- i. The statutory threshold for withholding information under Exemption 7(C) is somewhat lower than the threshold for withholding information under Exemption 6 because law enforcement files are inherently more invasive of personal privacy than other types of records. Individuals have a strong privacy interest in not being associated with law enforcement activity.
- ii. Information that OSHA may withhold under exemption 7(C), and if appropriate under Exemption 7(D) below, includes not only individuals' names but also "contextual identifiers." Contextual identifiers are identifying factors that would reveal the identity of an individual. Common contextual identifiers include job titles, educational background, and physical descriptions. Statements an individual makes may also be contextual identifiers if the statement would reveal the individual's identity.
- iii. A Glomar (neither confirm nor deny) response may be appropriate to protect privacy of the individuals named in investigatory files and who are the subject of a FOIA request even when the case file is closed.

### c. 7(D) –

Disclosure could reasonably be expected to identify persons who provide information to the government in confidence or under circumstances implying

confidentiality. Witnesses' identities are protected when they have provided information either under an express promise of confidentiality or under circumstances from which such as assurance could be reasonably inferred. However, confidentiality must still be determined on a case-by-case basis and whether a witness has caused a waiver of their confidentiality must be considered. Once confidentiality is waived, then witness information and statements should no longer be withheld under this exemption, but Exemptions 4 and 7(C) may still apply to material in the statement.

In rare circumstances, a Glomar response may be appropriate if a more specific response to a narrowly targeted request would disclose whether or not an individual acted as a confidential witness. A Glomar response may also be used when disclosure would permit the linking of a witness to specific witness-provided information.

d. **7(E) –**

Disclosure would reveal investigative techniques and procedures for law enforcement investigations or prosecutions if disclosure could result in circumvention of the law. Exemption 7(E) protects techniques that are not generally known to the public as well as law enforcement guides or manuals that are not available to the public, where disclosure could reasonably be expected to risk circumvention of the law.

**6. Exemption 8**

Exemption 8, [5 U.S.C. § 552\(b\)\(8\)](#), allows agencies to withhold matters “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” This exemption is most likely to arise in cases under the Consumer Financial Protection Act. See discussion of financial institution supervisory information (above at [Chapter 9.III.B.4](#)). Under OSHA’s MOU with CFPB, financial institution supervisory information in CFPA cases is treated as belonging to CFPB even if it is submitted to OSHA by a complainant or a respondent. In CFPA cases, OSHA should refer any FOIA request for information potentially covered by Exemption 8 to CFPB.

**F. Other FOIA Exemptions**

Several other exemptions exist that are not discussed in this chapter. Exemptions 1, 2, 7(B), 7(F), 8, and 9 should rarely be invoked and should an office wish to invoke any of these exemptions, it should contact SOL. These FOIA exemptions are discussed in the Attachment A.

**G. Denials Under the FOIA**

In addition to the FOIA exemptions, FOIA Officers may also deny a request in full or in part for several reasons. These reasons should be documented in the administrative record and communicated to the requester. Such reasons include:

1. No responsive records were located or the requested records do not exist. The FOIA Officer must document who conducted the search, when the search was conducted,

- where the search was conducted (paper and/or electronic files) and how the search was conducted (search terms or phrases used, subject line, or email text searched).
2. The request was referred to another component or agency; notify the requester that the request was referred to another agency. See [29 CFR 70.20\(c\)](#).
  3. The requester refuses to assume responsibility for fees associated with processing their request.
  4. The requested records were not reasonably described; notify the requester that the description was insufficient. See [29 CFR 70.19\(d\)](#).
  5. The request was not for an agency record; notify the requester that the request was not for an agency record.

#### **H. Partial Release of Records: Reasonably Segregable Disclosable and Non-Disclosable Records**

When making decisions regarding whether to release, redact, or withhold material under FOIA, care should be taken to review material thoroughly. The FOIA requires that any reasonably segregable portion of a record must be released after the application of the FOIA exemptions. Partial disclosures should be made whenever full release is not possible. Release portions of records that can be reasonably segregated from the information that is being withheld under the FOIA. If substantially all of a document would have to be redacted so that no meaningful content would remain, the document should be withheld in full.

These same rules apply to photographs, audio recordings, video recordings, and electronic records. For example, if a photograph must be released and a portion contains an image covered by Exemption 7(C), the photograph must be disclosed with the Exemption 7(C) material redacted.

