Whistleblower Investigations Manual

Alaska Occupational Safety & Health

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ABSTRACT

Purpose: This Instruction is the AKOSH Whistleblower Investigations Manual and supersedes PD 18-07. This manual outlines procedures and other information relative to the handling of retaliation complaints under AS 18.60.089 and may be used as a ready reference.

Scope: AKOSH Enforcement/LSS/LAW.

References: See Chapter 1, section III.

Cancellations: **AKOSH Whistleblower Manual, PD 18-07**.

State Plan Impact: Notice of Intent and Equivalency Required. See Chapter 1, section VI.

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Protecting Alaska's Workforce

Executive Summary

This Whistleblower Investigations Manual (WIM) replaces PD 18-07 dated July 10, 2018. Items such as letter/document templates were removed from this WIM.

Significant Changes

- Formal investigative correspondence, including notifications and determinations, may now be sent by email, delivery receipt required.
- Notification letters to Complainants must now include a copy of the complaint.
- The manual as a whole has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were scattered throughout the manual.

Disclaimer

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

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Chapter 1

PRELIMINARY MATTERS

I. Purpose

This version of the Alaska Occupational Safety & Health (AKOSH) Whistleblower Investigations Manual (WIM) supersedes the July 18, 2018, version, its organization and content follow the 2021 version of the Federal OSHA WIM, which supersedes its January 28, 2016, version.

This manual outlines legal concepts, procedures, and other information related to the handling of retaliation complaints under the whistleblower statute AS 18.60.089, which is the State of Alaska analog of, and is based on the Occupational Safety and Health Act (Section 11(c)), 29 U.S.C. § 660(c).

II. Scope

The WIM applies to all AKOSH Whistleblower investigations performed regarding employees and employers who fall under AKOSH jurisdiction. Complainants who fall outside of AKOSH jurisdiction will be referred to the appropriate agency(ies). This Program Directive applies AKOSH-wide and specifically to the AKOSH Whistleblower Investigator. It also discusses the roles and responsibilities Division Management and other Departments play in the execution of the Whistleblower Program.

III. References

The following statutes, codes, plans, and manuals:

- Occupational Safety and Health Act (Section 11(c)), 29 U.S.C. § 660(c), which is referenced in AS 18.60.030(6).
- Code of Federal Regulations (CFR) 29 CFR Part 1977 - Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act
- Alaska Statute (AS) 18.60.089, Prohibition against retribution
- Alaska Administrative Code 8 AAC 61.470 – 8 AAC 61.60.530[1]
- Alaska Statute 40.25.100 – 40.25.295[2]
- Alaska Statute 45.50.910 – 45.50.945[3]
- AKOSH Field Operations Manual PD 21-02

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[1] Title 8 Labor and Workforce Development->Part 4. Occupational Safety and Health Division. (8 AAC 60 - 8 AAC 80)->Chapter 61. Occupational Safety and Health. (8 AAC 61.010 - 8 AAC 61.1960). Article 7. Discrimination. (8 AAC 61.470 - 8 AAC 61.530)

[2] Alaska Public Records Act

[3] Alaska Uniform Trade Secrets Act

- Alaska State Plan (uses language 'discrimination' and 'anti-retaliation'). The State Plan addresses the Whistleblower or Discrimination process in A.12, B.5, and C.10.

Additional relevant regulations, instructions, and memoranda:

29 CFR 1913.10 – Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records.

OSHA Instruction CPL 02-03-010, Whistleblower Protection Program Pilot Procedures, July 20, 2020.

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

OSHA Instruction CPL 02-00-164, OSHA Field Operations Manual (FOM), April 4, 2020.

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

OSHA Regional Notice CPL 2016-30, Administrative Dismissals ROI Pilot, New York Regional Office (Region 2), August 22, 2016.

OSHA Instruction CSP 01-00-005, State Plan Policies and Procedures Manual, May 6, 2020, or succeeding guidance.

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

OSHA Instruction ADM 03-01-005, OSHA Compliance Records, August 3, 1998.

OSHA Instruction CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993, or succeeding guidance.

OSHA Instruction CPL 02-03-001 (DIS .7), Referral of Section 11(c) Discrimination Complaints to "State Plan" States, February 27, 1986.

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

Memorandum *Clarification of Procedures for Closing Investigations Based on a "Kick-Out" to Federal District Court*, January 26, 2018.

Memorandum *IMIS Recording of Whistleblower Complaints Initially Filed with Agencies Other Than OSHA*, January 9, 2018.

Memorandum *Coordination with Federal Partner Agencies*, October 3, 2017.

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

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

Memorandum *Interim Investigation Procedures for Section 29 CFR 1904.35(b)(1)(iv)*, November 10, 2016.

Memorandum *Interpretation of 1904.35(b)(1)(i) and (iv)*, October 19, 2016.

Memorandum *Updated Guidelines on Sharing Complaints and Findings with Partner Agencies*, October 12, 2016.

Memorandum *New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases*, August 23, 2016.

Memorandum *Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews*, July 15, 2016.

Memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, May 11, 2016.

Memorandum *Procedures for Significant or Novel Whistleblower Cases*, February 2, 2016.

Memorandum *Tolling of Limitation Periods Under OSHA Whistleblower Laws by Private Agreements and for Other Reasons*, January 28, 2016.

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

Memorandum *Policy for Enforcing Settlement Agreements, Preliminary Reinstatement Orders, and Final ALJ and ARB Orders*, December 21, 2015.

Memorandum *Taxability of Settlements Chart*, October 1, 2015.

Memorandum *Clarification of the Investigative Standard for OSHA Whistleblower Investigations*, April 20, 2015.

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

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

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

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

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

Statute-Specific Investigator's Desk Aids:

- Affordable Care Act Whistleblower Protection Provision (ACA): Section 1558 of the ACA, Section 18C of the Fair Labor Standards Act, 29 U.S.C. 218C [Update Pending]
- Asbestos Hazard Emergency Response Act (AHERA) Whistleblower Protection Provision: 15 U.S.C. §2651 [PDF]

- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) Whistleblower Protection Provision: 49 U.S.C. 42121 [PDF]
- Consumer Financial Protection Act of 2010 (CFPA) Whistleblower Protection Provision: Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5567 [PDF]
- Consumer Product Safety Improvement Act (CPSIA) Whistleblower Protection Provision: 15 U.S.C. § 2087 [PDF]
- Energy Reorganization Act (ERA) Whistleblower Protection Provision: 42 U.S.C. 5851 [Pending]
- Environmental Statutes Whistleblower Protection Provisions: [Pending]
- FDA Food Safety Modernization Act (FSMA) Whistleblower Protection Provision: Section 1013 of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. 399d [PDF]
- Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision: 49 U.S.C. § 20109 [PDF]
- International Safe Container Act (ISCA) Whistleblower Protection Provision: 46 U.S.C. § 80507 [PDF]
- Moving Ahead for Progress in the 21st Century Act (MAP-21) Employee Protection Provision: 49 U.S.C. § 30171 [PDF]
- National Transit Systems Security Act (NTSSA) Whistleblower Protection Provision: 6 U.S.C. § 1142 [PDF]
- Pipeline Safety Improvement Act (PSIA) Whistleblower Protection Provision: 49 U.S.C. § 60129 [PDF]
- **Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision: Section 11(c) of the OSH Act of 1970, 29 U.S.C. § 660(c)** [PDF]
- Sarbanes-Oxley Act (SOX) Whistleblower Protection Provision: 18 U.S.C. 1514A [PDF]
- Seaman's Protection Act (SPA) Whistleblower Protection Provision: 46 U.S.C. 2114 [PDF]
- Surface Transportation Assistance Act (STAA) Whistleblower Protection Provision: 49 U.S.C. § 31105 [PDF]
- Taxpayer First Act (TFA) Whistleblower Protection Provision: 26 U.S.C. § 7623(d) [Pending]

IV. Cancellations

- Alaska Program Directive PD 18-07 which adopted Revised Whistleblower Investigations Manual. AKOSH Field Operations Manual Program Directive (PD) #19-06, 18-06, and 18-05.

- OSHA Instruction CPL 02-03-007, Whistleblower Investigations Manual, January 28, 2016.
- OSHA Instruction CPL 02-03-004, Section 11(c), AHERA, and ISCA Appeals Program, September 12, 2012.
- OSHA Instruction CPL 02-03-001, Referral of Section 11(c) Discrimination Complaints to "State Plan" States, February 27, 1986.
- OSHA Instruction IRT 01-00-016, The IMIS Whistleblower User's Guide, date unknown.
- OSHA Regional Notice CPL 02-03-006, Settlement Agreement Template, Boston Regional Office (Region 1), October 1, 2019.
- OSHA Regional Notice 2017-WB-001, Non-Public Disclosure Pilot – 11(c) Complaints Only, Chicago and San Francisco Regional Offices (Regions 5 and 10), March 1, 2017.
- OSHA Regional Notice CPL 2016-30, Administrative Dismissals ROI Pilot, New York Regional Office (Region 2), August 22, 2016.
- OSHA Regional Notice CPL 02-03-01, Regional Whistleblower Protection Program Expedited Case Processing Pilot, San Francisco Regional Office (Region 9), August 1, 2016.
- OSHA Regional Notice CPL 02-03-005A, Whistleblower Electronic Case File, Boston Regional Office (Region 1), June 7, 2016.
- OSHA Regional Notice CPL 02-03-002, Streamlined Uniform ROI Pilot (SLURP), Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Instruction CPL 02-03-003, Region 1 Whistleblower Program Complaint Screening Instruction, Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Notice CPL 02-03-004, Streamlined Investigation Pilot (SIP), Boston Regional Office (Region 1), February 10, 2016.
- OSHA Regional Notice CPL Unknown, Regional Whistleblower Protection Closing Letter Pilot, New York and Chicago Regional Offices (Regions 2 and 5), April 1, 2015.

V. AKOSH Whistleblower – Specific Federal Guidance, Evaluation and Information

A. Program Office

Directorate of Whistleblower Protection Programs (DWPP) and Alaska Area Office.

B. Evaluation Offices

Region 10 DWPP and Alaska Area Office.

C. Information Offices

DWPP, Region 10 DWPP and State Plans and OSHA Training Institute.

VI. State Plan Impact

A. Notice of Intent and Equivalency Required

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

B. Review Process

State Plans must include in their policies and procedures manual, or other implementing documents, a procedure for review of an initial retaliation case determination that is at least as effective as the federal procedure in Chapter 5.VI.B.2 of this Instruction. This may be a process that is at least as effective as the federal procedure in Chapter 5.VI.B.2 of this Instruction. This may be a process similar to OSHA's review by a DWPP as set out in Chapter 5, an adjudicatory proceeding, or another at least as effective mechanism. However, it is accomplished, Complainants must be afforded the opportunity for reconsideration of an initial dismissal determination within the state. Complainants will be required to exhaust this remedy before federal OSHA will accept a "request for federal review" of a dually filed complaint or a Complaint About State Program Administration (CASPA) regarding a retaliation case filed only with the state.

C. Dual Filing

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

D. Reopening cases

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

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

State Plans (AKOSH) are expected to ensure that their personnel are familiar with statutes beyond AS 18.60.089 (11c equivalent). Federal OSHA administers over 20 other whistleblower statutes. State Plans are expected to include whistleblower

complaint coordination procedures in their manuals to reflect federal OSHA's administration of these laws. Appendix D describes these other statutes. See Chapter 2, Section V.A.

F. State of Alaska Action regarding OSHA WIM

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

VII. Significant Changes

A. General

1. All letter/document templates were removed.
2. Statute-specific investigator desk aids are referenced. Chapter 8 deals specifically with section 11(c) considering the interface with State Plans.
3. The manual has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were scattered throughout the manual.
4. Policies initiated by previously issued federal memoranda and pilot programs were incorporated into this Instruction. This incorporation affected all chapters. Please refer to the memorandum itself if you wish to learn the background of a specific policy.
5. Formal investigative correspondence, including notifications and determinations, may now be sent by email, delivery receipt required. While the use of email for formal investigative correspondence is now allowed, care shall be taken to ensure it is a method regularly used by Complainant and/or Respondent, or else a party's responses may not be timely. This is particularly important for Alaska where low-income or remote communities' residents may not have internet, email, or technology to manage/view emails with attachments.
6. All references to the Regional Administrator (RA) include the RA's designee, except as otherwise noted. The RA's responsibilities may be delegated to a Deputy Regional Administrator, ARA, or an RSI (see below), except as otherwise noted. The corresponding State of Alaska titles are as follows: AKOSH Chief of Enforcement corresponds to ARA and RSI; Commissioner corresponds to Secretary; Director of LSS corresponds to RA.

B. Chapter 1: Preliminary Matters

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

C. Chapter 2: Legal Concepts

1. Chapter 2 is new. It consolidates discussion of the legal concepts relevant to whistleblower investigations that were previously scattered throughout the manual.
2. Chapter 2.V.A.7 "Work Refusal" incorporates the memorandum *Clarification of the Work Refusal Standard Under 29 CFR 1977.12(b)(2)*, issued January 11, 2016.
3. Chapter 2.VIII "Policies and Practices Discouraging Injury Reporting" incorporates as applicable the memorandum *Employer Safety Incentive and Disincentive Policies and Practices*, issued March 12, 2012.

D. Chapter 3: Intake and Initial Processing of Complaints

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

with the letter if ADR is available and appropriate.

8. Chapter 3.IX.A "Complainant" requires notification letters to Complainants include a copy of the complaint.

E. Chapter 4: Conduct of the Investigation

1. Chapter 4.II.E "Supervisor Review is Required" explains who must review documents and decisions when a supervisor is the investigator on a case.
2. Chapter 4.III.D "Investigative Correspondence" defines the allowable methods for sending investigative correspondence, including by email.
3. Chapter 4.III.E "Investigative Research" explains how information and documents obtained during investigative research must be placed in the case file.
4. Chapter 4.IV "Referrals and Notifications" incorporates the memorandum *Whistleblower Complaints and Health and Safety Referrals*, issued June 27, 2014, which explains that investigators must refer all allegations related to safety and health hazards to the appropriate office.
5. Chapter 4.V.E "Amended Complaints Distinguished from New Complaints" clarifies when a new allegation should be docketed as a new complaint rather than amending the original one.
6. Chapter 4.VII "On-site Investigation, Telephonic and Recorded Interviews": The requirement to conduct on-site interviews has been deleted.
7. Chapter 4.VIII "Confidentiality" incorporates the memorandum *Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews*, issued July 15, 2016, which describes the procedures for witness confidentiality and express promises of confidentiality.
8. Chapter 4.XVIII.D "Medical Records" explains the proper handling of medical records.

F. Chapter 5: Case Disposition

1. Chapter 5.III.A "No ROI Required" explains when a Report of Investigation (ROI) is not required, and attendant procedures.
2. Chapter 5.VII.E "Abbreviated Secretary's Findings" incorporates the memorandum *Revised Whistleblower Disposition Procedures*, issued April 18, 2012, which explains when the Secretary's Findings may be abbreviated, and the attendant procedures. AKOSH refers to 'Director's Findings.
3. Chapter 5.VII.H "Requests for Expedited Case Processing in Administrative Cases" incorporates the regional pilot directive CPL 02-03-01, *Regional Whistleblower Protection Program Expedited Case Processing Pilot*, issued August 1, 2016, establishing procedures for Complainants in administrative cases to request that the OSHA investigation be terminated in order to allow Complainants to request a hearing before an ALJ more expeditiously. **This section is not applicable to AKOSH.**

4. Chapter 5.XIII "Significant or Novel Whistleblower Cases" references the memorandum *Procedures for Significant or Novel Whistleblower Cases*, issued February 2, 2016.
5. The end of the chapter now includes a table summarizing the closing actions and documents required depending on the disposition.

G. Chapter 6: Remedies

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

H. Chapter 7: Settlement Agreements

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

I. Chapter 8: OSHA/State Plan Coordination

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

J. Chapter 9: Information Disclosure

1. The relevant sections regarding confidential business information (CBI) were updated to reflect the decision in *Food Marketing Institute v. Argus Leader Media*, U.S. 18-481, 139 S. Ct. 2356 (2019)., 139 S. Ct. 2356 (2019).

VIII. Background

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

The OSH Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, recordkeeping requirements, the issuance of citations and notifications of proposed penalties, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and judicial review. In addition, states seeking to assume responsibility for development and enforcement of standards may submit plans to the Secretary of Labor and receive approval for such development and enforcement, including protection against retaliation for occupational safety or health activities.

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

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

The State of Alaska has enacted AS 18.60.089, which is equivalent to 11(c), that it enforces. AKOSH refers complainants/cases to OSHA if a complaint includes elements of other additional statutes associated with various agencies (see Appendix _).

IX. Definitions, Acronyms, and Terminology

- **Adverse Action**: See Chapter 2.V.C, *Adverse Action*.
- **Alternative Dispute Resolution (ADR):** A consensual process that utilizes a third-party neutral to assist parties in resolving their conflict.
- **Bilateral Agreements:** Settlement agreements under section **11(c)** between AKOSH and Respondent without Complainant's consent. See Chapter 7.VII.

