IOSHA WHISTLEBLOWER INVESTIGATIONS MANUAL

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Chapter 1

Introduction

I. Background

Iowa Code Chapter 88 is a state statute of general application designed to regulate conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the State of Iowa. Every employer is required to provide their employees with a place of employment free from recognized hazards that cause or would likely cause death or serious physical harm and, further, to comply with occupational safety and health standards promulgated under the Iowa Code.

The Iowa Code provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces and recordkeeping requirements. Enforcement proceedings initiated by Iowa OSHA, review proceedings before an independent quasi-judicial agency (Employment Appeal Board) and judicial review are provided by the Iowa Code.

Employees and representatives of employees are afforded a wide variety of substantive and procedural rights under the Iowa Code. Moreover, effective implementation of the Iowa Code and achievement of its goals depend in large measure upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity. It is essential that such participation and employee rights be preserved if the fundamental purposes of the Iowa Code are to be realized.

Iowa Code Chapter 88.9(3) of the Iowa Code provides, in general, that no person shall discharge or in any manner discriminate against any employee because the employee exercised rights under the Iowa Code. The Iowa OSHA Administrator (IA) has over-all responsibility for the investigation of whistleblower complaints under Iowa Code Chapter 88.9(3). The IA has the authority to dismiss non-meritorious complaints (absent withdrawal), approve acceptable withdrawals and negotiate settlement of meritorious complaints or affect recommendations of litigation to legal staff.

The Occupational Safety and Health Act (OSH Act), Public Law 91-596, is a federal statute. In addition to the over-all responsibility of enforcing Section 11c of the OSH Act, federal OSHA has the responsibility to investigate claims of whistleblowing filed by employees under the provisions of several other federal statutes that contain whistleblower provisions.

II. Definitions, Acronyms, and Terminology

- Adverse Action: Any action that could change an employment situation in a negative way.

- Bilateral Agreements: Settlement agreements between Iowa OSHA and Respondent without Complainant's consent.
- Cat's Paw Theory: The cat's paw theory holds that an employer can be liable for unlawful retaliation or discrimination even when the decisionmaker did not act with a discriminatory or retaliatory motive if he/she was influenced by another employee who did have a discriminatory or retaliatory motive.
- 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. These are not designated to afford individual relief to Iowa OSHA whistleblower complaints.
- Complainant: Any person who believes that they have suffered an adverse action in violation of an OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with OSHA. When this manual discusses investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.
- Compliance Safety and Health Officer (CSHO): This term refers to OSHA Safety Engineers, Safety Compliance Officers, and Industrial Hygienists.
- Confidential Business Information (CBI): All information owned by, or in possession or control of employers that is not in the public domain as it relates to research, development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support or use of a product.
- Designated Representative: A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in OSHA's investigation of a whistleblower complaint. If a representative has been designated, OSHA typically communicates with the Complainant or the Respondent through the designated representative, although OSHA may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. Iowa OSHA's findings are sent to both the parties and their representatives.
- Employer-Employee Agreements: Settlement agreements between Complainant and Respondent, subject to Iowa OSHA's approval.
- Enforcement Case: Refers to an inspection or investigation conducted by a CSHO or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.
- Investigator: An Iowa OSHA employee assigned to investigate and prepare an ROI in an Iowa OSHA whistleblower case.

- Lack of Cooperation (LOC): A complainant's failure to provide information necessary fora whistleblower investigation.
- Nexus: A causal connection, or link, between a protected activity and an 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-Whistleblower: The OSHA Information System (OIS) is the case management system used to process complaint data for Iowa OSHA's Whistleblower Protection Program (WPP). OIS - Whistleblower is formerly known as the OSHA IT Support System – Whistleblower – OITSS - Whistleblower and WebIMIS.
- 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: An activity that workers may engage in without the fear of retaliation by supervisors or employers.
- 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.
- Whistleblower complaint or complaint: A complaint filed with OSHA alleging unlawful retaliation for engaging in protected activity. For example, a roofing employee complains to OSHA that she was suspended for reporting a lack of fall protection to OSHA. The whistleblower complaint is the complaint to OSHA regarding the suspension for reporting a safety violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to OSHA regarding the lack of fall protection.
- Whistleblower Protection Program (WPP): Iowa OSHA's Whistleblower Protection Program as a whole.

III. Functional Responsibilities

The following describes the functions and responsibilities of the various positions within Iowa OSHA. The descriptions are intended neither to be all-inclusive nor to describe actual positions and/or job functions. Rather, the following descriptions are intended to provide a general overview of Iowa OSHA functions which may be different depending on needs or staffing.

A. *Iowa OSHA Administrator (IA)*

The IA has overall responsibility for all Iowa Code Chapter 88.9(3) investigations and outreach activities. The IA is authorized to issue determinations and approve settlement of complaints filed under the Iowa Code. The IA is responsible for implementation of policies and procedures, and for the effective supervision of whistleblower investigations, including the following functions:

- Receiving whistleblower complaints from the National, Regional, and Area Offices of federal OSHA, CSHO's or other entities;
- Ensuring that safety and health or environmental ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office, agency, or entity;
- Scheduling assignment of investigative cases to the Whistleblower Investigator (Investigator);
- Possibly investigating and conducting settlement negotiations for cases that are unusual or of a difficult nature;
- Providing guidance, assistance, supervision, and direction to the Investigator during the conduct of investigations and settlement negotiations;
- Reviewing investigation reports for comprehensiveness and technical accuracy;
- Recommending changes in policies and procedures in order to better accomplish agency objectives;
- Developing outreach programs and activities;
- Providing field training for Investigators;
- Performing necessary and appropriate administrative and personnel actions such as performance evaluations;
- Performing other special duties and represents Iowa OSHA to other agencies and the media.

B. *Whistleblower Investigator (Investigator)*

The Investigator carries out responsibilities under the direct guidance and supervision of the IA which includes, but is not limited to, the following functions:

A. Conducts screening of incoming complaints to determine whether the allegations warrant investigation;

B. Reviews case files for background information concerning any other proceedings which relate to a specific complaint. These would include, but not be limited to, safety and health inspections and consultation visits. Copies of materials needed for the whistleblower file will be made and contacts of other entities for information will be made;

C. Interviews Complainants and witnesses and obtains statements as necessary and obtains supporting documentary evidence as available;

D. Follows through on leads resulting from interviews and statements;

E. Interviews and obtains statements from Respondent officials, reviews pertinent records, and obtains relevant supporting documentary evidence;

F. Applies knowledge of the legal elements and evaluates the evidence revealed, writes an investigative report detailing the facts of the case, analyzes the evidence, and takes appropriate action needed;

G. Negotiates with the Respondent in merit cases to obtain a settlement agreement which provides prompt resolution and satisfactory remedy;

H. Monitors implementation of agreements or court orders, as assigned, determining specific action necessary and sufficiency of action taken or proposed by the Respondent. If necessary, recommends further legal proceedings to obtain compliance;

I. Assists the IA in whistleblower matters with other agencies, OSHA Area Offices, and the general public, and performs outreach activities;

J. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings;

K. As assigned, compiles information for the IA as needed for inquiries from other entities and CASPAs;

L. Makes referrals to federal OSHA when the information does not fall under Iowa Code 88.9(3) with minor exceptions that are in partially covered by both State and Federal “whistleblower” statutes;

M. Attends conferences and training sessions.

C. Compliance Safety and Health Officer (CSHO)

Each CSHO is responsible for maintaining a general knowledge of the protections under Iowa Code Chapter 88.9(3). Using this knowledge, the CSHO may then advise employers and employees of their responsibilities and rights granted under such laws, receive complaints and expeditiously notify the IA/Investigator of the receipt of a whistleblower complaint.

D. *Legal Staff*

The legal staff provides assistance to the IA/Investigator when needed and investigates appeals on behalf of the Labor Commissioner. The legal staff reviews cases submitted by the Investigator for their legal merits, makes decisions regarding those merits, and makes litigation referrals to the Iowa Attorney General for those cases deemed meritorious as appropriate. If possible, they settle merit cases that have been recommended for litigation by the Investigator.

IV. Personal Conduct and Activities

A. *Courtesy to the Public*

Iowa OSHA emphasizes that the proper and courteous discharge of duties and responsibilities by CSHO's and the Investigator is essential to the effective administration of the law. The success of the program depends upon their knowledge and understanding of the laws and regulations as well as upon their courtesy and tact in dealing with employers and employees. Investigators represent the State of Iowa and must, at all times conduct themselves in such a manner as to reflect that responsibility. They must never indulge in conduct unbecoming their positions, even when such conduct is invited or incited by those with whom they are dealing.

B. *Correspondence with the Public*

Investigators are the primary public relations representatives of the State. All written correspondence received by the Investigator from the public must be responded to in a prompt and courteous manner. The Investigator must respond to correspondence which is directed to an Investigator but which the Investigator must forward to a higher authority, other agency or person. The Investigator must notify the writer that the original correspondence is being forwarded for action by the authority, agency or person. Other inquiries received by the Investigator which are outside the Investigator's scope of normal job activities must be forwarded to the IA for appropriate action.

C. *Languages*

Iowa OSHA 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.

D. *Acceptance of Gratuities*

No Iowa OSHA employee shall solicit, accept or agree to accept, directly or indirectly, a favor, gift, loan, free service or other item of economic value in any form from any outside person, corporation or group which might reasonably be interpreted by others as being of such a nature that it could affect impartiality.

V. Subpoenas and Testimony

A. Subpoenas Served on Investigator

The Investigator, upon being served with a subpoena, must immediately communicate with the IA. The IA will refer the matter to the Legal Staff for action.

B. Testifying in Proceedings

The Investigator may be required to testify in proceedings on behalf of the State. The Investigator should keep this fact in mind when conducting an investigation and recording observations. Notes and reports must reflect conditions accurately and must be included in the case file. If the Investigator is called upon to testify, the reports and notes will be invaluable as a tool for recalling actual conditions and statements and reinforcing the facts of the case.

