New Mexico
Occupational Health and Safety Bureau

Whistleblower Investigations Manual

11/25/24

NEW MEXICO OSHA

ABSTRACT

Purpose: **This Instruction implements the NM Occupational Health and Safety Bureau's (OHSB or the Bureau) Whistleblower Investigations Manual (WIM), effective date 11/26/24, and supersedes Chapter 13 of the 11-4-2009 the Bureau's Field Operation Manual (FOM)**

This manual provides the Bureau's Whistleblower Investigators (WBIs) with a reference document for identifying the responsibilities associated with the majority of their investigative duties. It also describes the processes to be used by Bureau staff in the implementation of the New Mexico Whistleblower Program.

Scope: **This manual applies to all employees of the Bureau.**

Disclaimer: **This manual is intended to provide instruction regarding some of the internal operations of the New Mexico Whistleblower Program 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 Environment Department or the State of New Mexico. Statements which reflect current Occupational Health and Safety Review Commission, or court precedents do not necessarily indicate acquiescence with those procedures.**

References: **The whistleblower provisions of the following statutes:**

The New Mexico Occupational Health and Safety Act, NMSA 1978 §§ 50-9-1 through 50-9-25, ("the Act");

The federal Occupational Safety and Health Act (OSHA 11(c)), 29 U.S.C. § 660(c); Region VI directive CSP 01-03-001, Level of Federal Enforcement in New Mexico - (https://www.env.nm.gov/occupational_health_safety/wp-content/uploads/sites/12/2022/08/CSP-01-03-001.pdf);

The federal OSHA Instruction CPL 02-00-148, and OSHA Field Operations Manual (FOM), January 28, 2016.

Cancellations: This manual replaces Chapter 13 of the existing OHSBFOM in use by the Bureau as amended 10-4-2011.
The Bureau has adopted this Whistleblower Investigation Manual (WIM) based on the Federal OSHA Whistleblower Investigation Manual, updated 4-29-2022 with revisions and amendments pertinent to the NM State Plan.

State Plan Impact: Notice of Intent and Equivalency Required. See Chapter 1, paragraph III. A.

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CHAPTER 1: PRELIMINARY MATTERS

I. Purpose

This version of the New Mexico Occupational Health and Safety Bureau (OHSB) Whistleblower Investigations Manual (WIM) supersedes all previous versions of Chapter 13 of the OHSB Field Operations Manual. These manual outlines legal concepts, procedures, and other information related to the handling of retaliation complaints under the whistleblower statute for which responsibility was delegated to OHSB and may be used as a ready reference.

II. Scope

OHSB-wide.

Table 1 Revision History

Revision #	Revision Date	Revised By	Reason for Revision
0	12/12/2022Draft	Thomas Klein	April 29, 2022 Federal WIM Update
1	11/25/2024	Garth Hayden	Federal WIM Update / General Counsel approvals

III. State Plan Impact

A. Notice of Intent and Equivalency Required

This Whistleblower Investigations Manual is the New Mexico State Plan equivalent of CPL_02-03-011 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. The New Mexico 11(c) analog is Section 50-9-25 of the New Mexico Occupational Health and Safety Act,.

This manual supersedes the Previous New Mexico Field Operations Manual Chapter 13., 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. 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 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.

IV. Significant Changes

A. **General**

1. This document has been substantially revised from the Federal Whistleblower Instruction Manual to fit the statutes and practices of the New Mexico State Plan Occupational Health and Safety Bureau.

   Where there are no specific conflicts, procedures have been unaltered to bring New Mexico in line with Federal OSHA current practices.

V. 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 Act.

Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the 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 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.

New Mexico is a State Plan as defined by the OSH Act under Section 18. As such, New Mexico has enacted a state plan analog to Section 11(c) of the OSH Act. Section 50-9-25 of the New Mexico Occupational Health and Safety Act authorizes OHSB to investigate employee complaints of employer discrimination against those who are involved in safety and health activities. Federal OSHA is responsible for enforcing whistle blower protection under twenty-four other Federal laws. State and local government workers also have the right to file a complaint of employer discrimination in New Mexico. New Mexico Whistleblower only enforces the Section 11(c) analog (Section 50-9-25)

NM Stat § 50-9-25 (2021)

> *A. No person or employer shall discharge or in any manner discriminate against any employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the Occupational Health and Safety Act or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of himself or others of any right afforded by the Occupational Health and Safety Act.*
>
> *B. Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such alleged violation occurs, file a complaint with the secretary, in writing and acknowledged by the employee, alleging such discrimination. Upon receipt of the complaint, the secretary shall cause such investigation to be made as he deems appropriate. Within sixty days*

of the receipt of a complaint filed under this section, the secretary shall notify the complainant of his determination. If, upon such investigation, the secretary determines that the provisions of this section have been violated, he shall file a petition in the district court for the political subdivision in which the alleged violation occurred to restrain the violation of Subsection A of this section and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

Below are additional statutes enforced by Federal OSHA Whistleblower.

A. **Additional Statutes Under Federal OSHA**

In addition to the overall responsibility for enforcing section 11(c) of the OSH Act, the Secretary of Labor has delegated to federal 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

It is important for the New Mexico Whistleblower Investigator to have a basic understanding that Federal OSHA handles complaints associated with the above statutes. If the Investigator takes a complaint that appears to fall under one of these statues, they should notify their supervisor and arrange for the case to be transferred to Federal OSHA Region VI personnel.

The state of New Mexico also has whistleblower protections for situations that do not involve occupational health and safety. Below is a table of NM whistleblower protections and the state agencies that investigate retaliation or discrimination claims.

Type of Complaint	**New Mexico Statute**	**Agency/ Departme nt**	**Contact Information**
Retaliation against reporting abuse of adults with developmental disabilities	NMAC § 8.370.9.8(D)) Retaliation against anyone making an abuse, neglect or exploitation report is strictly prohibited	Department of Health / Developmental Disabilities Support Division	**1-800-752-8649** https://www.nmhealth.org/about/dhi/ane/rane/
Medical Facility Neglect or Abuse	NMAC § 8.370.9.8(D) 7.1.13.8 **D. Retaliation:** Any individual who, without false intent, reports an incident or makes an allegation of abuse, neglect or exploitation will be free of any form of retaliation.	Department of Health / Division of Health Improvement	866-654-3219 https://www.nmhealth.org/about/dhi/ane/rane/
Medicaid Fraud	NM Stat § 27-14-12 retaliation against anyone reporting Medicaid Fraud	NM Department of Justice: Medicaid Fraud Control Unit	1-505-717-3500 https://nmdoj.gov/about-the-office/criminal-affairs/#medicaid-fraud-control-unit
Discrimination based on race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental handicap or serious medical condition in the workplace	NM Stat § 28-1-7	Department of Workforce Solutions: Human Rights Bureau	1-800-566-9471 https://www.dws.state.nm.us/Human-Rights-Information
Retaliation against anyone filing a workers compensation claim	NM Stat § 52-1-28.2	Workers Comp	(505) 841-6000 https://workerscomp.nm.gov/
Retaliation against employee for reporting fraud against taxpayers	Section 44-9-11: Employer interference with employee disclosure; private action for retaliation.	Department of Justice	https://nmag.gov/contact-us/file-a-complaint/

VI. Definitions, Acronyms, and Terminology

The Act

This term refers to the New Mexico Occupational Health and Safety Act, 50-9-1 through 50-9-25 NMSA 1978.