- **Cat's Paw Theory:** If the Respondent's decision-maker takes action based on the recommendation of a lower-level supervisor who knew of and was motivated by the protected activity to recommend action against the Complainant, employer knowledge and motive is imputed to the decision maker.
- **Complaints About State Program Administration (CASPA)**. These are complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to section 11(c) complainants. See Chapter 8.II.J.
- **Complainant (CP):** Any person who believes that he or she has suffered an adverse action in violation of AS 18.60.089 or an OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with AKOSH or OSHA. When this manual discusses investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.
- **Compliance Safety and Health Officer (CSHO):** This term refers to AKOSH/ OSHA Safety Engineers, Safety Compliance Officers, and Industrial Hygienists.
- **Confidential Business Information (CBI):** See Chapter 9.III.B.
- **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in AKOSH's investigation of a whistleblower complaint. If a representative has been designated, AKOSH typically communicates with the Complainant or the Respondent through the designated representative, although AKOSH may occasionally communicate directly with a Complainant if it believes that communication through the designated representative is impracticable or inadvisable.
- **Directorate of Whistleblower Protection Programs (DWPP)**: The directorate in the OSHA National Office that is responsible for establishing policies and providing support for the Regional OSHA Whistleblower Protection Program.
- **Dual Filed:** Contemporaneously filed with AKOSH and Federal OSHA
- **Employer-Employee Agreements:** Settlement agreements between Complainant and Respondent, subject to AKOSH's approval.
- **Enforcement Case:** Refers to an inspection or investigation conducted by a CSHO, or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.
- **Environmental Statutes:** OSHA whistleblower statutes protecting activities related to statutes enforced by the Environmental Protection Administration, i.e., CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA.
- **Federal Review:** Complainants who have concerns about a State Plan's investigation of their **dually filed section 11(c)** whistleblower complaints may request a review by OSHA of the State Plan investigation in order to afford them the opportunity for reconsideration of the state's dismissal determination and, in

merit cases, to have the Secretary file suit in federal district court. See Chapter 8.II.I.

- **Investigator:** An AKOSH employee assigned to investigate and prepare an ROI (see below) in a whistleblower case.
- **Lack of Cooperation (LOC)**: A party's failure to provide information necessary for a whistleblower investigation. (There are different implications for action depending on if it is CP or RP.)
- **Leeway Doctrine:** The doctrine states that employers must give workers some leeway when they report potential safety problems. Employers should expect employees might be riled up when bringing a safety problem to a supervisor's attention.
- **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU)**: An agreement between two agencies regarding the coordination of related activities.
- **Nexus**: See Chapter 2.V.D, *Nexus*.
- **Non-Public Disclosure**: A disclosure of information from the investigative case file made to Complainant or Respondent during the investigation in order to resolve the complaint. See Chapter 9.
- **OIS:** The OSHA Information System- This is the Federal OSHA online system in which Safety and Health Compliance officers enter inspection data, and as of June 27, 2022, was expanded to be used for Whistleblower cases.
- **OITSS-Whistleblower**: The OSHA IT Support System – Whistleblower. The case management system used to process complaint data for OSHA's WPP, formerly known as *WebIMIS*.
- **Personal Identifiable Information (PII)**: Information about an individual which may identify the individual, such as a Social Security number or a medical record. See Chapter 9.III.A.4.a.
- **Protected Activity**: See Chapter 2.V.A, *Protected Activity*.
- **Regional Administrator (RA)**: The RA is responsible for the investigations and enforcement under the OSHA whistleblower statutes in his or her region. **References to the RA include the RA's designee**, except as otherwise noted. **The RA's responsibilities may be delegated** only to a Deputy Regional Administrator, ARA, or an RSI (see below), except as otherwise noted. The delegation must be in writing.
- **Respondent (RP):** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term "Respondent" also includes Respondent's designated representative.
- **Report of Investigation (ROI)**: The report prepared by an Investigator in a whistleblower case, setting forth the facts, analyzing the evidence, and making recommendations.

- **Regional Supervisory Investigator (RSI)**: The RSI is the immediate supervisor of the federal investigators.

- **Request for Review (RFR)**: Complainants may request that the Commissioner of DOLWD review non-merit determinations (i.e., dismissals) per 8 AAC 61.530(b). See Chapter 5. VI.B.2.
- **Supervisor:** The Chief of Enforcement oversees AKOSH whistleblower investigations, signs subpoenas and ROIs, and approves settlements.
- **Whistleblower complaint or "WB complaint":** A complaint filed with AKOSH alleging unlawful retaliation for engaging in protected activity under AS 18.60.089. For example, a roofing employee complains to AKOSH that she was suspended for reporting a lack of fall protection to AKOSH. The whistleblower complaint is the complaint to AKOSH regarding the suspension for reporting a safety violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to AKOSH or OSHA regarding the lack of fall protection.
- **Whistleblower Protection Program (WPP):** OSHA's Whistleblower Protection Program as a whole. The State of Alaska AKOSH WPP or 'WB' program is a sub-set of the AKOSH Enforcement Program.

X. Functional Responsibilities

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

A. State Offices

Only the Anchorage Office within AKOSH is responsible for promptly processing whistleblower retaliation complaints. This process includes, but is not limited to: conducting the investigation, issuing findings, referrals to the Attorney General (AG)'s Office of meritorious WB cases, and referrals to other governmental organizations, including OSHA, where appropriate.

The Federal OSHA Region 10 Office and the Alaska Area Office are responsible for monitoring and evaluating the Alaska State Plan (AKOSH) whistleblower program and investigating Complaints About State Program Administration (CASPA) involving these programs.

B. Director of Labor Standards and Safety (LSS)

The Director of LSS is responsible for administering AKOSH and the Whistleblower Protection Program in the State of Alaska, in collaboration with the Directorate of Whistleblower Protection Programs (DWPP), and for ensuring that AKOSH's whistleblower provisions are appropriately implemented.

C. **Chief of AKOSH Enforcement**

The Chief of AKOSH Enforcement ('Chief') is responsible for the overall implementation of approved policies and procedures for all whistleblower investigations, ensuring quality investigations and customer service, consultation with the Assistant Attorney/ies General (AAG), communication with state or federal agencies, and coordination of all outreach activities.

D. **Whistleblower Investigator ("WBI")**

Under the direct guidance and ongoing supervision of the Chief, or, if applicable, the SI, the investigator conducts investigations, which include responsibilities such as:

1. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
2. Reviewing investigative and/or enforcement case files in field offices for background information concerning any other proceedings that relate to a specific complaint.
3. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
4. Following up on leads resulting from interviews and statements.
5. Interviewing and obtaining statements from respondent's officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
6. Applying knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzing the evidence, drafting an investigative report, and recommending appropriate action to the supervisor.
7. Composing draft Director's Determination Letter from template for Director's signature.
8. Negotiating with the parties to obtain a written settlement agreement that provides prompt resolution and satisfactory remedies to Complainant where appropriate.
9. Assisting and acting on behalf of the Chief in whistleblower matters involving other state or federal agencies, DWPP or OSHA Area Offices as assigned, and interacting with the general public to perform outreach activities as assigned.
10. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.
11. Organizing and maintaining whistleblower investigation case files.

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

DWPP monitors State Plans. At OSHA, DWPP develops program policies and procedures, provides assistance to the field on both the program and the statutes, approves regional pilot programs, promulgates procedural and interpretive rules to

implement the whistleblower statutes, reviews RFRs and significant whistleblower cases, assists in commenting on proposed whistleblower legislation, serves as liaison with the whistleblower program's partner agencies, performs audits of investigations, maintains statistical information on the nation-wide program, and performs outreach.

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

Each AKOSH CSHO maintains a basic understanding of the whistleblower protection provisions administered by AKOSH and OSHA, in order to advise employers and employees of their responsibilities and rights under these laws. Each CSHO must accurately record information about potential whistleblower complaints on an AKOSH Event Form, other agency referral, Federal OSHA-87 form, or the appropriate regional intake worksheet received by AKOSH as a referral, and immediately forward it to the Chief. In every instance, the date of the initial contact must be recorded. Additionally, as noted in the FOM, CSHOs shall instruct employers and employees about section AS 18.60.089/11(c) rights during opening and closing conferences.

G. **Department of Law (LAW)**

The Civil Division of the Department of Law provides legal counsel to the executive branch in all civil actions. The division defends and prosecutes civil litigation to which the state is a party; handles legal matters for and provides legal advice to the governor, executive branch agencies. The Labor and State Affairs section provides legal assistance needed for governmental management, including employment law, labor relations, civil rights, separation of powers, boards and commissions, workers' compensation, and AKOSH. The Commissioner of Labor and Workforce Development requests the AG to file suit in Alaska Superior court against violators of AS 18.60.089.

Chapter 2

LEGAL PRINCIPLES

I. Scope

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

- the requirement to determine whether there is reasonable cause to believe that unlawful retaliation occurred;
- the prima facie elements of a violation of the whistleblower protection laws;
- the standards of causation relevant to AS 18.60.089;
- the types of evidence that may be relevant to determine causation and to detect pretext (a.k.a. "pretext testing") in whistleblower retaliation cases; and
- other applicable legal principles.

II. Introduction

The AKOSH-enforced whistleblower protection law (a.k.a. AKOSH whistleblower statute AS 18.60.089) prohibits a covered entity or ndividual ("a person") from retaliating against an employee for the employee's engaging in activity protected by the whistleblower protection law. In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of Alaska Statute AS 18.60.089 has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., but-for).

III. Gatekeeping

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

IV. Reasonable Cause

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

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

A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent but does not generally require as much evidence as would be required at trial. Although AKOSH will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, AKOSH does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred.[4] Because AKOSH makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a hearing.

If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, AKOSH will issue a merit ROI recommendation to the Director for review. If the investigation does not establish that there is reasonable cause to believe that a violation occurred, a recommendation of no merit will be issued to the Director for review regarding dismissal.

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

V. Elements of a Violation

An investigation focuses on the elements of a violation and the employer's defenses. The four basic elements of a whistleblower claim are that: (1) Complainant engaged in protected activity; (2) Respondent knew or suspected that Complainant engaged in the protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (a.k.a. nexus).

A. Protected Activity

The evidence must establish that Complainant engaged in activity protected under the AS 18.60.089. Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities. Specific information on the protected activities under the OSH Act/AS 18.60.089 can be found in the desk aid for the OSH Act. [APPENDIX D. For other specific statutes about which the investigator should be familiar in order to recognize and possibly make a referral(s), the desk aid references are found in Chapter 1, Section III, References.] If there is any inconsistency between this general information and the information in the desk aid, follow the more specific information in the desk aid.

1. **Reporting potential violations or hazards to management** – Reporting a complaint to a supervisor or someone with the authority to take corrective action.

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

2. **Reporting a work-related injury or illness** – Reporting a work-related injury or illness to management personnel. In some instances, these injury-reporting cases may be covered through AKOSH/OSHA enforcement under 29 CFR 1904.35(b)(1)(iv). For additional information, refer to the memorandum *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35(b)(1)(iv)*, October 11, 2018, and related memoranda. See also Chapter 2.VIII, *Policies and Practices Discouraging Injury Reporting* for related information.
3. **Providing information to a government agency –** Providing information to a government entity such as OSHA under the OSH Act's section 8(f)OSHA, AKOSH, FMCSA, EPA, NRC, DOE, FAA, SEC, CFPB, NHTSA, FRA, FTA, CPSC, HHS, USCG, PHMSA, EBSA, IRS, FDA, corresponding State agencies, local health department, police department, fire department, etc.
4. **Filing a complaint –** Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to AKOSH or OSHA.
5. **Instituting or causing to be instituted any proceeding under or related to the enforcement of occupational safety and health standards**– Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue (or other issue covered by the OSHA-enforced whistleblower protection laws) and communicating with the media about an unsafe or unhealthful workplace condition.[5] Communicating such complaints through social media may also be considered protected activity, in which case, AKOSH should consult with the AG.
6. **Assisting, participating, or testifying in proceedings relating to occupational safety and health –** Testifying in proceedings, such as hearings before the Occupational Safety and Health Review Board. Assisting or participating in inspections or investigations by agencies such as OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, CFPB, NHTSA, FRA, FTA, CPSC, HHS USCG, PHMSA, EBSA, IRS, or FDA, or State of Alaska counterparts or agencies with delegated authority.
7. **Work Refusal –** AS 18.60.089 generally protects employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected). If the work refusal is determined to be invalid, the investigator must still investigate the other protected activities alleged in the complaint. See 8 AAC 61.480(d), and the relevant desk aid for statute specific considerations. AKOSH will refer to Federal OSHA any work refusal protected activity outside of AS 18.60.089.

Generally, a Complainant only needs a good faith, reasonable belief that the conduct about which the Complainant initially complained - for example, lack of machine guarding– violated or would have violated the substantive (i.e., non-whistleblower) provisions of AS 18.60.010-105. If the Complainant had reasonable belief that there was a violation or hazard, this element has been satisfied.

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

The investigator shall look at protected activity not only under the statute named or described in context by the Complainant but any other OSHA whistleblower statutes where there appears to be coverage (See Appendix D). For example, if a driver of a commercial motor vehicle files a complaint and only mentions section 11(c), the investigator shall make an inquiry/referral to Region 10 OSHA DWPP ARA or RSI.

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

B. Employer Knowledge

The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that Complainant or someone closely associated with Complainant, such as a spouse or coworker, engaged in protected activity.[6] For example, one of Respondent's managers need not know that Complainant contacted a regulatory agency if his or her previous internal complaints would cause Respondent to suspect Complainant initiated a regulatory action.

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

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

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

C. Adverse Action

An **adverse action** is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the

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[6] *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (section 11(c)) (an employer's mere suspicion or belief that an employee had engaged in protected activity was sufficient to sustain an action alleging a violation of the OSH Act's anti-retaliation provision).

employee. The evidence must demonstrate that the Complainant suffered some form of adverse action. An adverse action usually must relate to employment, but under statutory provisions like section 11(c) which do not specify that the retaliation must affect the terms or conditions of employment, adverse action need not be related to employment.[7]

It may not always be clear whether Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the action at issue might have dissuaded a reasonable employee from engaging in protected activity.[8] The investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

Some examples of adverse actions are:

1. Discharge – Discharges include not only straightforward firings, but also situations in which the words or conduct of a supervisor would lead a reasonable employee to believe that he or she had been terminated (e.g., a supervisor's demand that the employee clear out his or her desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge.
2. Demotion
3. Suspension
4. Reprimand or other discipline
5. Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive such that it would dissuade a reasonable person from engaging in protected activity.
6. Hostile work environment – Separate adverse actions that occur over time may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. A hostile work environment typically involves ongoing severe and pervasive conduct, which, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
7. Lay-off,
8. Failure to hire,
9. Failure to promote,

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

[8] *Id*.

10. Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.
11. Failure to recall,
12. Transfer to a different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and shall be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, and reduced opportunities for promotion and training. In such cases, it is important to gather evidence indicating what positions Respondent(s) had available at the time of the transfer and whether any of Complainant's similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments. See Memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers* issued May 11, 2016, for further information.
13. Change in duties or responsibilities,
14. Denial of overtime,
15. Reduction in pay or hours,
16. Denial of benefits,
17. Making a threat,
18. Intimidation,
19. Constructive discharge – The employee quitting after the employer has *deliberately,* in response to protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
20. Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.

D. Nexus

There must be reasonable cause to believe that but for the protected activity the employee would not have suffered the adverse action (i.e., that a nexus exists). See VI.A, below, for the causation standard applicable to 11(c) and AS 18.60.089.
Nexus can be demonstrated by direct or circumstantial evidence. Direct evidence is evidence that directly proves the fact without any need for inference or presumption. For example, if the manager who fired the employee wrote in the termination letter that the employee was fired for engaging in the protected activity, there would be direct evidence of nexus.

Circumstantial evidence is indirect evidence of the circumstances surrounding the adverse action that allow the investigator to infer that protected activity played a role in the decision

to take the adverse action. Examples of circumstantial evidence that may support nexus include, but are not limited to:

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

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on AKOSH's evaluation of the facts and the strength of the evidence supporting both the employer and the employee through "pretext testing" described below (See Chapter 2.VII, *Testing Respondent's Defense*).

VI. Causation Standards

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

A. Cases Under District Court Statutes

The district court statutes, i.e., section 11(c) (consequently AS 18.60.089) simply use the word "because" to express the causation element. The Supreme Court has found that similar language requires the plaintiff to show that the employer would not have taken the adverse action but for the protected activity. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Thus, causation exists in section 11(c) and AS 18.60.089 case only if the evidence shows that Respondent would not have taken the adverse action but for the protected activity. A good explanation of but-for causation is found in *Bostock v. Clay County, Georgia*, U.S., 140 S. Ct. 1731, 1739 (2020). As the Supreme Court ruled, but-for causation analysis directs the courts to change one thing at a time and see if the outcome changes; if it does, there is but-for causation. This test does

not require that the illegal motive (in whistleblower cases, the protected activity) be the sole reason for the adverse action. It also does not require that an illegal motive (protected activity) be the primary reason for the adverse action. *Id.* at 1739. The but-for causation test is more stringent than the contributing factor or the motivating factor tests. Even so, it does not require a showing that the protected activity was the sole reason for the adverse action, only that it was independently sufficient. Id.

B. Cases Under Administrative Statutes are not relevant to AKOSH-however the examples and description may be useful for the investigator to articulate the analysis in the ROI.

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

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

   Under the *contributing factor* standard, Complainant therefore need only demonstrate that his or her protected activity contributed *in any way* to the adverse action; the protected activity does not need to be the sole or even predominant cause of the adverse action.

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

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

   a. There is reasonable cause to believe that protected activity was a contributing factor in the employer's decision, and Respondent has not demonstrated by clear and convincing evidence that Respondent would have taken the same adverse action even if Complainant had not engaged in protected activity: thus, the complaint is meritorious; or

b. There is reasonable cause to believe that protected activity was a contributing factor in the employer's decision, but Respondent has demonstrated by clear and convincing evidence that Respondent would have taken the same adverse action even in the absence of the protected activity, so the complaint must be dismissed; or

c. There is no reasonable cause to believe that the protected activity was a contributing factor in the decision to take the adverse action, and therefore the complaint must be dismissed.

2. Motivating Factor Statutes

Under the six environmental statutes, OSHA uses a *motivating factor* standard of causation.[9] A *motivating factor* is a substantial factor in causing an adverse action. It is a higher standard of causation than the contributing factor standard of causation, but a lower standard of causation than the "but for" standard.

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

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

a. There is reasonable cause to believe that protected activity was a motivating factor in the employer's decision, and Respondent has not demonstrated that Respondent more likely than not would have taken the same adverse action even if Complainant had not engaged in protected activity: thus, the complaint is meritorious; or

b. There is reasonable cause to believe that protected activity was a motivating factor in the employer's decision, but Respondent has demonstrated that Respondent more likely than not would have taken the same adverse action even in the absence of the protected activity, so the complaint must be dismissed; or

c. There is no reasonable cause to believe that the protected activity was a motivating factor in the decision to take the adverse action, and therefore the complaint must be dismissed.