VI. Release of Investigative Information

Investigation materials include notes, work papers, memoranda, records, and audio and/or video recordings received or prepared by the Investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties. Such original materials and all copies must be included in the case file, where necessary, to support the investigative findings. These records are the property of the State and a part of the case file. Under no circumstances are investigation notes and work papers to be destroyed or retained or used by an employee of the State for any private purpose.

The information and statements obtained from investigations are confidential except for those which may be released under Iowa Code Chapter 22, the Open Records Act (ORA). Requests for the public release of any information must be directed to https://www.iowaopenrecords.nextrequest.com for release according to current ORA and agency policy.

Cases under Iowa Code Chapter 88.9(3) shall be considered open investigations until a final determination has been made. After the case is closed, much of the case file material is available for disclosure upon receipt of an ORA request, a request from another Federal or State agency, a request from an Administrative Law Judge (ALJ), or through discovery procedures. The entire narrative report will normally be disclosed upon request, including interviews of officials representing the Respondent, interviews of Complainant and interviews of other individuals who have not requested confidentiality.

If, during the course of an investigation, the employer identifies any materials obtained as a trade secret and the Investigator has no reason to question such identification, information obtained in such areas will be labeled "Trade Secret." If the IA agrees with this characterization, it will not be disclosed except in accordance with the provisions of the ORA or similar protections under other laws or statutes.

Chapter 2

Legal Principles

I. Scope

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

- the requirement to determine whether there is reasonable cause to believe that unlawful retaliation occurred;
- the prima facie elements of a violation of the whistleblower protection law;
- the relevant causation standard;
- 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 Iowa OSHA-enforced whistleblower protection law prohibits a covered entity or individual from retaliating against an employee for the employee's engaging in activity protected that would be relevant to the Act. In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of the Act has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., but-for).

III. Gatekeeping

Upon receipt, an incoming whistleblower complaint is screened to determine whether the prima facie elements of unlawful retaliation (a "prima facie allegation") and other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and – as appropriate – the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of the Act.

IV. Reasonable Cause

If the case proceeds beyond the screening phase, Iowa OSHA investigates the case by gathering evidence to determine whether there is reasonable cause to believe that retaliation in violation of the Act occurred. Reasonable cause means that the evidence gathered in the investigation would lead Iowa OSHA to believe that unlawful retaliation occurred (i.e. that there could be success in proving a violation at a district court hearing based on the elements described in more detail below). A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent but does not generally require as much evidence as would be required at trial. Although Iowa OSHA will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, Iowa

OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred. 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, Iowa OSHA will issue merit findings or consult with the legal staff to ensure that the investigation captures as much relevant information as possible so that the legal staff 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.

V. Elements of a Violation

An investigation focuses on the elements of a violation and the employer's defense(s). 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:

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 Iowa OSHA enforcement under 29 CFR 1904.35(b)(1)(iv).

3. Providing information to a government agency–Providing information to a government entity such as Iowa OSHA, the health department, police department or fire department.

4. Filing a complaint–Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to Iowa OSHA.

5. Instituting or causing to be instituted any proceeding under or related to the Act.

6. Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue (or other issue covered by the Act) 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 Investigator should consult with the Legal Section.

7. Assisting, participating, or testifying in proceedings—Testifying in proceedings, such as hearings before an ALJs, or participating in inspections or investigations by Iowa OSHA.

8. Work Refusal—The whistleblower provisions of the Act generally protect employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected). If the work refusal is determined to be invalid, the investigator must still investigate any other protected activities alleged in the complaint. If the protected work refusal includes ambiguous action by Complainant that Respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, Complainant's subsequent lack of employment may constitute a discharge. If it is ambiguous whether Complainant quit or was discharged, consultation with the Legal Staff may be appropriate.

Generally, Complainant only needs a good faith, reasonable belief that the conduct about which Complainant initially complained violated or would have violated the substantive (i.e., non-whistleblower) provisions of the Act. As long as Complainant had reasonable belief that there was a violation or hazard this element has been satisfied.

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

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 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.
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" causation decision to take 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 a manager who fired an 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 would 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 Iowa OSHA citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action;

- Animus – Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager's attitude towards Complainant following the protected activity, can be important circumstantial evidence of nexus;

- Disparate Treatment – Evidence of inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity can support a finding of nexus;

- Pretext – Shifting explanations for the employer's actions, disparate treatment of the employee as described above, evidence that Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer's explanation for taking adverse action against the employee is pretext and that the employer's true motive for taking the adverse action was to retaliate against the employee for the protected activity.

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on Iowa OSHA's evaluation of the facts and the strength of the evidence supporting both the employer and the employee through "pretext testing" described below.

VI. Causation Standard

The causation standard is the type of causal link (a.k.a. nexus), required by the Act, between the protected activity and the adverse action. That causal link will be that the adverse action would not have occurred but for the protected activity.

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. Iowa OSHA refers to this testing as "pretext testing" although a showing that the employer's explanation for the adverse action was pretextual is not, strictly speaking, required under the Act. The Investigator is 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 IA. Consultation with Legal Staff 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.

VIII. Policies and Practices Discouraging Injury Reporting

For the purposes of this section the word "injury" also includes "illness."

There are several types of workplace policies and practices that could discourage injury reporting and thus violate the whistleblower provisions of the Act. Some of these policies and practices may also violate OSHA's recordkeeping regulations at 29 CFR 1904.35. 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.

IX. 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, the Investigator 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.

A. 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 9(3) of the Act.

In addition, such a policy is inconsistent with the employer's obligations under 29 CFR 1904.35(b), and where it is encountered in an Iowa OSH Act case, a referral for a recordkeeping investigation may be made.

X. Discipline for Violating Employer Rule on Time and Manner for Reporting Injuries

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, most especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating section 9(3) of the Act. Iowa OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the Act, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

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

XI. 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. Iowa OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. A careful investigation is warranted, however, when an employer might be attempting to use a work rule as a pretext for discrimination against an employee for reporting an injury, several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline

on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer's treatment of similarly situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section 9(3) of the Act.

Chapter 3

Intake and Evaluation of Complaints

I. Scope

This chapter explains the general process for receipt of whistleblower complaints under Iowa Code Chapter 88.9(3); screening and docketing of complaints, initial notification to Complainants and Respondents, the scheduling of investigations; and recording the case data in OIS formerly known as OSHA Information Technology Support System (OITSS) and the Integrated Management Information System (IMIS).

II. Receipt of Complaint

Any applicant for employment, employee, former employee or their authorized representative is permitted to file complaints under Iowa Code Chapter 88.9(3), either orally or in writing with any official of Iowa OSHA. If the Complainant is unable to file the complaint in English, Iowa OSHA will accept the complaint in any language. Complaints under the jurisdiction of federal whistleblower statutes will be forwarded to the U.S. Department of Labor (USDOL), OSHA Regional Office.

1. When a complaint is received, basic information about the complaint must be recorded. Alternatively, the complaint may be referred by telephone to the Investigator for intake. In the Investigator's absence, a cover letter with the initial contact date and a Whistleblower Questionnaire, with a Release Form will be sent to the Complainant and the initial contact information will be put in a pending file. Complaints received at an OSHA Regional Office or through other Federal or State governmental units normally are forwarded to the IA but may be forwarded to the Investigator. In every instance, the date of initial contact must be recorded. All complaints received must be logged in OIS-Whistleblower to ensure delivery and receipt. Even those complaints that on their face are untimely or have been wrongly filed with OSHA (e.g., a complaint alleging racial discrimination) must be logged. Also, materials indicating the date the

complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets.

2. Whenever possible, the minimum complaint information should include: the Complainant's full name, address, phone number and e-mail address; the Respondent company's name, address, phone number and e-mail address; date of filing; date of adverse action; a brief summary of the alleged retaliation addressing the prima facie elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus); and, if known, whether a safety and/or health complaint has also been filed with Iowa OSHA or other State or Federal enforcement agency.

III. Complaints Forwarded by Other Agencies

When Iowa OSHA receives a complaint alleging retaliation in violation of the Act that an employee originally filed with another agency (i.e., the other agency has sent OSHA a referral rather than a courtesy notification), Iowa OSHA must contact the employee to verify whether the employee wishes to pursue a retaliation complaint with OSHA. In determining whether such a complaint is timely, Iowa OSHA will first evaluate whether the other agency or OSHA has received the complaint within the applicable filing period. If Iowa OSHA received the complaint within the filing period, the complaint is timely and will be handled normally. If the partner agency received the complaint within the applicable filing period but Iowa OSHA did not (i.e., the complaint would be untimely based on the date Iowa OSHA received it), Iowa OSHA will consider whether the agency that originally received the complaint has authority to provide personal remedies to the employee for the retaliation. If the other agency cannot award personal remedies for the retaliation alleged in the complaint, Iowa OSHA will regard the complaint as mistakenly filed in the wrong forum and, under equitable tolling principles, will regard the date of filing with the other agency as the date of filing. If the other agency can award personal remedies to the employee for the retaliation alleged in the complaint, Iowa OSHA will regard the complaint as untimely unless there is some other basis for equitable tolling.

IV. Screening and Docketing

As soon as possible upon receipt of the complaint, the available information should be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may require telephone screening with the Complainant to obtain additional information. The Complainant will be told if the complaint falls under another jurisdiction. Complaints that fall under one of the federal "whistleblower" statutes will be referred to the USDOL Regional OSHA office. A file of such complaints will be made and logged and copies kept. Any original documents will be sent to the Regional OSHA office and data will be entered in OIS.

1. Complaints which do not allege a *prima facie* allegation, or are not filed within the statutory time limit, will be logged if the Complainant indicates concurrence with the decision. The Complainant will be sent a letter notifying them of the decision. If the Complainant refuses to accept this determination, the case will be logged and subsequently dismissed with appeal rights.