Adverse Action

An adverse action is an action that could dissuade or intimidate a reasonable worker from raising a concern about a workplace condition or activity.

Bilateral Agreements

Settlement agreements under section 50-9-25 between OHSB and Respondent without Complainant's consent.

Bureau Chief (BC)

The BC is responsible for the investigations and enforcement under the Act whistleblower statues in the state of New Mexico. References to the BC include the BC's designee except as otherwise noted. The BC's responsibilities may be delegated only to the Compliance and Enforcement Section Chief (CES Chief).

Commission and Review Commission

These terms are used interchangeably within this document. The term refers to the Occupational Health and Safety Review Commission of New Mexico granted authority by Section 50-9-9 of the Act. The powers, duties, and procedures of the Commission are described in 11.5.5 NMAC.

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 deficiencies.

Compliance and Enforcement Section Chief (CES Chief) (see Supervisor)

The CES Chief is the immediate Supervisor of the New Mexico Whistleblower Investigators. The CES may also be designated authorities by the BC associated with the efficient management of the Whistleblower section of OHSB.

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 OHSB. When this manual discusses Investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.

Compliance Officer (CO)

This term refers to Environmental Scientists and Specialists employed by the New Mexico Occupational Health and Safety Bureau and assigned to the compliance program to conduct occupational health and safety inspections and related activities.

Designated Representative

A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in OHSB 's investigation of a whistleblower complaint. If a representative has been designated, the Bureau typically communicates with the Complainant or the Respondent through the designated representative, although OHSB may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable.

Employer-Employee Agreements

Settlement agreements between Complainant and Respondent, subject to OHSB's approval.

Enforcement Case

Refers to an inspection or investigation conducted by a CO, or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.

Federal Review

Complainants who have concerns about a State Plan's investigation of their dually filed whistleblower complaints under both the state Act and Section 11(c) of the federal OSH Act 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.

Field Office

Any OHSB New Mexico office location or OSHA Regional or Area Office.

Investigator

An OHSB employee assigned to investigate and prepare an Report of Investigation in a whistleblower case.

IPRA; Exceptions; Trade Secrets (Trade Secrets)

Under New Mexico's Right to Inspect Public Records Act (IPRA) Section 14-2-1-F - Right to inspect public records; exceptions include provisions to keep confidential; trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting.

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.

Nexus

A causal connection between the protected activity and the adverse action.

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.

OIS

The OSHA Information System (OIS) is the primary database of information on enforcement and whistleblower cases. The system is maintained by federal OSHA and its use is adopted by the State of New Mexico.

OIS-Whistleblower

The OSHA IT Support System – Whistleblower, or subsequent whistleblower case management system. OIS-Whistleblower is the case management system used to process complaint data for OSHA's WPP, formerly known as WebIMIS. WebIMIS was replaced by OSHA Information System (OIS) on July1, 2022.

Personal Identifiable Information (PII)

Information about an individual which may identify the individual, such as a Social Security number or a medical record.

Protected Activity

The evidence must establish that Complainant engaged in activity protected under the specific statute(s).

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.

Office of General Counsel (OGC)

The Office of General Counsel provides legal services to all Environment Department divisions and advises New Mexico OHSB on whistleblower cases on a variety of topics including settlement document review, case reviews for merit, and interpretations of novel situations. OGC is also responsible for litigation of merit cases in New Mexico Courts.

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.

Supervisor (See Section Chief)

The BC, or the CES Chief, to whom the BC has delegated any of the BC's responsibilities, such as the responsibility to oversee OSHA whistleblower investigations, sign subpoenas (as applicable), issue findings and orders, recommend cases for litigation by OGC, 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 a report to OSHA regarding the lack of fall protection.

Whistleblower Protection Program (WPP)

OHSB's Whistleblower Protection Program as a whole.

Workplace and Worksite

The terms workplace and worksite are interchangeable. Workplace is used more frequently in general industry, while worksite is more commonly used in the construction industry. These two terms are defined as the "place of employment" in the Act as "any place, area or environment in or about which an employee is required or permitted to work".

VII. Functional Responsibilities

Responsibilities.

1. Secretary of the Environment Department
   a. The duties of the Secretary are delineated in 9-A7-6 NMSA 1978 and in the "Delegations by The Secretary of The New Mexico Environment Department of Signatory Authority" 5-24-2021.
2. Office of General Counsel (OGC)
   a. The duties of the OGC are delineated in the "Delegations by The Secretary of The New Mexico Environment Department of Signatory Authority". This document is frequently updated, and the most current document should be referenced. The most current document is located on the New Mexico Environment Department Intranet.
   b. NMED attorneys at OGC review cases submitted by the Bureau Chief and will assist in interpretation of the regulations governing the application of the Act and will, when requested, provide assistance in obtaining court enforcement of the Act's provisions, or assisting with negotiated settlements.
3. Bureau Chief
   a. The Bureau Chief is responsible for assuring the obligations imposed by the Act are fulfilled.
   b. General Duties
      - The responsibilities of the Bureau Chief are described in the Act, State regulations, Environment Department directives, and the New Mexico Field Operations Manual (FOM) and the Whistleblower Instruction Manual (WIM).
   c. Specific Duties
      - The Bureau Chief, or their designee, directs the general operation of OHSB, including the supervision of the Whistleblower Section.
      - Serves as the Secretary's contact with federal OSHA concerning all matters of program administration.
      - Serves as the Secretary's designee in meetings with other state plan states.
      - The Bureau Chief, or their designee, reviews discrimination complaints, directs the investigation of these complaints, and makes recommendations to the Secretary concerning final action on such complaints.
4. Section Chief
   a. The Section Chief supervises the Whistleblower section of OHSB and is directly responsible for performance and general functioning of the section.
   b. Specific Duties
      a. Responsible for ensuring that Whistleblower Investigators are following appropriate guidelines and policies
      b. Conducting Supervisor review and approvals of all major actions such as administrative closures.
      c. Coordinates with Bureau Chief on Merit and Non-Merit decisions

d. Coordinating with Federal OSHA on current policy and procedure to ensure that New Mexico remains "At Least as Effective" as Federal OSHA

5. Whistleblower Investigator (WBI)

a. OHSB role that is empowered to investigate allegations of discrimination and retaliation for health and safety complaints in the workplace.

b. The WBI performs the preliminary handling of received complaints, as well as all other duties required for investigating discrimination cases.

c. General Duties

- Serves under the direct guidance and ongoing supervision of the Section Chief with guidance from the BC
- Carries out required administrative and operational duties by following the Act and regulations, this WIM, and Environment Department directives. This WIM provides guidelines for the conduct of whistleblower operations and activities.