[9] *DeKalb County v. U.S. Dep't of Labor*, 812 F.3d 1015, 1021 (11th Cir. 2016).

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

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

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

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

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

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

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

- Did the Complainant actually engage in the misconduct or unsatisfactory performance that the Respondent cites as its reason for taking adverse action? If the Complainant did not engage in the misconduct or unsatisfactory performance, does the evidence suggest that the Respondent's actions were based on its actual but mistaken belief that there was misconduct or unsatisfactory performance?
- Did the Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?

- Did the Complainant's productivity, attitude, or actions change after the protected activity?
- Did the Respondent's behavior toward the Complainant change after the protected activity?
- Did the Respondent discipline other employees for the same infraction and to the same degree?

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

VIII. Policies and Practices Discouraging Injury[10] Reporting

There are several types of workplace policies and practices that could discourage injury reporting and thus violate section 11(c) and AS 18.60.089. Some of these policies and practices may also violate OSHA's recordkeeping regulations at 29 CFR 1904.35 where there is coverage under the OSH Act. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

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

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

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

Reporting an injury is a protected activity. This includes filing a claim of injury presuming the employer has previously been made aware of the injury and failed to report the injury under a worker's compensation statute (AS 23.30.070). Disciplining all employees who are injured, regardless of fault, is a discriminatory policy. Discipline imposed under such a policy against an employee for reporting an injury is therefore a direct violation of section 11(c) and AS 18.60.089. In addition, such a policy is inconsistent with the employer's obligations under 29 CFR 1904.35(b), and where it is encountered in an OSH Act case, a referral for a recordkeeping investigation will be made.

[Notes for investigator reference: Employees may experience retaliation under one set of circumstances that give way to remedy under multiple Alaska Statutes. Employees who are provided relief under one statute are not presumed to be precluded from seeking relief

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

under another applicable statute (i.e., AS 18.60.089 and AS 23.30.247). Where AKOSH encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.]

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

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, most especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating section 11(c) and AS 18.60.089. AKOSH recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statutes, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

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

D. Discipline for Violating Safety Rule

In some cases, an employee is disciplined after disclosing an injury purportedly because the employer concluded that the injury resulted from the employee's violation of a safety rule. Such cases warrant careful evaluation of the facts and circumstances. AKOSH encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. A careful investigation is warranted, however, when an employer might be attempting to use a work rule as a pretext for discrimination against an employee for reporting an injury. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer shall also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully," may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such

general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Therefore, a similarly situated evidence analysis is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section 11(c) and AS 18.60.089.

Chapter 3

INTAKE AND INITIAL PROCESSING OF COMPLAINTS

I. Scope

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

II. Incoming Complaints to AKOSH

A. Filing Options

1. Who may file

Any employee[11] covered by AS 18.60.089, the Alaska State Plan, and the Jurisdiction Guide, including any applicant for employment or former employee or his or her authorized representative (Complainant), is permitted to file a whistleblower complaint under AS 18.60.089 with AKOSH or under 11(c) with OSHA. [Please see the relevant statute-specific desk aid for further information when Complainant discusses employment situations that may involve other applicable statutes that warrant suggesting they dual file with OSHA. The WB inquiry email sent by investigator includes discussion on dual filing.]

2. How Complainant may file

No specific form of complaint is required to capture initial contact with the agency which may be by email, walk-in, phone, text, or referral. The complaint may be filed orally or in writing and must be filed with AKOSH within 30 days after the discriminatory action per 8 AAC 61.500 Filing discrimination complaints. (Materials indicating the date the complaint was filed must be retained for investigative use. Such materials include voice mail messages, AKOSH Event Contact Forms, envelopes bearing postmarks or FedEx tracking information, emails, and fax cover sheets.) Referrals may be internal from AKOSH, DOLWD, or another agency.

[11] The term "employee" includes an employee as defined in AS 18.60.105; may, in the department's discretion, include an applicant for employment, as required by 29 C.F.R. 1977.5(b); and need not be employed by the discriminator when engaging in the protected activity 8 AAC 61.470(a).

AKOSH will accept the complaint in any language. (AKOSH Staff: Use the Language Link translation service if staff do not possess competency in the language of the complainant.)

A complaint may be filed orally or in writing.[12]

a. **Written Complaints**

AKOSH accepts written complaints via email, fax, delivery (including USPS, FedEx, UPS, etc.), and walk-in. Federal OSHA accepts electronically filed complaints at https://www.osha.gov/whistleblower/WBComplaint.html, and if they are determined to be within AKOSH jurisdiction, the complaint will be referred to AKOSH by OSHA Region 10. OSHA also accepts written complaints delivered by other means; again, if they are determined to be within AKOSH jurisdiction, they will be referred to AKOSH.

b. **Oral Complaints**

AKOSH accepts oral complaints at 907-269-4940, or other lines, if a Complainant happens to have an Officer's direct dial line, or during an interview as part of an Enforcement activity. For oral complaints, when a complaint is received, the receiving officer/staffer must accurately record the pertinent information on an Event Form, WB Screening Form, WBss Inquiry tab, or another appropriate intake/interview worksheet and immediately forward it to the Chief of AKOSH Enforcement, who may assign it to an investigator or designated whistleblower e-mail box to complete the filing.

Whenever possible, the minimum complaint information on the intake worksheet shall include for each Complainant and Respondent: full name, mailing address, email address, and phone number; date of filing; and date of the adverse action.

In every instance, the date of the initial contact must be recorded.

B. **Receiving Complaints**

All complaints received by AKOSH that relate to a Complainant working in Alaska must be logged in AKOSH's Whistleblower spreadsheet ("WBss") and subsequently into the OSHA Information System (OIS). Even those complaints that on their face are untimely or have been wrongly filed with AKOSH/OSHA (e.g., a complaint alleging racial discrimination) must be logged. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets. Per government recordkeeping rules, electronically scanned copies of these documents are acceptable. Complaints are usually received at the Anchorage AKOSH office but may be referred by OSHA Region 10 or Anchorage Office, DOLWD Commissioner, or other government agencies.

[12] It is AKOSH practice to reduce all orally filed complaints to writing.

C. **Complaints Forwarded by Other Government Agencies**

When AKOSH receives a complaint alleging retaliation in violation of the whistleblower statute that an employee originally filed with another agency, AKOSH must contact the employee to verify whether the employee wishes to pursue a retaliation complaint with AKOSH. In determining whether such a complaint is timely, AKOSH will first evaluate whether the referring agency or AKOSH has received the complaint within the applicable filing period. If AKOSH has received the complaint within the filing period, the complaint is timely and will be handled normally.

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

1. **If the referring agency cannot award personal remedies** for the retaliation alleged in the complaint, AKOSH will regard the complaint as mistakenly filed in the wrong forum and, under equitable tolling principles (see Chapter 3.III.D.4.d, *Tolling (Extending) the Complaint Filing Deadline*), will regard the date of filing with the referring agency as the date of filing.
2. **If the referring agency can award personal remedies** to the employee for the retaliation alleged in the complaint, AKOSH will regard the complaint as untimely (unless there is some other basis for equitable tolling (see Chapter 3.III.D.4.d, *Tolling (Extending) the Complaint Filing Deadline*)). Alaska State Commission for Human Rights (ASCHR) and National Labor Relations Board (NLRB) are examples of agencies that in some circumstances may be able to provide personal remedies for unlawful retaliation alleged in a whistleblower complaint.

D. **Complaint Requirements**

The complaint, supplemented as appropriate with information obtained in the screening interview (described below) and any additional information[13], should ultimately contain the following[14]:

1. Complainant's name and contact information, and if applicable, name and contact information of Complainant's representative. If represented, AKOSH should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.
2. Respondents' name(s) and contact information (if multiple Respondents, then all contact information should be present).
3. Worksite address (if different from employer address).

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[13] The initial contact/screening interview is followed up via email, fax or USPS mail with AKOSH forms 14, 15 and 126 as well as other informative material (e.g., dual filing right; administrative closure and Complainant option to agree or disagree-see Chapter 3.IV.A, Administrative Closures). The Complainant initially is provided 10 working days to submit these forms to AKOSH, however this is not a mandatory process nor timeframe, as some Complainants in Alaska or elsewhere, have limited resources, including technology, or reading/writing abilities.

[14] AKOSH typically collects this information on AKOSH 14 and/or AKOSH 15.

4. The current or final job Complainant performed for Respondent(s).
5. An allegation of retaliation for having engaged in activity that is at least potentially protected by an AKOSH/OSHA whistleblower protection statute (i.e., a *prima facie* allegation). That is, the complaint, supplemented as appropriate by the screening interview and any additional information, should contain an allegation of:
    a. Some facts that could constitute protected activity under an AKOSH/OSHA whistleblower statute;
    b. Some facts indicating that the employer knew or suspected that Complainant engaged in protected activity;
    c. Some facts indicating that an adverse action occurred and the date of the action; and
    d. Some facts indicating that the adverse action was taken at least in part because of the protected activity.

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

- If the Complainant provides the missing information, AKOSH will either docket or refer the complaint to OSHA, or administratively close the complaint if Complainant agrees that the information provided does not meet *prima facie*.
- If the Complainant does not provide the missing information within a reasonable amount of time (usually 10 working days),[15] AKOSH may **administratively close** the complaint. See Chapter 3.IV.A.2 below for the requirements to administratively close a complaint in these conditions.
    - If the Complainant resumes communication with AKOSH after a complaint has been administratively closed and indicates a desire to pursue the complaint, see Chapter 3.IV.A.2.c for instructions on how to proceed.

III. Screening Interviews and Docketing Complaints

A. Overview

AKOSH is responsible for properly determining whether a complaint is appropriate for investigation. All complaints must be evaluated ("screened") before they can be docketed. See Chapter 8.II.E.1, *Referral of Private-Sector Complaints*, for more information regarding complaints that are to be handled by State Plans.

Complaints will be docketed for investigation if the complaint (as supplemented by the screening interview and any additional information-see footnotes 14 and 15) complies with

[15] In some circumstances, a reasonable period of time may be more than 10 working days; for instance, if medical, technology, remoteness with limited communication exchange, command of English, effects of trauma, or other issues prevented Complainant from responding to AKOSH's inquiry within 10 working days.

statutory time limit of 30 days beyond the most recent Adverse Action(s) (including time limits as modified by equitable tolling), meets coverage requirements, and sufficiently sets forth all four elements of a *prima facie* allegation.

Complaints that are not filed within statutory time limits (including time limits as modified by equitable tolling), fail to meet coverage requirements; or do not adequately contain all four elements of a *prima facie* allegation will be **administratively closed** if the Complainant agrees. If the Complainant does not agree to administrative closure, the complaint may be docketed and dismissed with notification of the right to object or request review per 8 AAC 61.530(b) provided to them. See Chapter 3.IV.A, *Administrative Closures*, below for more information.

The Complainant need not explicitly state the statute(s) implicated by the complaint. AKOSH/OSHA is responsible for properly determining the statute(s) under which a complaint is filed. For example, a truck driver may mistakenly file a complaint under STAA regarding whistleblower activities that are effectively covered by an environmental statute and not STAA. In another example, the Complainant may cite only one OSHA whistleblower statute, such as section 11(c), when multiple statutes may apply. If a complaint indicates protected activities under multiple statutes, AKOSH will recommend that the Complainant dually files with Federal OSHA and AKOSH with the explanation that it is important to process the complaint in accordance with the requirements of each of those statutes in order to preserve the parties' rights under each individual statute, and that AKOSH only investigates complaints under AS 18.60.089.

B. **Complaint/Case Assignment**

It is the Chief of Enforcement and the investigator's responsibility to ensure that the initial complaint is evaluated to determine whether all elements of a *prima facie* allegation are addressed, the complaint is timely, and AKOSH has coverage.

> The Chief of Enforcement will approve the case for docketing by signing the Respondent's Notification Letter. It is recommended that one investigator handle the case from screening interview to closing conference. While the case assignment may happen before or after the screening interview, the case must be assigned to a investigator no later than the completion of the screening. Initial Contact/Screening Interviews

As soon as possible upon investigator receipt of a complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may be memorialized by making an entry in the Case Matrix spreadsheet, within which an *Allegation Statement* is developed. AKOSH must contact the Complainant to confirm the Allegation Statement (information stated in the complaint) and, if needed, to conduct a (supplemental) screening interview to obtain additional information. The investigator must attempt to interview all Complainants in person, by phone, or video conferencing. Whenever possible, the evaluation of a complaint should be completed by the investigator whom the Chief of Enforcement assigns, or anticipates assigning, to the case. If the investigator determines before or during the screening interview that the complaint is likely to be docketed, the investigator may conduct a more detailed Complainant interview at that time. See Chapter 4.IX, *Complainant Interview and Contact*, for more information.

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

C. **Evaluating Whether a *Prima Facie* Allegation Exists and Other Threshold Issues**

As noted above, the primary purpose of the screening interview is to ensure that (a) a *prima facie* allegation of unlawful retaliation exists and (b) that the complaint is timely and that coverage requirements have been met. During the complaint screening process, it is important to confirm that the complaint was timely filed and that a *prima facie* allegation has been made under AS 18.60.089. Other threshold issues may also need to be verified depending on the circumstances. The following is a list of the threshold issues that most commonly arise when evaluating the sufficiency of a whistleblower complaint:

1. **Respondent being a Tribal Entity**

   In Alaska, this is of particular concern, as some Tribal Health entities are regulated by the Federal government, not by the State of Alaska. If the Respondent is not a Tribal Health entity, there may be future jurisdiction challenges that come up in the Respondent's Position Statement; if the Respondent asserts sovereignty, LAW should be consulted before proceeding further with the investigation. Therefore, whether the Respondent Tribal entity is engaged in intramural activities[16] is essential to make inquiries with the Complainant during screening interview.

2. **Coverage by Statute**

   The investigator must ensure that Complainant and Respondent(s) are covered under AS 18.60.089. [NOTE: To assist the AKOSH investigator in making a referral to OSHA, detailed information regarding coverage under each statute can be found in the statute and applicable regulations, and coverage requirements are summarized in the DWPP Whistleblower Statutes Summary Chart and in the statute-specific desk aids contained in Appendix D]. It may be necessary for the investigator to consult with the Chief of Enforcement and/or LAW in order to identify and resolve issues pertaining to coverage. Occasionally, AKOSH may need further information from the Respondent to verify coverage. In these circumstances, AKOSH may docket a complaint based on the Complainant's allegation of coverage in order to obtain further information from the Respondent.

3. **Timeliness of Filing**

   AKOSH Whistleblower complaints must be filed within a specified statutory time frame – 30 days, which generally begins when the adverse action takes place. The first day of the time period is the day after the alleged retaliatory decision is <u>both made and communicated</u> to the Complainant. Generally, the date of the postmark,

[16] The term 'intramural activities' is from p. 7, <u>Guide to Jurisdiction in OSHA, Region 10</u>

facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at a Department of Labor office will be considered the **date of filing**. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if the AKOSH Office is closed, then the next business day will count as the final day.

Table III-1: Specific statutes and their filing deadlines	
Statute	**Filing Deadline (Calendar Days)**
OSH Act section 11(c); AKOSH AS 18.60.089	30 days
CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA	30 days
ISCA	60 days
AHERA, AIR21	90 days
STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA, MAP-21, TFA	180 days

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

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

a. The employer has actively concealed or misled the employee regarding the existence of the adverse action. Examples of concealed adverse actions would be:

- After the employee engaged in protected activity, the employer placed a note in the personnel file that will negate the employee's eligibility for promotion but never informed the employee of the notation; and
- The employer purports to lay off a group of employees, but immediately rehires all the employees who did not engage in protected activity.

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

b. The employee is unable to file due to a debilitating illness or injury which occurred within the filing period. This tolling is usually more appropriate in cases under statutes with short filing periods, e.g., 30 days, than in cases under statutes with long filing periods, e.g., 180 days.

c. The employee is unable to file due to a major natural or man-made disaster, such as a major snowstorm or flood, which occurred during the filing period. Conditions should be such that a reasonable person, under the same

circumstances, would not have been able to communicate with OSHA within the filing period. This tolling is usually more appropriate in cases under statutes with short filing periods, e.g., 30 days, than in cases under statutes with long filing periods, e.g., 180 days.

d. The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by AKOSH with another agency that does not have the authority to grant individual relief (e.g., filing a retaliation complaint stemming from a workplace injury with the Division of Workers' Compensation). See Chapter 3.II.C, *Complaints Forwarded by Other Government Agencies*, above.

e. The employer's acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights. For example, tolling may be appropriate when an employer had repeatedly assured Complainant that he would be reinstated so that Complainant reasonably believed he would be restored to his former position. However, the mere fact that settlement negotiations were ongoing between Complainant and Respondent is not sufficient for tolling the time for filing a whistleblower complaint. *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010).

f. AKOSH will recognize private agreements between the employer and employee that expressly toll (extend) the filing deadline. The agreement must be (a) in writing, (b) operate to extend the deadline to file a whistleblower complaint, and (c) reflect the mutual assent of both parties. The agreement will only toll the limitations period with respect to the parties that are covered by the agreement.

g. Conditions which do not justify extension of the filing period include:

   i. Ignorance of the statutory filing period.

   ii. Filing of unemployment compensation claims.

   iii. Filing a workers' compensation claim.

   iv. Filing a private lawsuit.

   v. Filing a grievance or arbitration action.

   vi. Filing a retaliation complaint with another agency that has the authority to grant the requested relief.

