Whistleblower Discrimination Manual

Iowa Department of
INSPECTIONS, APPEALS & LICENSING

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CHAPTER 1
Introduction

I . INTRODUCTION

A. The Iowa Occupational Safety and Health Act, Iowa Code Chapter 88 (The Act), is a State statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the State. By terms of the Act, every employer is required to furnish each employee employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm and, further, to comply with occupational safety and health standards promulgated under the Act.

B. The Act 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 the Iowa Division of Labor (IDOL), review proceedings before an independent quasi-judicial agency (Employment Appeal Board), and judicial review are provided by the Act.

C. Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large measure upon the active 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 Act are to be realized.

D. Iowa Code 88.9(3) of the Act provides, in general, that no person shall discharge or in any manner discriminate against any employee because the employee has exercised rights under the Act. The IOSH Administrator (IA) has over-all responsibility for the investigation of discrimination complaints under Iowa Code 88.9(3). They have authority to dismiss non-meritorious complaints (absent withdrawal); approve acceptable withdrawals; and negotiate settlement of meritorious complaints or affect recommendations of litigation to the Legal Staff.

E. The Occupational Safety and Health Act, Public Law 91-596, is a Federal statute. In addition to the over-all responsibility of enforcing Section 11(c) of the OSH Act, Federal OSHA has the responsibility to investigate claims of discrimination filed by employees under the provisions of thirteen other "whistleblower" statutes as follows:

1. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §2651
2. International Safe Container Act (ISCA), 46 U.S.C. §80507
3. Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105
4. Clean Air Act (CAA), 42 U.S.C. §7622
5. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9610
6. Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367
7. Safe Drinking Water Act (SDWA), 42 U.S.C. §300j- 9(i)
8. Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971
9. Toxic Substances Control Act (TSCA), 15 U.S.C. §2622
10. Energy Reorganization Act (ERA), 42 U.S.C. §5851
11. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. §42121
12. Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A (SOX)
13. Pipeline Safety Improvement Act (PSIA), 49 U.S.C. §60129
14. Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109
15. National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142
16. Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087

17. Affordable Care Act (ACA), 29 U.S.C. §218C
18. Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §5567
19. Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281
20. FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d

Statutes number 4 through 9 above are collectively referred to as the "EPA statutes" (Environmental Protection Agency).

It should also be noted that there may be some overlap between the State OSHA program and Federal OSHA on the above. For example, complaints about retaliation for activities relating to occupational safety and health are covered by 88.9(3), while air carrier safety or security under AIR 21 is covered by Federal OSHA. Complaints about retaliation for activities relating to occupational safety and health are covered by 88.9(3) while commercial motor vehicle safety under STAA is covered by Federal OSHA. And, complaints about retaliation for activities relating to occupational safety and health are covered by 88.9(3) while public health (student exposure) issues about asbestos in schools under AHERA is covered by Federal OSHA. Communication between the Discrimination Investigator and Federal OSHA will take place on a case by case basis to establish which agency has jurisdiction.

II. FUNCTIONAL RESPONSIBILITIES

A. Responsibilities.

1. IOSHA Administrator (IA)
   The IA has overall responsibility for all 88.9(3) investigation and outreach activities. The IA is authorized to issue determinations and approve settlement of complaints filed under the 88.9(3) statute.
2. The IA is responsible for implementation of policies and procedures, and for the effective supervision of the discrimination investigations, including the following functions:
   a. Receives discrimination complaints from the National, Regional, and Area Office, Compliance Safety and Health Officers (CSHO) or other entities.
   b. Ensures that safety and health or environmental ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office, agency, or entity.
   c. Schedules assignment of investigative cases to the Discrimination Investigator (Investigator).
   d. May investigate and conduct settlement negotiations for cases that are unusual or of a difficult nature.
   e. Provides guidance, assistance, supervision, and direction to the Investigator during the conduct of investigations and settlement negotiations.
   f. Reviews investigation reports for comprehensiveness and technical accuracy.
   g. Recommends changes in policies and procedures in order to better accomplish agency objectives.
   h. Develops outreach programs and activities.
   i. Provides field training for Investigators.
   j. Performs necessary and appropriate administrative and personnel actions such as performance evaluations.
   k. Performs other special duties and represents IOSHA to other agencies and the media.
3. Discrimination Investigator. The investigator carries out responsibilities under the direct guidance and supervision of the IA which include, but are not limited to, the following functions:
   a. Conducts screening of incoming complaints to determine whether the allegations warrant field 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 discrimination file will be made and contacts of other entities for information will be made.

c. Interviews complainants and witnesses and obtains written statements as necessary and obtains supporting documentary evidence as available.

d. Follows through on leads resulting from interviews and statements.

e. Interviews and obtains written 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 investigation 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 discrimination 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 Complaints Against State Program Administration (CASPA).

l. Makes referrals to Federal 11(c) Programs when the discrimination does not fall under the State Program as listed in E. of this Chapter, with minor exceptions that are in part covered by both State and Federal "whistleblower" statutes.

m. Attends conferences and training sessions.

4. Compliance Safety and Health Officer (CSHO). Each CSHO is responsible for maintaining a general knowledge of the protections under 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 discrimination complaint.

5. 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 litigates those cases deemed meritorious as appropriate. If possible, they settle merit cases that have been recommended for litigation by the investigator or file in the District Court having jurisdiction and represents the Labor Commissioner in that Court.

B. Personal Conduct and Activities.

1. Courtesy to the Public. The IDOL 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.

2. 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.
3. Acceptance of Gratuities. No IOSH 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. See Iowa Gift Law, Iowa Code Chapter 68B.
4. 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.
5. Release of Investigation Information.
    a. Investigation materials include notes, work papers, memoranda, records, and audio or videotapes 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.
    b. 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 the IA for release according to current ORA and agency policy.
        1. Cases under 88.9(3) shall be considered open investigations until a final determination has been made as to whether litigation will be pursued.
        2. 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 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.
    c. Any inquiry received by the investigator concerning an investigation must be transmitted to the IA.
    d. 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 statutes.

CHAPTER 2
Intake and Evaluation of Complaints

I. SCOPE.

This chapter explains the general process for receipt of discrimination complaints under 88.9(3); screening and docketing of complaints; initial notification to complainants and respondents; the scheduling of investigations; and recording the case data in OSHA's 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 IOSH, either orally or in writing with any official of the Iowa Division of Labor (IDOL). 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 discrimination statutes will be forwarded to the U.S. Department of Labor, OSHA Regional Office.

A. 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 Discrimination Questionnaire, with a Release form will be sent to the Complainant and the initial contact information will be put in a pending file.

B. Complaints received at the OSHA Regional Office or through other Federal or State governmental units normally are forwarded to the IA.

C. 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 discrimination addressing the prima facie elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus); and, if known, whether a safety, health, or environmental complaint has also been filed with IOSH or other State or Federal enforcement agency.

III. SCREENING AND DOCKETING.

A. 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 in the Discrimination Call Tracker and copies kept. The original documents will be sent to the Regional OSHA office and data will not be entered in the IMIS.

B. Complaints which do not allege a prima facie allegation, or are not filed within the statutory time limit, will not be logged if the complainant indicates concurrence with the decision. If the complainant refuses to accept this determination, the case will be logged and subsequently dismissed with appeal rights. Complaints which are not logged, based on the initial screening, will not be assigned a case number or entered into the IMIS. A memorandum will be prepared documenting the screening interview and placed in the dead file.

C. Cases that are assigned for investigation will be given a Local Case Number which uniquely identifies the case. The IMIS automatically designates the case number when a new complaint is entered into the system.

D. An opening letter will be sent to the Complainant with all pertinent information for the complaint, date of initial contact, and dual filing rights (if applicable). The name, address, telephone number and e-mail address of the Investigator will be included in the letter.

E. The respondent notification letter may be hand delivered in person by the Investigator. The letter will be marked "Hand Delivered". The investigator will attempt to identify and interview Respondent's witnesses while at the employer's facility.

1. In certain instances the respondent notification letter with requests for information may be mailed by certified mail, return receipt requested. Notice by mail may be appropriate when authorized by the IA.
2. Prior to sending the notification letter, the investigator will first determine if a compliance inspection is pending under IOSHA. If such an inspection is pending, and the IA requests a short delay, the notification letter will not be delivered/mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection or interfere with an inspection in progress.