d. Specific Duties

- Conducts complaint intake and determines whether the allegations warrant a field investigation.
- Reviews enforcement case files for background information concerning any other proceedings that relate to a specific complaint. As used in this manual, an "enforcement case" refers to an inspection or investigation conducted by an OSHA Compliance Safety and Health Officer (CSHO or CO) or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.
- Prepares for investigations as described in Chapters 2 and 3 of this manual.
- Conducts investigations according to policies described in Chapters 2 and 3 of this manual.
- Promptly prepares the case file for all investigations as described Chapters 3 and 5 of this manual.
- Interviews complainants and witnesses and obtains statements and supporting documentary evidence.
- Follows up on leads resulting from interviews and statements.
- Interviews and obtains statements from respondents' officials, reviews pertinent records, and obtains relevant supporting documentary evidence.
- Applies knowledge of the legal elements and evaluates the evidence revealed, analyzes the evidence, and recommends appropriate action to the Bureau Chief, or their designee.
- Negotiates with the parties to obtain a settlement agreement that provides prompt resolution and satisfactory remedy.
- Negotiates with the parties when they are interested in early resolution of any case in which the Investigator has not yet recommended a determination.
- Monitors implementation of settlement agreements and determines specific actions necessary, and the sufficiency of action taken or proposed by the respondent. If necessary, recommends to Bureau Chief, or their designee, that legal advice be sought, or further legal proceedings are appropriate to seek enforcement of such settlement agreements or orders.

- Assists and acts on behalf of the Bureau Chief, or their designee, in whistleblower matters with other agencies or OSHA Regional Offices.
- Assists in the litigation process, including preparing for trials and hearings and testifying in proceedings.
- Conducts settlement negotiations with input from Bureau Chief, or their designee, and OGC representative if necessary.
- Promptly informs the Bureau Chief, or their designee, when served with a subpoena.
- Promptly refers any requests for case file information that are covered by the Inspection of Public Records Act.
- Participates in all required training.

VIII. Languages

OHSB is 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 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 OHSB 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 the 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 OHSB-enforced whistleblower protection law prohibits 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 the OHSB 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., the "but-for" cause of the adverse action).

Relevance and Use of footnotes

In the text of this manual the existence of a footnote, located at the bottom of the page may be indicated by one or more asterisks *. These footnotes may denote relevant state or federal case law, or further clarification of concept.

In the case of federal OSHA statute and case law cited, these are used as general guidance and may or may not be relevant to New Mexico statutes and are used in this manual as general guidance only.

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 the whistleblower law? 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, OHSB investigates the case by gathering evidence to determine whether there is reasonable cause to believe that retaliation in violation of the relevant whistleblower statute has occurred. Reasonable cause means that the evidence gathered in the investigation would lead OHSB to believe that unlawful retaliation occurred – i.e., that there could be success in proving a violation at a 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 OHSB will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, OHSB 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. Because OHSB 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, OHSB will issue merit findings or consult with OGC to ensure that the investigation captures as much relevant information as possible so that the OGC can evaluate whether the case is appropriate for litigation. 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 OGC in cases that OHSB 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 Act. Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities. 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.

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, health department, police department, fire department, Congress, or the Governor.
4. **Filing a complaint –** Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to OSHA Section 50-9-10 (B)
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 OHSB-enforced whistleblower protection laws), and communicating with the media about an unsafe or unhealthful workplace condition.[*] Communicating such complaints through social media may also be considered protected activity, in which case, the CES and Investigator should consult with OGC.
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 –** Refusing to work because of potentially unsafe workplace conditions is generally not an employee right under the New Mexico Occupational Health and Safety Act. A union contract or other state law may give a complainant this right, but the Occupational Health and Safety Bureau cannot enforce it. Refusing to work may result in disciplinary action by your employer.

   Employees do have the right to refuse to do a job if they believe in good faith that they may be exposed to an imminent danger. "Good faith" means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe it did exist.

[*] Donovan v. R.D. Andersen Construction Company, Inc., 552 F.Supp. 249 (D. Kansas, 1982).

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.[*] 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 OHSB 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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[*] *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)

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.[*]

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. 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 OGC 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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[*] *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).

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, the protected activity must have been a "but-for-cause" of the adverse action.

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 OHSB 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 OHSB'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 that the adverse action would not have occurred ***but for*** the protected activity. OHSB whistleblower cases require that the causation standard is the "but for" reason for the adverse action.

A. Cases Under District Court Statutes

The district court statute simply uses 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 OHSB whistleblower 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)).The protected activity does not need to be the sole or even predominant cause of the adverse action.

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. OHSB refers to this testing loosely as "pretext testing" . 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:

- 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 OGC 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* Reporting

There are several types of workplace policies and practices that could discourage injury reporting and thus violate section 50-9-25. Some of these policies and practices may also violate OHSB'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 50-9-25. In addition, such a policy is inconsistent with the employer's obligations the Health and Safety Act, and where it is encountered in an OHSB case, a referral for a recordkeeping investigation will be made.

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 or illness directly results in discipline, there is a clear potential for violating section 50-9-25. OHSB 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.

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. OHSB 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 50-9-25.

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 OHSB's OIS-Whistleblower. The procedures outlined in this chapter are designed to ensure that cases are efficiently evaluated to determine whether an investigation is appropriate; that OHSB 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 covered by a relevant OHSB whistleblower statute, including any applicant for employment or former employee or their authorized representative, is permitted to file a whistleblower complaint with OHSB. How to file

No particular form of complaint is required.

OHSB will accept the complaint in any language.

A complaint under the Act may be filed orally or in writing. Complaints that fall under a statute other than Section 50-9-25 of the New Mexico Occupational Health and Safety Act will be referred to Federal OSHA or the appropriate New Mexico State agency.

a. Written Complaints

OHSB accepts electronically filed complaints at https://www.osha.gov/whistleblower/WBComplaint.html. OHSB 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**

Oral complaints will be documented in writing by the screener or Investigator. A complaint need not be signed nor written by the complainant to qualify as "written" for the purposes of Section 50-9-25. For oral complaints, when a complaint is received, the receiving officer must accurately record the pertinent information in OIS or other appropriate intake worksheet and immediately forward it to a whistleblower Supervisor or designated whistleblower e-mail box to complete the filing in OIS.

Whenever possible, the minimum complaint information or entry into OIS 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**.

50-9-25 (B)

B. Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such alleged violation occurs, file a complaint with the secretary, in writing and acknowledged by the employee, alleging such discrimination. Upon receipt of the complaint, the secretary shall cause such investigation to be made as he deems appropriate. Within sixty days of the receipt of a complaint filed under this section, the secretary shall notify the complainant of his determination. If, upon such investigation, the secretary determines that the provisions of this section have been violated, he shall file a petition in the district court for the political subdivision in which the alleged violation occurred to restrain the violation of Subsection A of this section and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

When the Complainant offers a verbal complaint over the phone, the Whistleblower Investigator should take the verbal complaint and document it in writing. At the end of documenting the complaint, the Investigator should read back the information they have gathered, correcting any mistakes with the Complainant, and gaining verbal confirmation that the information is correct. This agreement constitutes *acknowledgement* for the purposes of 50-9-25 (B).