2. Cases that are assigned for investigation will be given a Local Case Number which uniquely identifies the case. Local Case Numbers will begin with the calendar year of the complaint followed by the number in which the case was received (i.e.: 25-0001, 25-0002, etc.) The OIS automatically designates a number when a new complaint is entered into the system. A Local Case Number can be entered into the OIS in an appropriate field.

3. An opening/notification letter will be sent to the Complainant with all pertinent information for the complaint, date of initial contact, information about early resolution of complaints and dual filing rights. Only Private Sector Complainants may dual file their complaints as this is not applicable to complaints filed by Public Sector employees. The name, address, telephone number and e-mail address of the Investigator will be included in the letter.

4. The Respondent opening/notification letter may be hand delivered in person by the Investigator. The letter will be marked "Hand Delivered" and signed for by the Respondent. The Investigator may attempt to identify and interview Respondent's witnesses while at the employer's facility. In most instances, the Respondent notification letter with requests for information may be mailed by certified mail, return receipt requested, or may be emailed with confirmation of delivery.

5. Prior to sending the opening/notification letter, the Investigator will first determine if a compliance inspection is pending. If such an inspection is pending, and the IA requests a short delay, the opening/notification letter will not be delivered/mailed/emailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection or interfere with an inspection in progress.

V. Timeliness of Filing

Whistleblower complaints must be filed within a specified statutory time frame (30 days) which generally begins when an 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 the Iowa OSHA will be considered the date of filing. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if the relevant OSHA Office is closed, then the next business day will count as the final day.

VI. Tolling the Complaint Filing Deadline

Complaints filed after this deadline will normally be closed without further investigation. However, there are certain extenuating circumstances which could justify tolling the statutory filing period for equitable principles. If the Complainant does not withdraw, a dismissal must be issued if the complaint was untimely and there was no valid extenuating circumstance. The general policy is outlined below, but each case must be considered individually.

An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following to including, but not limited to:

- The employer has actively concealed or misled the employee regarding the existence of an adverse action or the retaliatory grounds for an adverse action in such a way as to prevent the Complainant from knowing or discovering the requisite elements of a *prima facie* case, such as presenting the Complainant with forged documents purporting to negate any basis for supposing that an adverse action was relating to protected activity. Mere misrepresentation about the reason for the adverse action is insufficient for tolling;
- The employee is unable to file within the statutory time period due to debilitating illness or injury and has satisfactory proof of such;
- The employee is unable to file within the required period due to a natural disaster such as a tornado or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period;
- The employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the whistleblower.

Conditions which will not justify extension of the filing periods are, among others:

- Ignorance of the statutory filing period;
- Filing of unemployment compensation claims;
- Filing of workers' compensation claims;
- Filing a private law suit;
- Filing a grievance or arbitration action.

VII. Scheduling the Investigation

As part of the case process, the Investigator will prepare a case file containing the original complaint and other evidentiary materials supplied by the Complainant. The Investigator will generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the IA. When assistance is needed to interview witnesses or obtain evidence, the Investigator will contact the IA/Legal Staff who will coordinate as appropriate.

VIII. Administrative Closures

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. When a complaint is administratively closed in these circumstances, the following must be completed by the investigator:

- The investigator will notify Complainant, verbally and in writing, that the complaint does not meet threshold requirements for investigation and that, if Complainant agrees, Iowa OSHA will administratively close the case;

- An explanation that when the case is administratively closed, the complaint will not be forwarded to Respondent;
- An explanation that if Complainant does not agree to allow Iowa OSHA to administratively close the case, Iowa OSHA will docket and dismiss the case so that Complainant can appeal the decision. Complainant will also be informed that Respondent will be notified of the complaint if it is docketed and dismissed;
- Send Complainant confirmation of the administrative closure or dismissal of the complaint and document the administrative closure in the case file.

If Complainant does not respond to Iowa OSHA's reasonable attempts to conduct a screening interview or obtain information needed to docket the complaint, Iowa OSHA may administratively close the complaint. 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. Iowa OSHA's attempts to contact Complainant must be documented in the case file. Iowa OSHA will inform the Complainant that it has administratively closed the complaint and that if Complainant wishes to pursue the complaint, Complainant should contact Iowa OSHA within five 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 Iowa OSHA to confirm delivery. The notification will specify direct contact information for the Investigator including: mailing address, telephone number, and email. If Complainant contacts Iowa OSHA and indicates a desire to pursue the complaint, Iowa OSHA will reopen the case, complete the screening interview, and either docket the case or seek Complainant's concurrence with administratively closing the case if it does not meet the necessary threshold requirements. If Complainant contacts the Investigator within five days, the original filing date will normally be used. If Complainant contacts the investigator after five days, but still within the statutory filing period, the date of Complainant's new response may be used as the filing date. If Complainant contacts the Investigator after five 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 the IA and/or Legal Staff, 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.

IX. Docket and Dismiss

If the complaint is not administratively closed and the complaint does not meet the threshold requirements, Iowa OSHA will docket and dismiss the complaint without conducting an investigation. In docket and dismiss cases, Complainant and Respondent will not receive notification letters. Instead, the Complainant will be sent a closing letter that includes information about their complaint, explain the reason for dismissal and provide appeal rights. Respondent will be sent a letter about the complaint filed by Complainant, that the complaint was dismissed; however, Complainant may appeal the decision.

X. Referral of Complainants to the National Labor Relations Board (NLRB)

If a complaint is untimely, Iowa OSHA will advise Complainant that they may file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than Iowa OSHA's (30 days). Iowa OSHA, therefore, will recommend that Complainant contact the NLRB as soon as possible to discuss their rights. Iowa OSHA should then give Complainant the contact information for the appropriate NLRB Field Office. Closing letters for administratively closed complaints will also include information regarding contacting the NLRB.

XI. Early Resolution

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

Chapter 4

Conduct the Investigation

I. Scope

This chapter sets forth the policies and procedures the Investigator must follow during the course of a whistleblower investigation. It does not attempt to cover all aspects of a thorough whistleblower investigation. It must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. To the extent that statutes and their rules mandate specific procedures, those procedures must be followed if there is any conflict with the procedures in this chapter. The Investigator should consult with the IA 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 Iowa OSHA'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 the Iowa OSHA 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 Iowa OSHA. The Investigator will review all relevant documents and interview relevant witnesses in order to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the Investigator, although the Investigator will need the cooperation of Complainant, Respondent, and witnesses.

D. Reasonable Cause to Believe a Violation Occurred

When Iowa OSHA believes that there may be reasonable cause to believe that a violation occurred, Iowa OSHA should consult informally with the Legal Section, if it has not already done so, to ensure that the investigation captures as much relevant information as possible so that the Legal Section can evaluate whether it is likely to prevail at trial.

III. Case File

The Investigator will begin preparing the investigation's case file. A standard case file contains the complaint and/or an appropriate intake worksheet, all documents received or created during the intake and evaluation process, including screening notes, and 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. Documenting the Investigation

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

B. Case Activity Log

All telephone calls made and voice mails received during the course of an investigation must be accurately documented and notation of calls and voice mails must be placed 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.

C. Correspondence by Email

Subject lines of emails delivering formal investigative correspondence should be appropriately descriptive (e.g., "Complainant/Respondent/Case Number" or "Complainant/Respondent/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.

D. Investigative Research

It is important that the Investigator adequately plan for each investigation. The Investigator should research whether there are prior or current retaliation and/or safety and health cases related to either Complainant or Respondent. Such information normally will be available from OITSS-Whistleblower and OIS. Examples of information sought during this investigation may include copies of safety and health complaints filed with Iowa OSHA, inspection reports, and citations. Research results must be documented in the case file. When research reveals no relevant results, the Investigator must still note in the case activity log the pre-investigation research that was performed (for example, by listing the searches that the investigator did in OITSS-Whistleblower and/or OIS) 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 through established channels. This includes new allegations that arise during witness interviews. Allegations of occupational safety and health hazards covered by the Iowa OSH Act, for example, will be referred to Iowa OSHA enforcement as soon as possible.

V. Amended Complaints

After filing a retaliation complaint with Iowa OSHA, Complainant may wish to amend the complaint to add additional allegations and/or additional Respondents. It is Iowa OSHA's policy to permit the 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. Iowa OSHA will reduce oral amendments to writing. If Complainant is unable to file the amendment in English, Iowa OSHA will accept the amendment in any language.

B. Amendments Filed within Statutory Filing Period

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

C. Amendments Filed After the Statutory Filing Has Expired

If amendments are received after the limitations period for the original complaint has expired, the Investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional Respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint and the investigation remains open, then it must be accepted as an amendment. 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.

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 Iowa OSHA to confirm delivery and be given an opportunity to respond to the new allegations contained in the amendment. The amendment and notification to Respondent of the amendment must be documented in the case file.

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

The mere fact that the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean that new allegations should be considered an amendment. If the alleged retaliation involves a new or separate adverse action that is unrelated to the active investigation, then the complaint maybe 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.

VI. Deceased Complainant

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

VII. 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 Iowa OSHA;
- Failure to attend scheduled meetings; and
- Other conduct making it impossible for Iowa OSHA to continue the investigation, such as excessive requests for extending deadlines.

Harassment, inappropriate behavior, or threats of violence may also justify dismissal for LOC. When Complainant fails to provide requested documents in Complainant's possession or a reasonable explanation for not providing such documents, Iowa OSHA may draw an adverse inference against Complainant based on this failure unless the documents may be acquired from Respondent. If the documents cannot be acquired from Respondent, then Complainant's failure to provide requested documents or a reasonable explanation for not doing so may be included as a consideration with the factors listed above when considering whether a case should be dismissed for LOC.