IV. TIMELINESS OF FILING.

A. Discrimination complaints must be filed within a specified statutory time frame (30 days) which generally begins when the adverse action takes place. If the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. The first day of the time period is the day after the alleged adverse action. Generally, the date a complaint is considered filed is the day the complainant visits, emails, faxes or telephones an IDOL staff person or verbally tells a CSHO during an inspection. For complaints sent by mail, the date filed is the date of the postmark. 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 State/Federal holiday, or if the IDOL office is closed, the next business day will count as the final day.

B. Complaints must be filed within 30 days of the adverse action. 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.

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

1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the 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 the adverse action was relating to protected activity. Mere misrepresentation about the reason for the adverse action is insufficient for tolling.
2. The employee is unable to file within the statutory time period due to debilitating illness or injury and has satisfactory proof of such.
3. 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.
4. The employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the whistleblower.

D. Conditions which will not justify extension of the filing period are, among others:

1. Ignorance of the statutory filing period,
2. Filing of unemployment compensation claims,
3. Filing of workers' compensation claims,
4. Filing a private law suit,
5. Filing a grievance or arbitration action.

V. SCHEDULING THE INVESTIGATION.

A. 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.

B. 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.

C. When assistance is needed to interview witnesses or obtain evidence, the investigator will contact the IA/ Legal Staff who will coordinate as appropriate.

CHAPTER 3
Conduct of the Investigation

I. SCOPE.

This chapter sets forth the policies and procedures the Investigator must follow during the course of a discrimination investigation. It does not attempt to cover all aspects of a thorough discrimination 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.

The investigator should make clear to all parties that IOSHA does not represent either the complainant or respondent, and that both the complainant's allegation(s) and the respondent's proffered non-retaliatory reason(s) for the alleged adverse action must be investigated. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case.

The investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by IOSHA. This applies not only to complainants and respondents but to other witnesses as well; quite often witnesses are unaware that they have knowledge that would help resolve a jurisdictional issue or establish an element. Framing the issues and obtaining information relevant to the investigation are the responsibilities of the investigator, although the investigator will need the cooperation of the complainant, respondent and witnesses.

The standard that applies to IOSHA whistleblower investigations is whether IOSHA has reasonable cause to believe that a violation occurred. This standard applies to all elements of a violation. When IOSHA believes that there may be reasonable cause to believe that a violation occurred, IOSHA 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 Legal can evaluate whether it is likely to prevail at trial.

III. CASE FILE.

The investigator must prepare a standard case file containing the Whistleblower Case Activity Worksheet (OSHA-87) form, all documents received or created during the intake and evaluation process, copies of all required opening letters, and any original evidentiary material initially supplied by the complainant. All evidence, records, administrative material, photos, recordings and notes collected or created during an investigation must be maintained in a case file and cannot be destroyed, unless they are duplicates. Further detailed guidance regarding proper case file organization may be found in Chapter 5, Report Writing and Case File Documentation.

IV. PRELIMINARY INVESTIGATION.

A. Intake and Evaluation.

When initially receiving the discrimination case, it is important to confirm that the complaint is valid and is covered under Iowa Code 88.9(3). This initial review should confirm that the complaint is timely filed, that a prima facie allegation is present, if possible, and that the case has been properly logged.

B. Early Resolution.

IOSHA must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. At any point the investigator may explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding

settlement techniques and agreements.) An early resolution is often beneficial to all parties, since potential losses are at their minimum when the complaint is first filed. Consequently, if the investigator believes that an early resolution may be possible, he or she is encouraged to contact the respondent immediately after completing the intake interview and docketing the complaint. However, the investigator must first determine whether an enforcement action is pending with IOSHA prior to any contact with a respondent. Additionally, any resolution reached must be memorialized in a written settlement agreement that complies with the requirements set forth in Chapter 6.

C. Additional Case Information.

The investigator may also check on prior or current discrimination or safety and health cases related to either the complainant or employer. Such information normally will be available from the IMIS, Discrimination Log or safety and health inspection records. This enables the investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand.

Examples of information to be sought during the pre-investigation research phase include, but are not limited to:

1. Copies of IOSHA safety and health actions including phone/fax complaints, or any complaint filed with other State or Federal agencies or entities. This would include inspection reports, investigator's notes, etc.
2. Interviews and signed statements
3. Information on previous discrimination complaints

D. Coordination with Other Agencies.

If information received during the investigation indicates that the complainant has filed a concurrent whistleblower charge or a safety and health or environmental complaint with another government agency (such as DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the investigator may wish to contact such agency to determine the nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the discrimination complaint, and may, in certain cases, also preclude unnecessary duplication of governmental investigative efforts.

V. WEIGHING THE EVIDENCE.

The investigative standard for Iowa Code 88.9(3) is whether there is reasonable cause to believe that a violation occurred. This standard applies to each element of a violation.

A. Investigative Standard.

Under the reasonable cause standard, IOSHA must believe, after evaluating all of the evidence gathered from the respondent, the complainant, and other witnesses or sources, that a reasonable judge could rule in favor of the complainant. The threshold that IOSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the evidence provided by both sides or otherwise gathered during the investigation, but does not generally require as much evidence as would be required at trial. Because IOSHA makes a reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing. Accordingly, IOSHA's investigation must reach an objective conclusion – after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation did occur.

IOSHA's responsibility to determine whether there is reasonable cause to believe a violation occurred is greater than the complainant's initial burden to demonstrate a prima facie allegation that is enough to trigger the investigation.

However, a reasonable cause finding does not necessarily require as much evidence as would be required at trial to establish unlawful retaliation by a preponderance of the evidence. Although IOSHA will need to make credibility determinations to evaluate whether a reasonable judge could find in the complainant's

favor, IOSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred. Rather, when IOSHA believes, after considering all of the evidence gathered during the investigations, that the complainant could succeed in proving a violation, it is appropriate to issue a merit finding or to consult with Legal.

B. Causation Standards.

Iowa Code Chapter 88.9(3) simply uses the word "because" to express the causation element. The Supreme Court has ruled that the anti-retaliation provision of Title VII, which simply uses the term "because" to express the causation element, requires the plaintiff to prove that the employer would not have taken adverse action but for the protected activity and that the plaintiff always has the burden of proof on this element. University of Texas Southwestern Medical Center v. Nassar, _U.S._, 133 S. Ct. 2517 (2013). A fuller explanation of but-for causation and examples can be found in Burrage v. United States, _U.S._, 133 S. Ct. 881 (2014). Since the district court statutes also simply use the term "because" to express the causation element, likewise before IOSHA informally consults with legal staff to suggest a possible merit determination IOSHA must have reasonable cause to believe that the employer would not have carried out the adverse action but for the protected activity. The but-for causation test is more stringent than the contributing factor or the motivating factor tests, but it does not require a showing that the protected activity was the sole reason for the adverse action.

C. Gatekeeping Provisions.

Iowa Code Chapter 88 also contains "gatekeeping" provisions, which provide that the investigation must be discontinued and the complaint dismissed if no prima facie allegation is made. That is, the complaint supplemented as appropriate by interviews of the complainant, must allege the existence of facts and either direct or circumstantial evidence that:

1. The complainant engaged in protected activity;
2. The respondent knew or suspected that the complainant engaged in protected activity;
3. The complainant suffered an adverse action; and
4. The circumstances are sufficient to raise an inference that protected activity was a contributing factor (or a motivating factor under the environmental statutes) in the adverse action. For example, the adverse action happened soon after the protected activity.

These gatekeeping provisions help stem frivolous complaints and simply codify the commonsense principle that no investigation should continue beyond the point at which enough evidence has been gathered to reach a determination.

VI. THE FIELD INVESTIGATION.

The investigator ordinarily will be assigned several complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

A. The Elements of a Violation.

An illegal retaliation is an adverse action taken against an employee by a covered entity or individual in reprisal for the employee's engagement in protected activity. An effective investigation focuses on the elements of a violation and the burden of proof required. If the investigation does not establish by preponderance of the evidence that all of the elements of a violation exist the case should be dismissed. Therefore, the investigator should search for evidence that would help resolve each of the following elements of a violation:

1. Protected Activity.
   The evidence must establish that the complainant engaged in activity protected by 88.9(3).
2. Employer Knowledge. The investigation must show that a person involved in the decision to take the

adverse action was aware, or suspected, that the complainant engaged in protected activity. The investigation need not show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity. If the respondent does not know, but could reasonably deduce that the complainant filed a complaint, it is referred to as inferred knowledge.