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

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

A. Administrative Closures

1. Administrative Closures with Complainant's Agreement

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

a. Obtain Complainant's agreement: The investigator will notify Complainant, verbally or in writing, that the complaint does not meet threshold requirements for investigation and that, if Complainant agrees, AKOSH will administratively close the case. The notification can be done as part of a screening interview and should include:

   i. A brief explanation of the reason(s) the complaint cannot be investigated and the opportunity for the complainant to provide any pertinent information that might lead AKOSH to docket the case;

   ii. An explanation that if the case is administratively closed, the complaint will not be forwarded to Respondent and Complainant will not have the opportunity to object to or request review of AKOSH's decision; and

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

b. Send Complainant confirmation of the administrative closure or dismissal of the complaint and document the administrative closure in the case file:

   i. **If Complainant agrees**, AKOSH will send (email or mail, delivery confirmation required) an administrative closure letter to Complainant, stating that Complainant has agreed to the administrative closure.

   ii. **If Complainant disagrees** with the administrative closure, AKOSH will docket and dismiss the case.

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

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

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

   a. Reasonable attempts include attempting to contact the Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information and allowing Complainant 48 hours to respond. In the case of phone calls, attempts should be

made at different hours of the day. AKOSH's attempts to contact Complainant must be documented in the case file.

b. AKOSH will inform the complainant that it has administratively closed the complaint and that if Complainant wishes to pursue the complaint, Complainant should contact AKOSH within 10 days. Where possible, this notification should be done in writing and sent by methods that allow AKOSH to confirm receipt. The notification will specify direct contact information for the investigator including: mailing address, telephone number, and email.

c. If the Complainant contacts AKOSH and indicates a desire to pursue the complaint, OSHA will reopen the case, complete the screening interview, and either docket the case or seek Complainant's permission to administratively close the case if it does not meet the necessary threshold requirements.

   i. If Complainant contacts the investigator within 10 days, the original filing date will normally be used.

   ii. If Complainant contacts the investigator after 10 days, but still within the statutory filing period, the date of Complainant's new response may be used as the filing date.

   iii. If Complainant contacts the investigator after 10 days and the statutory filing period has ended, the investigator will, in the screening interview, determine if (1) Complainant received the letter, and (2) if circumstances exist that could excuse the Complainant's failure to pursue their case in a timely manner. The investigator shall then consult with the Chief of Enforcement to determine whether the complaint should be reopened or if the complaint should remain closed due to Complainant's failure to pursue their case in a timely manner. This determination is fact-specific to each complaint. The original filing date must be used.

3. **Administratively closed complaints will not be forwarded to the named respondent.**

4. **Documenting Administrative Closures**

   As noted above, the decision to administratively close a complaint and communications with Complainant related to administratively closing a complaint must be appropriately documented. AKOSH must:

   a. Appropriately enter the administrative closure in Whistleblower spreadsheet.

   b. Preserve, in the same manner as investigation case files and in accordance with the current Agency records retention schedule, a copy of the administrative closure letter and the original complaint, along with any other related documents such as emails and interview statements/recordings. Typical documents to be included in the screening file record are:

      i. The initial complaint;

      ii. Complaint assignment memo or email;

      iii. All internal and external emails and other correspondence;

iv. Documentation of contacts / attempted contacts with Complainant and supervisor's approval of actions taken (e.g., case activity log);

v. Complainant interview (e.g., recording, statement, or memo to file);

vi. Administrative closure letter to Complainant; and

vii. OITSS-Whistleblower Summary Page

B. Docket and Dismiss

If the complaint is not administratively closed (i.e., because Complainant does not agree) and the complaint does not meet the threshold requirements, AKOSH will docket and dismiss the complaint without conducting an investigation. In those cases, AKOSH will follow its case disposition procedures. See Chapter 4.VI, Lack of Cooperation/ Unresponsiveness, and Chapter 5 for more information on non-merit findings procedures.

Notification: In docket and dismiss cases, Complainant and Respondent will not receive notification letters. Instead, the Complainant will be sent a letter, which will indicate that the case has been received and docketed, briefly explain the basis for the dismissal, and will include a description of the applicable rights of Complainant to file objections to, or request review of, the dismissal.

C. Election Not to Proceed, a.k.a. Withdrawal Before Docketing

When Complainant elects not to pursue his or her complaint before docketing, the investigator will document Complainant's withdrawal request in the case file and administratively close the complaint. Follow administrative closure procedures beginning at Chapter 3.IV.A.1.a above. The administrative closure letter will indicate Complainant did not wish to pursue the case.

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

If an employee files a complaint with AKOSH and the safety or health activity appears to have been undertaken in concert with or on behalf of co-workers, including, but not limited to, the filing of a grievance under a collective bargaining agreement, the following procedures will be followed:

A. If the complaint is timely, AKOSH shall inform the employee of the additional right to file a charge with the NLRB, as well as provide contact information for the appropriate NLRB Regional Office.

B. If the complaint is untimely, AKOSH will advise Complainant that he or she may file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than AKOSH's (30 days). AKOSH personnel should then give Complainant the contact information for the appropriate NLRB Field Office.

VI. Referral of United States Postal Service (USPS) Complaints

AKOSH personnel should advise Complainants who are USPS employees to contact Federal OSHA.

VII. Docketing

The term "to docket" means to open a case for an investigation, formally notify both parties in writing of AKOSH's receipt of the complaint and intent to investigate, and assignment of a case number. [Alternatively, a case will be docketed and dismissed if, for example, it is untimely or lacks coverage or a *prima facie* allegation and the Complainant does not consent to the administrative closure of the complaint. See Chapter 3. IV.A.1.b.ii – iii, and 3.IV.B, *Docket and Dismiss*, above.]

The appropriate case file identification format is *"Local Case Number*[space] *Complainant v. Respondent."*

AKOSH designates the case number when a new complaint is entered into the WBss [open cases TAB]. All case numbers follow the FY-XXX format, where FY designates the Federal Fiscal Year and XXX is a sequential (or XXXX, when four digits are appropriate).

- This case numbering format applies only to AKOSH records.

Cases involving multiple Complainants may be docketed under separate case numbers or may be consolidated into a single case, depending on how closely related the prima facie elements of each Complainant are. However, it is easier to account for case metrics if separate case numbers are assigned.

Named Respondents

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

Under some statutes, including section 11(c) (and AHERA, ISCA, STAA, SPA, SOX, FRSA, and NTSSA), an individual company official who carries out the retaliatory adverse action may be liable if he or she has the authority to hire, transfer, promote, reprimand, or discharge Complainant. *Anderson v. Timex Logistics*, 2014 WL 1758319 (ARB 2014).

VIII. Notification Letters

A. Complainant

As part of the requisite docketing procedures when a case is opened for investigation, a notification letter will be sent notifying Complainant of the complaint's case number and

the assigned investigator. The contact information of an investigator will be included in the docketing letter. The letter will also request that the parties provide each other with a copy of all submissions they make to AKOSH related to the complaint. The letter packet will include at minimum:

- A copy of the Respondent's Notification package, which includes a copy of the whistleblower complaint, supplemented as appropriate by a summary of allegations added during the screening interview, Complainant evidence supporting complaint, and AKOSH/OSHA forms.
- A Designation of Representative/Entry of Appearance Form to allow Complainant the option of designating an attorney or other official representative.
- Information on opportunity for early resolution (contained within the text of the Notification letter signed by the Chief of Enforcement).
- The Complainant will be notified using a method that permits AKOSH to confirm receipt. This includes but is not limited to email or U.S. mail, delivery confirmation required, or hand delivery.

B. Respondent

At the time of docketing, or as soon as appropriate if an inspection is pending, a notification letter will be sent notifying Respondent that a complaint alleging unlawful retaliation has been filed by Complainant and requesting that Respondent submit a written position statement. The letter will also request that the parties provide each other with a copy of all submissions they make to OSHA related to the complaint. The letter packet will include at minimum:

- A copy of the whistleblower complaint, supplemented as appropriate by a summary of allegations added during the screening interview, and any AKOSH/OSHA forms.
- A Designation of Representative Entry of Appearance Form to allow Respondent the option of designating an attorney or other official representative.
- Information on opportunity for early resolution.

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

Prior to sending the notification letter, the Chief of Enforcement should determine whether it appears from the complaint and/or the initial contact with Complainant that an inspection/ investigation may be pending with AKOSH. If it appears that an inspection/investigation may be pending, the Chief of Enforcement should ensure that the notification letter will not be issued until such inspection/investigation has commenced in order to avoid giving advance notice of a potential inspection/investigation.

IX. Early Resolution

AKOSH will work to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact Respondent soon after completing the intake interview and docketing the

complaint if he or she believes an early resolution may be possible. However, the investigator must first determine whether a safety/health inspection is pending with AKOSH. The investigator must wait until the commencement of the safety and health inspection before contacting Respondent.

X. Case Transfer

If a case file must be transferred to another investigator, whether within AKOSH, the transfer must be documented in the case file and the parties notified. Only the Chief of Enforcement and the Assistant Chief of Enforcement are authorized to transfer case files. Every attempt to limit the number of transfers should be made.

In the event a case is reassigned, the Supervisor will send notification to the complainant and respondent introducing the new investigator including contact information. The complainant will be allowed ten days after the receipt of notification to respond indicating whether they wish to proceed or withdraw their complaint. If the complainant does not respond to the investigator in that timeframe, the case will be Administratively Closed for lack of contact. Notification must be sent (either by mail, third-party, or electronic means) in a way that provides delivery confirmation.

Chapter 4

CONDUCT OF INVESTIGATION

I. Scope

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

II. General Principles

A. Reasonable Balance

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

B. Investigator as Neutral Party

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

C. Investigator's Expertise

The investigator, not Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation of AS 18.60.089. The investigator will review all relevant documents and interview relevant witnesses in order to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of Complainant, Respondent, and witnesses.

D. Reasonable Cause to Believe a Violation Occurred

When AKOSH believes that there may be reasonable cause to believe that a violation occurred (i.e., the case may be a merit case), AKOSH should consult informally with the Chief of Enforcement in order to ensure that the investigation captures as much relevant information as possible for LAW to evaluate whether the case is suitable for litigation. See Chapter 2.IV, *Reasonable Cause*, for more information.

E. Chief of Enforcement Review is Required

Chief of Enforcement review and approval are required before docketed case files can be closed. The Director must agree that closure is appropriate in that the Director signs Determination letters, which accompany case closures through settlement, dismissal, or merit finding, and are documented in the case file. Case closures by withdrawal or administrative closure do not require the Director's signature on a Determination letter.

For ongoing cases, the Chief of Enforcement shall establish a regular recurring meeting, specific to whistleblower investigations, to discuss upcoming cases, pending merit determinations, or legal issues regarding active investigations. OSHA Region X Whistleblower Protection leadership may also be available to provide technical assistance.

III. Case File

Upon assignment, the investigator will begin preparing the investigation's case file. A standard case file contains the initial complaint or the R-10 referral email and attachments, AKOSH intake worksheet, all documents received or created during the intake and evaluation process (including screening notes and the assignment documentation), copies of all required opening letters, and any original evidentiary material initially supplied by Complainant or, following docketing/notification, the Respondent. All evidence, records, administrative material, photos, recordings, and notes collected or created during an investigation must be organized and maintained in the case file according to the WB case file Table of Contents (TOC).

A. **File Format**

1. **Electronic Case Files**

AKOSH utilizes electronic case files stored on the agency's shared drive.

a. **Organization of Case Files**

Case file materials should be organized within each case file by exhibit. The exhibit folders are organized by numerical exhibits, which correspond to the evidentiary exhibits traditionally stored on the right side of paper case files, and alphabetical exhibits, which correspond to the administrative materials traditionally contained on the left side of

paper case files. Any internal emails or communication that AKOSH has within the agency, within DOL, or to another government agency (such as a sharing letter) should be within Exhibit B (Government Correspondence). Unused folders should not be deleted.

Exhibit 1 (Complaint)
Exhibit 2 (Interviews)
Exhibit 3 (RP Position Statement and Documents)
Exhibit 4 (Complainant Documents)
Exhibit 5 (Investigator Notes)
Exhibit 6 (Activity Log)
Exhibit A (Notifications)
Exhibit B (Government Correspondence)
Exhibit C (Complainant Correspondence)
Exhibit D (Respondent Correspondence)
Exhibit E (Outside Correspondence)
Exhibit F (Determination Letters)
Exhibit G (OIS Case Summary)
Exhibit H (Appeal)

b. **Exhibit Naming Protocol**

Individual documents should be saved within specific exhibit folders in Adobe PDF format; however, Word documents are allowed in specific circumstances. Document names will include an exhibit designation, as well as a concise description about the document or file, as illustrated below:

- 1.1 – AKOSH-14
- 2 – Complainant [date] Interview Summary
- 3.2 – Respondent DOR
- 3.3 – Respondent Position Description
- 3.4 – Respondent Exhibit A
- 3.5 – Respondent Exhibit B

2. **Paper Case Files**

Paper case files exist for older cases, although they may be duplicated or augmented by electronic versions. New paper case files will not be created for cases as of 2021. For existing paper files, care should be taken to keep all material securely fastened in the file folder to avoid loss or damage and to enable scanning of the file into digital format. Prior to case closure, the file must be digitized.

B. **Documenting the Investigation**

With respect to all activities associated with the investigation of a case, investigators must fully document the case file to support their findings. A well-documented case file assists reviewers of the file. Relevant documentation should be entered into the Evidence Log, housed in the Investigator Notes folder (Exhibit 5).

C. **Case Activity Log**

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

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

D. **Investigative Correspondence**

Templates for complaint notifications, Director's Findings, and other correspondence are available on the agency's shared drive and/or OIS. The templates will be used to the extent possible. Correspondence must be sent (either by mail, third-party, or electronic means) in a way that provides delivery confirmation. Delivery receipts will be preserved in the case file. Findings in all cases may be sent by electronic means on LSS letterhead under the Director's signature.

E. **Investigative Research**

It is important that investigators adequately plan for each investigation. The investigator should research whether there are prior or current retaliation and/or safety and health cases related to either Complainant or Respondent. Such information normally will be available from OITSS-Whistleblower, OIS, and the Chief of Enforcement. Examples of information sought during this pre-investigation planning may include copies of safety and health complaints filed with OSHA or AKOSH, inspection reports, and citations. Relevant research results must be documented in the case file.

A. Referrals and Notifications

Allegations of safety and health hazards, or other regulatory violations, will be referred promptly to the Chief of Enforcement. This includes new allegations that arise during witness interviews. Allegations of environmental releases covered by environmental laws, for example, will be referred to the appropriate environmental agency as soon as possible.

A. Other Agencies

Appropriate referrals may be made to other agencies. At times, information may be sought from other agencies, for example, police reports.

B. Coordination with Other Agencies

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

C. Other Legal Proceedings

The investigator should also gather information concerning any other current or pending legal actions that Complainant may have initiated against Respondent(s) related to the protected activity, the adverse action and/or other aspects of Complainant's employment with Respondent, such as lawsuits, arbitrations, and grievances.[17] Obtaining information related to such actions could result in the postponement of the investigation or deferral to the outcome of the other proceedings. See 29 CFR 1977.18 and Chapter 4.XI, *Postponement/Deferral*.

V. Amended Complaints

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

[17] In some circumstances, such as complaints filed with another agency or an action under the Alaska State Commission for Human Rights (ASCHR), the confidentiality of the proceeding may be protected by statute and the investigator may not be able to obtain information about the proceeding unless they get it from the parties.

A. Form of Amendment

No specific form of amendment is required. A complaint may be amended orally or in writing. AKOSH will reduce oral amendments to writing. If the Complainant is unable to file the amendment in English, AKOSH will accept the amendment in any language for which AKOSH's translation service provides translation.

B. Amendments Filed within Statutory Filing Period

At any time prior to the expiration of the statutory filing period (30 days) for the original complaint, a complainant may amend the complaint to add additional allegations and/or additional Respondents.

C. Amendments Filed After the Statutory Filing Has Expired

If amendments are received after the 30-day period for the original complaint has expired, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional Respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment, provided that the investigation remains open (refer to paragraph E, below). 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 AS 18.60.089, or if the amendment(s) relate to another statute(s), a prompt referral to OSHA should be made, either by the investigator agency to agency, or directing the Complainant to OSHA.

D. Processing of Amended Complaints

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

E. 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. A new allegation should also be docketed as a new complaint when an amendment to the original complaint would unduly delay a determination of the original complaint.

F. Deceased Complainant

If the Complainant passes away during the AKOSH investigation, AKOSH shall consult the Complainant's designated representative or a family member to determine whether the Complainant's estate will continue to pursue the retaliation claim. In such circumstances, the Complainant's estate will be automatically substituted for Complainant. The investigator should consult with the Chief of

Enforcement regarding potential remedies and other pertinent issues as needed in these circumstances.

VI. Lack of Cooperation/Unresponsiveness

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

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

A. Dismissal Procedures for Lack of Cooperation/Unresponsiveness

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

1. Telephone the Complainant during normal work hours and contact them by email. Notify the Complainant that they are expected to respond within 48 hours of receiving this phone message or email.
2. If the Complainant fails to contact the investigator within 48 hours, AKOSH will notify the Complainant in writing that it has unsuccessfully attempted to contact them to obtain information needed for the investigation and that Complainant must contact the investigator within 10 days of delivery of the correspondence. The Complainant will be notified using a method that permits AKOSH to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. The notification will specify direct contact information for the investigator including mailing address, telephone number, and email address. If no response is received within 10 days, the supervisor may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the communication must be preserved in the file.

3. The Complainant has an obligation to provide AKOSH with all available methods of contact, including a working telephone number, email address, or mailing address of record. The Complainant also has an obligation to update AKOSH when contact information changes. AKOSH may dismiss a complaint for lack of cooperation if AKOSH is unable to contact the Complainant due to the absence of up-to-date contact information. It should be noted in the case file if the Complainant lives and/or works in a remote section of Alaska with limited, or no access to one or more of the methods of contact.
4. Consistent with the applicable regulations, when AKOSH dismisses a case for lack of cooperation, an abbreviated Director's Findings letter, with an explanation of the right to request a review by the Commissioner per 8 AAC 61.530(b) will be provided to the Complainant.