A. Dismissal Procedures for Lack of Cooperation/Unresponsiveness

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

- 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.
- If Complainant fails to contact the Investigator within 48 hours, Iowa OSHA will notify Complainant in writing that it has unsuccessfully attempted to contact Complainant to obtain information needed for the investigation and that Complainant must contact the Investigator within five days of delivery of the correspondence. Complainant will be notified using a method that permits Iowa OSHA to confirm delivery, such as email or U.S. mail,

delivery confirmation required, or hand delivery. The notification will specify direct contact information for the Investigator including: mailing address, telephone number, and email address. If no response is received within five days, the IA may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the communication must be preserved in the file.

- Complainant has an obligation to provide Iowa OSHA with all available methods of contact, including a working telephone number, email address, or mailing address of record. Complainant also has an obligation to update Iowa OSHA when contact information changes. Iowa OSHA may dismiss a complaint for lack of cooperation if Iowa OSHA is unable to contact Complainant due to the absence of up-to-date contact information.

When Iowa OSHA dismisses a case for lack of cooperation, a closing letter, with an explanation of the right to appeal will be provided to the Complainant. If an appeal is received, Iowa OSHA has discretion to reopen the investigation within 30 days of delivery of the dismissal letter to Complainant if Complainant contacts Iowa OSHA, indicates a desire to pursue the case, and provides a reasonable explanation for the failure to maintain contact with Iowa OSHA.

VIII. 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 Iowa Code 88.14(7) makes it a criminal offense to knowingly make a false statement or misrepresentation 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 may 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 Iowa OSHA's policy to have the witness acknowledge at the beginning of the recording that the witness understands that the interview is being recorded. At the IA's discretion, in consultation with the Legal Section, 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.

IX. Confidentiality

When interviewing a witness (other than Complainant and current management officials representing Respondent), the Investigator should inform the witness that their information 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

information 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. 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.

X. 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, Iowa OSHA will endeavor to interview Complainant within a reasonable amount of time following receipt of Respondent's position statement. 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 information regarding this representation. 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.

The relief sought by Complainant should be determined during the interview if possible. If discharged or laid off by Respondent, Complainant should be advised of their obligation to seek other employment (a.k.a. "mitigate"), 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, 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.

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. The Complainant may also decide to submit a written rebuttal in lieu of the rebuttal interview.

XI. Contact with Respondent

A. In many cases, following receipt of Iowa OSHA's notification letter, Respondent forwards a written position statement, which may or may not include supporting documentation. The Investigator should not rely on assertions in Respondent's position statement unless they are supported by evidence or are undisputed. Even if the position statement is accompanied by supporting documentation, the Investigator should still contact Respondent to interview witnesses, review records, and obtain additional documentary evidence to test Respondent's stated defense(s).

B. 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.

C. 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 10-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.

D. 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.

E. 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.

F. 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.

G. Witnesses must be advised of their rights regarding protection under the whistleblower provisions of the Code and advised that they may contact Iowa OSHA if they believe that they have been subjected to retaliation because they participated in an Iowa OSHA investigation.

H. 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.

I. 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.

J. 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 activity log may simply indicate the nature and date of the contact and the comment "See Memo to File."

XII. 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 IA and Legal Section. Otherwise, Complainants and Iowa OSHA 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 IA and Legal Section as appropriate. Iowa OSHA should determine whether there are legal grounds to continue the investigation against successors in interest of the original Respondent.

C. Uncooperative Respondent

When conducting an investigation, subpoenas may be obtained for witness interviews or records. When dealing with a nonresponsive or uncooperative Respondent, it will frequently be appropriate for the Investigator, in consultation with the IA and/or Legal Section, 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 Iowa OSHA to reach a determination without Respondent's input. Additionally, Respondent may be advised that Iowa OSHA may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

D. Uncooperative Respondent Representative

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

XIII. Early Involvement of the Legal Staff

In general, Iowa OSHA should consult the Legal Staff as early as possible in the investigative process for all instances where Iowa OSHA believes that there is a potential that the case will be referred for litigation, that Iowa OSHA will issue merit findings, or that the Legal Staff may otherwise be of assistance. For example, the Legal Staff may be of assistance in cases where settlement discussions reach an impasse, where assistance is needed to determine the appropriate remedy, or where a case presents a novel question of statutory coverage or protected activity. When Iowa OSHA has reasonable cause to believe that a violation occurred, the Investigator should consult informally with the Legal Staff, if it has not already done so. Consulting early with the Legal Staff is particularly important in cases that Iowa OSHA anticipates referring to the Legal Staff for litigation as early consultation helps to ensure that the investigation captures as much relevant information as possible so that the Legal Staff can evaluate whether the case is suitable for litigation.

XIV. Further Interviews and Documentation

It is the Investigator's responsibility, in consultation with the IA, 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.

XV. Party Representation at Witness Interviews

Where either party is attempting to interfere with the rights of witnesses to request confidentiality, the Investigator should coordinate with the IA and Legal Section 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.

XVI. 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.

XVII. Resolve Discrepancies

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

XVIII. 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 Code.

XIX. Closing Conference

Upon completion of the field investigation and after discussion of the case with the IA, the Investigator will conduct a closing conference with Complainant (in cases in which Iowa OSHA anticipates issuing non-merit findings) or Respondent (in cases in which Iowa OSHA 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. It is unnecessary and improper to reveal the identity of witnesses interviewed. Complainant (or Respondent) should be advised that Iowa OSHA does not normally reveal the identity of witnesses, especially if they requested confidentiality. Although Iowa OSHA anticipates that in most cases no new evidence or argument will be raised in the closing conference, if Complainant (or Respondent) attempts to offer any new evidence, argument, or witnesses, this information should be discussed as appropriate to ascertain whether it is relevant; might change the recommended determination; and, if so, what further investigation might be necessary prior to the issuance of findings. During the closing conference, the Investigator must inform Complainant of their right to appeal, as well as the time limitation for filing the appeal.

B. 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. Where Iowa OSHA 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 Iowa OSHA's reasonable attempts to conduct a closing conference, Iowa OSHA will document its attempts to reach Complainant/Respondent in the file and proceed to issue the 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. OSHA's attempts to contact Complainant must be documented in the case file.

C. 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 the findings. Combativeness is not the simple questioning of the evidence and Iowa OSHA's determination. Combativeness includes, but is not limited to, cursing the Investigator and making threats.

XX. Document Handling and Requests

A. Requests to Return Documents Upon Completion of the Case

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

B. Documents Containing Confidential Information

If Complainant or Respondent submits documents containing confidential information, such as confidential business information of Respondent or information that reveals private information about employees other than Complainant, Iowa OSHA must mark that information appropriately in the file, take care to avoid inadvertent disclosure of the information.

C. Witness Confidentiality

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

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 Iowa OSHA arrives at the appropriate determination for each whistleblower complaint by achieving a reasonable balance between an investigation's timeliness and quality. Attention to the proper balance between quality and timeliness will ensure that each investigation receives the appropriate level of supervisory review, and that a final determination is reached as expeditiously as possible while ensuring that each investigation meets Iowa OSHA's standards for quality and thoroughness.

II. 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 Iowa OSHA's internal summary of the investigation written as a memo from the Investigator to the IA.

The first page of the ROI must note the names and titles of the Investigator and the reviewing IA. 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 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. 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 Iowa OSHA did not interview should be identified with contact information (if it exists) and the reason for not interviewing.

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

III. 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:

I. Coverage

Give a brief statement of the basis for coverage. This statement includes information about Respondent and Complainant. Explain the coverage of Complainant. If coverage was disputed, this is where Iowa OSHA's determination on the issue should be addressed. In addition, this section should note the location of the company and the nature of the business, if not already addressed.

II. Timeliness

Indicate the actual date that the complaint was filed and whether or not the filing was timely, including any equitable tolling.

III. The Elements of a Violation

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

1. Protected Activity
2. Respondent Knowledge or Suspicion
3. Adverse Action
4. Nexus

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

IV. 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.

V. The Elements of a Violation

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.

VI. 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.

VII. 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.

IV. Case Review and Approval by the Administrator

A. Review

The Investigator will notify the IA when the completed case file, including, if applicable, the ROI and draft findings or other draft case closing documents is ready for review. The IA 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 IA determines that appropriate issues have been explored and concurs with the analysis and recommendation of the Investigator, the IA will sign on the signature block on the last page of the ROI and record the date the review was completed. If the IA does not concur with the analysis and recommendation of the Investigator, the IA 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 IA's signature on the ROI serves as approval of the recommended determination.

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 the Legal Section for litigation (in cases under the Code where Iowa OSHA, working with the Legal Section, has reasonable cause to believe that unlawful retaliation has occurred and the case is appropriate for litigation), or
2. Complainants may also request to withdraw their whistleblower claims at any point in the investigation.
3. Iowa OSHA may close a case due to a settlement.
4. Iowa OSHA may determine that a deferral to the results of another proceeding is appropriate under the circumstances. Iowa OSHA will issue findings noting the deferral in these circumstances.

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

Where Iowa OSHA believes that a case is meritorious, the Investigator will work with the Legal Staff 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 the Legal Staff approves a case for litigation, the Iowa Attorney General's Office generally litigates the case on behalf of the Labor Commissioner in district court. For merit cases, the district court complaint filed by the Iowa Attorney General's Office constitutes the findings. The Iowa Attorney General's Office ordinarily will send a copy of the filed district court complaint to Complainant.

If the Legal Staff determines that additional investigation is required prior to approving a case for litigation, the IA normally will assign such further investigation to the Investigator. If the Legal Staff or the Iowa Attorney General's Office determines that a case is not suitable for litigation, findings will be issued dismissing the case and Complainant will be notified of the right to appeal.

VI. Dismissals

A. Issuance of Non-Merit Findings

For all dismissal determinations, the parties must be notified of the results of the investigation by the issuance of a closing letter. The findings must advise Complainant of the right to appeal. 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. Iowa OSHA retains the right to reopen a dismissal for further investigation or review, where appropriate.

B. Appeals

If a complaint is dismissed, Complainant may seek to appeal the dismissal by the IA. The request for review must be made in writing to the IA within 15 calendar days of Complainant's receipt of the dismissal letter (unless equitable tolling applies). Verbal requests for review are not accepted.