#### **I. Retention of FOIA Files**

FOIA files must be maintained separately from whistleblower case files and must have 1) a clean copy of all information reviewed, 2) a copy of any materials released to the requester, and 3) a copy of all communications about the FOIA (e.g., request letter, closing letter, clarifications about fees or search parameters, E.O. 12600 letter and response). A best practice is to maintain a copy of the redacted records without the redactions applied. FOIA records should be retained in accordance with the disposition periods contained in the General Records Schedule 4.2. In general, FOIA records must be retained for six years. In the event of a FOIA appeal, the record must be maintained six years from the date of the appeal conclusion. If litigation ensues, the record must be retained for three years from the date of the FOIA litigation conclusion. When more specific information or guidance is necessary, the FOIA Officer and/or OSHA's Records Officer should be consulted.

#### **J. ADR Case Files**

ADR case files generally consist of communications between the parties and a neutral representative appointed by OSHA and agreed upon by the parties. These files should be segregated from whistleblower case files, and are generally exempt from disclosure under Exemption 3(B) and therefore should not be released.

## **V. Guidance for FOIA-Processing of Documents Typically Found in Whistleblower Investigation Case Files**

The guidance below is aimed at providing FOIA processors with general information about the FOIA exemptions that most typically apply to the documents found in whistleblower investigation case files. However, each request is different and must be processed accordingly. When responding to a FOIA request for material from whistleblower investigation case files, OSHA must review the responsive documents thoroughly to determine whether the document contains different or additional information that should be withheld as exempt from the FOIA. As previously noted, the FOIA requires that any reasonably segregable portion of a record must be released after the application of the FOIA exemptions. Only if substantially all of a document would have to be redacted so that no meaningful content would remain may the document be withheld in full.

With respect to specific documents in case files, the following guidance may not apply in all cases. Please be aware that many of these documents may be withheld, redacted or released in full depending on the content of the document. The guidance below should not be substituted for a thorough review of each and every document in the case file. For example, a document such as an Assignment Memorandum, in some circumstances, may contain deliberative discussions that would be subject to protection under Exemption 5.

### **A. Case File - Administrative Materials**

#### **1. Assignment Memorandum**

- a. **Complainant or Respondent Requester** – Redact non-management OSHA employee names, job titles, contact information and other contextual identifiers under Exemption 7(C). Redact any material subject to Exemption 5.
- b. **Third Party Requester** – Redact Complainant and non-management OSHA employee names, job titles, contact information and other contextual identifiers under Exemption 7(C). Redact any material subject to Exemption 5.

#### **2. Complainant Notification**

- a. **Complainant** – Release in full.
- b. **Respondent Requester** – Redact contextual identifiers such as the postal carrier tracking number under Exemption 7(C).
- c. **Third Party Requester** – Redact Complainant and non-management OSHA employee names, job titles, contact information, and other contextual identifiers under Exemption 7(C).

#### **3. Respondent Notification**

- a. **Complainant** – Redact contextual identifiers such as the postal carrier tracking number under Exemption 7(C).
- b. **Respondent Requester** – Release in full.
- c. **Third Party Requester** – Redact Complainant and non-management OSHA employee names, job titles, contact information, and other contextual identifiers under Exemption 7(C).

4. **Designation of Representative**
  - a. **Complainant or Respondent Requester** – Release in full.
  - b. **Third Party Requester** – Redact Complainant’s name, job title, contact information, and other contextual identifiers under Exemption 7(C).
5. **Correspondence to/from Complainant or Respondent**
  - a. **Complainant Requester** – Release in full correspondence to or from Complainant. Review correspondence for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld from correspondence to or from Respondent under Exemption 7(C). Process CBI pursuant to Exemption 4 and E.O. 12600.
  - b. **Respondent Requester** – Release in full correspondence to or from Respondent. Review correspondence for non-management witness/employee names, job titles and other contextual identifiers that may need to be withheld from correspondence to/from Complainant under Exemption 7(C). If there are multiple respondents, CBI should be processed pursuant to Exemption 4 and E.O. 12600 if the requester is not the same respondent as the submitter.
  - c. **Third Party Requester** – Review for Complainant and witness/employee names, job titles contact information, and other contextual identifiers; management employee’s personal contact information; and all respondent and OSHA non-management employee names and contact information that may need to be withheld under Exemption 7(C). (For example, Delivery Service Tracking Numbers may provide contextual identifiers that would reveal the identities of OSHA or respondent staff that would have signed for deliveries). Process CBI pursuant to Exemption 4 and E.O. 12600.
6. **Determination Letter**
  - a. **Complainant or Respondent Requester** – Release in full.
  - b. **Third Party Requester** – Review for Complainant and non-management witness names, job titles and other contextual identifiers that may need to be withheld under Exemption 7(C).
7. **OSH 11(c), ISCA, and AHERA Administrative Review Files (Request for Administrative Review Letter/DWPP Review and Evaluation Form/Determination Letter or Equivalent Forms)**
  - a. **Complainant Requester** – Release the Request for Administrative Review and Determination Letter in full. Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5. Review documents for non-management OSHA or Respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 7(C) or 7(D). Process CBI pursuant to Exemption 4 and E.O. 12600.
  - b. **Respondent Requester** – Release the Request for Administrative Review and Determination Letter in full. Review documents for deliberative material or SOL-OSHA communications that may be withheld or redacted under Exemption 5.