B. **Receiving Complaints**

All complaints received by the Whistleblower Section must be logged in OIS 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 OHSB (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.

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.

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, OHSB 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 OHSB's 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 the OHSB 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), OHSB will preserve the filing date for timeliness purposes and inform Complainant that Complainant needs to provide the missing information (OHSB should be specific as to what is missing).

- If Complainant provides the missing information, OHSB 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), OHSB may administratively close the complaint. See Chapter 3.IV.A.2 below for the requirements to administratively close a complaint in these conditions.
    - If Complainant resumes communication with OHSB 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

OHSB 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 OHSB. 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 implicated by the complaint. OHSB is responsible for properly determining the statute under which a complaint is filed. For example, Complainant may cite only one OSHA whistleblower statute, such as Section 50-9-25 when multiple statutes may apply. If a complaint indicates protected activities under multiple statutes, it is important to also refer the complainant to Federal OSHA or the appropriate New Mexico State agency.

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 OHSB has coverage.

The Supervisor will approve the case for docketing and assign for investigation based on the needs of the state. 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. OHSB 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, OHSB 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. 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 the statute enforced by OHSB. Other threshold issues may also need to be verified depending on the circumstances. The following is a list of the threshold issues that most commonly arise when evaluating the sufficiency of a whistleblower complaint:

1. **Timeliness of Filing**

Whistleblower complaints must be filed within specified statutory time frame of 30 days for Section 50-9-25, 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 OHSB Office is closed, then the next business day will count as the final day.

2. **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 or OGC.

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 OHSB 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 OHSB with another agency that does not have the authority to grant individual relief.

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.

f. OHSB 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 OHSB whistleblower statute) will be either administratively closed (if the complainant agrees) or docketed and dismissed.

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, OHSB 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 OHSB 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 OHSB's decision; and

iii. An explanation that if Complainant does not agree to allow OHSB to administratively close the case, OHSB will docket and dismiss the case so that Complainant can object or request review of OHSB'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**, OHSB 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, OHSB will docket and dismiss the case.

iii. **If Complainant changes their mind** after initially agreeing to the administrative closure of the case and contacts OHSB within a reasonable amount of time (usually 10 days), OHSB should reopen the case and docket and dismiss unless Complainant provides information that would allow OHSB to docket the case for investigation.

2. **Administrative Closures where Complainant has not responded to OHSB's reasonable attempts to conduct a screening interview or obtain information that OHSB needs to docket the case**

If Complainant does not respond to OHSB's reasonable attempts to conduct a screening interview or obtain information needed to docket the complaint, OHSB 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. OHSB's attempts to contact Complainant must be documented in the case file.

b. OHSB will inform the complainant that it has administratively closed the complaint and that if Complainant wishes to pursue the complaint, Complainant should contact OHSB 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 OHSB to confirm delivery. The notification will specify

direct contact information for OHSB or the Investigator including: mailing address, telephone number, and email.

c. If Complainant contacts OHSB and indicates a desire to pursue the complaint, OHSB 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 Bureau Chief, and OGC, 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. **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 OIS-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. Supervisor review memo or communication

   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. OIS-Whistleblower Summary page.

B. **Docket and Dismiss**

If the complaint is not administratively closed and the complaint does not meet the threshold requirements, OHSB will docket and dismiss the complaint without conducting an investigation. In those cases, OHSB will follow its case disposition procedures. 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 Findings. The 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 OHSB 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 50- 9-25 Complainants to the NLRB

If an employee files a section 50-9-25 complaint with OHSB 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:

A. If the complaint is timely, OHSB 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. OHSB 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, OHSB 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 OHSB's (30 days). OHSB, therefore, will recommend that Complainant contact the NLRB as soon as possible to discuss their rights. OHSB personnel should then give Complainant the contact information for the appropriate NLRB Field Office.

In both situations, OHSB 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. Docketing

The term "to docket" means to open a case for an investigation, document the case as an open investigation in OIS-Whistleblower, and formally notify both parties in writing of OHSB'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*."[16] The appropriate case identification format in correspondence is "*Respondent/Complainant/Local Case Number*."

OIS-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.
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.

VII. 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 Section 50-9-25 an individual company official who carries out the retaliatory adverse action may be 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.

VIII. 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 OHSB 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.
- For administrative-statute cases, information on expedited case processing.

Complainant will be notified using a method that permits OHSB 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 OHSB 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.

Respondent will be notified using a method that permits OHSB 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 OHSB Compliance section. 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.

IX. Early Resolution

OHSB 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 OHSB. The Investigator must wait until the commencement of the safety and health inspection (or partner agency inspection) before contacting Respondent.

X. Geographical Coverage

OHSB is a state plan for the state of New Mexico only. Complaints originating outside of the borders of New Mexico should be referred to the appropriate OSHA Region.

XI. Case Transfer

If a case file has to be transferred to another Investigator, whether within the state or between or to Federal OSHA, the transfer must be documented in the case file and the parties notified. Only supervisors are authorized to transfer case files. Transfers will generally be due to Federal OSHA coverage of a statute that New Mexico does not cover that may be more appropriate to the complaint.

XII. 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 OHSB's quality standards. **Reasonable balance** is achieved when further evidence is not likely to change the outcome.

B. Investigator as Neutral Party

The Investigator should make clear to all parties that OHSB 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 OHSB. 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**

When OHSB believes that there may be reasonable cause to believe that a violation occurred (i.e., the case may be a merit case), OHSB should consult informally with the OGC in order to ensure that the investigation captures as much relevant information as possible for OGC 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 OHSB 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**

New Mexico has converted to an electronic casefile system. Please refer to the Current ECF for proper case file format.

2. **Paper Case Files**

As noted above, New Mexico is transitioning to keeping electronic case files as a general rule. Investigators 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 OHSB 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.

Older paper case files will be destroyed according to the retention schedule required by the records custodian.

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 OHSB 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, Findings, and 10-day contact letters are available in the Whistleblower network folder. 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 OIS-Whistleblower, OIS, and the Area Office. Examples of information sought during this investigation may include copies of safety and health complaints filed with OHSB, 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 OIS-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 Compliance and Enforcement Section as soon as possible

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. It is also important to coordinate with the Compliance and Enforcement sections to ensure that the Whistleblower section does not provide the employer with advanced notice of an inspection.