3. Adverse Action. The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer. An adverse action may occur at work; or, in certain circumstances, outside of work. Some examples of adverse actions include, but are not limited to:
   - Discharge
   - Demotion
   - Reprimand
   - Harassment - unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
   - 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. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
   - Lay-off
   - Failure to hire
   - Failure to promote
   - Blacklisting
   - Failure to recall
   - Transfer to different job
   - Change in duties or responsibilities
   - Denial of overtime
   - Reduction in pay
   - Denial of benefits
   - Making a threat
   - Intimidation
   - Constructive discharge - the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign

   It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as “adverse,” in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action “materially adverse.” Specifically, the evidence must show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation. The investigator can test for material adversity by interviewing co-workers to determine whether the action taken by the employer

would likely have dissuaded other employees from engaging in protected activity.

4. Nexus. There must be reasonable cause to believe that there is a causal link 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. Nexus can be demonstrated by direct or circumstantial evidence, such as timing (proximity in the time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees or in comparison to how the complainant was treated prior to engaging in protected activity, and/or animus (ill will towards the complainant).

B. Contact with Complainant.

The initial contact with the complainant must be made as soon as possible after receipt of the case assignment. Contact must be made even if the investigator's caseload is such that the actual field investigation will be delayed.

1. Telephone Log. All telephone calls made, messages received, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. If a telephone conversation with the complainant 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 this instance or when written correspondence is noted, the activity/telephone log may simply indicate the nature and date of the contact and the comment "See Memo/Document - Exhibit #."
2. Amended Complaints. After filing a retaliation complaint with IOSHA, a complainant may wish to amend the complaint to add additional allegations and/or additional respondents. It is IOSHA's policy to permit the liberal amendment of complaints, provided that the original complaint was timely, and the investigation has not yet concluded.
    a. Form of Amendment. No particular form of amendment is required. A complaint may be amended orally or in writing. Oral amendments will be reduced to writing by IOSHA. If the complainant is unable to file the amendment in English, IOSHA will accept the amendment in any language.
    b. Amendments Filed within Statute of Limitations. 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 Statute of Limitations Has Expired. For amendments received after the statute of limitations for the original complaint has run, 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, then it must be accepted as an amendment, provided that the investigation remains open. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with 88.9(3).
    d. Processing of Amended Complaints. Regardless of the statute, any amended complaint must be processed in the same manner as any original complaint. This means that all parties must be provided with a copy of the amended complaint; that this notification must be documented in the case file; and that the respondent(s) must be afforded an opportunity to respond. Investigators must review every amendment to ensure that a prima facie allegation is present. The investigator must ensure that all parties have been notified of the amendment in accordance with 88.9(3). See the chapter related to the implicated statute for specific information on processing complaints.
3. Amended Complaints Distinguished from New Complaints. The mere fact that the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean that new allegations should be considered an amendment. If the alleged retaliation involves a new or separate

adverse action that is unrelated to the active investigation, then the complaint may be docketed with its own unique case number and processed as a new case.

4. Early Dismissal. If the investigator determines that the complainant does not have allegations which are appropriate for investigation under the statute, but may have a prima facie case under the jurisdiction of another State or Federal agency, the investigator can terminate the investigation and take proper steps to close the case and refer the complainant to the other agency as appropriate for possible assistance.
5. Inability to Locate Complainant. In situations where the investigator is having difficulty locating the complainant to initiate or continue the investigation, the following steps must be taken:
    a. Telephone the complainant at different hours during normal work hours and at other times of the day.
    b. Mail a certified, return-receipt-requested letter to the complainant's last known address requesting that the investigator be contacted within five days of the receipt of the letter or the case will be dismissed. If no response is received within five days, the investigator may terminate the investigation and dismiss the complaint.

C. Field Investigation.

Personal interviews and collection of documentary evidence must be conducted on-site whenever practicable. Investigations should be planned in such a manner as to personally interview all appropriate witnesses during a single site visit. The respondent's designated representative 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, of course, request that an attorney or other personal representative be present at any time. In limited circumstances, witness statements and evidence may be obtained by telephone, mail, or electronically.

If a conversation is recorded electronically, the investigator must be a party to the conversation, and the witness give prior consent to the recording. This does not apply to other tape recordings supplied by the complainant or witnesses; however, all electronically recorded interviews or other voice recordings may be transcribed if they are to be used as evidence.

D. Complainant Interview.

The investigator will arrange to meet with the complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations. Such a record is highly desirable and useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in testimony, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present at any time. The investigator must attempt to obtain from the complainant all documentation in his or her possession that is relevant to the case. Relevant records may include, but are not limited to:

- Copies of any termination notices, reprimands, warnings or personnel actions
- Performance appraisals
- Earnings and benefits statements
- Grievances
- Unemployment benefits, claims and determinations
- Job position descriptions
- Company employee and policy handbooks
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Medical records

The restitution sought by the complainant should be ascertained during the interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment 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 the complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. The complainant should be advised that the respondent's back pay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

If the complainant is not personally interviewed and his or her statement is taken by telephone, a detailed Interview Summary will be prepared relating the complainant's testimony.

E. Contact Respondent.

1. The respondent notification letter will normally be delivered in person by the Investigator without prior notice. The investigator will hand deliver the respondent notification letter which will be marked as "HAND DELIVERED". The respondent shall be advised of the protection provided to employees under Iowa Code 88.9(3). The investigator may then immediately commence with the investigation. The investigator will attempt to identify and interview respondent's witnesses, neutral witnesses, etc. that the respondent feels are important to the case. In some instances, at the discretion of the Investigator, notification to respondent can be sent by certified mail.
2. In many cases the respondent will forward a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. Assertions made in the respondent's position statement do not constitute evidence. The investigator will still need to talk with the respondent; interview respondent's witnesses; review records and obtain documentary evidence; and to further test respondent's stated defense.
3. The ideal arrangement is to make the respondent contact unannounced and complete as much of the respondent's investigation as possible, excluding the complainant interview and complainant witness interviews.
4. If the respondent requests time to consult legal counsel or a designated representative, and they cannot be reached at the time of the investigation, the investigator will request that the respondent or counsel representative contact them in a reasonable time limit. The investigator will obtain counsel/designate representative's name, address, telephone number and e-mail address. The investigator will advise that future contact in the matter will be through such representative.
5. In the absence of counsel/designated representative, the investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the investigator will contact the person who signed the letter.
    a. The investigator should interview all company officials who have known direct involvement in the case, and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually to obtain the best testimony.
    b. If the respondent has designated an attorney to represent the company, interviews with management and supervisory officials should ordinarily be scheduled through the attorney, who may be present during any interviews of the management and supervisory witnesses.
    c. Respondent's attorney does not, however, have the right to be present, and should not be present, during interviews of non-management or non-supervisory employees.

d. Any respondent or other witness may, of course, have a personal representative or attorney present at any time. If respondent's attorney indicates that he/she represents the non-management witness, a signed Designation of Representative form should be completed by respondent's attorney memorializing that he/she represents the non-management witness.

e. 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 the complainant and does not wish the company to know he or she is speaking with the investigator. In such event, an interview should ordinarily be scheduled away from the premises.

6. While at the respondent's establishment, the investigator should make every effort to obtain copies of, or at least review and make notes on, all pertinent data and documentary evidence which respondent offers, and which the investigator construes as being relevant to the case.

7. If at any time during the initial (or subsequent) meeting with respondent, management officials, or counsel, respondent suggests the possibility of an early resolution to the matter, the investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.)

8. If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under 88.9(3). Subpoenas should be obtained following procedures established by the legal staff.

9. If the respondent fails to cooperate or refuses to respond, the investigator will evaluate the case and make a determination based on the information gathered during the investigation.

F. Uncooperative Respondent.

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

G. Early Joint Review with Legal Staff.

If in the early stages of the investigation of a case (where preliminary reinstatement may be ordered), and in other cases where the IA or the investigator may recommend that legal staff participate in the case, where the investigator and the IA believes there is evidence that the complainant's allegation has merit and may not be easily settled, legal staff should be contacted and briefed on the case.

H. Further Interviews and Documentation.

It is the investigator's responsibility to fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources.

a. The investigator must attempt to obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. Only on rare occasions will the complainant's witnesses be interviewed in the workplace. If witnesses appear to be "rehearsed," intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may, of course, have an attorney or other personal representative present at any time.

b. In the event that a signed statement cannot be obtained from a witness, interview notes should be taken and a memorandum to the file subsequently prepared by the investigator setting forth all pertinent information obtained verbally from the witness.

c. The investigator will attempt to obtain copies of appropriate records and other pertinent documentary materials as required. If this is not possible, the investigator will review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceedings.

d. In cases where the complainant is covered by a collective bargaining agreement, the investigator should interview the appropriate union officials, and obtain copies of grievance proceedings or arbitration decisions specifically related to the discrimination case in question.

e. When interviewing potential witnesses (other than officials representing the respondent), the investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement will need to be disclosed.