Review documents for non-management OSHA or Respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 7(C) or 7(D).

- c. **Third Party Requester** – Review documents for deliberative material or SOL-OSHA communications that may be withheld or redacted under Exemption 5. Review documents for Complainant and non-management OSHA or Respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 7(C) or 7(D). Process CBI pursuant to Exemption 4 and E.O. 12600.

## **B. Case File - Evidentiary Materials**

### **1. Complaint/Intake Form (OSHA – 87 or equivalent form)**

- a. **Complainant or Respondent Requester** – Withhold the names of non-management OSHA employees, job titles, and other contextual identifiers under Exemption 7(C).
- b. **Third Party Requester** – Withhold Complainant and non-management OSHA employee names, job titles, and other contextual identifiers under Exemption 7(C).

### **2. Safety and Health Intake Form (OSHA –7 or equivalent form)**

- a. **Complainant Requester** – Release in full only if Complainant is the safety and health complainant. Otherwise, review for safety and health complainant and non-management respondent and OSHA employee names, job titles, contact information, and contextual identifiers that may need to be withheld under Exemption 7(C) or 7(D).
- b. **Respondent or Third Party Requester** – Review for safety and health complainant and non-management respondent and OSHA employee names, job titles, contact information, and contextual identifiers that may need to be withheld under Exemption 7(C) or 7(D).

### **3. Complainant’s Statement(s) and Documents, Photographs, or Audio/Video Records Provided by Complainant**

The guidance below applies to Complainant’s statement(s) to OSHA and any documents or other evidence that Complainant provides to OSHA during the investigation. Such other evidence may include photographs, audio or video recordings taken by Complainant.

- a. **Complainant Requester** – Generally release in full. However, in some cases, Complainant may have submitted documents that contain CBI of Respondent. If OSHA believes that Complainant submitted respondent’s CBI (for example if Complainant submitted documents that OSHA believes that Complainant obtained without permission, such documents might contain CBI), then such CBI must be processed pursuant to Exemption 4 and E.O. 12600.
- b. **Respondent Requester** – Unless OSHA provided an unredacted version of the statement or documents to Respondent during the investigation, review material

for non-management witness/employee names, job titles, contact information and other contextual identifiers that may need to be withheld under Exemption 7(C). Redactions made should be consistent with any version of the statement or documents given to Respondent during the investigation.

- c. **Third Party Requester** – Review material for Complainant and all non-management witness/employee names, job titles, contact information and other contextual identifiers and management’s personal contact information that may need to be withheld under Exemption 7(C). Process CBI pursuant to Exemption 4 and E.O. 12600.

#### 4. **Documents Obtained From Safety and Health Investigation Files**

- a. Please check with the appropriate Safety and Health Area Office staff regarding whether safety and health inspection records may be released.
- b. **All FOIA Requesters** – Review documents for deliberative material or SOL-OSHA communications that may be withheld or redacted under Exemption 5. Review documents for non-management witness and non-management OSHA employee names, job titles and other contextual identifiers that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600.

#### 5. **Witness Statements and Interview Questions and Answers**

Witness statements must be treated with care to ensure that OSHA provides the appropriate information but does not disclose the identity of witnesses who provided information to OSHA in confidence. Confidential witnesses’ names and contextual identifiers should be withheld from all requesters under Exemption 7(C). If the statement cannot be redacted to protect the identity of the confidential witness, the statement may be withheld in full under Exemptions 7(C) and 7(D).

While the confidentiality of a witness should always be determined on a case-by-case basis, witnesses’ identities should be protected when they have provided information either under an express promise of confidentiality or under circumstances from which such an assurance can be reasonably inferred. Confidential witness statements will often, but not always, be marked as such and segregated in the case file.