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. Obtaining information related to such actions could result in the 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 OHSB, Complainant may wish to amend the complaint to add additional allegations and/or additional Respondents. It is OHSB'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. OHSB will reduce oral amendments to writing. If Complainant is unable to file the amendment in English, OHSB 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 OHSB 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 OHSB investigation, OHSB 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. OHSB should consult with OGC 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 OHSB
- Failure to attend scheduled meetings; and
- Other conduct making it impossible for OHSB 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, OHSB 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, OHSB 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 OHSB 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 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 OHSB 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 OHSB when contact information changes. OHSB may dismiss a complaint for lack of cooperation if OHSB is unable to contact Complainant due to the absence of up-to-date contact information.
4. Consistent with the applicable regulations, when OHSB dismisses a case for lack of cooperation, an abbreviated Findings letter, with an explanation of the

right to request review by from the EHD Director, will be provided to the Complainant. OHSB has discretion to reopen the investigation within 30 days of delivery of the dismissal letter to Complainant if Complainant contacts OHSB, indicates a desire to pursue the case, and provides a reasonable explanation for the failure to maintain contact with OHSB.

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 50-9-24. M NMSA 1978 makes 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. 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. If an interview is recorded electronically, the Investigator must be a party to the conversation, and it is OHSB'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 Bureau Chief's discretion, in consultation with OGC, 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 OHSB'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 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 OHSB's whistleblower statute, any witness (other than the Complainant) may provide information to OHSB confidentially. 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, OHSB 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 OHSB'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 OHSB if they believe that they have been subjected to retaliation because they participated in an OHSB investigation. See also Chapter 4.XII.B, *Early Involvement of the OGC*.

   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 50-9-25 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, OHSB has a statutory right to interview non-management, non-Supervisory employees in private.[20]

   OHSB'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, 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, OHSB should consult with OGC.

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 #."

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 Supervisor, Bureau Chief or OGC. Otherwise, complainants and OHSB 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 Supervisor, Bureau Chief or OGC as appropriate. OHSB 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 subpoenas may be obtained for witness interviews or records. See Chapter4.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 OGC, 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 OHSB to reach a determination without Respondent's input. Additionally, Respondent may be advised that OHSB 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. OHSB should not decline to accept written information received directly from a represented Respondent.

XII. Subpoenas, Document and Interview Requests

A. Subpoena Power 50-9-18 NMSA 1978

In connection with investigations or enforcement hearings conducted under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], the department may apply to the district court for an order requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the state. Any district court, upon application by the department, shall have jurisdiction to issue to such person an order requiring the person to appear and to produce evidence if, as and when so ordered and to give testimony relating to the matter under investigation if the court finds that the evidence or testimony sought is discoverable under the Rules of Civil Procedure for The District Courts.

B. Early Involvement of the OGC

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

For example, OGC may be of assistance in cases 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 OHSB has reasonable cause to believe that a violation occurred, OHSB should consult informally with OGC, if it has not already done so. Consulting early with OGC is particularly important in cases that OHSB anticipates referring to OGC for litigation as early consultation helps to ensure that the investigation captures as much relevant information as possible so that OGC 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 Supervisor, Bureau Chief, or OGC 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 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 OHSB anticipates issuing non-merit findings) or Respondent (in administrative cases in which OHSB anticipates issuing merit findings). 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 OHSB does not normally reveal the identity of witnesses, especially if they requested confidentiality.

C. Although OHSB 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 appeal to the Environmental Health Division Director and the process for doing so.

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 OHSB anticipates issuing merit findings, the closing conference may be used to explore the possibility of settlement with Respondent. Where

Complainant (or Respondent) cannot be reached despite OHSB's reasonable attempts to conduct a closing conference, OHSB will document its attempts to reach Complainant/Respondent in the file and proceed to issue Findings. 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. OHSB's attempts to contact Complainant must be documented in the case file.

G. 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 Findings, then end the conference. Combativeness is not the simple questioning of the evidence and OHSB'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 OHSB 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 OHSB-requested documents as well as those documents they believe OHSB 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, OHSB 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 OHSB's non-public disclosure policy) or in response to a IPRA 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 OHSB 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 OHSB 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 OHSB'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 OHSB'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 OHSB 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 OHSB

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, dismissal due to expedited case processing, or dismissal for lack of cooperation/unresponsiveness will require only an entry into the OIS-Whistleblower database (or a successor database) in lieu of a Report of Investigation. The notation in the OIS- 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 OIS-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**,[*] 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 statute, how interstate commerce is affected. Also explain the coverage of Complainant (e.g., in SPA cases whether Complainant is a seaman). If coverage was disputed, this is where OHSB'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

[*] 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 OHSB 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 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 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 Bureau Chief's policy and procedures, the supervisor's approval may be the final approval in most cases. The EHD Director's review of the case file and final approval is required for all merit and novel cases.

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 OGC for litigation, or
2. The issuance of Findings in merit cases and non-merit cases.
3. Complainants may also request to withdraw their whistleblower claims at any point in the investigation. See Chapter 5.X, *Withdrawal*.
4. OHSB may close a case due to a settlement. See Chapter 5.XI, *Settlement*.
5. OHSB may determine that a deferral to the results of another proceeding is appropriate under the circumstances. OHSB 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 Statute 50-9-25

A. Recommendation to Litigate

Where OHSB believes that a case is meritorious the case must be forwarded to OGC for review. The Supervisor (or designee) and other OHSB staff will work with OGC 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 OGC approves a case for litigation OGC 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 OGC constitutes the Findings. OGC ordinarily will send a copy of the filed district court complaint to Complainant.

If OGC 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 OGC determines that a section 50-9-25 case is not suitable for litigation, 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 Findings

For all dismissal determinations, the parties must be notified of the results of the investigation by the issuance of 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 Findings must advise Complainant of the right to request a review of the determination pursuant to OHSB's long-standing policy to provide complainants with the right to seek review of dismissals under section 50-9-25.

The 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 Findings to maintain accountability.

See Chapter 5.VIII.A, *Format of Findings*, for instructions of drafting the Findings.

OHSB 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 50-9-25 complaint is dismissed, Complainant may seek review of the dismissal by the EHD Director. The request for review must be made in writing to EHD Director 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 Bureau Chief. The request must be mailed via the US Postal Service. 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 OHSB Office is closed, then the next business day will count as the final day.

Upon EHD Director's receipt of a request for review under Section 50-9-25the regional Supervisor must promptly make available a copy of the case file and any additional comments regarding the request for review to EHD Director for

review. The request for review must be preserved in the file.

EHD Director 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, EHD Director 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 EHD Director for further review and analysis. EHD Director will then determine if it will affirm or not affirm the original determination.
    - If another determination is made (e.g., merit referral to OGC, settlement, withdrawal, etc.), OHSB will notify EHD Director of this outcome.
- Alternatively, if EHD Director, after consultation with OGC determines that the case has merit, it will return the case to OHSB with instructions to refer the case to OGC for litigation consideration.

VII. Findings

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

A. Format of Findings

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 the Environment , acting through [his/her] agent, the Bureau Chief for the Occupational Safety and Health Administration, 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 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 Findings.