I. Resolve Discrepancies.

After completing the respondent's side of the investigation, the investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.

J. Analysis.

After having gathered all relevant evidence available, the investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in VI. A.

K. Closing Conferences.

Upon completion of the field investigation, the investigator will conduct a closing conference with the complainant. This conference may be conducted with the complainant in person or by telephone. The investigator should bear in mind that a thorough, tactful closing conference is considered a very important and valuable step to achieve a successful conclusion to the investigation.

Assuring the complainant that his or her concerns have been fully explored and the investigative findings impartially evaluated will minimize the likelihood of appeals or objections, even though the complainant may not be totally satisfied or in agreement with the determination.

1. During the conference, the investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
2. It is unnecessary to reveal the identity of witnesses interviewed. If the complainant feels that certain witnesses should have been interviewed but were not, the investigator will explain why the witnesses may not have been interviewed.
3. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant or might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
4. During the closing conference, the investigator must inform the complainant of his/her rights to appeal, as well as the time limitation for filing the appeal or objection.
5. The investigator will also send a closing letter, by certified mail, which contains the procedure for appealing.

6. The closing conference will be documented in the case file either by an entry in the telephone log or a separate Memo to File.

L. Document File.

With respect to any and all activities associated with the investigation of a case, the investigator must continually bear in mind the importance of documenting the file to support his/her findings. Time spent carefully taking notes and writing memoranda to file is considered productive time and can save hours, days, and dollars later when memories fade and issues become unclear. To aid clarity, documentation should be arranged chronologically where feasible.

The Report of Investigation (ROI) must be signed by the investigator and reviewed and approved by the supervisor.

CHAPTER 4
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, settlement, dismissal, postponement, deferrals, appeals, and litigation; adequacy of remedies; and agency tracking procedures for timely completion of cases.

II. PREPARATION.

A. Investigator Reviews the File.

After completing the investigation, the investigator must thoroughly review the file and its contents to collate and organize all pertinent data in preparation for writing the Report of Investigation (ROI). When appropriate, the investigator may wish to discuss the case with the IA/Legal Staff prior to writing the ROI.

B. Investigator and IA/Legal Staff Discuss the Case.

Once the investigator has thoroughly reviewed the file and compiled all pertinent data, the IA/Legal Staff may be contacted to discuss the facts and merits of the case prior to writing the ROI. The IA/Legal Staff can advise the investigator of any issues and, as appropriate, assist in reaching a decision on the merits or decide whether additional investigation is necessary.

III. REPORT OF INVESTIGATION

The investigator must report the results of the investigation by means of a Report of Investigation (ROI) following the policies and format described in detail in Chapter 5 of this Manual.

IV. CASE REVIEW.

A. Review.

After the investigation is completed, the IA may review the file to ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case. Appropriate determination letters will be prepared by the investigator.

B. Approval

If the Supervisor concurs with the analysis and recommendation of the investigator, he or she will sign on the signature block on the last page of the ROI and record the date the review was completed. The Supervisor's signature on the ROI serves as approval of the recommended determination. Therefore, a thorough review of the case file is essential prior to issuing any determination letters. Appropriate determination letters must be issued to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation. Should either party request the determination letter electronically, documentation of such will be placed in the Case Activity/Phone Log and a copy of the email placed in the case file along with the determination letter – a Delivery Receipt and Read Receipt will be attached with the email). Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

1. **Withdrawal.** A complainant may withdraw his or her complaint at any time during IOSHA's processing of the complaint. However, it should be made clear to the complainant that by entering a withdrawal on a case, he or she is forfeiting all rights to appeal or object, and the case will not be reopened. Withdrawals may be requested either orally or in writing. It is advisable, however, to obtain a signed withdrawal whenever possible. In cases where the withdrawal request is made orally, the investigator must send the complainant a letter outlining the above information and confirming the oral request to withdraw the complaint. Once the supervisor reviews and approves the request to withdraw the complaint, a second

letter must be sent to the complainant, clearly indicating that the case is being closed based on the complainant's oral request for withdrawal. Both letters must be sent via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation. Should either party request the determination letter electronically, documentation of such will be placed in the Case Activity/ Phone Log and a copy of the email placed in the case file along with the determination letter – a Delivery Receipt and Read Receipt will be attached with the email). Proof of delivery of both letters must be preserved in the file with copies of the letters to maintain accountability.

2. **Dismissal.** For recommendations to dismiss, the investigator will prepare letters of dismissal to the complainant and the respondent. The letters must include the necessary information regarding the complainant's rights to appeal the findings.
3. **Settlement.** Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached solely through the utilization of IOSHA's standard settlement agreement. The language of this agreement generally should not be altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation. The investigator should use his/her judgment as to when to involve Legal Staff in settlement discussions. The investigator will obtain approval by the supervisor of the settlement agreement language prior to the parties signing the agreement. For recommendations to approve settlement, the supervisor's approval will be indicated by signature on both the settlement agreement and the ROI. The investigator will issue appropriate letters to the parties forwarding copies of the signed settlement agreement, posters, the Notice to Employees, the back pay check, or any other relevant documents, including tax-related documents. (Settlement procedures and settlement negotiations are discussed in detail in Chapter 6). Once an employee has filed a complaint and if the case is currently open, any settlement of the underlying claims reached between the parties must be reviewed by IOSHA to ensure that the settlement is just, reasonable, and in the public interest. At the investigation stage, this requirement is fulfilled through IOSHA's review of the agreement. A copy of the reviewed agreement must be retained in the case file. If IOSHA is unable to obtain a copy of the settlement agreement, then IOSHA must reach a determination on the merits of the complaint, based on the evidence obtained. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand our involvement in any resolution reached after a complaint has been initiated.
4. **Deferral.** Voluntary resolution of disputes is desirable in many whistleblower cases. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints under 88.9(3). The investigator must review the results of any proceeding to ensure all relevant issues were addressed; that the proceedings were fair; regular; and free of procedural infirmities; and that the outcome of the proceedings was not repugnant to the purpose and policy of the IOSHA whistleblower statute. Repugnancy deals not only with the violation, but also the completeness of the remedies. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. If the determination is accepted, Iowa OSHA may defer to the decision as outlined above. In cases where the investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration or other appropriate action, letters of deferral will be issued to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in IMIS as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in chapter 6. IOSH may defer to the determination of another agency, grievance, etc. in accordance with IAC 875-36.10(1). Determination must be made on a case by case basis.

5. **Postponement.** Where the rights asserted in other proceedings are substantially the same as rights under 88.9(3), and those proceedings are not likely to violate the complainant's rights and the outcome would be the same, the investigator or the IA would be justified in postponing a determination. However, if the other action is dismissed, such dismissal may not be determinative of the complaint, and IDOL may proceed with the investigation, settlement or dismissal (IAC 875-9.18). The investigator will apprise the complainant as to the reason for the postponement and letters will be sent to both the Complainant and Respondent informing them of the postponement. This action would be done on a case by case basis.
6. **Merit Finding.** For recommendations of merit cases under 88.9(3), the investigator or IA will draft a letter to Legal Staff recommending litigation.
7. **Further Investigation Warranted.** If, for any reason, the IA/Legal Staff does not concur with the investigator's analysis and recommendation, or finds that additional investigation is warranted, the file will be returned to the investigator for follow-up work.

C. Legal Requirements.

The investigator should confer with Legal Staff for advice or consultation at this point, if necessary, or at other appropriate times during the conduct of the investigation to ensure that legal requirements are met. This is particularly important if preliminary, immediate reinstatement of the complainant is being ordered.

V. APPEALS AND OBJECTIONS.

For cases in which the investigator has made a non-merit determination and the case is dismissed, the complainant is given an opportunity to appeal the decision to the Commissioner of Labor/Designee within 15 days of receipt of the dismissal letter.

1. Upon receipt of the copy of the appeal, under 88.9(3), the investigator will immediately forward the original case file to Legal Staff.
2. Legal Staff will review the file and any other documentation supplied by the complainant, and issue a decision to sustain the appeal, deny the appeal or remand the case for additional investigation.