VII. On-site Investigation, Telephonic and Recorded Interviews

At the beginning of all interviews, the investigator will inform the interviewee in a tactful and professional manner that AS 18.60.095(f) makes it a criminal offense to knowingly make a false statement or misrepresentation to a government representative during an investigation. If the interview is recorded electronically, this notification and the interviewee's acknowledgment must be on the recording.

The Respondent's designated representative generally has the right to be present for all interviews with currently employed managers, but interviews of non-management employees are to be conducted in private.[18] The witness may request that an attorney or other personal representative be present at any time and, if the witness does so, the investigator should obtain a signed "Entry of Appearance" form and include it in the case file. Witness statements and evidence may be obtained by telephone, mail, or electronically.

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

VIII. Confidentiality

A. When interviewing witnesses (other than management officials representing Respondent), the investigator shall specifically ask the witness if they request confidentiality. In each case, a notation should be made on the interview form as

[18] OSHA's regulations provide that "[i]nvestigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant. . . ." *See AS 18.60.087(b)*. Thus, AKOSH will interview a managerial employee in private if the managerial employee requests confidentiality.

to whether confidentiality is desired. If the interview is being recorded, the investigator must note the right to confidentiality in the recording.

For non-management witnesses including current and former employees (including former managers) of Respondent or employees of employers other than Respondent, the investigator should state, "**Your interview will be protected to the fullest extent of the law.**" This statement shall be included in the audio recordings. The investigator should then explain to potential witnesses that the witness's identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the existence and content of the interview may need to be disclosed. Indeed, a court may require the disclosure of the names of witnesses before trial. Furthermore, the witness should be advised that their identity might be disclosed to another agency, under a pledge of confidentiality from that agency. The investigator should answer questions posed about confidentiality only with the information noted above.

B. In addition, all interview statements obtained from non-managers (including former or current employees or employees of employers not named in the complaint) must be clearly marked "CONFIDENTIAL", or in such a way as to prevent the unintentional disclosure of any confidential statements. This procedure also applies to memos of confidential interviews.

C. AKOSH will take all legal steps necessary to prevent the disclosure of the interview or statement when responding to a public records request regarding statements by non-management witnesses including current and former employees (including former managers) of the Respondent or employees of employers other than the Respondent. Marking the documents appropriately and noting in audio recordings that witnesses have requested confidentiality will assist AKOSH in preventing inadvertent disclosure of a confidential witness's identity. See Chapter 9.III.A.4.b, *Witness Statements*, for non-public disclosure procedures of witness statements.

D. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to Complainant and does not wish the company to know that he or she is speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the above procedures for handling confidential witness interviews must be followed.

IX. Complainant Interview and Contact

The investigator must attempt to interview Complainant in all docketed cases. This interview may be conducted as part of the screening process. If a full Complainant interview is not conducted as part of the complaint screening process, AKOSH will endeavor to interview the Complainant within a reasonable time (e.g.,30 days) of receiving the Respondent's position statement. It is highly desirable to record the Complainant interview (if Complainant agrees) or obtain a signed interview statement from Complainant during the interview. The Complainant may have an attorney or other

personal representative present during the interview, so long as the investigator has obtained a signed "Entry of Appearance" form.

The investigator must attempt to obtain from Complainant all documentation properly in his or her possession that is relevant to the case. Relevant records may include:

- Termination notices, reprimands, warnings, or other personnel actions
- Performance appraisals
- Earnings and benefits statements
- Grievances
- Unemployment or worker's compensation benefits, claims, and determinations
- Job position descriptions
- Company employee policy handbooks
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Emails, voice mails, phone records, texts, and other relevant correspondence related to Complainant's employment
- Medical records. Most often medical records should not be obtained until it is determined that those records are needed to proceed with the investigation. Because medical records require special handling, investigators must familiarize themselves with the requirements of an Alaska Program Directive PD 11-01 AKOSH Medical Records Handling Protocol. See Chapter 4.XVIII.D, *Medical Records – Handling and Storage of Medical Records in Whistleblower Case Files*, below for more information on the handling of medical records. Consult the Chief of Enforcement if there are questions.

The relief sought by the Complainant should be determined 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 (a.k.a. "mitigate," see Chapter 6.IV.D, *Mitigation Considerations*, and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the Complainant might be entitled in the event of settlement, issuance of merit findings, 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. See Chapter 6.IV.A, *Lost Wages*.

The investigator must also inform the Complainant that they must preserve all records that relate to the whistleblower complaint, such as documents, emails, texts, photographs, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies the Complainant seeks. Thus, for instance, the Complainant should retain documentation supporting Complainant's compensation with Respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting

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

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

X. Contact with Respondent

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

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

B. If the Respondent requests time to consult legal counsel, the investigator must advise the Respondent that future contact in the matter will be through such a representative and that this does not alter the 20-day time to respond to the complaint. A reasonable extension to the deadline may be granted, but the investigator must be mindful that for any leeway given to the Respondent, substantially equivalent leeway should also be granted to Complainant for the rebuttal if needed. An Entry of Appearance form shall be completed by the Respondent's representative to document their involvement. The Representative must identify which Respondent(s) are represented, in cases of multiple Respondents.

   If the Respondent has designated an attorney to represent the company, interviews with management officials shall ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials. (Note: if the interviewee WAS a manager, but is not at the time of the interview, treat the interviewee as non-management employee.)

C. In the absence of a signed Entry of Appearance form, the investigator is not bound or limited to contacting the Respondent through any one individual or other designated representative (e.g., safety director). If a position statement was received from the Respondent, the investigator's initial contact should be the person who signed the letter unless otherwise specified in the letter.

D. The investigator shall, in accordance with the reasonable balance standard, interview all relevant Respondent witnesses who can provide information relevant

to the case. The investigator should attempt to identify other witnesses at the Respondent's facility that may have relevant knowledge. Witnesses must be interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality. (Names and contact information of employees could be obtained through a request for information –RFI, for example.)

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

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

AS 18.60.083(a)(2) authorizes investigators to question any employee privately during regular working hours or at other reasonable times. The purpose of such interviews is to obtain whatever information investigators deem necessary or useful in carrying out investigations effectively. Thus, under the Alaska Statute, AKOSH may privately question an employer, owner, operator, agent, or employee.

The Respondent's attorney does not have the right to be present, and shall not be permitted to be present, during interviews of non-management or non-supervisory employees. If the Respondent's attorney insists on being present during interviews of non-management or non-supervisory employees, AKOSH shall consult with the Chief of Enforcement.

E. The investigator shall make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which Respondent offers and which the investigator believes is relevant to the case.

F. Per Chapter 4.III.C, *Case Activity Log*, if a telephone conversation with Respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a Memo to File to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the case diary may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

XI. Unresponsive/Uncooperative Respondent

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

A. Respondent Bankruptcy

When investigating a Respondent that has filed for bankruptcy, the investigator should promptly consult with their Chief of Enforcement. Otherwise, complainants and DOLWD may lose their rights to obtain any remedies.

B. Respondent Out-of-Business

When investigating a Respondent that has gone out of business, the investigator should consult with the Chief of Enforcement. AKOSH should determine whether there are legal grounds to continue the investigation against successors in interest of the original Respondent.

C. Uncooperative Respondent

When performing an investigation under section AS 18.60.089, subpoenas may be obtained for witness interviews or records. See Chapter 4.XII.A below for procedures for obtaining subpoenas.

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

D. Uncooperative Respondent Representative

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

XII. Subpoenas, Document and Interview Requests

A. Subpoenas

When performing an investigation under section AS 18.60.089, subpoenas may be obtained for witness interviews or records. Subpoenas shall be obtained following procedures established by the Division. AKOSH has two types of subpoenas for use in these cases. A Subpoena *Ad Testificandum* is used to obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to obtain documentary evidence. They can be served on the same party at the same time, and AKOSH can require the named party to appear at a designated office for production. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present).

An administrative subpoena can be signed by either the Chief of Enforcement, or Director, or designee.

The subpoena must contain language mandating a reasonable timeframe for the witness to comply, identify the statutory provision(s)[19] under which the subpoena is issued, use broad language for requests, and identify the investigator responsible for delivery and completion of the service form. Before issuing a subpoena, AKOSH may consult with LAW regarding the appropriate time frames and language. If the witness decides to cooperate, the supervisor can choose to lift the subpoena requirements.

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

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

In the event a State of Alaska Agency requests a subpoena or is otherwise unwilling or unable to provide information to the investigator, the Chief of Enforcement or Investigator will request assistance from LAW to ensure the investigator receives information and interviews required to complete the investigation.

C. Early Involvement of the Department of Law

In general, AKOSH should consult LAW as early as possible in the investigative process for all instances where AKOSH believes that there is a potential that the case will be referred for litigation, or that LAW may otherwise be of assistance. For example, LAW may be of assistance in cases where settlement discussions reach an impasse, where assistance is needed to determine the appropriate remedy (see Chapter 6.I, *Remedies*), or where a case presents a novel question of statutory coverage or protected activity. When AKOSH has reasonable cause to believe that a violation occurred, the Chief of Enforcement should consult informally with LAW. Consulting early with LAW helps to ensure that the investigation captures as much relevant information as possible so that LAW can evaluate whether the case is suitable for litigation.

D. Further Interviews and Documentation

It is the investigator's responsibility, in consultation with the supervisor, to determine and pursue all appropriate investigative leads deemed pertinent to the investigation with respect to Complainant's and Respondent's positions. Contact

[19] The information requested must be limited to information relating to the whistleblower claim under the AS 18.60.089.

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.

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

XIII. Party Representation at Witness Interviews

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

XIV. Records Collection

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

XV. Resolve Discrepancies

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

XVI. Analysis

After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions to support a recommended outcome based on the evidence and the law using the guidance given in Chapter 2.

XVII. Closing Conference

Upon completion of the field investigation and after discussion of the case with the Chief of Enforcement, the investigator will conduct a closing conference with the Complainant in cases in which AKOSH anticipates issuing non-merit findings.[20] The closing conference may be conducted in person, by telephone, or via videoconference, depending

[20] In section 11(c) cases referred to AG where AG plans to file suit, any post-investigation contact with Respondent and Complainant will generally be made by AAG.

on the circumstances of the case. In addition, depending on the case's investigative stage, the closing conference may be conducted in conjunction with the rebuttal interview, if warranted.

A. During the closing conference, the investigator will provide a brief verbal summary of the recommendation and basis for the recommendation.

B. It is unnecessary and improper to reveal the identity of any witnesses interviewed. The Complainant should be advised that AKOSH does not normally reveal the identity of witnesses, especially if they requested confidentiality.

C. Although AKOSH anticipates that in most cases no new evidence or argument will be raised in the closing conference, if the Complainant attempts to offer any new evidence, argument, or witnesses, this information should be discussed as appropriate to ascertain whether it is relevant; might change the recommended determination; and, if so, what further investigation might be necessary prior to the issuance of findings.

D. During the closing conference, the investigator must inform the Complainant of his/her rights to object and request a review by the Commissioner, as well as the time limitation for filing the request for review.

E. The investigator should also advise the Complainant that the decision at this stage is a recommendation subject to review and approval by higher management.

F. Where the Complainant cannot be reached despite AKOSH's reasonable attempts to conduct a closing conference, AKOSH will document its attempts to reach Complainant in the case file and proceed to issue the Director's Findings. Reasonable attempts include attempting to contact Complainant through more than one method of communication (e.g., telephone and email) if the Complainant has provided more than one form of contact information and allowing the Complainant 48 hours to respond. In the case of phone calls, attempts shall be made at different hours of the day. AKOSH's attempts to contact the Complainant shall be documented in the case file.

XVIII. Document Handling and Requests

A. Requests to Return Documents Upon Completion of the Case

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

B. Documents Containing Confidential Information

If the Complainant or the Respondent submit documents containing confidential information, such as confidential business information of the Respondent or information that reveals private information about employees other than the

Complainant, AKOSH must mark that information ("CONFIDENTIAL") in the file, take care to avoid inadvertent disclosure of the information, and follow the procedures in Chapter 9 for evaluating whether the information may be disclosed either to the other party (under AKOSH's non-public disclosure policy) or in response to a public records request.

C. Witness Confidentiality

All confidential witness statements shall be clearly marked as "Confidential" in the file.

E. Medical Records – Handling and Storage of Medical Records in Whistleblower Case Files

Ensure that medical records are handled in as described in IX, above, which references Alaska Program Directive PD 11-01 AKOSH Medical Records Handling Protocol.

In rare instances where a case file includes medical information, the medical information must be password protected. If stored on external media, the records must be encrypted and kept in a secure manner.

Chapter 5

CASE DISPOSITION

I. Scope

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

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

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

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

III. Report of Investigation

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

The first page of the ROI shall note the names and titles of the investigator, the reviewing supervisor, and the Alaska whistleblower statute. It shall also list the parties and their representatives (if any) names, addresses, phone numbers, fax numbers, and email addresses. The remainder of the ROI shall follow the policies and format described below.

The ROI shall contain the elements listed below in Chapter 5.III.B, *Elements of the ROI*, as well as a chronology of events. It may also include, as needed, a witness log and any other information requested by the Chief of Enforcement. The ROI shall include citations to specific exhibits in the case file as well as other information necessary to facilitate supervisory review of the case file. The citations must note the case file location of the exhibit.

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

A. No ROI Required

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

B. Elements of the ROI

The ROI must include a chronology of the relevant events of the case and, as applicable, analysis of the following issues:

1. **Coverage**

   Give a brief statement of the basis for coverage. This statement includes information about the Respondent and the Complainant relevant to the State Plan coverage, jurisdiction guide, other federal guidance (e.g., regarding tribal health facilities, federally recognized tribes), AS 18.60.089, interstate commerce is affected, and delineates the information that brings the case under the applicable statute. Coverage of the Complainant shall also be covered. If coverage was disputed, AKOSH's determination on the issue shall be addressed (e.g., claims of tribal sovereignty in the Respondent's Position Statement). If it is determined that there is no coverage, then no further discussion of the elements is required in the ROI. In addition, this section shall note the location of the company and the nature of the business, if not already addressed.

2. **Timeliness**

   Indicate the actual date that the complaint was first filed (particularly if it is an agency referral) and whether the filing was timely under AS 18.60.089, including any equitable tolling.

3. **The Elements of a Violation**

   Discuss and evaluate the facts as they relate to the four *prima facia* elements of a violation, following Chapter 2. V, *Elements of a Violation*, and 2.VI, *Causation Standards*. The objective for a *prima facia* case (merit) is to identify evidence from both the Complainant and Respondent for each of the below elements. [There are two tabs in Exhibit L where this information can be recorded.]

   a. Protected Activity

   b. Respondent Knowledge or Suspicion

   c. Adverse Action

   d. Nexus

If there is conflicting evidence about a relevant matter, the investigator must substantiate a position and articulate the reasoning.

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

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

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

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

5. **Remedy**

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

6. **Recommended Disposition**

   The investigator will put the recommendation for the disposition of the case and reason for it here.

7. **Other Relevant Information**

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

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

IV. Case Review and Approval by the Supervisor

A. Review

The investigator will notify the Chief of Enforcement when the completed case file, including, if applicable, the ROI and draft the Director's Findings (Determination) or other draft case closing documents (such as approvals of withdrawal requests, and settlement is ready for review on the shared drive. The Chief of Enforcement will review the file to ensure technical accuracy, the thoroughness and adequacy of the investigation, the correct application of law to the facts, and the completeness of the Director's determination or other closure letters. Such a review will be completed as soon as practicable after receipt of the file.

B. Approval

If the Chief of Enforcement determines that appropriate issues have been explored and concurs with the analysis and recommendation of the investigator, they will initial by their name on the Memo of the ROI and record the date the review was completed. If the Chief of Enforcement does not concur with the analysis and recommendation of the investigator, they will make a note on the Case Activity Log (Ex. A) of the reason for non-concurrence and return the case file to the investigator for additional work. The Chief's signature on the ROI serves as their initial approval of the recommended determination. The LSS Division Director's review of the case file, Determination letter, and final approval is required for all merit and novel cases to be recommended to the Attorney General. The Director will review each case once the Chief approves the ROI and draft the determination letter or other case closing documents and notifies the Director that the case is ready for review.

V. Case Closing Alternatives

Docketed whistleblower cases may be resolved by a variety of means. Completed whistleblower investigations will result either in:

- a referral to the Department of Law (LAW) requesting their action, which may or may not be litigation, or
- the issuance of Director's a determination letter in non-merit cases.

Complainants may also request to withdraw their whistleblower claims at any point in the investigation unless they are involved in an employer-employee settlement where the employer wants to include the AKOSH case in matters to be disposed of. Finally, AKOSH may close a case due to a settlement, or determine that a deferral to the results of another proceeding is appropriate under the circumstances. Each case disposition option, along with the applicable procedures, is discussed below.

VI. Cases Under State Plan/State Statute)

A. Refer to Attorney General

Where the Director determines that a case is meritorious under AS 18.60.089, the case shall be forwarded to the Department of Law by a letter signed by the Director.

The Chief (or designee) and other AKOSH staff may be asked to provide additional information after the referral. Within 30 days the Chief of AKOSH Enforcement (or designee) will follow up in writing with AG's office on any pending merit referrals and offer assistance as needed and request a written response from AG's office.

If the Department of Law moves forward with the case for litigation, that office generally litigates the case on behalf of the State of Alaska in Superior court. For merit cases under this statute, the Superior court complaint filed by the AG constitutes the Director's Findings. The AG ordinarily will send a copy of the filed Superior court complaint to the Complainant.

If the Department of Law determines that additional investigation is required prior to approving a case for litigation, the Chief of Enforcement will assign such further investigation to the original investigator.

B. Dismissals Under State Plan/ Statute

1. Issuance of Non-Merit Director's Findings

For dismissal determinations, the parties must be notified of the results of the investigation by the issuance of Director's the determination addressed to the Complainant (or Complainant's counsel if applicable, with a copy to Complainant), and copied to the Respondent (and Respondent's counsel if applicable). The Director's determination must advise the Complainant of the right to request a review of the determination pursuant to 8 AAC 61.530(b).