In rare circumstances, OSHA may need to consider whether a witness has caused a waiver of confidentiality. Once confidentiality is waived, then witness information and statements should no longer be withheld. For example, if a non-management witness willingly provided a statement to OSHA with a management representative in the room or emailed their statement to OSHA but copied their own supervisor, then confidentiality might be waived and the statements would no longer be withheld under Exemption 7(D). However, Exemptions 4 and 7(C) could still apply to portions of the witness statement.

When reviewing witness statements in response to a FOIA request, reviewers also should consider whether the witness was speaking on behalf of Respondent in their statement to OSHA. If the witness was speaking for Respondent, then the witness cannot be a confidential witness and the witness’s identity should not be redacted from the witness statement, although certain information that could cause an invasion

of the witness's privacy, such as the witness's personal contact information, may be redacted.

Often the fact that the witness is a manager or high-level company official is sufficient to determine that the witness is speaking on behalf of Respondent. However, the job title alone is not always determinative. Whether a person can speak on behalf of Respondent may depend on the particular facts and circumstances. For example, a human resource specialist may be an expert on company policy, but may not be able to speak on behalf of Respondent. Also, in some circumstances, a manager or high-level company official may ask to speak to OSHA confidentially and without Respondent's counsel present. In that circumstance, the manager or high-level company official is a confidential witness and the witness's name and all contextual identifiers identifying the witness would be withheld under exemptions 7(C) and 7(D).

Below are general guidelines for the FOIA processing of witness statements, as well as interview questions and answers, in a whistleblower investigation case file. The guidance below applies regardless of whether the witness statements are written, recorded, or videotaped:

- a. **Complainant Requester** – Review for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600.
- b. **Respondent Requester** – Review for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemptions 7(C) and/or 7(D).
- c. **Third Party Requester** – Review for Complainant and non-management witness/employee names, job titles, contact information, and other contextual identifiers and management employees' personal contact information that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600.

#### 6. **Respondent Position Statement and Documents, Photographs, or Audio/Video Recordings Provided by Respondent**

The guidance below applies to Respondent's position statement(s) to OSHA and any documents or other evidence that Respondent provides to OSHA during the investigation. Such other evidence may include photographs, audio or video recordings taken by Respondent.

- a. **Complainant Requester** – Unless OSHA provided an unredacted version of the statement to Complainant during the investigation, review the position statement for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 7(C). Redactions made should be consistent with the version of the statement given to Complainant during the investigation. Process CBI pursuant to Exemption 4 and E.O. 12600.
- b. **Respondent Requester** – Release in full.

- c. **Third Party Requester** – Review the position statement for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees’ personal contact information that may need to be withheld under Exemption 7(C). Process CBI under Exemption 4 and E.O. 12600.
- 7. **Investigator’s Notes, Memoranda to File, and Report of Investigation**
  - a. **Complainant Requester** – Review notes and memos to file for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600. Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.
  - b. **Respondent Requester** – Review notes and memos to file for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemptions 7(C) and/or 7(D). Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.
  - c. **Third Party Requester** – Review notes and memos to file for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees’ personal contact information that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600. Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.
- 8. **Case Activity Log, Telephone Log, and Table of Contents**
  - a. **Complainant Requester** – Review log for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600. Review log for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.
  - b. **Respondent Requester** – Review log for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 7(C) and/or 7(D). Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.
  - c. **Third Party Requester** – Review log for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees’ personal contact information that may need to be withheld under Exemption 7(C) and/or 7(D). Process CBI under Exemption 4 and E.O. 12600. Review documents for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.

## C. Other Documents That May Be Found in Whistleblower Case Files

### 1. OITSS-Whistleblower Summary

- a. **Complainant or Respondent Requester** – Review summary for non-management witness/employee and non-management agency employee names, job titles, contact information, and other contextual identifiers under Exemption 7(C) and/or 7(D). Review documents for deliberative material or SOL-OSHA communications that may be withheld or redacted under Exemption 5.
- b. **Third Party Requester** – Review summary for Complainant, non-management witness/employee and non-management agency employee names, job title, contact information, and other contextual identifiers; and portions of settlement information, if appropriate, that may need to be withheld under Exemption 7(C). Review summary for deliberative material or SOL-OSHA communications that may be withheld under Exemption 5.