VI. APPROVAL FOR LITIGATION.

A. Procedures provide that cases recommended for litigation will be forwarded to Legal Staff for review and approval for filing in District Court. If Legal Staff determines that additional investigation is required, the IA normally will return the case file to the investigator for further investigation. Legal Staff will address additional communication directly with the investigator.

B. Additional investigation authorized as a result of the review for litigation shall have priority over all other cases pending investigation.

CHAPTER 5
Report Writing and Case File Documentation

I . SCOPE.

This chapter sets forth the policies, procedures, and format for documenting the investigation and for properly organizing the investigative case file.

II. ADMINISTRATIVELY CLOSED COMPLAINTS

In cases which are not docketed after the initial screening, the file arrangement of materials as outlined below need not be followed. All administratively closed cases must be appropriately entered into the IMIS system. Additionally, a letter to the complainant, documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation, will be sent by the investigator. A copy of the letter, along with any related documents will be placed in the "Dead" File.

III. CASE FILE ORGANIZATION.

A. As part of the case logging process, the investigator will prepare the case file.

B. The investigator will set up the file with the OSHA - 87 form, transmittal documents and administrative materials on the left side. All evidentiary material will go on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.

1. Evidentiary material normally is arranged as follows:
   a. Copy of the complaint, OSHA-87 form or the appropriate regional intake worksheet
   b. Documents from IOSHA or other agency enforcement files
   c. Complainant's signed statement
   d. Remaining evidence (statements, records, etc., in logical sequence)
   e. Investigator's rough notes
   f. Case Activity/Telephone log
   g. Report of Investigation
   h. Table of Contents (Exhibit Log)
2. Separation of Materials. Administrative and evidentiary materials will be separated by means of blank paper dividers with numbered index tabs at the right or bottom.
   a. Administrative documents will be arranged in chronological order, with the newest being on top.
   b. Evidentiary material tabs (right side of file) will be numbered consecutively using Arabic numerals, with the highest number at the top of the stack.
   c. A "Table of Contents" sheet identifying all the material by exhibit must be placed on top of the last exhibit on the right side. Nothing should be placed on top of the Contents of Case File sheet.

IV. DOCUMENTING THE INVESTIGATION

A. Report of Investigation (Formerly called Final Investigative Report or FIR).
The Report of Investigation (ROI) is the summary of the investigation; and as such is written as a memo from the investigator to the IA. The ROI must contain the information below. 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 first page of the ROI must set forth the name of the case investigated and list the parties' and their attorneys' names, addresses, phone numbers, fax numbers, and e-mail addresses, but nothing else. See the appendix to this chapter for a sample format for the ROI.

B. ROI Format. The format for the ROI is as follows:

1. **Background.** Give a brief account of the Complainant's allegations; e.g., "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."
2. **Timeliness.** Indicate the actual date that the complaint was filed and whether or not the filing was timely.
3. **Respondent Defense.** Give a brief account of the Respondent's defense; e.g., "Respondent claims the Complainant was discharged for excessive absenteeism."
4. **Company Information.** Give a brief description of the company to include location of main offices, nature of primary business, etc.
5. **Investigative Findings:** The Investigative Findings section should begin with descriptive background information on the work site and history of safety and health activity, if any, and flow from there through the events relating to the alleged discrimination. The findings should be written in a narrative, "story telling" format. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary). References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned.
6. **The Elements of a Violation.** Evaluate the facts presented in the Complainant's Closing Letter as they relate to the four elements of a violation, following Chapter 3, Section V. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented.
   - Protected Activity
   - Respondent Knowledge
   - Adverse Action
   - Nexus
   - Credibility
7. **Witnesses:** List all witnesses interviewed during the course of the investigation. Include the witnesses' job title or classification, street address, city, state, zip code and a contact phone number.
8. **Other Relevant Information.** Any novel legal or other unusual issues, related complaints, investigator's assessment of a proposed settlement agreement, or any other relevant consideration in the case may be addressed here. The closing conference should be documented in this section of the ROI.
9. **Recommendation.** This is a concise statement of the investigator's recommendation for disposition of the case.
10. **Reinstatement.** In meritorious cases, the complainant may wish to be reinstated to his/her original position, or the complainant may no longer want to be employed by his/her former employer or work in his/her original position. In either case, document whether the complainant wants to be reinstated or not.
11. **Back Wages.** In meritorious cases, the complainant may want to back wages. Calculations of those wages should be kept using the Back Wage Calculator supplied by OSHA and a copy of those calculations attached to the ROI.
12. **Interest.** Interest can be paid to the complainant in addition to back wages. Indicate the amount of interest and include the calculations with the ROI.
13. **Punitive Damages.** In merit cases, the rationale for ordering any punitive damages should be concisely stated here.
14. **Expungement.** If the complainant wishes to have any documents expunged from his/her personnel file, indicate which documents here.
15. **Posting.** Posting of a Settlement Agreement should be indicated here.
16. **Other Damages.** Any other damages that are not discussed should be documented here.

CHAPTER 6

Remedies and Settlement Agreements

I. SCOPE.

This section covers policy and procedures for the determination of appropriate remedies in whistleblower cases and for the effective negotiation of settlements. Damage awards should result from a fact-specific evaluation of the evidence developed in the investigation. Investigators should consult with the IA/Legal

Staff before IOSHA awards any of the following remedies: preliminary reinstatement, front pay, punitive damages, compensatory damages from non-pecuniary losses such as emotional distress, and any order to change or rescind a corporate policy.

II. REMEDIES.

In cases where IOSHA is ordering monetary and other relief or recommending litigation, the investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation. 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, and other documentary evidence of damages. Witness and expert statements also may be appropriate in cases involving mental distress or pain and suffering 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, Investigative Findings should include an explanation of the basis for awarding any punitive or emotional distress damages. The basis for such damages should be something beyond the basis for finding that the respondent violated the statute.

A. Reinstatement and Front pay.

Under 88.9(3) enforced by IOSHA, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases, and is a critical component of making the complainant whole. Where reinstatement is not feasible, such as where the employer has ceased doing business or there is so much hostility between the employer and the complainant that complainant's continued employment would be unbearable, front pay in lieu of reinstatement should be awarded from the date of discharge up to a reasonable amount of time for the complainant to obtain another job. Legal Staff should be consulted on front pay.

B. Back Pay.

Back pay is available under 88.9(3). Back pay is computed by deducting net interim earnings from gross back pay. Gross back pay is defined as the total taxable earnings (before taxes and other deductions) that the complainant would have earned during the periods of unemployment.

Generally gross back pay is calculated by multiplying the hourly wage by the number of hours per week that the complainant typically worked. If the complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be broken down into a daily rate and then multiplied by the number of days that the complainant typically would have worked. If the complainant has not been reinstated, the gross pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. The back pay award should include any cost-of-living increases or raises the complainant would have received if employment had continued. Investigators should also include lost bonuses, overtime, benefits, raises and promotions in the back pay award when there is evidence to etermine these figures.

Net interim earnings are interim earnings reduced by expenses. Interim earnings are the total taxable

earnings complainant earned from interim employment (other employers) and are subtracted from the lost wages attributable to the timeframe between termination (or other adverse action) and reinstatement (if applicable). Examples of expenses are:

1. Those incurred in searching for interim employment, e.g., mileage at the current IRS rate per driving mile; toll and long distance telephone calls;
2. Employment agency fees, other job registration fees, meals and lodging if travel away from home;
3. Bridge and highway tolls;
4. Moving expenses, etc.; and those incurred as a condition of accepting and retaining an interim job;
5. Special tools and equipment, safety clothing, union fees, employment agency payments, mileage for any increase in commuting distance from distance travelled to the discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc.

A complainant must 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 alternative employment. A complainant must make an honest, good-faith effort to find work, but is not required to succeed. The investigator should ask the complainant for evidence of their job search and keep evidence in the case file. A complainant's obligation to mitigate their damages does not normally require that the complainant go into another line of work or accept a demotion. However, a complainant who is unable to secure substantially equivalent employment after a reasonable period of time must consider other available and suitable employment.

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

Unemployment insurance is not deducted from gross back pay. Worker's compensation is not deducted from back pay except for the portion which compensates for lost wages.

A respondent's cumulative liability for back pay ceases when a complainant rejects a bona fide offer of reinstatement. A bona fide offer must afford the complainant reinstatement to a job substantially equivalent to the former position.