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

Upon receipt of an appeal, the IA must promptly make available a copy of the case file and any additional comments regarding the request for review to the Legal Section for review. The request for review must be preserved in the file.

The Legal Staff 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, the Legal Section will uphold the determination. If not, the case will be returned to the Investigator for further investigation. After additional investigative efforts are completed and, if the original determination (e.g., dismissal) does not change, the Investigator will send a written report of its findings, accompanied by any new evidence it obtained during the reinvestigation, to the Legal Staff for further review and analysis. The Legal Staff will then determine if it will affirm or not affirm the original determination.

C. Closing (Finding's) Letters

Closing Letters are written in the form of a latter, rather than a report, and must follow a standard format. The opening paragraph of Complainant's Closing Letter will contain the following standard language:

> *Your complaint of discrimination under Section 88.9(3) of the Iowa Occupational Safety and Health Act has been investigated and the results thereof carefully considered. As a result of the investigation, the evidence developed during the investigation was not sufficient to support the finding of a violation. In every whistleblower investigation conducted there are four (4) elements that need to be proven, with supportive evidence, for a prima facie case. Those four (4) elements are 1) that you engaged in an activity that is protected by OSHA, or a Protected Activity; 2) that there is Employer Knowledge of that Protected Activity; 3) that you received an Adverse [Employment] Action; and 4) that there is a Nexus, or causal connection between your Protected Activity and the Adverse Action you received. All four (4) elements have to be proven, with supportive evidence, for a prima facie case.*

The second paragraph will address the four elements informing Complainant whether each element was supported by evidence. The letter does not need to recount the details of the investigation, such as listing the witnesses interviewed or documents requested. Complainant will be informed of their appeal rights, the time in which to appeal as well as to whom the appeal is to be made.

Closing Letters to Respondent will differ from Complainant's letters and will inform Respondent of a case dismissal and Complainant's right to appeal.

VII. Withdrawal

Complainant may withdraw the complaint at any time during Iowa OSHA's processing of the complaint. However, it must be made clear to Complainant that by entering a withdrawal, they are forfeiting all rights to appeal 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 record the withdrawal conversation and attempt to 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 requiring Iowa OSHA's review and approval of the settlement, Iowa OSHA must inform Complainant of the requirement to submit the settlement for Iowa OSHA's approval.

Once the IA 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 appeal. The withdrawal approval letter will be sent using a method that permits Iowa OSHA to confirm delivery, such as 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.

VIII. Settlement

Voluntary resolution of disputes is desirable and the Investigator is encouraged to actively assist the parties in reaching an agreement, where possible. It is Iowa OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, Iowa OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.

IX. 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 Iowa OSHA whistleblower provisions. Thus, postponement and/or deferral may be advised when there is a proceeding that meets the criteria below.

A. Postponement

Iowa OSHA 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 Iowa OSHA's whistleblower statute and those proceedings must not violate the rights of Complainant under the relevant Iowa OSHA whistleblower statute. The factual issues to be addressed by such proceedings must be substantially similar to those raised by the complaint under the whistleblower statute. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. The Investigator must consult with the Legal Section to make these determinations. To postpone the Iowa OSHA case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that Iowa OSHA must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement.

B. Deferral

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

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

The IA may obtain the concurrence of the Legal Staff for this determination. This assessment will be documented in an ROI prepared for the case. As noted above, for all relevant issues to have been addressed, the forum hearing the matter must have the power to determine the ultimate issue of retaliation. In other words, the adjudicator in the other proceeding must have considered whether the adverse action was taken, at least in part, because of Complainant's alleged protected activity. Repugnancy deals not only with the violation, but also the completeness of the remedies. Thus, if for instance, Complainant was reinstated as a result of the other proceeding but back pay was not awarded, deferral would not be appropriate. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate.

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. The Investigator should consult with the IA in designing the appropriate remedies. Legal Staff also should be consulted on determining potential remedies in any case that Iowa OSHA anticipates referring for litigation or issuing merit findings.

II. General Principles

The Iowa OSHA whistleblower statute is 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 statute is 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. 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.

III. Reinstatement and Front Pay

A. 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, 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 Iowa OSHA considers to be economic reinstatement, is a substitute for actual reinstatement in rare cases where actual reinstatement, the presumptive remedy in cases of discharge, demotion, or adverse transfer, is not possible. 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. Front pay should be adjusted to account for any income Complainant is earning. Legal Staff 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 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 Legal Staff should be consulted as needed for assistance in determining the method for calculating back pay.

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

A Respondent's cumulative liability for back pay ceases when a complainant rejects (or does not accept within a reasonable amount of time) a bona fide offer of reinstatement, which must afford Complainant reinstatement to a job substantially equivalent to the former position. Whether a reinstatement offer meets this requirement sometimes requires an evaluation of the facts and circumstances of the offer as compared to the complainant's previous position, and consultation with Legal Staff 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 temporary 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.

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; however, Complainant may need to reimburse the Unemployment Division for any unemployment benefits received and the Investigator should explain this to Complainant. 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 Legal Staff.

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. 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.

V. Compensatory Damages

A. Pecuniary or Monetary Damages

Pecuniary damages (also known as monetary damages) may be awarded. Pecuniary damages are Complainant's out-of-pocket losses that result from or are likely to result from unlawful retaliation. Investigators must support awards of these types of damages with documentary evidence in the case file.

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

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

B. Non-Pecuniary Damages

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

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

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

Evidence from a healthcare provider is required if Complainant seeks to prove a specific and diagnosable medical condition. Investigators should contact Legal Staff 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 Iowa's Open Records Law (Iowa Code Chapter 22).

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.

VI. Factors to Consider

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

1. The severity of the distress. Serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships justify higher damage awards for emotional distress or other forms of non-pecuniary damages.

2. Degradation and humiliation. Generally, courts have held that when Respondent's actions were inherently humiliating and degrading, somewhat more conclusory evidence of emotional distress or other non-pecuniary harm is acceptable to support an award for damages.

3. Length of time out of work. Often, long periods of unemployment contribute to Complainant's mental distress. Thus, higher amounts may be awarded in cases where individuals have been out of work for extended periods of time as a result of Respondent's adverse employment action and thus were unable to support themselves and their families.

4. Comparison to other cases. A key step in determining the number of compensatory damages is a comparison with awards made in similar cases. In Iowa OSHA Whistleblower cases, comparison with court decisions under that statute, or other discrimination or anti-retaliation provisions, such as the Title VII anti-retaliation provision and 42 U.S.C. § 1983, is appropriate.

VII. 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 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 Iowa OSHA seeks to order payment of punitive damages, Iowa OSHA first should consult with Legal Staff.

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.

C. 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 whistleblower provisions of the Code 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.

D. Respondent's Conduct Was Egregious

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

- A discharge was accompanied by previous or simultaneous harassment or subsequent blacklisting;
- Complainant has been discharged because of their association with a whistleblower;
- A group of whistleblowers has been discharged;
- There has been a pattern or practice of retaliation in violation of the Code and the case fits the pattern;
- 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 Iowa OSHA or restricting employee discussions with Iowa OSHA compliance officers during inspections) and the retaliation relates to this policy;
- A manager has committed, or has threatened to commit, violence against Complainant;
- 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;
- The retaliation is accompanied by extensive or serious violations of the Code, e.g., serious violations of OSHA standards in a whistleblower case.

E. 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.

VIII. 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.

A. Statutory Caps

There are no provisions capping punitive damages in Iowa OSHA whistleblower cases.

B. Guideposts

There are several guideposts, listed below, that should be considered in determining how much to award in punitive damages.

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:

- The degree of Respondent's awareness that its conduct was illegal;
- The duration and frequency of the adverse action;
- 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;
- 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;
- The deliberate nature of the retaliation or actual threats to Complainant for their complaints to management;
- Whether Iowa OSHA has found merit in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, so as to suggest a pattern of retaliatory conduct; and/or
- Other mitigating or aggravating factors.

C. Ratios

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

D. 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 Iowa OSHA. Consultation with Legal Staff can be helpful for identifying comparable cases.

E. 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 pecuniary nature.

IX. Evidence of Damages

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

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

X. Non-Monetary Remedies

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

- 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;
- Providing Complainant with at least a neutral reference for future employers and others;
- Requiring Respondent to correct information submitted to self-regulatory organizations, licensing authorities, or others:
- Requiring Respondent to provide employee or manager training regarding the rights afforded by Iowa OSHA's whistleblower statute. 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;
- Posting of an informational poster about the whistleblower statute:
- Posting of a notice regarding the Iowa OSHA order.

Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact the IA and Legal Staff 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: standard Iowa OSHA settlement agreements; Iowa OSHA's approval of settlement agreements negotiated between Complainant and Respondent where applicable; terms that Iowa OSHA believes are inappropriate in whistleblower settlement agreements because they are contrary to the public interest and the policies underlying the whistleblower protection statute enforced by Iowa OSHA; bilateral agreements; and 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 Iowa OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Iowa OSHA will not enter into or approve a settlement agreement unless it determines that the settlement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement is not repugnant to the relevant whistleblower statute and does not undermine the protection that the relevant whistleblower statute provides.

As discussed below, Complainant and Respondent should be encouraged whenever possible to use the Iowa OSHA standard settlement agreement (see Iowa OSHA Settlement Agreement). However, the parties may negotiate their own settlement agreement and submit it for Iowa OSHA's approval (see Employer-Employee Settlement Agreements). Such settlement agreements are referred to as employer-employee settlement agreements in this manual. In most cases, a claim may be settled only with the consent of both Complainant and Respondent. However, in limited circumstances, Iowa OSHA may enter into an agreement with Respondent to settle claims without Complainant's consent (see Bilateral Agreements). Such settlement agreements are referred to as bilateral agreements in this manual.