### 2. Settlement Agreements

The following guidance applies to all settlement agreements in whistleblower investigation files, whether the settlement agreement is on OSHA's standard settlement form or is an agreement negotiated by Complainant and respondent that OSHA has approved.

- a. **Complainant or Respondent Requester** – Release in full.
- b. **Third Party Requester** – Withhold Complainant's name, job title, contact information, and other contextual identifiers under Exemption 7(C). Process CBI under Exemption 4 and E.O. 12600. For further guidance on settlement agreements and Exemption 4, contact your FOIA officer.

### 3. Complainant's Personnel and Medical Files Provided by Respondent

Medical records may occasionally be found in whistleblower case files and consist of medical information along with direct or contextual identifiers. An Employee Medical Record is a record concerning the health status of an employee, which is made or maintained by a physician, nurse, or other health care personnel, or technician.

OSHA personnel who encounter medical records should be mindful of the guidance set forth in OSHA's medical access regulations at 29 CFR 1913.10, which applies to investigations under the OSH Act. Care should also be taken during the copying and redaction of such files to limit disclosures within the office.

- a. **Complainant or Respondent Requester** – Release in full.
- b. **Third Party Requester** – Withhold in full under Exemption 7(C).

### 4. Complainant's Personnel and Medical Files Provided by Complainant

- a. **Complainant Requester** – Release in full.
- b. **Respondent Requester** – Release personnel file in full. Review file for a signed medical release by Complainant. If there is no signed medical release, withhold any medical information under Exemption 7(C).

- c. **Third Party Requester** – Withhold in full under Exemption 7(C).
- 5. **Reports or Other Documents Obtained From State or Local Entities or Other Federal Agencies**

Notify the FOIA requester in your FOIA response letter that the OSHA file contains a copy of such a report or documents. Identify the report or documents and the state, local or federal entity from which OSHA obtained the report or documents. Provide the requester with the information needed to request the report from the federal, state, or local entity. This guidance applies to reports such as police reports, fire reports, or a coroner's report, as well as to documents OSHA may have from another agency's investigation of a matter related to the whistleblower investigation.

# **ATTACHMENT A**

## **List of FOIA Exemptions**

Subsections of Title 5, United States Code, Section 552

### **EXEMPTIONS**

- (1) Classified records on national defense or foreign policy.
- (2) The internal personnel rules and practices of an agency.
- (3) Records specifically exempted from disclosure by another statute.
- (4) Trade secrets and commercial or financial information obtained from a person and which are privileged or confidential.
- (5) Inter-agency or intra-agency memorandums or letters only available by law to a party in litigation with the agency. This Exemption encompasses the generally recognized civil-discovery protections. The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.
- (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- (7) Protects law enforcement records or information if disclosure:
  - (A) could reasonably be expected to interfere with enforcement proceedings;
  - (B) would deprive a person of a right to a fair trial or an impartial adjudication;
  - (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) could reasonably be expected to disclose the identity of a confidential source;

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions;

(F) could reasonably be expected to endanger the life or physical safety of an individual.

(8) Records relating to the regulation or supervision of financial institutions.

(9) Geological and geophysical information and data concerning wells.

## ATTACHMENT B

### FOIA REQUESTERS & FEES<sup>49</sup>

Requester	Permissible Charges	Fee Reduction/Waivers	Non-Permissible Charges	Comments
Commercial	Search, Reproduction & Review Costs  (Add charges for mailing, aggregating & authentication if applicable)	Do not charge anything if total costs are \$25.00 or less	N/A – All charges are permissible	Partially defined as a person who will further their commercial, trade or profit interests.  Interest charges are applicable for debt collection purposes.
Educational or Non-Commercial Scientific Institution	Reproduction  (Add charges for mailing, aggregating & authentication if applicable)	First 100 reproduced pages are free  Do not charge anything if total costs are \$25.00 or less	Search & Review	Partially defined as preschool, public or private elementary or secondary school, institution of undergraduate higher education, institution of graduate higher education, an institution of professional education, or an institution of vocational education AND who operates a program of scholarly research. FOIA request records must directly relate to the scholarly research of the

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<sup>49</sup> This information is current as of September 2019. Consult DOL's FOIA regulations for the most current fees.