C. Compensatory Damages.

Compensatory damages may be awarded under the IOSHA whistleblower statute. Compensatory damages include, but are not limited to, out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy, expenses incurred in searching for a new job (see paragraph B above), vested fund or profit-sharing losses, credit card interest and other property loss resulting from missed payments, annuity losses, compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health professional and medication related to that mental distress. Legal staff should be consulted on computing the amount of compensation for mental distress.

D. Punitive Damages.

Punitive damages should be considered whenever a management official involved in the adverse action knew about the relevant discrimination statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages should also be considered when the Respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting; when the Complainant has been discharged because of his/her association with a whistleblower; when a group of whistleblowers has been discharged; or when there has been a pattern or practice of retaliation in violation of the statute IOSH enforces.

When an investigation uncovers evidence which could lead to a recommendation for punitive damages, the Investigator should advise the IA/IEO as soon as possible in order to alert Legal Staff of the egregious

nature of the potential violation. If Legal Staff agrees that such damages may be appropriate, further development of evidence should be coordinated with Legal Staff.

When determining punitive damages, refer to Reich v. Skyline Terrace Inc., 977 F. Supp. 1141 (N.D. Okl. 1997). Circumstances which make a case more or less egregious than Skyline, as well as inflation, should be considered.

E. Interest.

Interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes. See 26 U.S.C. §6621 (the Federal short–term rate plus three percentage points). That underpayment rate can be determined for each quarter by visiting www.irs.gov and entering "Federal short-term rate" in the search field. The press releases for the interest rates for each quarter will appear. The relevant rate is the one for underpayments (not large corporate underpayments). A definite amount should be computed for the time up to the date of calculation. The findings should state that in addition, interest at the IRS underpayment rate at 26 U.S.C. §6621, compounded daily, must be paid on monies owed after that date. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function.

F. Expungement.

The respondent will be required to expunge any warnings, reprimands, and derogatory references (such as references to the complainant's termination) which may have been placed in the complainant's personnel file as a result of the protected activity.

G. References.

The Respondent will be required to provide the complainant a neutral reference for potential employers.

H. Training.

Require the respondent to provide employee or manager training regarding the rights afforded by Iowa Code Chapter 88.9(3). Training may be appropriate particularly where the respondent's conduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation.

I. Posting.

The Respondent may be required to post a notice regarding the IOSHA order.

III. SETTLEMENT POLICY.

Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is IOSHA 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, IOSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it. IOSHA should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

IV. SETTLEMENT PROCEDURE.

A. Requirements.

Requirements for settlement agreements are:

1. The file must contain documentation of all appropriate relief at the time the case has settled and the relief obtained.
2. The settlement must contain all of the core elements of a settlement agreement (see IV.C. below).
3. To be finalized, every settlement, or in cases where the IDOL approves a private settlement, every approval letter must be signed by the appropriate IOSHA official.
4. To be finalized, every settlement must be signed by the respondent.

B. Adequacy of Settlements.

1. Full Restitution. Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter.

   Restitution may encompass and is not necessarily limited to any or all of the following:

   a. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement. See Ch. 6 II. A. above.

   b. "Front pay" in the context of settlement is a term referring to future wage losses, calculated from the time of discharge, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties' wishes to avoid reinstatement and the other agrees. See Ch. 6 II. A. above.

   c. Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant's attempt to mitigate his or her losses are subtracted from the full back wages (NOTE: Unemployment compensation benefits may never be considered as an offset to back pay). See Ch. 6 II. B. above.

   d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which have been placed in the complainant's personnel file or other records.

   e. The respondent's agreement to provide a neutral reference to potential employers of the complainant.

   f. Posting of a notice to employees stating that the respondent agreed to comply with the whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting.

   g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property loss resulting from missed payments, compensation for mental distress caused by the adverse action, and out-of-pocket expenses for treatment by a mental health professional and medication related to that distress See Ch. 6 II. C.

   h. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.

   i. Punitive damages may be considered. They may be awarded when a management official involved in the adverse action knew that the adverse action violated the whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting; when the complainant has been discharged because of his/her association with a whistleblower; when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of 88.9(3). See Ch. 6 II. D. above for more guidance, including other examples. However, coordination with the IA and Legal Staff as soon as possible is imperative when considering such action. If Legal Staff agrees that such damages may be appropriate, further development of evidence should be coordinated with the Legal Staff. (See Ch. II. D. for most of this information.)

C. The Standard IOSHA Settlement Agreement.

Whenever possible, the parties should be encouraged to utilize IOSHA's standard settlement agreement containing all of the core elements outlined below. This will ensure that all issues within IOSHA's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

1. It must be in writing.
2. It must stipulate that the employer agrees to comply with the relevant statute(s).
3. It must address the alleged retaliation.
4. It must specify the relief obtained.
5. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, where the employer communicates with its employees electronically) or an equivalent notice.

Adherence to these core elements should not create a barrier to achieving an early resolution and adequate relief for the complainant. But according to the circumstances, concessions may sometimes be made.

All appropriate relief and damages to which the complainant is entitled must be documented in the file. If the settlement does not make the complainant whole, the justification must be documented and the complainant's concurrence must be noted in the case file.

In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Yet, posting of a settlement agreement, standard poster and/or notice to employees, while an important remedy, may also be an impediment to a settlement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

The investigator should try as much as possible to obtain a single payment of all monetary relief. This will ensure that complainant obtains all of the monetary relief.

The settlement should require that a certified or cashier's check, or where installment payments are agreed to, the checks, to be made out to the complainant, but sent to IOSHA. IOSHA shall promptly note receipt of the checks, copy the check[s], and mail the check[s], via certified mail, to the complainant.

D. Sections of an IOSHA Settlement Agreement.

Much of the language of the standard agreement should generally not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Those sections that can be omitted or included, with management approval include:

1. *Posting of Notice*
   Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, and maintain for a period of at least 90 consecutive days from the date of posting, copies of the Notice attached hereto and made part hereof, said Notice to be signed by a responsible official of Respondent's organization and the date of actual posting to be shown thereon.
2. *Compliance with Notice*
   Respondent will comply with all terms and provisions of the notice.
3. *General Posting*
   Respondent will permanently post in a conspicuous place in or about its premise, including all places where posters for employees are customarily posted the Iowa OSHA poster available at www.iowaosha.gov.

4. *Non-Admission*
   Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation under the jurisdiction of the Iowa Division of Labor/Occupational Safety and Health Administration. Nothing in this agreement may be used against either party except for the enforcement of its terms and provisions.
5. *Reinstatement (this section may be omitted if adequate front pay is offered)*
   a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted.
   b. Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.
   c. The Respondent agrees to make the complainant whole by payment of back pay less normal payroll deductions. Checks will be made out to the complainant but provided to IOSHA.
   d. Respondent agrees to pay complainant a lump sum of money. Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check(s) shall be made out to the complainant, but mailed to IOSHA.

All agreements utilizing IOSHA's standard settlement agreement must be recorded in the IMIS as "Settled." IOSHA settlements should generally not be altered beyond the options outlined above. Any changes to the standard IOSHA settlement agreement language, beyond the few options noted above, must be discussed and approved by Legal Staff. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the employer belongs. Settlement agreements must not contain provisions which prohibit IDOL's release of the agreement to the general public, except as provided in Ch. 1 section 5.

E. Settlements to which IOSHA is not a Party.

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without IOSHA's participation in settlement negotiations. Because voluntary resolution of disputes is desirable in many whistleblower cases, IOSHA's policy is to defer to adequate, privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the whistleblower statute and the public interest (See F. below). Approval of the settlement demonstrates IDOL's consent and achieves the consent of all three parties. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand IOSHA's involvement in any resolution reached after a complaint has been initiated.

1. In most circumstances, issues are better addressed through an IOSHA agreement, and if the parties are amenable to signing one as well, the IOSHA settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the IOSHA agreement. This is achieved by inserting the following paragraph in the IOSHA agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the Iowa Occupational Safety and Health Administration's (IOSHA's) authority. IOSHA's authority over that agreement is limited to the statute within its authority. Therefore, IOSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to 88.9(3) under which the complaint was filed." These cases must be recorded in the IMIS as "Settled."
2. If the IDOL approves a settlement agreement, it constitutes the final order of the Labor Commissioner and may be enforced in an appropriate state district court according to the provisions of IOSHA's whistleblower statute.