   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, Findings should contain a brief summary of OHSB's analysis on each element or issue relevant to the determination and OHSB'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 OHSB'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, OHSB 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;*
- *OHSB 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];*
- *OHSB has no reasonable cause to believe that Complainant suffered an adverse action; [insert reason for OHSB's conclusion]; or*
- *OHSB 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 OHSB's conclusion that there is no nexus between the protected activity and the adverse action]; 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 OHSB 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].*[27]

Merit findings would contain analysis and a conclusion similar to the following:

> *On the basis of the findings above, OHSB has reasonable cause to believe that Respondent[s] violated [statute cite] in that Complainant's protected activity was the but for cause of 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 calculated, include brief explanation for why the damages calculated are appropriate in the case].*

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

In merit administrative statute cases, the rationale for ordering any punitive damages or any non-Monetary 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-Monetary 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 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 (Monetary and non-Monetary) and punitive damages must be stated. The interest on back pay and Monetary 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 non-merit cases, the findings must advise Complainant of the right to request a review of the determination pursuant to OHSB's long-standing policy to provide complainants with the right to seek review of dismissals under Section 50-9-25 through appeal to the EHD Director.

9. **Signature**

   The Bureau Chief (or designee) must sign the findings.

B. **Abbreviated 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 Findings may be abbreviated. The abbreviated findings must state why the case is being closed (e.g., that Complainant has not cooperated 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, OHSB's attempts to contact Complainant should be documented in the Findings. The abbreviated findings must inform the parties of the right to object to the findings and request a review.

VIII. Dismissals for Lack of Cooperation/Unresponsiveness

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

IX. Withdrawal

Complainant, with OHSB's approval, may withdraw the complaint at any time during OHSB's processing of the complaint. 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 OHSB's review and approval of the settlement, OHSB must inform Complainant of the requirement to submit the settlement for OHSB's approval.

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 OHSB 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. 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*.

X. Settlement

Voluntary resolution of disputes is desirable, and Investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is OHSB 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, OHSB will make every effort to accommodate an early resolution of complaints in which both parties seek it.. Settlement requirements and procedures, including the requirement to submit the settlement agreement for OHSB's review and approval, are discussed in detail in Chapter 7.

XI. 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 OHSB whistleblower statutes. Thus, postponement and/or deferral may be advised when there is a proceeding

> OHSB 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 OHSB whistleblower statute and those proceedings must not violate the rights of Complainant under the relevant OHSB 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 OGC to make these determinations. To postpone the OHSB case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that OHSB must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement.

XII. Significant or Novel Whistleblower Cases

In order to ensure consistency among and to alert the New Mexico Environment Department and Federal OSHA about any significant or novel issues, Findings in all significant and novel merit cases must be reviewed by the EHD Director. The Bureau Chief will establish criteria and procedures for significant and novel cases as required by the specifics of the case.

XIII. Documenting Key Dates in OIS-Whistleblower

For purposes of documenting case disposition, key dates must be accurately recorded in OIS 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 OHSB office. If tolling applies, the basis for tolling should be explained in the OIS-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 OIS-Whistleblower.

C. Determination Date

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

D. Date Request for Review or Objection Filed

The date a request for review is filed is the date of the postmark or hand- delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHB field office. The EHD Director will have entered the RFR filing date into OIS-Whistleblower.

Any party may object to an OHSB determination and request a review by the EHD Director, petition for review of decision.

Required Documents for Disposition				
Disposition	OIS-Whistleblower	Report of Investigation	Findings	Parties Receive
Administratively Closed (e.g. prior to docketing, complaint determined to be untimely or contains no *prima facie* allegation)	Entry of complaint information	N/A	N/A	Complainant receives written explanation and confirmation of the screen-out. Ch. 3.IV.A
Settled (OHSB approved)	Summary in Case Comments field	None Required Ch. 5.III.A	None Required	Copy of signed settlement Ch. 7.V.B.4
Settled – Other (OHSB approved)	Summary in Case Comments field	None Required Ch. 5.III.A	None Required	Settlement approval letter Ch. 7.VI.B
Dismissal: Lack of Cooperation (LOC)/ Unresponsiveness	Summary in Case Comments field	None Required Ch. 5.III.A	Abbreviated Ch. 5.VIII.B	Abbreviated Findings, with rights to object or request review. Ch. 5.VI.B (district court) Ch. 5.VIII.B (Admin. Statutes)

Continued next page.

Required Documents for Disposition (continued)				
Disposition	OIS-Whistleblower	Report of Investigation	Findings	Parties Receive
Dismissed without investigation (e.g. after docketing, complaint determined to be untimely or contains no *prima facie* allegation)	Detailed note in Case Diary	Not required	Abbreviated Ch. 3.IV.B Ch. 5.VIII.B	Abbreviated Findings, with rights to object or request review. Ch. 3.IV.B
Dismissals after investigation		Required Ch. 5.III	Required	Findings, with rights to object. Ch. 5.VII.B
Merit		Required Ch. 5.III	Required Ch. 5.VII.A & C	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. OGC also should be consulted on determining potential remedies in any case that OHSB 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.

OHSB's whistleblower statute provides for reinstatement, back pay, and compensatory damages for Monetary losses* and non-Monetary damages.** 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.

B. Front Pay

Front pay, which OHSB 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. OGC should be consulted when considering an award of front pay.

IV. Back Pay

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

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 OGC 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 Findings but should not be stated in the 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, the formula that OHSB proposes using to compute back pay should be provided to OGC.

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 OGC 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. Complainants should be reminded that they may need to reimburse unemployment benefits received. 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 OGC.

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 issued.

E. Reporting of Back Pay to the Social Security Administration

Respondents are required to submit appropriate documentation to the Social Security Administration allocating the back pay award to the appropriate periods. Findings where applicable must include this requirement.

V. Compensatory Damages

A. Monetary Damages

Monetary damages (sometimes referred to as Pecuniary Damages) may be awarded under all OSHA- administered whistleblower statutes. Monetary 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.

Monetary 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-Monetary Damages

Non-Monetary 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 although they are not necessarily appropriate in every case. OHSB, with guidance from OGC, will evaluate whether compensation for these damages is appropriate.

Entitlement to non-Monetary 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-Monetary 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 OGC 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 New Mexico's Inspection of Public Records 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-Monetary damages. Investigators should seek guidance from their Supervisor and OGC. 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-Monetary 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-Monetary 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.** a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. Relevant cases can include those decided by the courts under the OHSB whistleblower statute and cases decided by the courts under section 11(c) and other discrimination or anti-retaliation provisions.

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 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 OHSB seeks to order payment of punitive damages, OHSB first should consult with OGC.

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 OHSB 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 OHSB or restricting employee discussions with OHSB 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.

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. 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 OHSB 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. **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 OHSB or courts under OHSB whistleblower statutes or other anti-retaliation provisions. Consultation with OGC can be helpful for identifying comparable cases.

VII. Attorney's Fees

OHSB will award reasonable attorney's fees in merit cases if Complainant has been represented by an attorney and requests attorney's fees.

In most instances, OHSB's findings and order may simply state that OHSB 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 OHSB's order will become the final order of the Secretary of the Environment Department 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, OHSB 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 OHSB, 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 OHSB. For example, a complainant's attorney who filed a Section 50-9-25 complaint and an EEOC claim may be eligible for the Section 50-9-25 portion of the attorney's fees only.