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

Other parties may be informed via first class postal mail or email.

See Chapter 5.VII.D, *Format for Director's Determination*, for instructions on drafting the Director's determination.

2. Requests for Review (RFRs)

If a section AS 18.60.089 ("Whistleblower") complaint is dismissed without a referral to LAW, the Complainant may seek a review of the dismissal by the Commissioner of the Department of Labor and Workforce Development (DOLWD). The request for review must be made in writing to DOLWD within **15** calendar days of the Complainant's receipt of the determination letter (unless equitable tolling applies; see Chapter 3.III.D.4, *Tolling (Extending) the Complaint Filing Deadline*). The request may be mailed, faxed, or emailed (commissioner.labor@alaska.gov). Verbal requests for review are not accepted.

The first day of the request period is the day after the Complainant's receipt of the Director's dismissal letter. Generally, the date of the request is the date of the postmark, facsimile transmittal, or email communication. If the postmark is absent or illegible, the date of the request is considered to be three days prior to the date the request for review is received unless it is from an offroad

system location or extenuating circumstances apply (e.g., severe weather, road closures, etc.). If the last day of the request period falls on a weekend or a state holiday, or if the DOLWD Office is closed, the next business day will count as the final day.

Upon DOLWD's receipt of a request for review under 8 AAC 61.530(b), the Chief of Enforcement shall promptly make available a copy of the case file to DOLWD for review. The request for review must be preserved in the file.

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

- If the decision is supported by the evidence and is consistent with the law, the Commissioner of DOLWD will uphold the Director's determination.
- If not, the case will be returned to AKOSH for further investigation.
    - After additional investigative efforts are completed and, if the original determination (e.g., dismissal) does not change, the AKOSH will send a written report of its findings, accompanied by any new evidence it obtained during the reinvestigation, to the Commissioner for further review and analysis. The Commissioner of DOLWD will then determine if they will affirm or not affirm the original AKOSH/LSS determination.
    - If another determination is made (e.g., merit referral to AG, settlement, withdrawal, etc.), the Director will notify the Commissioner of this outcome.

VII. Dismissals for Lack of Cooperation/Unresponsiveness

See chapter 4.VI, *Lack of Cooperation/Unresponsiveness*, for the requirements and procedures for dismissing complaints for lack of cooperation (LOC).

VIII. Withdrawal

The Complainant, with AKOSH's approval, may withdraw the complaint at any time during AKOSH's processing of the complaint.[21] However, it must be made clear to Complainant that by entering a withdrawal, he or she is forfeiting all rights to seek review or object, and the case will not be reopened.

Withdrawals may be requested either orally or in writing. It is advisable, however, for the investigator to obtain a signed withdrawal request whenever possible. In cases where the withdrawal request is made orally, the investigator will either record the withdrawal conversation or confirm in writing the Complainant's desire to withdraw. As part of the request, the Complainant must also indicate whether the withdrawal is due to a settlement. If the Complainant is seeking to withdraw a complaint due to settlement

[21] Exception: AKOSH will not accept a withdrawal when the parties have reached a private settlement until AKOSH has obtained and reviewed the settlement.

under AS 18.60.089, which requires AKOSH's review and approval of the settlement, AKOSH must inform the Complainant of the requirement to submit the settlement for AKOSH's approval. More information regarding AKOSH's review and approval of settlement agreements is available in Chapter 7.

Once the Chief of Enforcement reviews and approves the request to withdraw the complaint, a letter will be sent to the Complainant, clearly indicating that the case is being closed based on the Complainant's request for withdrawal. The withdrawal approval letter will be sent using a method that permits AKOSH to confirm receipt of the communication, such as email or U.S. mail, delivery confirmation required, or hand delivery. Proof of delivery shall be preserved in the file with copies of the letters.

Although the Complainant's request to withdraw is usually granted, there may be situations in which approval of the withdrawal is not warranted. (Enforcement of the provisions of section 11(c) is not only a matter of protecting the rights of individual employees but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the Commissioner's investigation. The Commissioner's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.) Situations in which approval for withdrawal may be denied include, but are not limited to, a withdrawal made under duress, the existence of similarly situated complainants other than the Complainant requesting a withdrawal, adverse effects on employees in the workplace other than the Complainant if the case is not pursued, and the existence of a discriminatory policy or practice.

When the Complainant elects not to pursue his or her complaint before docketing, the complaint will be administratively closed. See Chapter 3.IV.C, *Election Not To Proceed, a.k.a. Withdrawal Before Docketing*.

IX. Settlement

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

X. Postponement/Deferral

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

analogous standards for postponement and deferral is an aspect of AKOSH's Whistleblower investigation program that is evaluated on being 'at least as effective as' OSHA's (ALAE), therefore, AKOSH will adhere to the federal statute cited herein.

A. Postponement

AKOSH may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement, arbitration agreement, statute, or common law. The rights asserted in the other proceeding must be substantially the same as the rights under AS 18.60.089 and those proceedings must not violate the rights of the Complainant under the Whistleblower statute. The factual issues to be addressed by such proceedings must be substantially similar to those raised by the complaint under AS 18.60.089. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective state whistleblower statute (i.e., AS 39), but not when the proceeding is under an unemployment compensation statute, which typically does not address retaliation. The investigator must consult with the Chief of Enforcement to make these determinations. To postpone the AKOSH case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that AKOSH must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement. [NOTE: the above can apply at AKOSH's discretion when an AKOSH Complainant under AS 18.60.089 dual files with OSHA, and OSHA decides to investigate the 11(c) case because OSHA also is investigating the circumstances under one or more other federal statute(s).]

B. Deferral

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

1. All relevant issues were addressed;
2. The proceedings were fair, regular, and free of procedural infirmities; and
3. The outcome of the proceedings was not repugnant to the purpose and policy of AS 18.60.089.

This assessment will be documented in an ROI prepared for the case.

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

Repugnancy deals not only with the violation but also with the completeness of the remedies. Thus, if for instance, the Complainant was reinstated as a result of the

other proceeding, but back pay was not awarded, deferral would not be appropriate.

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

In cases where the investigator recommends a deferral to another agency's or tribunal's decision, grievance proceeding, arbitration, or other appropriate determination, a Director's determination based on the deferral will be issued dismissing the case. The parties will be notified of the Complainant's right to request a review, based on 8 AAC 61.530(b). The case will be considered closed at the time of the deferral and will be recorded in OIS as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in Chapter 7.

XI. Significant or Novel Whistleblower Cases

For informational purposes about OSHA's current criteria and procedures, see memorandum *Procedures for Significant or Novel Whistleblower Cases* (February 2, 2016). The Chief of Enforcement has the discretion to elevate any AKOSH case aspects of which it may be important for LSS, DOLWD, or LAW to be made aware.

XII. Documenting Key Dates in OITSS-Whistleblower

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

A. Date Complaint Filed

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

B. ROI Date

The date upon which the supervisor approved the ROI is the ROI date.

C. Determination Date

The date upon which the Director's determination or closing letter is dated is the determination date.

D. Date Request for Review Filed

The date an 8 AAC 61.530(b) request for review is filed is the date of the postmark, facsimile transmittal, email communication, hand-delivery, delivery to a third-party

commercial carrier, or in-person filing at an AKOSH Office. If the filing with DOLWD Commissioner is untimely but the copy filed with AKOSH is earlier and timely, then the date the request for review was filed is the earlier date.

E. Date of Key Post-OSHA Events

The key dates for referrals to LAW/AG and court decisions must be documented in OIS.

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

Continued next page.

Required Documents for Disposition (continued)				
Disposition	OIS	Report of Investigation	Director's Findings/Determination	Parties Receive
Dismissed without investigation (e.g., after docketing, complaint determined to be untimely or contains no *prima facie* allegation ('docket & dismiss')		Required Ch. 5.III	Abbreviated Ch. 3.IV.B Ch. 5.VII.E	Abbreviated Director's Findings/Determination, with rights to request review. Ch. 3.IV.B
Deferral		Required Ch. 5.III	Abbreviated Ch. 5.VII.E Ch. 5.XI.B	Abbreviated Director's Findings/Determination, with rights to request review. Ch. 5.XI.B
Dismissals after investigation		Required Ch. 5.III	Required -District Court statutes: Ch. 5.VI.B	Director's Findings/Determination, with rights to request review. Ch. 5.VI.B.1

Chapter 6

REMEDIES

I. Scope

This chapter provides guidance on **gathering evidence** and **determining appropriate remedies** in whistleblower cases where a violation has been found. Investigator should consult with the Chief of Enforcement in designing the appropriate remedies. The investigator should provide a detailed backup for remedies in any case that AKOSH anticipates issuing merit findings and referring for litigation.

II. General Principles

Alaska Statute 18.60.089 allows for Complainants to be compensated for the losses caused by unlawful retaliation and to encourage the employer to restore to the Complainant the terms, conditions, and privileges of their employment as they existed prior to Respondent's adverse actions (i.e., "Make Whole").

AS 18.60.089 provides for reinstatement, back pay, and compensatory damages for pecuniary losses22 and non-pecuniary damages.23 Where appropriate, the Complainant's remedies also include other remedies designed to make the Complainant whole, such as receipt of promotion that the Complainant was denied, expungement of adverse references in the employment record, or a neutral employment reference. Alaska permits punitive damages and recovery of attorney fees.

III. Reinstatement and Front Pay

A. Reinstatement

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

B. Front Pay

Front pay, which AKOSH considers to be economic reinstatement, is a substitute for actual reinstatement in cases where actual reinstatement, the presumptive remedy in cases of

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[22] These are damages that are readily quantified-- for example, job search expenses, medical bills that Complainant would not have incurred absent the unlawful retaliation, and health insurance premiums.

[23] These damages are not readily quantifiable and include, for example, pain and suffering, emotional distress, and loss of quality of life.

discharge, demotion, or adverse transfer, is not possible (this occurs for a number of reasons, including, but not limited to, loss of trust, no longer in the same locale, seasonal position, inability to accommodate). Front pay may be appropriate in situations such as those in which the Respondent's retaliatory conduct has caused the Complainant to be medically unable to return to work, or the Complainant's former position or a comparable position no longer exists. Similarly, front pay may be appropriate where it is determined that a respondent's offer of reinstatement is not made in good faith, or if returning to the workplace would result in debilitating anxiety or other risks to the Complainant's mental health. Front pay also may be available in cases of extreme hostility between the Respondent and the Complainant such that the Complainant's continued employment would be unbearable.

In cases where front pay may be a remedy, the investigator should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors such as the length of time that the Complainant expects to be out of work and the Complainant's compensation prior to the retaliation. Front pay should be adjusted to account for any income the Complainant is earning. For example, if the Complainant has a new job, the front pay should be adjusted to account for any difference in pay between the Complainant's old job and the new job. Employers in Alaska may be well versed in the employers' discretion aspect derived from 'At-will' employment law, but statutory limitations to that discretion are outlined in AS 18.60.089.

IV. Back Pay

Back pay is available under AS 18.60.089 enforced by AKOSH.

A. Lost Wages

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

Gross back pay is defined as the total earnings (before taxes and other deductions) that the Complainant would have earned during the period of unemployment. Generally, this gross back pay is calculated by multiplying the hourly wage by the number of hours per week that 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 converted into a daily rate and then multiplied by the number of days that a complainant typically would have worked. Depending on the circumstances, other methods for calculating back pay may be appropriate and the Chief of Enforcement should provide guidance in determining the method for calculating back pay.

Regardless, the formula that AKOSH proposes using to compute back pay shall be provided in the case file, typically in Exhibit 10 (Damages/Remedy).

Back pay should include any cost-of-living increases or raises that the Complainant would have received if he or she had continued to work for the Respondent. The investigator shall

ask the Complainant for evidence of such increases or raises and keep the evidence in the case file. If the Complainant requests a tax gross-up and supports the request with appropriate evidence, AKOSH's back pay calculation may include it. A "tax gross-up" is an adjustment to back pay to compensate for the increased tax burden on the complainant of a lump sum award of back pay. The worksheet template in Exhibit 10 has a category for 'future tax burden' from a windfall of settlement award.

A respondent's cumulative liability for back pay ceases when a complainant rejects (or does not accept within a reasonable amount of time) a bona fide offer of reinstatement, which must afford the Complainant reinstatement to a job substantially equivalent to the former position. A respondent's liability for back pay can also cease in other circumstances, such as when the Respondent goes out of business, closes the location where the Complainant worked without retaining other employees who worked at the location, or when the Complainant becomes totally disabled or otherwise unable to perform his or her former job.

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

B. Bonuses, Overtime and Benefits

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

C. Interim Earnings and Unemployment Benefits

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

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

Interim earnings should be deducted from back pay using the periodic mitigation method. Under this method, the time in which back pay is owed is divided into periods. The period should be the smallest possible amount of time given the evidence available. Interim

earnings in each period are subtracted from the lost wages attributable to that period. This yields the amount of back pay owed for that period. If the interim earnings exceed the lost wages in any given period, the amount of back pay owed for that period would be $0.00, not a negative amount. The back pay owed for each period is added together to determine a total back pay award.

Unemployment benefits received are not deducted from gross back pay.[24] The investigator should determine whether workers' compensation benefits that replace lost wages during a period in which back pay is owed should be deducted from gross back pay after consultation with the Chief of Enforcement and/or the Law Department.

D. Mitigation Considerations

Complainants have a duty to mitigate the damages incurred as a result of the adverse employment action. To be entitled to back pay, a complainant must exercise reasonable diligence in seeking alternate employment, except as noted below. However, complainants need not succeed in finding new employment; they are required only to make an honest, good-faith effort to do so. The investigator shall ask the Complainant for evidence of his or her job search and keep the evidence in the case file. The Complainant's obligation to mitigate his or her damages does not normally require that Complainant go into another line of work or accept a demotion. However, generally, complainants who are unable to secure substantially equivalent employment after a reasonable period of time should consider other available and suitable employment. Circumstances may exist where depending on the type/industry of job, the reputational influence the Respondent has can limit work opportunities for the Complainant if the Respondent exercises this influence, thus inflicting further retaliation (i.e., small communities that exist throughout rural Alaska). The costs for relocation, if that is what Complainant demonstrates the need and desire to do, should be factored into the damages. In certain other circumstances, such as when retaliation or the underlying safety issue causes disabling physical ailments, complainants do not need to look for substantially equivalent employment.

E. Reporting of Back Pay to the Social Security Administration

Respondents are required to submit appropriate documentation to the Social Security Administration, allocating the back pay award to the appropriate periods. The Director's Findings/Determination, in the case of an AKOSH-participatory settlement and/or the Settlement Agreement, where applicable, must include this requirement.

V. Compensatory Damages

A. Pecuniary or Monetary Damages

Pecuniary damages (a.k.a. monetary damages) may be awarded under AS 18.60.089. Pecuniary damages are the Complainant's out-of-pocket losses that result from or are likely to result from unlawful retaliation. investigators must support awards of these types of

[24] Complainants should be reminded that they may need to reimburse unemployment benefits received, depending on their State of residence.

damages with documentary evidence in the case file.

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

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

B. Non-Pecuniary Damages

Non-pecuniary damages include compensation for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish resulting from the Respondent's adverse action. Courts regularly award compensatory damages for demonstrated mental anguish, loss of reputation, emotional distress, and pain and suffering in employment retaliation and discrimination cases. Such damages may be awarded under AS 18.60.089, although they are not necessarily appropriate in every case. AKOSH, with guidance from LAW, will evaluate whether compensation for these damages is appropriate.

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

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

Evidence from a healthcare provider is required if Complainant seeks to prove a specific and diagnosable medical condition. If medical records are to be obtained as supporting documentation to be contained in the case file, the AKOSH investigator shall utilize existing Agency written waiver forms and obtain one from the Complainant to communicate with his or her health care provider to ensure compliance with HIPAA as well as the Complainant's privacy rights. To comply with privacy laws, any medical evidence must be marked as confidential in the case file and shall not be disclosed except in accordance with Alaska Public Records Act (APRA) and Privacy Act policies set forth in Chapter 9 or otherwise required by law.

In addition to proof of objective manifestations of harm, there must be evidence of a causal

connection between the harm and the Respondent's adverse employment action. A Respondent also may be held liable where the Complainant proves that the Respondent's unlawful conduct aggravated a pre-existing condition, but only the additional harm should be considered in determining damages.

C. Factors to Consider

The AKOSH investigator and Chief of Enforcement shall consider the following factors when determining the amount of an award for non-pecuniary damages if they are deemed appropriate:

1. **The severity of the distress.** Serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships justify higher damage awards for emotional distress or other forms of non-pecuniary damages.
2. **Degradation and humiliation.** Generally, courts have held that when the Respondent's actions were inherently humiliating and degrading, somewhat more conclusory evidence of emotional distress or other non-pecuniary harm is acceptable to support an award for damages.
3. **Length of time out of work.** Often, long periods of unemployment contribute to a Complainant's mental distress. Thus, higher amounts may be awarded in cases where individuals have been out of work for extended periods of time as a result of the Respondent's adverse employment action and thus were unable to support themselves and their families.
4. **Comparison to other cases.** A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. Relevant cases can include those decided by Administrative Review Boards (ARBs) or the courts under the various OSHA whistleblower statutes and cases decided by the courts under section 11(c) and other discrimination or anti-retaliation provisions, such as the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3a. In AS 18.60.089 cases, comparison with court decisions under OSHA District Court statutes or other discrimination or anti-retaliation provisions, such as the Title VII anti-retaliation provision and 42 U.S.C. § 1983, is appropriate, as are cases decided in Alaska under AS 39 or 18, or other statutes.

VI. Punitive Damages

A. General

Punitive damages, also known as exemplary damages, are awards of money used to punish violations and deter future violations in cases where respondents were aware that they were violating the law or where the violations involved egregious misconduct. Punitive damages are available under AS 18.60.089. Punitive damages are subject to a statutory cap that depends on the defendant's conduct. *See* AS 09.17.020.