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 whistleblower statute and must not undermine the protection that the whistleblower statute provides.
2. Every Iowa OSHA settlement agreement must be signed by the appropriate Iowa OSHA official.

3. In every employer-employee agreement, the settlement approval letter must be signed by the appropriate Iowa OSHA official.
4. Every settlement agreement must be signed by Respondent(s).
5. Every settlement agreement must be signed by Complainant, except in bilateral agreements.
6. Employer-employee settlements must be submitted to Iowa OSHA for review and approval.

B. Adequacy of Settlements

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

1. Knowing and Voluntary
   Except in the case of a bilateral agreement, 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, or other monetary relief. Alternatively, the settlement agreement may specify payment of a lump sum amount to Complainant. 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 Iowa OSHA may seek in a settlement include the following, although additional non-monetary remedies may be appropriate as well:
   a. The expungement of any warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in Complainant's personnel file or other records, and/or requiring the employer to change a complainant's personnel file to simply state that employment ended and to note the date employment ended rather than that Complainant was discharged;
   b. The agreement of Respondent, and those acting on Respondent's behalf, to provide at least a neutral reference (e.g., title, dates of employment, and pay rate) to potential employers of Complainant, to refrain from any mention of

Complainant's protected activity, and to refrain from saying or conveying to any third party anything that could be construed as damaging the name, character, or the employment prospects of Complainant;

c. Posting of a notice to employees stating that Respondent agrees to comply with the 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 whistleblower statute.

C. Consistent with the Public Interest

Iowa OSHA will not enter into or approve a settlement agreement that contains provisions that it believes are inconsistent with the 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. Iowa OSHA is not responsible for advising the parties on the proper tax treatment or tax reporting of payments made to resolve whistleblower cases.

1. The investigator should inform parties that Iowa OSHA cannot provide Complainants or Respondents with individual tax advice and that the parties are responsible for compliance with applicable tax law and may need to seek advice from their own tax advisers.
2. The Investigator 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. OSHA Settlement Agreement

A. General Principles

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

B. Specific Requirements

An Iowa OSHA settlement agreement:

- Must be in writing;
- Must stipulate that Respondent agrees to comply with Iowa Code, Chapter 88;
- Must document the agreed-upon relief;
- Must be signed by Complainant, Respondent, and the IA, except in bilateral agreements.
- Iowa OSHA will send a copy of the signed agreement to each of the parties;

- 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 posting and training of employees and managers and model provisions are contained in Iowa OSHA standard settlement template;
- Should include a single payment of all monetary relief due to Complainant's whenever possible. If Respondent sends the payment directly to Complainant, the Investigator will obtain a confirmation of payment from Complainant or Respondent. If Respondent sends the payment to Iowa OSHA, the Investigator will promptly note receipt of any check, copy the check for inclusion in the case file, and mail or otherwise deliver the check to Complainant.

C. Provisions of the Agreement

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

1. POSTING OF NOTICE. A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirements of the whistleblower law pursuant to a settlement agreement. (Optional)

COMPLIANCE WITH NOTICE. A provision stating that Respondent will comply with all of the terms and provisions of the Notice. (Optional)

POSTING OF AN INFORMATIONAL POSTER. A provision requiring Respondent to post an appropriate poster that summarizes employee rights and employer responsibilities under the Iowa OSHA whistleblower statute. (Optional)

TRAINING. A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under the whistleblower protection law. (Optional)

NON-ADMISSION. A provision stating that, by signing the agreement, Respondent does not admit or deny violating any law, standard, or regulation enforced by Iowa OSHA. (Optional)

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.

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 Iowa OSHA to craft alternative provisions regarding the payment of money to Complainant. The settlement agreement should expressly identify the payments that are made for restitution or to come into compliance with the law.

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.

CONFIDENTIALITY. Settlement agreements must not contain provisions that state or imply that Iowa OSHA 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 Iowa OSHA to regard the agreement as potentially containing confidential business information exempt from disclosure under Iowa's Open Records Law. 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 Iowa OSHA's records in this case and is subject to disclosure under Iowa's Open Records Law, unless an exemption applies. Complainant and Respondent have requested that Iowa OSHA designate the agreement as containing potentially confidential information and request predisclosure notification of any open records 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 Iowa's Open Records Law.

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 Iowa OSHA's whistleblower law. In those instances, Iowa OSHA prefers that the parties use the Iowa OSHA settlement agreement to resolve the whistleblower claim. If the parties' separate agreement contains terms relevant to settlement of the whistleblower case, the separate agreement must be submitted to Iowa OSHA for review/approval and the Iowa OSHA standard settlement agreement may incorporate the relevant (approved) parts of the employer-employee agreement by reference. This is achieved by inserting the following paragraph in the Iowa OSHA standard settlement agreement:

> *Respondent and Complainant have signed a separate agreement encompassing matters not within Iowa Occupational Safety and Health Administration's (IOSHA's) authority. Iowa OSHA's authority over that agreement is limited to the law within its authority. Therefore, Iowa OSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to the whistleblower provisions of Iowa Code, Chapter 88.*

E. OIS Whistleblower Recording

All cases utilizing the Iowa OSHA settlement agreement, including those that also contain a side agreement, must be recorded in OIS Whistleblower as "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 Iowa OSHA does not take an active role in the settlement negotiations. Because voluntary resolution of disputes is desirable, Iowa OSHA's policy is to defer to adequate employer-employee settlements (previously known as "third party agreements").

In most circumstances, an Iowa OSHA settlement agreement is optimal. As explained above, if the parties are amenable to signing one, the Iowa OSHA settlement agreement may incorporate the relevant (approved) parts of an employer-employee agreement by reference.

A. Review Required

Settlement agreements reached between the parties must be reviewed and approved by the IA and/or Legal Staff 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 whistleblower law and not undermine the protection that the whistleblower law provides. Iowa OSHA's authority over settlement agreements is limited to the law within its authority. Therefore, Iowa OSHA's approval only relates to the terms of the agreement pertaining to the referenced law 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 Iowa OSHA's involvement in any resolution reached after a complaint has been initiated.

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

The approval letter for employer-employee settlement agreements under Iowa OSHA's whistleblower law must include the following statement:

> *The Iowa Occupational Safety and Health Administration's authority over this agreement is limited to the statute it enforces. Therefore, the Iowa Occupational Safety and Health Administration approves only the terms of the agreement pertaining to the Iowa Code, Chapter 88.*

A copy of the reviewed agreement must be retained in the case file and the parties should be notified that Iowa OSHA will disclose settlement agreements in accordance with the Iowa Open Records Law, unless an exemption applies.

B. 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, Iowa OSHA may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The Investigator should also advise the parties that upon Iowa OSHA's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed.

C. OIS Whistleblower Recording

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

D. 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, Iowa OSHA must review unredacted settlement agreements in light of the particular circumstances of the case. The criteria below provides examples rather than an all-inclusive list of the types of terms that Iowa OSHA will not approve in a settlement agreement negotiated between Complainant and Respondent. As previously noted, Iowa OSHA prefers that parties use the Iowa OSHA settlement agreement whenever possible, as that agreement does not contain terms that Iowa OSHA cannot approve:

I. Party to a Confidentiality Agreement.
Iowa OSHA will not approve a provision that states or implies that Iowa OSHA is party to a confidentiality agreement. Complainant and Respondent may agree that each of them will keep the settlement agreement confidential and may ask Iowa OSHA to regard the agreement as potentially containing confidential business information exempt from disclosure under Iowa's Open Records Law. In those circumstances, the settlement or Iowa OSHA's approval letter will contain a statement such as the following:

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

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 Iowa's Open Records Law.

II. Gag Provisions.
Iowa OSHA will not approve a "gag" provision that prohibits, restricts, or otherwise discourages Complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation,

testifying in proceedings, or otherwise providing information to the government. Potential "gag" provisions often arise from broad confidentiality or non-disparagement clauses, which Complainants may interpret as restricting their ability to engage in protected activity. Other times, they are found in specific provisions, such as the following:

- A 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, Iowa OSHA will not approve a provision that restricts Complainant's right to provide information to the government related to an occupational injury or exposure;

- 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;

- 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.

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, Iowa OSHA will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement:

> *Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower law administered by Iowa OSHA.*

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.*

III. Overly Broad Terms.

Claims and Parties Released. Iowa OSHA will typically approve a settlement agreement that contains a general release of employment-related claims against Respondent with the understanding that Iowa OSHA's approval is limited to the settlement of the claims under the whistleblower statutes that it enforces. Because a general release cannot apply to future claims, Iowa OSHA prefers that a general release explicitly state that Complainant is releasing only

employment-related claims that Complainant knew of as of the date of the settlement agreement. In addition, Iowa OSHA occasionally encounters settlement agreements that are extremely broad as to the parties released by the agreement or the claims released by the agreement, such as settlements containing terms that would release affiliates of Respondent unconnected to either Complainant's employment with Respondent or the protected activity alleged in the complaint or claims unconnected to Complainant's employment with Respondent. In order to ensure that Complainant's consent to the settlement is knowing and voluntary, Iowa OSHA may require that Respondent clearly list in the agreement the entities and/or individuals (e.g. the subsidiaries, affiliates, partners, directors, agents, attorneys, insurers, etc.) that are being released or provide more specific information regarding the claims that are being released.