3. The approval letter 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 only approves the terms of the agreement pertaining to 88.9(3)". These cases must be recorded in the IMIS as "Settled – Other."
4. If the parties do not submit their agreement to IOSHA or if IOSHA does not approve the signed agreement, IOSHA may dismiss the complaint. The dismissal shall state that the parties settled the case independently, but that the settlement agreement was not submitted to IOSHA or that the settlement agreement did not meet IOSHA's criteria for approval, as the case may be. The dismissal will not include factual findings. Alternatively, if IOSHA's investigation has already gathered sufficient evidence for IOSHA to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than the complainant, IOSHA may issue merit findings or continue the investigation. The findings shall note the failure to submit the settlement to IOSHA or IOSHA's decision not to approve the settlement. The determination should be recorded in IMIS as either dismissed or merit, depending on IOSHA's determination.

F. Criteria by which to Review Private Settlements.

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest the investigator must carefully review un-redacted settlement agreements in light of the particular circumstances of the case.

1. IOSHA will not approve a provision that states or implies that IOSHA or IDOL is party to a confidentiality agreement.
2. IOSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or shall prevent or interfere with Complainant's non-waivable right to engage in any future activities protected under the whistleblower statute administered by IOSHA."
3. IOSHA will not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency."
4. IOSHA must ensure that the complainant's decision to settle is voluntary.
5. 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 the complainant from working in his or her chosen field in the locality where he or she resides?

       Consideration should include whether the complainant's skills are readily transferable to other employers or industries. Waivers that more narrowly restrict future employment, for example, to a single employer or its subsidiaries or parent company may generally be less problematic than broad restrictions such as any employers at the same worksite or any companies with which the respondent does business.

       The investigator must ask the complainant, "Do you feel that, by entering in to this agreement, your ability to work in your field is restricted?" If the answer is yes, then the follow-up question must be asked, "Do you feel that the monetary payment fairly compensates you for that?" The complainant also

should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the monetary payment, fairly compensates for the waiver of employment. The case file must document the complainant's replies and any discussion thereof.

b. **The amount of the remuneration.** Does the complainant receive adequate consideration in exchange for the waiver of future employment?

c. **The strength of the complainant's case.** How strong is the 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 is, unless very well remunerated. Consultation with Legal Staff may be advisable.

d. **Complainant's consent.** IOSHA must ensure that the complainant's consent to the waiver is knowing and voluntary. The case file must document the complainant's replies and any discussion thereof.

   If the complainant is represented by counsel, the investigator must ask the attorney if he or she has discussed this provision with the complainant.

   If the complainant is not represented, the investigator must ask the complainant if he or she understands the waiver and if he or she accepted it voluntarily. Particular attention should be paid to whether or not there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, if threats were made in order to persuade the complainant to agree; or if additional monies or forgiveness of debt were promised as an additional incentive.

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

V. BILATERAL AGREEMENTS (FORMERLY CALLED UNILATERAL AGREEMENTS).

A. A bilateral settlement is one between the IDOL and a respondent—without the complainant's consent—to resolve a complaint filed under 88.9(3). It is an acceptable remedy to be used only under the following conditions:

1. The settlement 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. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
2. The complainant refuses to accept the settlement offer. (The case file should fully set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by management.)
3. The complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses); attempts to resolve these demands fail; and the final offer from the respondent is reasonable to IOSHA.

B. When presenting the proposed agreement to the complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and that IDOL may settle the case without the complainant's participation. This is also the time to explain that, once settled, the case cannot be appealed, as the settlement resolves the case.

C. All potential bilateral settlement agreements must be reviewed and approved in writing by the IA. The bilateral settlement is then signed by both the respondent and the IA. Once settled, the case is entered in IMIS as "settled."

D. Documentation and implementation

1. Although each agreement will, by necessity, be unique in its details, in settlements negotiated by IOSHA, the general format and wording of the standard IOSHA 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 must be included in the case file, with explanations of calculating methods and relevant circumstances, as necessary.
4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function. See Ch. 6 II. E.
5. Any check from the employer must be sent to the complainant even if he or she did not agree with the settlement. If the complainant returns the check, IOSHA shall record this fact and return it to the employer.

VI. ENFORCEMENT OF SETTLEMENTS.

If an employer fails to comply with a settlement in an 88.9(3) IOSHA discrimination case, the investigator shall refer the case to Legal Staff for litigation and the complainant and respondent shall be so informed.

CHAPTER 7

Section 9(3) of Iowa Code Chapter 88 - the Iowa Occupational Safety and Health Act

I. 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 30 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."

II. COVERAGE

Any private or public sector employee.

III. PROTECTED ACTIVITY

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

- Occupational safety or health complaints filed orally or in writing with IOSHA, 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.
- Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel.
- Instituting or causing to be instituted any proceeding under or related to the IOSH 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 IOSHA 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.

- 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.
- Exercising any right afforded by the IOSH 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 material safety data sheet (MSDS); and requesting access to records, copies of the IOSH 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 he or she:

1. Has a reasonable apprehension of death or serious injury , and
2. Refuses in good faith, and
3. Has no reasonable alternative, and
4. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting OSHA, and
5. Where possible, sought from his or her 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, IOSHA 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 IOSHA inspection. He or she has the right to communicate with an IOSHA compliance officer, orally or in writing. He or she must not suffer retaliation because of the exercise of this right.

- Relationship to State Plan States

A. General.

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §667, provides that any State, i.e., States as defined by 29 U.S.C. §652(7), that desires to assume responsibility for 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 investigate and enforce Section 11(c) of the Act in any state, although 29 CFR 1977.23 and 1902.4(c)(2)(v) require that each state plan include whistleblower protections that are as effective as OSHA's Section 11(c). Therefore, in state plan states that cover the private sector, such employees may file occupational safety and health whistleblower complaints with federal OSHA, the state, or both.

B. B. State Plan State Coverage.

All state plans extend coverage, including occupational safety and health whistleblower protections, to non-federal public employees; and the majority of the state plans also extend this coverage to private-sector employees in the state.

There are currently five jurisdictions operating state plans (Connecticut, Illinois, New Jersey, New York, and the Virgin Islands) that cover non-federal public employees only. In these five states, all private-sector coverage remains solely under the authority of federal OSHA.

C. Overview of the 11(c) Referral Policy.

The regulation at 29 CFR §1977.23 provides that OSHA may refer complaints of employees protected by state plans to the appropriate state agency. It is OSHA's long-standing policy to refer all Section 11(c) complaints to the appropriate state plan for investigation; thus it is rarely the case that a complaint is investigated by both federal OSHA and a state plan. However, utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

1. **Exemption to the Referral Policy.** The Regional Administrator (RA) may determine, based on monitoring findings or legislative or judicial actions, that a state plan cannot adequately enforce whistleblower protections or for some reason cannot provide protection. In such situations, the RA may elect to temporarily process private-sector Section 11(c) complaints from employees covered by the affected state in accordance with procedures in non-plan states.
2. **Federal Review of a Properly Dually-Filed Complaint.** If a complaint has been dually filed with federal OSHA and a state plan state, and meets specific criteria as outlined in this chapter, OSHA will review the complaint under the basic principles of its deferral criteria, set forth in 29 CFR §1977.18(c).

D. Procedures for Referring Complaints to State Plans

1. In general, all federally-filed complaints alleging retaliation for occupational safety or health activity under state plan authority i.e., private-sector and non-federal public sector, will be referred to the appropriate state plan official for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. If such complaints also contain allegations of retaliation covered under the OSHA-administered whistleblower laws other than Section 11(c), such allegations will be investigated by federal OSHA under those laws.
2. **Referral of Private-Sector Complaints.** A private-sector employee may file an occupational safety and health whistleblower complaint with federal OSHA under Section 11(c) and with the state plan. When a complaint from a private-sector employee is received, the complaint will be screened, but not docketed, as a federal Section 11(c) complaint. A memo to the file will be drafted to document the screening, the federal filing date and the fact that the complaint was dually filed, so that the complaint can be acted upon, if needed.
3. **Referral of Public Sector Complaints.** Any occupational safety and health whistleblower complaint from a non-federal public employee will be referred, without screening, to the state.
4. **Referral Letters.** Federal OSHA shall promptly refer Section 11(c) complaints to the state by means of a letter, fax or e-mail to the state office handling state plan whistleblower complaints. In addition, the complainant will be notified of the referral by letter. The referral letter will inform the complainant that he or she may request federal review of dually filed 11(c) complaint, as follows:
    a. "OSHA will not conduct a parallel investigation. [State agency] will conduct the investigation of your retaliation complaint. However, should you have any concerns regarding [state agency's] conduct 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 any appeal right has been exercised and the state has issued a final administrative decision. The request for a review must be made in writing to the OSHA [Regional Office] indicated below and postmarked within 15 calendar days after your receipt of the State's final administrative decision. If you do not request a review in writing within the 15-calendar day period, your federal 11(c) complaint will be closed."