Punitive damages are not appropriate in every meritorious retaliation case. Punitive damages are awarded when the Respondent knew or should have known that the adverse action was illegal under the relevant whistleblower statute or where the Respondent engaged in egregious misconduct related to the violation. In determining whether to award

punitive damages, the AKOSH investigator and Chief of Enforcement should focus on the character of the Respondent's conduct and consider whether it is of the sort that calls for an additional deterrent effect. A settlement containing punitive damages can be negotiated by AKOSH.

B. Determining When Punitive Damages are Appropriate

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

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

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

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

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

   a. A discharge was accompanied by previous or simultaneous harassment or subsequent blacklisting.

   b. The Complainant has been discharged because of his or her association with a whistleblower.

   c. A group of whistleblowers has been discharged.

   d. There has been a pattern or practice of retaliation in violation of a AS 18.60.089 and the case fits the pattern.

   e. A policy exists which is contrary to rights protected by the statute (for example, a policy requiring safety complaints to be made to management before filing them with AKOSH/OSHA or restricting employee discussions with AKOSH/OSHA compliance officers during inspections) and the retaliation relates to this policy.

   f. A manager has (or has threatened to) committed violence against the Complainant.

   g. The adverse action is accompanied by public humiliation, threats of violence, or other retribution against the Complainant, or by violence, other retribution, or threats of violence or retribution against the Complainant's family, coworkers, or friends.

   h. The retaliation is accompanied by extensive or serious violations of the OSHA standards, Alaska Statutes, or DOLWD/AKOSH regulations in an AS 18.60.089

case.

C. Respondent's Good Faith Defense

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

D. Calculating the Punitive Damages Award

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

1. **Statutory Caps**

   Although these caps do not strictly apply under some other anti-retaliation /anti-discrimination statutes that AKOSH or EEOC/ASCHR enforce, they are relevant because they indicate what damages are available under similar whistleblower and/or discrimination statutes. Punitive damages shall be calculated in accordance with AS 09.17.020.

2. **Guideposts**

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

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

      This factor is the most important factor in determining the amount of a punitive damages award. More egregious conduct generally merits a higher punitive damage award, and several variables may be considered to determine how this factor affects the size of the award, including but not limited to:

      i. The degree of the Respondent's awareness that its conduct was illegal (see discussion above);

      ii. The duration and frequency of the adverse action;

      iii. The Respondent's response to the complaint and investigation: for example, whether Respondent admitted wrongdoing, cooperated with the investigation, offered remedies to Complainant on its own, or disciplined managers who were at fault. On the other hand, it is appropriate to consider whether the Respondent was uncooperative during the investigation, covered up retaliation, falsified evidence, or misled the investigator;

      iv. Evidence that the Respondent tolerated or created a workplace culture that discouraged or punished whistleblowing; in other words, whistleblowers were

chilled from engaging in protected activity;

v. The deliberate nature of the retaliation or actual threats to the Complainant for his or her complaints to management;

vi. Whether AKOSH/OSHA has found merit in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, to suggest a pattern of retaliatory conduct; and/or

vii. Other mitigating or aggravating factors, such as AKOSH Enforcement's experience with the Respondent regarding good faith and cooperation during inspection(s), document or information production requests, citation discussion(s), abatement, and settlement.

b. **Ratios**

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

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

It is also important to consider whether the amount of punitive damages awarded is comparable to the amount awarded in comparably egregious retaliation cases by the OSH Review Board, Alaska Superior Court, ASCHR, EEOC, OSHA, ALJs, the ARB, or courts under OSHA whistleblower statutes or other anti-retaliation provisions. Consultation with Region 10 or Alaska Department of Law can be helpful for identifying comparable cases.

VII. Attorney's Fees

Attorney's fees are specifically authorized by all whistleblower statutes enforced by OSHA, except for section 11(c). Common settlement language within the State of Alaska dictates that each party will bear the responsibility of their own attorney's fees.

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

In the situation where the Complainant has an attorney, either for the AKOSH case or for a case in another forum, but the basis is the same circumstances as the AKOSH case, the issue of accounting for attorney's fees within the settlement can come up when AKOSH is a participant, and the Respondent wants to dispose of the AKOSH case as part of the settlement. The Complainant's attorney should be consulted regarding the hourly rate and the number of hours worked. The number of hours worked would include, for example, hours spent on the attorney's preparation of the complaint filed with AKOSH and/or the other forum (e.g., NLRB, private

action), the submission of information to the investigator, and time spent with the Complainant preparing for and attending interviews with the investigator. However, the hours worked must involve the specific investigation in question and cannot include hours worked on related cases that are not pending before AKOSH. For example, a complainant's attorney who filed an AKOSH complaint and an NLRB charge on the same set of facts and allegations may be eligible for the AKOSH portion of the attorney's fees unless under a global settlement resolving both matters the attorney's fees could apply to both.

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

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

VIII. Interest

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

IX. Evidence of Damages

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

In addition to including this evidence in the case file, the Director's Findings should include an explanation of the basis for awarding any punitive damages or non-pecuniary compensatory damages (such as damages for emotional distress, pain and suffering, loss of reputation, personal

humiliation, and mental anguish). As discussed above, the basis for such damages should be something beyond the basis for finding that the Respondent violated the statute.

X. Non-Monetary Remedies

A. AKOSH may require non-monetary remedies under AS 18.60.089 in AKOSH settlement agreements. Non-monetary remedies may include:

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

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

2. Providing the Complainant with at least a neutral reference for future employers and others.

3. Requiring the Respondent to correct information submitted to self-regulatory organizations, licensing authorities, or others (for example, licensing boards).

4. Requiring the Respondent to provide employee or manager training regarding the rights afforded by AKOSH's whistleblower statutes. Training may be appropriate, particularly where the Respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation by the Respondent.

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

B. Other non-monetary remedies may be appropriate in particular circumstances. The investigator should contact the Chief of Enforcement for guidance on these and other non-monetary remedies.

XI. Undocumented Workers

Undocumented workers are not entitled to reinstatement, front pay, or back pay. *Cf. Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) reinstatement or back pay). Other remedies, including compensatory and punitive damages, and conditional reinstatement,[25] may be negotiated, as appropriate.

[25] With negotiated conditional reinstatement the worker is given a reasonable period of time to present or acquire work authorization and, if he or she is able to do so, the employer who offered reinstatement should be held to his/her offer.

Chapter 7

SETTLEMENTS

I. Scope

This chapter provides guidance on the following topics: (1) "Early Resolution" (i.e., without an investigation); (2) standard AKOSH settlement agreements; (3) AKOSH's approval of settlement agreements negotiated between Complainant and Respondent where applicable; (4) terms that AKOSH believes are inappropriate in whistleblower settlement agreements because they are contrary to the public interest and the policies underlying AS 18.60.089; (5) bilateral agreements; and (6) enforcement of agreements.

II. Settlement Policy

Voluntary resolution of disputes is often desirable, and the investigator is encouraged to actively assist the parties in reaching an agreement, where appropriate. It is AKOSH policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. AKOSH will not enter into or approve a settlement agreement unless it determines that the settlement is knowing and voluntary, provides appropriate relief to the Complainant, and is consistent with public policy, i.e., the settlement agreement is not repugnant to the relevant whistleblower statute and does not undermine the protection that AS 18.60.089 provides.

As discussed below, both the Complainant and Respondent should be encouraged whenever possible to use the AKOSH standard settlement agreement (see Chapter 7.V, AK*OSH Settlement Agreement*). However, the parties may negotiate their own settlement agreement and submit it for AKOSH's approval (see Chapter 7.VI, *Employer-Employee Settlement Agreements*). Such settlement agreements are referred to as employer-employee settlement agreements in this manual. In limited circumstances, AKOSH may enter into an agreement with the Respondent to settle claims without Complainant's consent if AKOSH deems the Respondent's offer to be fair, even if the Complainant does not (see Chapter 7.VII, *Bilateral Agreements*). Such settlement agreements are referred to as bilateral agreements in this manual.

III. Early Resolution

In addition to traditional settlement negotiation methods, AKOSH offers the parties the opportunity to resolve complaints upon Notification without an investigation using the Early Resolution option. This is helpful to assist willing parties in resolving their conflict before many damages can accrue, and focuses on Make Whole, where a large part is reinstatement (or economic reinstatement) and back pay. Both parties must agree to participate in Early Resolution, and either party may choose to terminate the Early Resolution process at any time and proceed with a full field investigation.

Please note that any settlement agreement reached as a result of Early Resolution must be approved by the Chief of Enforcement (or designee).

IV. Settlement Procedure

A. Requirements

Requirements for settlement agreements are:

1. The settlement agreement must be in writing and the settlement must be knowing and voluntary, provide appropriate relief to Complainant, and be consistent with public policy, i.e., the settlement agreement must not be repugnant to AS 18.60.089 and must not undermine the protection that it provides.
2. Every AKOSH settlement agreement must be signed by the Chief of Enforcement (or designee).
3. In every employer-employee agreement, the settlement approval letter or incorporated/referenced AKOSH Settlement Agreement must be signed by the Chief of Enforcement (or designee).
4. Every settlement agreement must be signed by Respondent(s).
5. Every settlement agreement must be signed by Complainant, except in bilateral agreements.
6. All employer-employee settlements must be submitted to AKOSH for review and approval.

B. Adequacy of Settlements

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

1. **Knowing and Voluntary**

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

2. **Reinstatement & Monetary Remedies**

   The settlement agreement must specify the remedies for Complainant, which may include reinstatement, back pay, front pay, damages, attorney fees, or other monetary relief. Alternatively, the settlement agreement may specify payment of a lump sum amount to the Complainant, or the payment of separate lump sum amounts to Complainant and Complainant's counsel. It is recommended that the settlement agreement expressly state the allocation of

payment between wages and other amounts.[26]

3. **Other Remedies**

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

a. The expungement of any warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the Complainant's personnel file or other records, and/or requiring the employer to change a complainant's personnel file to simply state that employment ended (if that is the case) and to note the date employment ended rather than that Complainant was discharged;

b. The agreement of the Respondent, and those acting on the Respondent's behalf, to provide at least a neutral reference (e.g., title, dates of employment, and pay rate) to potential employers of Complainant, to refrain from any mention of Complainant's protected activity, and to refrain from saying or conveying to any third party anything that could be construed as damaging the name, character, or the employment prospects of Complainant.

c. Posting of a notice to employees regarding AS 18.60.089 and/or posting of an informational poster or fact sheet about that statute. Postings should be readily available to all employees, e.g., posted on a bulletin board or distributed electronically.

d. Training of managers and employees regarding employees' right to report potential violations of the law without fear of retaliation.

C. Consistent With the Public Interest

As explained below (see Chapter 7.VI.E, *Criteria for Reviewing Employer-Employee Settlement Agreements*), AKOSH will not enter into or approve a settlement agreement that contains provisions that it believes are inconsistent with AS 18.60.089 or are contrary to public policy.

D. Tax Treatment of Amounts Recovered in a Settlement

Complainant and Respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with applicable tax law.[27] AKOSH is not responsible for advising the parties on the

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

[27] For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to *IRS Counsel*

proper tax treatment or tax reporting of payments made to resolve whistleblower cases.

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

V. AKOSH Settlement Agreement

A. General Principles

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

B. Specific Requirements

An AKOSH settlement agreement:

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

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Memorandum, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at: *http://www.irs.gov/pub/lanoa/pmta2009-035.pdf*. The parties may also wish to refer to OSHA's *Taxability of Settlements Desk Aid* (Sept. 30, 2015), available at *https://www.whistleblowers.gov/memo/TaxabilityofSettlementsChartCCF_FLSD9-30-15.html or* https://www.whistleblowers.gov/memo/2015-09-30 or https://www.whistleblowers.gov/sites/wb/files/2019-06/TaxabilityofSettlementsChartCCF_FLSD9-30-15.pdf. However, AKOSH notes that these guidance documents may change in the future.

the Complainant does not return to the workplace as a result of the settlement agreement. Appropriate remedial provisions to alleviate the chilling effect of retaliation in the workplace, such as postings and training of employees and managers are discussed further below (see next section, Chapter 7.V.C, *Provisions of the Agreement*) and model provisions are contained in AKOSH's standard settlement template.

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

C. Provisions of the Agreement

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

1. REINSTATEMENT. This section may be omitted if reinstatement is not a possible remedy in the case. Otherwise, the settlement agreement should include one of the two options below:

   a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have had but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [If accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].
   b. Economic reinstatement, including the basis for calculation and statement that it is in replacement for actual reinstatement,
   c. Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.

2. MONIES. This section may be omitted if monetary relief is not a part of the settlement. The parties should choose one of the options for monetary relief in the standard settlement agreement to indicate either:

   a. the payment of a specified amount of back pay;

   b. the payment of a specified damages (compensatory, punitive, etc. using a damages log to itemize) amount; or

   c. a combination of a specified payment of back pay and a specified payment of a lump sum for damages.

   In unique circumstances it may be appropriate for the parties and AKOSH to craft alternative provisions regarding the payment of money to Complainant. The settlement agreement should expressly identify the payments that are

made for restitution or to come into compliance with the law (e.g., wages). See 26 U.S.C. § 162(f)(2)(A)(ii).

3. POSTING OF AN INFORMATIONAL POSTER. A provision requiring Respondent to post an AS 18.60.089 poster/ fact sheet that summarizes the whistleblower statute.[28] (Optional)
4. TRAINING. A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation. (Optional)
5. NON-ADMISSION. A provision stating that, by signing the agreement, Respondent does not admit or deny violating any law, standard, or regulation enforced by AKOSH. (Optional)
6. PERSONNEL RECORD. The settlement should include a provision expunging Respondent's records of references to Complainant's protected activities as well as any adverse actions taken against Complainant and requiring that Respondent provide Complainant with at least a neutral reference. The precise terms of this provision may vary depending on the facts of the case.
7. PERFORMANCE - Performance by the Respondent with the terms and provisions of the Agreement shall commence immediately after the Agreement's approval.
8. CONSIDERATION. The Complainant agrees to accept this Agreement in full as a complete settlement of any and all claims arising out of the filing of the discrimination complaints filed with AKOSH and OSHA against the Respondent. The Complainant agrees that this claim against the Respondent will be dismissed without any additional or further award of costs or attorney's fees. All costs and attorney's fees are to be borne by the individual party who incurred the expenses. Neither complainant nor the government shall be liable for any attorney's fees or costs of Respondent.
9. ENFORCEABILITY.

   In AKOSH AS 18.60.089 cases, the settlement must state the following:

   > Respondent's violation of any terms of the settlement may prompt further investigation and the filing of an action by AKOSH, through the Attorney General in Superior court under AS 18.60.089. This Agreement shall be admissible in such an action. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. A violation of this settlement agreement is a breach of contract for which the Complainant may seek redress. [In bilateral settlement agreements add

[28] https://labor.alaska.gov/lss/forms/AKOSH_Whistleblower_Fact_Sheet.pdf and https://labor.alaska.gov/lss/forms/AKOSH_Whistleblower_Fact_Sheet_reference8AAC.pdf.

the following: Complainant is a third-party beneficiary of this agreement.]

10. Confidentiality. Settlement agreements must not contain provisions that state or imply that the State of Alaska, Department of Labor and Workforce Development (DOLWD) is a party to a confidentiality agreement. Complainant and Respondent may agree that each of them will keep the settlement agreement confidential and may ask AKOSH to regard the agreement as potentially containing confidential business information exempt from disclosure under Alaska Public Records Act (APRA). In those circumstances, the agreement should contain a statement such as the following:

    > The Complainant and the Respondent have agreed to keep the settlement confidential. The settlement agreement is part of AKOSH's records in this case and is subject to disclosure under APRA unless an exemption applies. The Complainant and the Respondent have requested that AKOSH designate the agreement as containing potentially confidential information and request pre-disclosure notification of any APRA request pursuant to _____.

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

11. Non-Waiver of Rights. The standard language reaffirming Complainant's right to engage in activity protected under the relevant AKOSH/ OSHA's whistleblower statute may be included in the agreement:

    > Nothing in this Agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA and AKOSH, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.

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

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

D. Side Agreements

In some instances, the Complainant and the Respondent in a whistleblower case may negotiate to resolve multiple claims arising from the Complainant's employment, including a claim under one of Alaska's whistleblower statutes. In those instances, AKOSH prefers that the parties utilize the AKOSH settlement

agreement to resolve the whistleblower claim pending before AKOSH. If the parties' separate agreement contains terms relevant to the settlement of the whistleblower case, the separate agreement must be submitted to AKOSH for approval (see Chapter 7.VI, Employer-Employee Settlement Agreements) and the AKOSH standard settlement agreement may incorporate the relevant (approved) parts of the employer-employee agreement by reference. This is achieved by inserting the following paragraph in the AKOSH standard settlement agreement:

> Respondent and Complainant have signed a separate agreement encompassing matters which are not within the State of Alaska's Occupational Safety and Health (AKOSH's) authority. AKOSH's authority over that agreement is limited to AS 18.60.089. Therefore, AKOSH, through the Chief of Enforcement, approves and incorporates in this agreement only the terms of the other agreement pertaining to AS 18.60.089.

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

E. Whistleblower Recording of AKOSH Settlements

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

VI. Employer-Employee Settlement Agreements

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

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

A. Review Required

Settlement agreements reached between the parties must be reviewed and approved by the Chief of Enforcement to ensure that the settlement agreement is knowing and voluntary, provides appropriate relief to the Complainant, and is consistent with public policy, i.e., the settlement agreement must not be repugnant to the relevant whistleblower statute and not undermine the protection that AS 18.60.089 provides. [29] AKOSH's authority over settlement agreements is limited to AS 18.60.089. Therefore, AKOSH's approval only relates to the terms of the agreement pertaining to the statute under which the complaint was filed. AKOSH, through its Notification Letter, should make every effort to explain this process to the parties

[29] For cases under AS 18.60.089, parties must submit employer-employee settlements for review and approval.

early in the investigation to ensure that they understand AKOSH's involvement in any resolution reached after a complaint has been initiated.