IV. 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 Legal Staff may be advisable.

e. Complainant's consent. Iowa OSHA must ensure that Complainant's consent to the waiver is knowing and voluntary. The case file must document Complainant's replies and any discussion thereof.

f. Comprehension and acceptance of the waiver. If Complainant is not represented, the Investigator must ask Complainant if they understand the waiver and if they accepted it voluntarily. Particular attention should be paid to whether there is other inducement - either positive or negative - that is not specified in the agreement itself, for example, threats made to persuade Complainant to agree, or additional monies or forgiveness of debt promised as an additional incentive.

g. Other relevant factors. Any other relevant factors in the particular case also must be considered. For example, does Complainant intend to leave their profession, to relocate, to pursue other employment opportunities, or to retire? Have they already found other employment that is not affected by the waiver? In such circumstances, Complainant may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

VI. Bilateral Agreements

A bilateral settlement is one between Iowa OSHA, signed by the IA and Respondent - *without Complainant's consent* - to resolve a complaint filed under the Code. It is an acceptable remedy to be used only under the following conditions:

- The settlement offer by Respondent is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. Although the desired goal is to obtain reinstatement and all back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief;

- Complainant refuses to accept the settlement offer by Respondent. The case file must fully set out Complainant's objections in the discussion of the settlement to ensure that the information is available when the case is reviewed by the supervisor;

- When presenting the proposed agreement to Complainant, the Investigator should explain that there are significant delays and potential risks associated with litigation and Iowa OSHA may settle the case without Complainant's participation. This is also the time to explain that, once settled, Complainant may not appeal the case because the settlement resolves the case.

All potential bilateral settlement agreements must be reviewed and approved in writing by the IA and Legal Staff. The bilateral settlement is then signed by both Respondent and the IA. Once settled, the case is entered in OIS-Whistleblower as "Settled."

A. Documentation and Implementation of Bilateral Agreements

1. Although each agreement will be unique in its details by necessity, in settlements negotiated by Iowa OSHA, the general format and wording of the Iowa OSHA standard settlement agreement should be used.

2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.

3. Back pay computations should be included in the case file, with explanations of calculating methods and relevant circumstances as necessary.
4. Any check from Respondent must be sent to Complainant even if they did not agree with the settlement. If Complainant returns the check to Iowa OSHA, Iowa OSHA will record this fact and return it to Respondent.

VII. Enforcement of Settlements

If there is a breach of a settlement agreement that Iowa OSHA has entered into or approved, depending on the status of Iowa OSHA's investigation or any subsequent proceedings at the time the settlement was reached, Iowa OSHA staff may either reopen the whistleblower investigation or refer the matter to the Legal Section to pursue court-ordered enforcement. The additional work is a continuation of the original case. Iowa OSHA does not open a new case to deal with the breach of a settlement agreement.

If there is a breach of a settlement agreement, the IA generally should consult with the Legal Staff. Iowa OSHA may also inform the parties that violation of a settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.

Iowa OSHA staff will, after appropriate consultation with legal staff, 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 Legal Staff 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 Iowa OSHA generally will refer the case to Legal Staff to obtain further relief from the court.

Chapter 8

Section 9(3) of Iowa Code Chapter 88 – Iowa Occupational Safety and Health

XXI. Introduction

Section 9(3) of Iowa Code Chapter 88 – Iowa Occupational safety and Health, mandates that *"A person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of the employee or others of a right afforded by this chapter. A person shall not discharge or in any manner discriminate against an employee because the employee, who with no reasonable alternative, refuses in good faith to expose the employee's self to a dangerous condition of a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; provided the employee, where possible, has first sought through resort to regular statutory enforcement channels, unless there has been insufficient time due to the urgency of the situation, or the employee has sought and been unable to obtain from the person, a correction of the dangerous condition.*

An employee who believes that the employee has been discharged or otherwise discriminated against by a person in violation of this subsection may, within thirty days after the violation occurs, file a complaint with the commissioner alleging discrimination. Upon receipt of the complaint, the commissioner shall conduct an investigation as the commissioner deems appropriate. If, upon investigation, the commissioner determines that the provisions of this subsection have been violated, the commissioner shall bring an action in the appropriate district court against the person. In any such action, the district court has jurisdiction to restrain violations of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay. Within ninety days of the receipt of a complaint filed under this subsection, the commissioner shall notify the complainant of the commissioner's determination under this subsection."

I. Coverage

Any private or public sector employee.

II. Protected Activity

Activities protected by Section 9(3) include, but are not limited to, the following:

A. Occupational safety or health complaints filed orally or in writing with Iowa OSHA, the National Institute of Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department, health department, or police department. The time of the

filing of the safety or health complaint in relation to the alleged retaliation and employer knowledge are often the focus of investigations involving this protected activity.

B. Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel.

C. Instituting or causing to be instituted any proceeding under or related to the Iowa OSHA Act. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a complainant of a determination not to issue a citation, employee contests of abatement dates, employee initiation of proceedings for the announcement of Iowa OSHA standards, and employee application for modification or revocation of a variance. Filing an occupational safety or health grievance under a collective bargaining agreement would also fall into this category.

D. Providing testimony or being about to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, depositions during inspections and investigations.

E. Exercising any right afforded by the Iowa OSHA Act. The following is not an exhaustive list. This broad category includes communicating orally or in writing with the employee's supervisor or other management personnel about occupational safety or health matters, including asking questions; expressing concerns; reporting a work-related injury or illness; requesting a safety data sheet (SDS); and requesting access to records, copies of the Iowa OSHA Act, OSHA regulations, applicable OSHA standards, or plans for compliance (such as the hazard communication program or the bloodborne pathogens exposure control plan), as allowed by the standards and regulations.

Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with union officials or co-workers.

This category (exercising any right afforded by the Act), also includes refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury. An employee has the right to refuse to perform an assigned task if they:

- Have a reasonable apprehension of death or serious injury, and
- Refuses in good faith, and
- Have no reasonable alternative, and
- Have insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting OSHA, and
- Where possible, sought from their employer, and was unable to obtain, a correction of the dangerous condition.

An employee also has the right to comply with, and to obtain the benefits of, Iowa OSHA standards and rules, regulations, and orders applicable to his or her own actions or conduct. Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by an OSHA standard, to

refuse to purchase PPE (except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work.
An employee has the right to participate in an Iowa OSHA inspection. They have the right to communicate with an Iowa OSHA compliance officer, orally or in writing. They must not suffer retaliation because of the exercise of this right.

IV. Federal OSHA Relationship to State Plan States

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.

B. State Plan State 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, which includes the State of Iowa, 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, such as with Iowa, 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.

V. Overview of the 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.

A. Exemption 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.

2. 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 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 (generally, longshoremen, shipyard workers, marine terminal workers, and seamen), and employees working in aircraft cabins in flight. Complaints from such employees received by federal OSHA will not be referred to the State Plans.

3. 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 of Iowa, the State of Iowa 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.

4. Inadequate Enforcement of Whistleblower Protections: When federal OSHA receives a section 11(c) complaint concerning an employee covered by a State Plan, the RA may determine, based on monitoring findings or legislative or judicial actions, that a State Plan does not adequately enforce whistleblower protections or fails to provide protection equivalent to that provided by federal OSHA policies, e.g., a State Plan that does not protect internal complaints. In such situations, the RA may elect to process private-sector section 11(c) complaints from employees covered by the affected State Plan in accordance with procedures in non-plan states.

B. Referral Procedures: Complaints Received by Federal OSHA

In general, federally filed complaints alleging retaliation for occupational safety or health activity under the State of Iowa's, i.e., complaints by private-sector and state and local government employees, will be referred to Iowa OSHA for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. Generally, the complaint shall be referred to the state where Complainant's workplace is located. The federal OSHA referral is a filing of the complaint with Iowa OSHA. The referral must be made promptly, preferably by e-mail, fax, or expedited delivery and should be made within Iowa OSHA's filing period if possible.

C. 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 Iowa OSHA. 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 Iowa OSHA for handling. If the adverse action or protected activity took place in another state, federal OSHA will determine if the case should be referred to that State Plan or handled by federal OSHA.

The complaint will be referred to Iowa OSHA 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.

D. 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 Iowa OSHA. If the complaint falls under both section 11(c) as well as an OSHA whistleblower statute covering public-sector employees, such as the National Transit System Security Act (NTSSA) and the Asbestos Hazard Emergency Response Act (AHERA), OSHA will refer the section 11(c) portion to Iowa OSHA while continuing to process/investigate the component of the complaint falling under the other statute.

VI. Procedures for Complaints Received by State Plans

In general, a whistleblower complaint covered by the Code and received directly from a Complainant in Iowa will be investigated by Iowa OSHA and will not be referred to federal OSHA. Iowa OSHA may not request federal OSHA to handle a section 11(c) case after the expiration of a section 11(c) filing period if the complaint was not timely dual-filed by Complainant with federal OSHA.

A. Notifying Complainants of Right to File Federal Section 11(c) Complaint

Because some employers in the State of Iowa do not use the federal OSHA poster, Iowa OSHA 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 opening letter sent or given to Complainant:

> *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 days of the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under OSHA's Section 11(c). Although OSHA will not conduct a parallel investigation, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final administrative determination; that is, after the State's appeals process is completed. To file such a complaint, contact the OSHA Regional Office representative indicated below:*

U.S. DOL/OSHA
Whistleblower Protection Program
2300 Main Street, Suite#1010
Kansas City, MO 64108
816-502-9031
816-283-0547 (fax)

B. Notification of Federal Review Option at Conclusion of State Plan Investigation

At the conclusion of each whistleblower investigation, Iowa OSHA must notify Complainant of the determination in writing and inform them of the process for appeal. 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.*

The determination letter will also provide the Complainant with the following information:

> *In the Iowa Supreme Court decision of Jeffery George vs. D W Zinser Co, No. 762 N.W. 2d 865 (Iowa 2009), the Court held: "The remedy provided in IOSHA is not exclusive, and George may bring a common law action for wrongful discharge in the district court." This means that an employee can now file a private cause of action in district court for wrongful discharge based upon retaliation*

VII. Federal Whistleblower Statutes Other than Section 11(c)

OSHA expects that, where applicable, Iowa OSHA 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.

A. Properly Dually Filed Complaints

A "properly dually filed complaint" is:

1. An occupational safety or health whistleblower complaint filed with federal OSHA and Iowa OSHA within the respective filing periods of both entities, or;
2. An occupational safety or health whistleblower complaint that was timely filed with federal OSHA, and federal OSHA has referred the complaint to Iowa OSHA.