OHSB 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, OHSB 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 OGC 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* 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 monetary 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-monetary 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, Findings should include an explanation of the basis for awarding any punitive damages or non-monetary 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. OHSB 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 provide employee or manager training regarding the rights afforded by OHSB'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.

4. Posting of an informational poster about the relevant whistleblower statute.

5. Posting of a notice regarding the OHSB order.

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

XI. 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, may be awarded, as appropriate.

CHAPTER 7: SETTLEMENTS

I. Scope

This chapter provides guidance on the following topics: (2) standard OHSB settlement agreements; (3) OHSB's approval of settlement agreements negotiated between Complainant and Respondent where applicable; (4) terms that OHSB 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 OHSB; (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. It is OHSB policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. OHSB 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 OHSB standard settlement agreement (see Chapter 7.V, *OHSB Settlement Agreement*). However, the parties may negotiate their own settlement agreement and submit it for OHSB'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.

III. 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 OHSB settlement agreement must be signed by the appropriate OHSB official.
3. In every employer-employee agreement, the settlement approval letter must be signed by the appropriate OHSB official.
4. Every settlement agreement must be signed by Respondent(s).
5. The relevant partner agency or agencies must be promptly notified that the parties

have settled the complaint and that the case is closed.

6. Employer-employee settlements must be submitted to OHSB 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 OHSB'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**

   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.

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 OHSB 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*), OHSB 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 applicable tax law.* OHSB 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 OHSB 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.

IV. OHSB Settlement Agreement

A. General Principles

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

B. Specific Requirements

An OHSB 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 Bureau Chief (or designee), except in bilateral agreements under Section 50-9-25 where Complainant's

concurrence is not required. OHSB 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 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 OHSB'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 OHSB, 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 OHSB 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 OHSB 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 OHSB-enforced whistleblower statute. (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 OHSB. (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 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 OHSB 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).

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 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 the Environment Department, enforceable in an appropriate New Mexico court under [the relevant whistleblower statute].

   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 the New Mexico Environment Department 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 OHSB to regard the agreement as potentially containing confidential business information exempt from disclosure under IPRA. 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 OHSB's records in this case and is subject to disclosure under IPRA unless an exemption applies. Complainant and Respondent have requested that OHSB designate the agreement as containing potentially confidential information and request predisclosure notification of any IPRA request.*

The agreement must be maintained in the case file and should be clearly marked as potentially containing business confidential information exempt from disclosure under IPRA (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 OHSB'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 OHSB, 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 OHSB's whistleblower statute. In those instances, OHSB prefers that the parties use the OHSB settlement agreement to resolve the whistleblower claim pending before OHSB. If the parties' separate agreement contains terms relevant to settlement of the whistleblower case, the separate agreement must be submitted to OHSB for approval (see Chapter 7.VI, *Employer-Employee Settlement Agreements*) and the OHSB 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 OHSB standard settlement agreement:

Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration's (OHSB's) authority. OHSB's authority over that agreement is limited to the statutes within its authority. Therefore, OHSB 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. OIS-Whistleblower Recording and Partner Agency Notifications for OHSB Settlements

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

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

V. Employer-Employee Settlement Agreements

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

In most circumstances, an OHSB settlement agreement is optimal. As explained above, if the parties are amenable to signing one, the OHSB 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 Bureau Chief (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.[41] OHSB's authority over settlement agreements is limited to the statutes within its authority. Therefore, OHSB'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 OHSB's involvement in any resolution reached after a complaint is initiated.

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

B. **Required Language**

If OHSB approves an employer-employee settlement agreement in a case under a whistleblower statute 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 OHSB's whistleblower statutes.

In section 50-9-25 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 that are relevant, that is, under OHSB's authority.

A copy of the reviewed agreement must be retained in the case file and the parties should be notified that OHSB will disclose settlement agreements in accordance with the IPRA, unless one of the IPRA 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. If the withdrawal is due to settlement, the Investigator must inform the parties that the settlement agreement must be submitted for approval. Upon review, OHSB may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The Investigator should also advise the parties that upon OHSB's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed.

D. OIS-Whistleblower Recording and Partner Agency Notifications for Employer-Employee Settlements

Any case in which OHSB approves an employer-employee settlement agreement must be recorded in OIS-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, OHSB 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 OHSB will not approve in a settlement agreement negotiated between Complainant and Respondent. As previously noted, OHSB prefers that parties use the OHSB settlement agreement whenever possible, as that agreement does not contain **terms that OHSB cannot approve**:

1. PARTY TO A CONFIDENTIALITY AGREEMENT. OHSB will not approve a provision that states or implies that OHSB 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 OHSB to regard the agreement as potentially containing confidential business information exempt from disclosure under IPRA. In those circumstances, the settlement or OHSB'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 OHSB's records in this case and is subject to disclosure under IPRA unless an exemption applies. The parties have requested that OHSB designate the agreement as containing potentially confidential information and request predisclosure notification of any IPRA requests encompassing the New Mexico Occupational Health and Safety Whistleblower Case File.*

   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 IPRA (see Chapter 9.III.B.2, *Traditional CBI*).

2. GAG PROVISIONS. OHSB 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, OHSB

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, OHSB 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.[44] 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, OHSB will also not approve a provision that requires Complainant to remit any portion of such an award to Respondent. For example, OHSB 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, OHSB 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 OHSB, 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. OHSB occasionally encounters settlement agreements that require a breaching party to pay liquidated damages. OHSB may refuse to approve a settlement agreement where the liquidated damages are clearly disproportionate to the anticipated loss to Respondent from a breach. OHSB 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. OHSB will typically approve a settlement agreement that contains a general release of employment-related claims against Respondent with the understanding that OHSB'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, OHSB 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, OHSB 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, OHSB 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. OHSB 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 OHSB encounters such a term, OHSB 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. As OHSB is a state plan governed by the laws of the state of New Mexico, settlement agreements that name other states are not acceptable.

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 OGC may be advisable.

   e. **Complainant's consent.** OHSB 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.

VI. Enforcement of Settlements

If there is a breach of a settlement agreement that OHSB has entered into or approved,

depending on the status of OHSB's investigation or any subsequent proceedings at the time the settlement was reached, OHSB staff may either reopen the whistleblower investigation or refer the matter to OGC to pursue court-ordered enforcement. The additional work is a continuation of the original case. OHSB does not open a new case to deal with the breach of a settlement agreement.

A. **Cases Settled Under Section 50-9-25**

If there is a breach of a settlement agreement in a Section 50-9-25 case, the supervisor generally should consult with OGC. OHSB 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.

OHSB staff will, after appropriate consultation with OGC, 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 OGC 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 OHSB generally will refer the case to OGC to obtain further relief from the court.

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 OGC 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* 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.

* 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.* 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

*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[47] (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 Bureau Chief 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 Bureau Chief 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 OIS-Whistleblower case summary.

Referral of Private-Sector Complaints

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 OIS-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 OGC 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.

1. 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.