5. **Federal Statutes Other than 11(c).** Complaints filed solely under the whistleblower statutes administered by OSHA (other than 11(c)) are under the exclusive authority of federal OSHA and may not be referred to the states. If a complaint is filed under a federal OSHA whistleblower statute other than Section 11(c) and a state whistleblower statute, it is important to process the complaint in accordance with the requirements related to each of the named federal statutes in order to preserve the respondent's and complainant's rights under the differing laws. Therefore, it will be necessary to coordinate the federal and state investigations.

E. Procedures for Processing Dually Filed 11(c) Complaints

1. **Complainant's Request for Federal Review.** If a complainant requests federal review of a dually filed complaint under Section 11(c) ("a dually filed complaint") after receiving a state determination, it will be evaluated to determine whether it has been properly dually filed.
2. **Proper Dual Filing.** OSHA will deem a complaint to be a properly dually filed only if it meets the following criteria:
   a. Complainant filed the complaint with federal OSHA in a timely manner (i.e., within 30 days or within the time allowed by extenuating circumstances, see Chapter 2); and
   b. A final administrative determination has been made by the State; and
   c. Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's determination letter; and
   d. Complainant and Respondent would be covered under Section 11(c). (See Paragraph III.)
3. **Administrative Closure of Complaints Not Dually Filed**
   a. If upon request for review, the complaint is deemed to be not properly dually filed, the complaint will be administratively closed, and the complainant will be notified, except as noted in subparagraph (b). Section 11(c) appeal rights will not be available. Further review of such complaints will be conducted under Complaint About State Plan Administration (CASPA) procedures.
   b. If the complainant requests federal review before the state determination is made, the complainant shall be notified that he or she may request review only after a state determination is made. However, in cases of extraordinary delay or misfeasance by the state, the RA may allow a federal review before the issuance of a state determination.
4. **Federal Review.** The OSHA review of a properly dually-filed complaint will be conducted as follows:
   a. Preliminary Review. Under the basic principles of §1977.18(c), before deferring to the results of the state's proceedings, it must be clear that:
      i. The state proceedings "dealt adequately with all factual issues;" and
      ii. The state proceedings were "fair, regular and free of procedural infirmities;" and
      iii. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
   b. The preliminary review will be conducted on a case-by-case basis, after careful scrutiny of all available information, including the state's investigative file. The State's dismissal of the complaint "will not ordinarily be regarded as determinative of the Section 11(c) complaint." This means that OSHA may not defer to the state's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the case be re-opened and the specific deficiencies corrected by the State.
5. **Deferral.** If the state's proceedings meet the criteria above, the RA may simply defer to the state's findings. The complaint will be administratively closed, and the complainant will be notified. Appeal rights will not be available.

6. **No Deferral.** Should state correction be inadequate and the RA determines that OSHA cannot properly defer to the state's determination pursuant to 29 CFR 1977.18(c), the RA will conduct whatever additional investigation is necessary, with every effort being made not to duplicate any portion of the state investigation believed to have been adequately performed and documented. Based on the investigation's findings, the RA may either dismiss, settle, or recommend litigation.
7. **State Plan Evaluation.** Should any recommendations for needed corrective actions by the state with regard to future state investigation techniques, policies and procedures arise out of the federal 11(c) review of a properly dually filed complaint, those recommendations will be referred to the RA for use in the state plan evaluation.

F. Referral Procedure – Complaints Received by State Plan States

1. In general, 11(c)-type complaints received by a state plan state which are under dual federal-state authority will be investigated by the state and shall not be referred to federal OSHA.
2. Because employers in state plan states do not use the federal OSHA poster, the states must advise private-sector complainants of their right to file a federal 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to concurrent federal protection. This may be accomplished through such means as an addition to the state safety and health poster, a checklist, handout, or in the letter of acknowledgment, by the inclusion of the following paragraph:
    a. "If you are employed in the private sector or the United States Postal Service, 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 30-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:

        USDOL/OSHA, Whistleblower Protection Program
        2300 Main Street, Ste. 1010
        Kansas City, MO 64108
        Phone: 816.283.0545 ext. 231
        Fax: 816.283.0547
3. At the conclusion of each whistleblower investigation conducted by a state, the state must notify the complainant of the determination in writing and inform the complainant of the State's appeals process. If the complaint constituted a dually-filed complaint, the determination letter will inform the complainant as follows:
    a. "Should you have any concerns regarding this agency's conduct 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 this agency has issued a final administrative determination after exercise of all appeal opportunities. The request for a 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 administrative decision. If you do not request a review in writing within the 15 calendar day period, your federal retaliation complaint will be closed."
4. Federal Whistleblower Statutes other than Section 11(c). Complainants in state plan states must be made aware of their rights under the whistleblower protection provision administered by the state plan and should be informed of their rights under the federal whistleblower 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. State plan states must determine whether their whistleblower provisions are pre-empted in these circumstances by provisions of the state occupational safety and health law or directly by the substantive provisions of the other federal agency's statute. See paragraph D.5.

G. Complaints About State Program Administration (CASPAs)

1. OSHA state plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a state's program may file a Complaint About State Program Administration (CASPA) with the appropriate RA. (See: 29 CFR 1954.20; CSP 01-00-002/STP 2-0.22B, Chap. 11.)
2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a state plan made to OSHA by any person or group. The CASPA process provides a mechanism for employers, employees, and the public to notify federal OSHA of specific issues, systemic problems, or concerns about a state program. A CASPA may reflect a generic criticism of the state program administration or it may relate to a specific investigation.
3. Because properly dually-filed 11(c) complaints undergo federal review under the Section 11(c) procedures outlined in Paragraph E of this chapter, no duplicative CASPA investigation is required for such complaints. Complaints about the handling of state whistleblower investigations from non-federal public sector employees, and from private-sector employees who have not properly dually-filed their complaint, will be considered under CASPA procedures.
4. Upon receipt of a CASPA complaint relating to a state's handling of a whistleblower case, OSHA at the regional level will review the state's investigative file and conduct other investigation as necessary to determine if the state's investigation was adequate and that the determination was supported by appropriate available evidence. A review of the state's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the Whistleblower Protection Program.
5. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future state investigations techniques, policies and procedures. A review under CASPA procedures is not an appeal and a review under CASPA procedures will not be reviewed by the Appeals Committee; however, it should always be possible to reopen a discrimination case for corrective action. If the Region finds that the outcome in a specific state whistleblower investigation is not appropriate (i.e., final state action is contrary to federal practice and is less protective than if investigated federally; does not follow state policies and procedures; relied on state policies and procedures that are not at least as effective as OSHA's policies and procedures), the Region should require the state to take appropriate action to reopen the case or in some manner correct the outcome, whenever possible, as well as make procedural changes to prevent recurrence.

CHAPTER 8
Other Whistleblower Statutes

I. SCOPE.

As discussed in Chapter 1, Federal OSHA has responsibility of investigating allegations into twenty other federal statutes. It is not the responsibility of the state investigator or CSHO to know each statute; however, a general knowledge of those statues is essential to provide proper guidance to complainant's that alleged discrimination may be covered under federal statutes. The following provides a brief explanation of the twenty 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

ACT/OSHA REGULATION	DAYS TO FILE	RESPONDENTS COVERED
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 share holders. (If the complaint was filed on or before July 20, 2010, the 90-day deadline applies. If the complaint was filed on or after July 21, 2010, and the adverse action occurred on or after April 22, 2010, the 180-day deadline applies. Any alleged adverse action occurring on or before April 22, 2010 is untimely under either deadline if filed on or after July 21, 2010). 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

ACT/OSHA REGULATION	DAYS TO FILE	RESPONDENTS COVERED
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

ACT/OSHA REGULATION	DAYS TO FILE	RESPONDENTS COVERED
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
Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA). (Section 1057 of Public Law 111-203) [12 U.S.C. §5567]. Employees are protected for reporting reasonably perceived violations of any provision of the Dodd-Frank Act or any other provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.	180	Any service provider or person engaged in offering or providing a consumer financial product or service or such persons' affiliate acting as a service provider to it
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

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