B. Activating Properly Dually-Filed Complaints

Complainants who have concerns about Iowa OSHA's investigation of their whistleblower complaints may request federal review of the investigation. Such a request may only be made after

any appeal has been exercised and a final decision issued. The request for a federal review must be made in writing to the OSHA Regional Office in Kansas City, Missouri and postmarked within 15 calendar days after receipt of the state if Iowa's final decision. If the request for federal review is not timely filed, the federal section 11(c) case will remain administratively closed.

VIII. State Plan Evaluation

If the federal section 11(c) review reveals issues regarding Iowa OSHA's investigation techniques, policies, and procedures, recommendations will be referred for use in the overall State Plan evaluation and monitoring of Iowa OSHA.

A. CASPA Procedures

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).

1. 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.
2. Because properly dually filed section 11(c) complaints may undergo federal review under the section 11(c), 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 Iowa OSHA's whistleblower investigations from state and local government employees will be considered under CASPA procedures only.
3. Upon receipt of a CASPA complaint relating to Iowa OSHA's handling of a whistleblower case, federal OSHA will review the Iowa OSHA's investigative file and conduct other inquiries as necessary to determine if Iowa OSHA's investigation was adequate and whether Iowa OSHA's handling of the case was in accordance with the Code and supported by appropriate available evidence. A review of Iowa OSHA's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of Iowa OSHA's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to Iowa OSHA and Complainant within the required 90 days.
4. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future investigation techniques, policies, and procedures. If the OSHA Regional Office in Kansas City, Missouri 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 Iowa OSHA to take appropriate action to reopen the case or in some manner correct the outcome, and, whenever possible, make changes to prevent recurrence.

Chapter 9

Other Whistleblower Statutes

I. Scope

Federal OSHA has responsibility of investigating allegations into several other federal statutes that contain a whistleblower provision. It is not the responsibility of the Investigator or CSHO to know each statute; however, a general knowledge of those statues is essential to provide proper guidance to Complainant's that an alleged whistleblower/discrimination claim may be covered under certain federal statutes. The following provides a brief explanation of the other statutes that Federal OSHA would investigate as well as the days that a Complainant would need to file and the Respondents covered:

Act/OSHA Regulation	Days to File	Respondents Covered
Asbestos Hazard Emergency Response Act (AHERA). [15 U.S.C. §2651] Provides protection for individuals who report alleged violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or private. 29 CFR 1977	90	Private Sector State and Municipal Certain DoD Schools Certain Tribal Schools
International Safe Container Act (ISCA). [46 U.S.C. §80507] Provides protection for employees who report allegations of an unsafe cargo container. 29 CFR 1977	60	Private Sector
Surface Transportation Assistance Act (STAA). [49 U.S.C. §31105] Provides protection for truck drivers and other employees of commercial motor carriers who report certain commercial motor vehicle safety, health or security conditions, or engage in other safety or security activities. Coverage includes all buses (for hire), hazardous material placarded, and freight trucks with a gross vehicle weight of 10,001 pounds. 29 CFR 1978	180	Private Sector

Safe Drinking Water Act (SDWA). [42U.S.C. §300j-9(i)] Provides protection for employees who report alleged violations relating to any waters actually or potentially designated for drinking use, whether from above ground or underground sources. 29 CFR 24	30	Private Sector Federal, State and Municipal Indian Tribes
Federal Water Pollution Control Act (FWPCA). [33 U.S.C. §1367] Also called the Clean Air Act, provides protection for employees who report alleged violations relating to discharges of pollutants into the water of the United States. 29 CFR 24	30	Private Sector State and Municipal Indian Tribes Federal Sovereign Immunity Bars of Investigation of FWPCA Complaints Filed by Federal Employees
Toxic Substances Control Act (TSCA). [15 U.S.C. §2662] Provides protection for employees who report alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and Toxic Release Inventory under Emergency Planning and Community Right to Know Act (EPCRA). 29 CFR 24	30	Private Sector
Solid Waste Disposal Act (SWDA) [42 U.S.C.§6971] Also called the Resource Conservation and Recovery Act (RCRA), provides protection for employees who report alleged violations relating to the disposal of solid or hazardous waste at active or future facilities (see CERCLA for abandoned or historical sites). 29 CFR 24	30	Private Sector Federal, State and Municipal Indian Tribes
Clean Air Act (CAA). [42 U.S.C. §7622] Provides protection for employees who report alleged violations regarding air emissions from area, stationary, and mobile sources. 29 CFR 24	30	Private Sector Federal, State and Municipal

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). [42 U.S.C. §9610] a.k.a. "Superfund", provides protection for employees who report alleged violations relating to clean-up of uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. 29 CFR 24	30	Private Sector Federal, State and Municipal
Energy Reorganization Act (ERA). [42 U.S.C. §5851] Provides protection for employees who report alleged violations of nuclear safety requirements imposed under the ERA or the Atomic Energy Act of 1954, as amended. 29 CFR 24	180	NRC and its contractors and subcontractors. NRC licensees and applicants for licenses, including contractors and subcontractors. Agreement state licenses. Applicants for licenses from agreement states, including their contractors and subcontractors. DOE and its contractors and subcontractors. Federal sovereign immunity bars investigation. of ERA complaints filed against all other federal agencies
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). [49 U.S.C. §42121] Provides protection for employees who report alleged violations of federal air carrier safety laws or regulations. 29 CFR 1979	90	Air Carriers and Their Contractors and Subcontractors

Sarbanes-Oxley Act (SOX). [18 U.S.C. §1514A] Provides protection for employees who report alleged violations of the federal mail, wire, bank, or securities fraud statutes, or the Securities Exchange Act or any other federal law relating to fraud against shareholders. (If the complaint was filed on or before 7/20/10, the 90-day deadline applies. If the complaint was filed on or after 7/21/10, and the adverse action occurred on or after 4/22/10, the 180-day deadline applies. Any alleged adverse action occurring on or before 4/21/10 is untimely under either deadline if filed on or after 7/21/10). 29 CFR 1980	180 See Note at Left	Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations
Pipeline Safety Improvement Act (PSIA). [49 U.S.C. §60129] Provides protection for employees who report alleged violations of federal law regarding pipeline safety or security or who refuse to violate such provisions. It includes a provision for levying up to $1,000.00 civil penalties against the employer. 29 CFR 1981	180	Private Sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors

Federal Railroad Safety Act (FRSA). [49 U.S.C. §20109] Provides protection for employees of railroads who report alleged violation of any federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad safety; reports, in good faith, a hazardous safety or security condition; refuses to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security; refuse to work when confronted by a hazardous safety or security condition related to the performance of the employees duties (under imminent danger circumstances); requests prompt medical or first aid treatment for employment-related injuries; are disciplined for requesting medical or first aid treatment or for following an order or treatment plan of a treating physician. 29 CFR 1982	180	Railroad Carriers and Their Contractors, Subcontractors and Officers
National Transit Systems Security Act (NTSSA). [6 U.S.C. §1142] Provides protection for public transit employees who report alleged violations of any federal law, rule, or regulation relating to public transportation agency safety or security, or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security, refuses to violate or assist in the violation of any federal law, rule, or regulation relating to public transportation safety or security; reports a hazardous safety or security condition; refuses to work when confronted by a hazardous safety or security condition related to the performance of the employees' duties (under imminent danger circumstances). 29 CFR 1982	180	Public Transportation Agencies and Their Contractors and Subcontractors and Officers

Consumer Product Safety Improvement Act (CPSIA). [15 U.S.C. §2087] Employees are protected from retaliation for reporting reasonably perceived violations of any statute, order, rule, regulation, standard, or ban within the jurisdiction of the Consumer Product Safety Commission (CPSC) to the employer, the federal government, or a state attorney general. The act also protects work refusals where the employee reasonably believes an assigned task would constitute such a violation. 29 CFR 1983	180	Manufacturing, Private Labeling, Distribution and Retail Employers in the United States
Affordable Care Act (ACA). [29 U.S.C. §218c] Employees are protected for reporting reasonably believed violations of any provision of title I of the ACA (or amendment), or any order, rule, standard, or ban under title I of the ACA (or amendment)	180	Private and Public Sector Employees
Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by §611 of the Coast Guard Authorization Act of 2010, Public Law 111-281. Seamen are protected for reporting to the Coast Guard or other federal agency a reasonably believed violation of a maritime safety law or regulation prescribed under the law or regulation. The act also protects work refusals where the employee reasonably believes an assigned task would result in serious injury to the seaman, or the public.	180	Private (and maybe public) Sector Employees
Consumer Financial Protection Act of 201 (CFPA), 12 U.S.C. § 5567 Workers in the consumer financial product and service industries are protected from retaliation for reporting violations of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection (the Bureau).	180	Private and Public Sector

FDA Food Safety Modernization Act (FSMA) Public Law 111-353 [21 U.S.C. §1012] Employees are protected for reporting to an employer, the federal government, or the attorney general of a state, information relating to any reasonably perceived violations of any provision of the Food, Drug & Cosmetic Act or FSMA or any order, rule, or ban under this act; or for objecting to, or refusing to participate in, any activity, policy, practice, or assigned task that violates same.	180	Any Entity Engaged in the Manufacturing, Processing, Packaging, Transporting, Distribution, Reception, Holding or Importation of Food
Anti-Money Laundering Act (AMLA) 31 U.S.C. § 5323(g) & (j) Provides protections to employees for reporting potential money laundering violations to their employers or to the federal government.	90	Private and Public Sector
Criminal Antitrust Anti-Retaliation Act (CAARA), 15 U.S.C. § 7a-3 Provides protections to workers that report criminal antitrust violations to their employers or the federal government or engaging in related protected activity.	180	Private and Public Sector
Taxpayer First Act (TFA), 26 U.S.C. § 7623(d) Provides protections to employees who report underpayment of taxes or other potential federal tax law violations or engage in other protected activities	180	Private and Public Sector Employees