2. 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 OIS-Whistleblower entry. No new case will be opened or new entry added into OIS-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 OIS-Whistleblower. The legal filing date remains the original filing date. However, instead of reopening the original complaint in OIS-Whistleblower, the Investigator will open a new case in the database, using as the filing date for OIS-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 Regional Administrator 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 OHSB's whistleblower investigation files. Whistleblower investigation files are subject to disclosure under OHSB's non-public disclosure policy, the Privacy Act, and the Freedom of Information Act (FOIA). The New Mexico FOIA analog that OHSB operates under is the Inspection of Public Records Act (IPRA). Under the anti-retaliation provisions that OHSB 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 OHSB'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 OHSB's files under the IPRA.

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) IPRA, the goal of which is to enable public access to New Mexico government records; and (3) relevant provisions in the whistleblower statute. The guidelines below are intended to ensure that OHSB's Whistleblower Protection Program fulfills its disclosure obligations under IPRA, and the whistleblower statute.

II. Overview

A. This Chapter Applies to OHSB's Whistleblower Investigation Records

The guidelines in this chapter apply to all investigative materials and records maintained by OHSB'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 New Mexico State 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 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 OHSB's investigation is ongoing or OHSB is involved in litigating the case.

Whistleblower cases should be considered closed when a final determination has been made that litigation will not be pursued. Accordingly, a case is considered open even if Findings have been issued, but the case is under review. If the case is under review for potential litigation or the Department is litigating the case, the case should be considered open.

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 OGC and, in high profile cases, with NMED Cabinet Secretary.

If a case is open, OHSB 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 IPRA requests. However, OHSB 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. OHSB may also post statistical data on the OHSB web page.

OHSB may decide that it is in the public interest or OHSB'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 OHSB and Other Government Entities**

1. OHSB generally shares an unredacted copy of the whistleblower complaint and any findings in the case with Federal OSHA, Region VI, which provides oversight of the New Mexico OHSB State Plan. Appropriate, relevant, necessary, and compatible investigative records may be shared with other state or federal agencies responsible for investigating, prosecuting, enforcing, or implementing the general provisions of the statutes whose whistleblower provisions are enforced by OHSB, if OHSB deems such sharing to be compatible with the purpose for which the records were collected. When sharing records, OHSB 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 OHSB and the relevant federal agency, OHSB should generally use a sharing letter when transmitting records.

2. **Memoranda of Understanding (MOU)**

   An MOU can also establish a method by which OHSB 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 OHSB receives a request for records via a subpoena in a case in which NMED is not a party, a IPRA Officer must immediately notify the Bureau Chief and OGC. The IPRA Officer should then follow OGC instructions on how to proceed with the subpoena request.

III. OHSB's Non-Public Disclosure Policy

A non-public disclosure is a release by OHSB 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 OHSB's determination. OHSB's non-public disclosure policy does not create any appeal rights or enforceable disclosure rights.

During an investigation, requests for material from whistleblower investigation case files from third party requesters must be directed to the appropriate IPRA Officer who will process the request in compliance with Departmental IPRA regulations.

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 IPRA exemptions, but redactions generally should be consistent with the redactions that would be made if the documents were being released under IPRA. 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 OGC 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. **Trade Secrets 50-9-21 NMSA 1978**

All information reported to or otherwise obtained by the OHSB in connection with any inspection or proceeding under this section which contains or might reveal a trade secret, as defined in Paragraph (2) of this subsection, shall be considered confidential, except that such information may be disclosed to other officers or employees concerned with carrying out the Occupational Health and Safety Act. In any such proceeding, the secretary, the secretary's authorized representative or a court of competent jurisdiction, as the case may be, shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

(1) It is unlawful for any employee of the agency to reveal to any individual other than another employee of the department the trade secrets of any employer except in response to an order of a district court, the court of appeals, the supreme court or a federal court in an action to which the state is a party and in which the information sought is material to the inquiry.

(2) For the purposes of this subsection, "trade secrets" means the whole or any portion or phrase of any scientific or technical information, design,

process, procedure, formula or improvement which is secret and of value. A trade secret shall be presumed to be secret when the owner takes measures to prevent it from becoming available to persons other than

d. **those selected by the owner to have access for limited purposes. 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 OHSB gathered in the investigation. Thus, intra-agency memoranda are generally not subject to non-public disclosure. However, if for some reason OHSB is considering releasing intra-agency memoranda as part of a non-public disclosure, then intra-agency deliberations, communications from OGC to OSHA, and OGC attorney work product should be withheld under OHSB's non-public disclosure policy to the same extent that they would be withheld in response to a IPRA request.

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 Chapter 9.III.	Refer to Glomar discussion and Exemption 7(A) discussion in Chapter 9.IV.E.5.
Closed Investigation	**Complainant and Respondent Requester**	**Third Party**
Assignment Memo	See Chapter 9.V.A.1	See Chapter 9.V.A.1.b
Complainant Notification	See Chapter 9.V.A.2	See Chapter 9.V.A.2.c
Respondent Notification	See Chapter 9.V.A.3	See Chapter 9.V.A.3.c
Designation of Representatives	See Chapter 9.V.A.4	See Chapter 9.V.A.4.b

Complainant/Respondent Correspondence	See Chapter 9.V.A.5	See Chapter 9.V.A.5.c
Determination Letter	See Chapter 9.V.A.6	See Chapter 9.V.A.6.b
OIS-Whistleblower Summary	See Chapter 9.V.C.1	See Chapter 9.V.C.1.b
Request for Review Files (RFR)(Appeal Letter/RFR Review Form/ Determination)	See Chapter 9.V.A.7	See Chapter 9.V.A.7.c
OSHA-7/Complaint	See Chapter 9.V.B.2	See Chapter 9.V.B.2.b

Complainant's Statement	See Chapter 9.V.B.3	See Chapter 9.V.B.3.c
CSHO Statement	See Chapter 9.V.B.4	See Chapter 9.V.B.4
Witness Statement(s)	See Chapter 9.V.B.5	See Chapter 9.V.B.5.c
Respondent Position Statement	See Chapter 9.V.B.6	See Chapter 9.V.B.6.c
Investigator's Notes/ Memos to File	See Chapter 9.V.B.7	See Chapter 9.V.B.7.c
Case Activity/Telephone Log	See Chapter 9.V.B.8	See Chapter 9.V.B.8.c
Report of Investigation	See Chapter 9.V.B.7	See Chapter 9.V.B.7.c
Table of Contents/Exhibit Log	See Chapter 9.V.B.8	See Chapter 9.V.B.8.c
Settlement Agreement	See Chapter 9.V.C.2	See Chapter 9.V.C.2.b
Complainant's Personnel/ Medical Files provided by Respondent	See Chapter 9.V.C.3	See Chapter 9.V.C.3.b

Complainant's Personnel/ Medical Files provided by Complainant	See Chapter 9.V.C.4	See Chapter 9.V.C.4.c
Documents from State/ Local Entities or Other Federal Agencies	See Chapter 9.V.C.5	See Chapter 9.V.C.5