				<p>institution and not an individual's pursuits.</p> <p>Interest charges are applicable for debt collection purposes.</p>
<b>Requester</b>	<b>Permissible Charges</b>	<b>Fee Reduction/Waivers</b>	<b>Non-Permissible Charges</b>	<b>Comments</b>
Representatives of the News Media	<p>Reproduction</p> <p>(Add charges for mailing, aggregating &amp; authentication if applicable)</p>	<p>First 100 reproduced pages are free</p> <p>Do not charge anything if total costs are \$25.00 or less</p>	Search & Review	<p>Partially defined as representatives of the news media actively gathering news for an entity that is organized &amp; operated to publish or broadcast news to the public. Please see <a href="#">29 CFR Part 70</a> for additional information.</p> <p>Interest charges are applicable for debt collection purposes.</p>
All Other Requesters	<p>Search &amp; Reproduction</p> <p>(Add charges for mailing, aggregating &amp; authentication if applicable)</p>	<p>First 100 reproduced pages are free</p> <p>First two hours of search time are free</p> <p>Computer searches – The monetary value of two hours at the professional search level are free</p> <p>Do not charge anything if total costs are \$25.00 or less</p>	Review	<p>Partially defined as those requesters that do not fit into the other three categories.</p> <p>Interest charges are applicable for debt collection purposes.</p>

## ATTACHMENT C

### Index of Common Whistleblower Documents

Open Investigation	Complainant and Respondent Requester	Third Party Requester
Review file for information that can be released which would not damage or hurt an on-going investigation or litigation (i.e., public documents) and withhold other records under the appropriate exemptions	Refer to Non-Public Disclosure Guidance in <a href="#">Chapter 9.III</a> .	Refer to Glomar discussion and Exemption 7(A) discussion in <a href="#">Chapter 9.IV.E.5</a> .
Closed Investigation	Complainant and Respondent Requester	Third Party
Assignment Memo	See <a href="#">Chapter 9.V.A.1</a>	See <a href="#">Chapter 9.V.A.1.b</a>
Complainant Notification	See <a href="#">Chapter 9.V.A.2</a>	See <a href="#">Chapter 9.V.A.2.c</a>
Respondent Notification	See <a href="#">Chapter 9.V.A.3</a>	See <a href="#">Chapter 9.V.A.3.c</a>
Designation of Representatives	See <a href="#">Chapter 9.V.A.4</a>	See <a href="#">Chapter 9.V.A.4.b</a>
Complainant/Respondent Correspondence	See <a href="#">Chapter 9.V.A.5</a>	See <a href="#">Chapter 9.V.A.5.c</a>
Determination Letter	See <a href="#">Chapter 9.V.A.6</a>	See <a href="#">Chapter 9.V.A.6.b</a>
OITSS-Whistleblower Summary	See <a href="#">Chapter 9.V.C.1</a>	See <a href="#">Chapter 9.V.C.1.b</a>
Request for Review Files (RFR)(Appeal Letter/RFR Review Form/ Determination)	See <a href="#">Chapter 9.V.A.7</a>	See <a href="#">Chapter 9.V.A.7.c</a>
OSHA-7/Complaint	See <a href="#">Chapter 9.V.B.2</a>	See <a href="#">Chapter 9.V.B.2.b</a>

Complainant's Statement	See <a href="#">Chapter 9.V.B.3</a>	See <a href="#">Chapter 9.V.B.3.c</a>
CSHO Statement	See <a href="#">Chapter 9.V.B.4</a>	See <a href="#">Chapter 9.V.B.4</a>
Witness Statement(s)	<a href="#">See Chapter 9.V.B.5</a>	See <a href="#">Chapter 9.V.B.5.c</a>
Respondent Position Statement	See <a href="#">Chapter 9.V.B.6</a>	See <a href="#">Chapter 9.V.B.6.c</a>
Investigator's Notes/ Memos to File	See <a href="#">Chapter 9.V.B.7</a>	See <a href="#">Chapter 9.V.B.7.c</a>
Case Activity/Telephone Log	See <a href="#">Chapter 9.V.B.8</a>	See <a href="#">Chapter 9.V.B.8.c</a>
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Settlement Agreement	See <a href="#">Chapter 9.V.C.2</a>	See <a href="#">Chapter 9.V.C.2.b</a>
Complainant's Personnel/ Medical Files provided by Respondent	See <a href="#">Chapter 9.V.C.3</a>	See <a href="#">Chapter 9.V.C.3.b</a>
Complainant's Personnel/ Medical Files provided by Complainant	See <a href="#">Chapter 9.V.C.4</a>	See <a href="#">Chapter 9.V.C.4.c</a>
Documents from State/ Local Entities or Other Federal Agencies	See <a href="#">Chapter 9.V.C.5</a>	See <a href="#">Chapter 9.V.C.5</a>