If the parties do not submit their agreement to AKOSH or will not submit an agreement that AKOSH can approve, AKOSH may take the following actions: (1) dismiss the complaint; the dismissal will state that the parties settled the case independently, but that the settlement agreement was not submitted to AKOSH or that the settlement agreement did not meet AKOSH's criteria for approval. The dismissal will not include factual findings. (2) Alternatively, if AKOSH's investigation has already gathered sufficient evidence for AKOSH to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than Complainant, AKOSH may issue merit findings or (3) continue the investigation. The findings will note the failure to submit the settlement to AKOSH or AKOSH's decision not to approve the settlement. The determination should be recorded in the OSHA Information System (OIS) as either dismissed or merit, depending on AKOSH's determination.

B. Required Language

If AKOSH approves an employer-employee settlement agreement in a case under AS 18.60.089, the settlement agreement must state the following:

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

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

> *The State of Alaska's Occupational Safety and Health (AKOSH's) authority over this agreement is limited to the statute it enforces. Therefore, AKOSH approves only the terms of the agreement pertaining to AS 18.60.089.*

This last sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under AKOSH's authority.

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

C. Complaint Withdrawal Request

If the Complainant requests to withdraw the whistleblower complaint, the investigator should inquire whether the withdrawal is due to settlement.[30] If the

[30] See Chapter 5.IX, *Withdrawal*. Complainant must provide the reason for the withdrawal request.

withdrawal is due to a settlement, the investigator must inform the parties that the settlement agreement must be submitted for approval. Upon review, AKOSH may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The investigator should also advise the parties that upon AKOSH's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed.

D. OSHA Information System (OIS) Recording of Employer-Employee Settlements and Deferrals

Any case in which AKOSH approves an employer-employee settlement agreement or defers to a resolution of the complaint through other means, such as a grievance or arbitration, etc., must be recorded in OIS as "Settled – Other."

E. Criteria for Reviewing Employer-Employee Settlement Agreements

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

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

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

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

2. GAG PROVISIONS. AKOSH will not approve a "gag" provision that prohibits, restricts, or otherwise discourages Complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a

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

a. A provision that restricts a Complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on the Respondent's past or future conduct. For example, AKOSH will not approve a provision that restricts a Complainant's right to provide information to the government related to an occupational injury or exposure.

b. A provision that requires a Complainant to notify his or her employer before filing a complaint or communicating with the government regarding the employer's past or future conduct.

c. A provision that requires a Complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.

d. A provision that requires a Complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. For example, AKOSH will not approve a provision that requires a Complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission SEC, under section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws (in the event that did or may provide such information in a separate case from the AKOSH case).[31] Such an award waiver may discourage a Complainant from engaging in protected activity under the Sarbanes-Oxley (SOX) Act, such as providing information to the Commission about a possible securities law violation. For the same reason, AKOSH will also not approve a provision that requires a Complainant to remit any portion of such an award to the Respondent. For example, AKOSH will not approve a provision that requires a Complainant to transfer award funds to the Respondent to offset payments made to the Complainant under the settlement agreement. These are

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

unlikely scenarios for AKOSH, and if they apply, federal OSHA investigates complaints under those statutes, so they also would be involved in the settlement discussion (unless the complaint under those statutes post-dates the settlement AKOSH is reviewing to approve).

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

> *Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA or AKOSH, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.*

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

> *Nothing in this Agreement is intended to or shall prevent, impede, or interfere with Complainants filing a future claim related to an exposure, an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date he or she signed this Agreement.*

3. LIQUIDATED DAMAGES. AKOSH occasionally encounters settlement agreements that require a breaching party to pay liquidated damages. AKOSH may refuse to approve a settlement agreement where the liquidated damages are clearly disproportionate to the anticipated loss to the Respondent from a breach. AKOSH may also consider whether the potential liquidated damages would exceed the relief provided to the Complainant, or whether, owing to the Complainant's position and/or wages, he or she would be unable to pay the proposed amount in the event of a breach. Language with broad terms (such as a confidentiality agreement that includes 'customers' of a large retail employer) is a category so potentially broad the Complainant wouldn't be able to understand the terms of the settlement. To then attach significant costs to a breach (e.g., both sides' court costs and attorney's fees) is likely many times larger than the settlement amount that the Complainant would receive.

4. OVERLY BROAD TERMS.

a. PARTIES RELEASED. AKOSH will typically approve a settlement agreement that contains a general release of employment-related claims

against Respondent with the understanding that AKOSH's approval is limited to the settlement of the claims under the whistleblower statute that it enforces (AS 18.60.089). AKOSH occasionally, however, encounters settlement agreements that are extremely broad as to the parties released by the agreement or the claims released by the agreement, such as settlements containing terms that would release affiliates of Respondent unconnected to either Complainant's employment with Respondent or the protected activity alleged in the complaint or claims unconnected to Complainant's employment with Respondent. To ensure that Complainant's consent to the settlement is knowing and voluntary, AKOSH may require that the Respondent clearly list in the agreement the entities and/or individuals (e.g., the subsidiaries, affiliates, partners, directors, agents, attorneys, insurers, etc.) that are being released or provide more specific information regarding the claims that are being released.

b. TAX ISSUES. AKOSH occasionally encounters settlement agreements that have broad language relating to tax issues, e.g., requiring the Complainant to indemnify and/or hold the Respondent harmless for all taxes except those for which the Respondent is solely liable. In order to ensure that the settlement agreement is not so vague regarding the Complainant's potential liability that Complainant's consent cannot be regarded as knowing and voluntary when AKOSH encounters such a term, AKOSH will request that the parties (1) omit the term from their agreement, or (2) substitute a term that states that both parties are solely responsible for their own tax obligations on monies paid under the settlement agreement and/or (3) substitute a term that states that Complainant is solely liable for Complainant's tax obligations and will hold Respondent harmless if Complainant fails to comply with any legal obligations to report and pay taxes on the amount that Complainant is receiving under the settlement agreement.

CHOICE OF LAW. Employer-employee settlement agreements sometimes contain a "choice of law" provision that states that the settlement is to be governed by the laws of a particular state. For AKOSH cases, this will be Alaska.

5. WAIVER OF FUTURE EMPLOYMENT. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file:

a. **The breadth of the waiver.** Does the employment waiver effectively prevent Complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether Complainant's skills are readily transferable to other employers or industries. Waivers that narrowly restrict future employment may be less problematic than broader waivers. Thus, an agreement limiting Complainant's future employment from a single employer is less problematic than a waiver that would prohibit Complainant from working

for any companies with which Respondent does business.

b. **Fairness.** The investigator must ask the Complainant: "Do you feel that, by entering into this agreement, your ability to work in your field is restricted?" If the answer is yes, then the following question must be asked: "Do you feel that the monetary payment fairly compensates you for that?" The Complainant also should be asked whether he or she believes that there are any other concessions made by the Respondent in the settlement that, taken together with the monetary payment, fairly compensate for the waiver of employment. The case file must document Complainant's replies and any discussion thereof.

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

d. **The strength of Complainant's case.** How strong is Complainant's retaliation case and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver, unless it is very well remunerated. Consultation with Chief of Enforcement and/or LAW may be advisable.

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

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

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

VII. Bilateral Agreements

A bilateral settlement is one between State of Alaska, DOLWD, AKOSH signed by the Chief of Enforcement (or designee) and Respondent—*without Complainant's consent*—to resolve a complaint filed under AS 18.60.089. It is an acceptable remedy to be used only under the following conditions:

- The settlement offer by the Respondent is reasonable considering the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. Although the desired goal is to obtain reinstatement and all back pay and out-of-pocket

compensatory damages, the give-and-take of settlement negotiations may result in less than complete relief.

- The Complainant refuses to accept the settlement offer made by the Respondent. The case file must fully set out the Complainant's objections in the discussion of the settlement to ensure that the information is available when the case is reviewed by the Director.
- When presenting the proposed agreement to Complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and AKOSH may settle the case without Complainant's participation. This is also the time to explain that, once settled, the Complainant may not request a review of the case by the Commissioner of DOLWD because the settlement resolves the case.
- All potential bilateral settlement agreements must be reviewed and approved in writing by the Chief of Enforcement (or designee). The bilateral settlement is then signed by both the Respondent and the Chief of Enforcement (or designee). Once settled, the case is entered in OIS as "Settled."

A. Documentation and Implementation of Bilateral Agreements

1. Although each agreement will be unique in its details by necessity, in settlements negotiated by AKOSH the general format and wording of the AKOSH standard settlement agreement should be used.
2. Investigator must document in the file the rationale for the restitution obtained. This can be a combination of a completed Damages log (Remedy log) and possibly the AKOSH settlement evaluation spreadsheet/form. If the settlement falls short of a full remedy, the justification must be explained.
3. Back pay computations should be included in the case file, with explanations of calculating methods and relevant circumstances as necessary. The Damages log provides for this.
4. The interest rate used in computing a monetary settlement, if included, will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily.
5. Any check from Respondent must be sent to Complainant even if he or she did not agree with the settlement. If Complainant returns the check to AKOSHA, the Chief of Enforcement or Director will record this fact and return it to Respondent.

VIII. Enforcement of Settlements

If there is a breach of a settlement agreement that AKOSH has entered into or approved, depending upon the status of AKOSH's investigation or any subsequent proceedings at the time the settlement was reached, AKOSH staff may either reopen the whistleblower investigation or refer the matter to the Director for a determination of merit. The additional work is a continuation of the original case. AKOSH shall not open a new case to deal with the breach of a settlement agreement.

AKOSH may inform the parties that violation of a settlement agreement is a breach of contract for which Complainant may seek redress in Superior court.

AKOSH will evaluate the case to determine how to proceed.

1. If the case settled before the merits of the complaint could be determined, the case may be reopened and investigated.
2. If the case had already been determined to have merit before the settlement was reached (e.g., a pre-referral settlement), the case may be referred to AG for litigation.
3. If the case was settled after the case had been determined to have merit and the settlement agreement was between the LAW Department and the Respondent, then the case belongs with the LAW Department.

Chapter 8

STATE PLAN – FEDERAL OSHA COORDINATION

I. Scope

Section 11(c) of the OSH Act mandates: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

Section 11(c) generally provides employees protection from retaliation for engaging in activity related to safety or health in the workplace. The Secretary of Labor is represented by RSOL in any litigation deemed appropriate, and cases are heard in United States district court.

The purpose of this chapter is to describe the procedures for the coordination of cases involving section 11(c) and State Plan analogs to section 11(c), except for II.F, where AKOSH's referral to OSHA is described. An explanation of the substantive and procedural provisions of section 11(c) can be found in the section 11(c) desk aid. The other chapters of this manual provide guidance on the investigation of AKOSH whistleblower cases under AS 18.60.089, which is an 11(c) analog.

Regulations pertaining to the administration of section 11(c) of the OSH Act are contained in 29 CFR Part 1977. The regulations most pertinent to Federal-State coordination on occupational safety or health retaliation cases are at 29 CFR 1977.18 (arbitration or other agency proceedings) and 29 CFR 1977.23 (State Plans).

II. Relationship to State Plans

A. General

Section 18 of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 667, provides that any State[32] wishing to assume responsibility for the development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a State Plan for the development of such standards and their enforcement. Approval of a State Plan under section 18 does not affect the Secretary of Labor's authority to enforce section 11(c) of the Act in any State; additionally, 29 CFR 1977.23 and 1902.4(c)(2)(v) require that each State Plan include a whistleblower provision as effective as OSHA's section 11(c) ("section 11(c) analog"). Therefore, in State Plans that cover the private sector, employees may file occupational safety and health whistleblower complaints

[32] Under the OSH Act the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. 29 U.S.C. § 652(7). Pursuant to the *Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America,* Article V, section 502(a), as contained in Pub. L. 94-24, 90 Stat. 263 (Mar. 24, 1976) [citations to amendments omitted], generally applicable laws applicable to Guam apply to the Northern Marianas as they do to Guam. Therefore, the Commonwealth of the Northern Mariana Islands is also a "State" under the OSH Act.

with federal OSHA, the State Plan, or both (known as 'Dual Filed').

B. State Plan Coverage

Section 11(c) does not cover state and local government employees. The Alaska State Plan covers state and local government employees, as well as most private sector employees.[33] In the Alaska State Plan, complaints from state and local government employees are covered only by the AKOSH. In addition, issues arising from the AKOSH's handling of retaliation cases are eligible for review under Complaint About State Program Administration (CASPA) procedures.

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

Under 29 CFR 1977.23, OSHA may refer section 11(c) complaints to AKOSH. It is OSHA's long-standing policy to refer section 11(c) complaints to AKOSH for investigation under its section 11(c) analog, AS 18.60.089; thus, rarely do both federal OSHA and a State Plan investigate a complaint. However, AKOSH may keep a case open if it opened it and then referred non-AKOSH elements to OSHA. Such a case can be maintained open but inactive, or it may be closed if OSHA is investigating a complaint against a private employer that contains elements of 11(c) and one or more other statutes. For example, complaints against private employers subject to EPA Clean Air Act (CAA) Risk Management Plan (RMP) – who also are subject to OSHA's Process Safety Management (PSM) standard; employers also subject to pipeline, surface transportation, Clean Water Act (CWA), hazardous waste, or railroad statutes, etc., where the complaint protected activity includes issues related to these covered areas may be the kinds of cases where this would occur. To steer eligible complainants to dual file, the investigator's early communication with the complainant can suggest certain categories (employees of private employers, tribal employers, tribal health consortia, etc.) to file first/also with OSHA.

D. Exemptions to the Referral Policy

Utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

1. **Multi-Statute Complaint:** If federal OSHA receives a complaint that is covered by section 11(c) and another OSHA whistleblower statute, federal OSHA will not refer the case to the State Plan. However, federal OSHA should notify the State Plan that it has received the complaint and will be conducting the investigation.
2. **Certain Federal and Non-Federal Public Employees:** Complaints from federal employees and complaints from state and local government employees in states without State Plans will not be referred to a state and will be administratively closed with concurrence or dismissed for lack of section 11(c) coverage, unless the complaint falls under another OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA. See Chapter 8.II.B, *State Plan Coverage*, above regarding whistleblower protections for other state and local government

[33] The State Plans which cover both private-sector and state and local government employees are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

employees.

3. **Exceptions to State Plan Coverage:** Alaska's State Plan presents exceptions to State Plan coverage at https://www.osha.gov/stateplans/ak; in these areas federal OSHA retains coverage of both safety and health complaints and section 11(c) complaints. Such areas include complaints from employees of USPS, employees of contractor-operated facilities engaged in USPS mail operations, employees of tribal enterprises or Indian-owned enterprises on reservations or trust lands, employees working in workplaces on federal enclaves where the state has not retained authority, maritime employees (generally, longshoremen, shipyard workers, marine terminal workers, and seamen), and employees working in aircraft cabins in flight (as defined by the FAA Policy Statement). Complaints from such employees received by federal OSHA will not be referred to AKOSH. For details about the areas of State Plan coverage, see each State Plan's webpage at: https://www.osha.gov/stateplans.
4. **Multi-State Contacts:** When federal OSHA encounters a section 11(c) case with multi-state contacts and one or more of the states is a State Plan, it is best to avoid the complexities a State Plan may face in attempting to cover the case. For example, if the unsafe conditions which the employee complained about are not within the State Plan, the State Plan may have a coverage problem. Another problem relates to the possible inability of the State Plan to serve process on the employer because the employer is headquartered in another state; this may often happen with construction businesses. The nation-wide applicability of section 11(c) solves these problems. Federal OSHA must take such cases and should communicate with the State Plan when it does so.
5. **Inadequate Enforcement of Whistleblower Protections:** When federal OSHA receives a section 11(c) complaint concerning an employee covered by a State Plan, the RA may determine, based on monitoring findings or legislative or judicial actions, that a State Plan does not adequately enforce whistleblower protections or fails to provide protection equivalent to that provided by federal OSHA policies, e.g., a State Plan that does not protect internal complaints. In such situations, the RA may elect to process private-sector section 11(c) complaints from employees covered by the affected State Plan in accordance with procedures in non-plan states.

E. Referral Procedures: Complaints Received by Federal OSHA

In general, federally filed complaints alleging retaliation for occupational safety or health activity under State Plan authority, i.e., complaints by private-sector and state and local government employees, will be referred to the appropriate State Plan official for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. Generally, the complaint shall be referred to the State Plan where Complainant's workplace is located. The federal OSHA referral is a filing of the complaint with the State Plan. The referral must be made promptly, preferably by e-mail, fax, or expedited delivery. It should be made within the AKOSH's filing period of 30 days, if possible (see Chapter 8.II.E.3, *Filing Periods in State Plans*, below).

1. Referral of Private-Sector Complaints

A private-sector employee may file an occupational safety and health whistleblower

complaint with both federal OSHA under section 11(c) and with AKOSH under AS 18.60.089. When such a complaint is received by federal OSHA, the complaint will be administratively closed as a federal section 11(c) complaint. The date of the filing with federal OSHA will be recorded in OIS. The case will then be referred to AKOSH. If the adverse action or protected activity took place in another state (see Chapter 8.II.D.4, *Multi-State Contacts*, above), the Chief of Enforcement shall consult with Region 10, DWPP to determine if the case should be referred to AKOSH or handled by federal OSHA.

Complaints that on their face implicate only section 11(c) and a State Plan's section 11(c) analog should be immediately referred to the State Plan. The requirement of a screening interview is waived with such complaints (see Chapter 3.III.A, *Overview*).

The complaint will be referred to the State Plan for screening and, if the complaint was timely filed with federal OSHA, the OSHA Regional Office will consider the complaint dually filed so that the complaint can be acted upon under the federal review procedures, if needed.

When AKOSH conducts screening and discovers that other WB statutes (investigated by OSHA) might apply, based on information gleaned from speaking with the Complainant, the investigator shall prepare a memo to file or summary of the screening interview or correspondence and confer with the Chief of Enforcement. If information is gathered from the Complainant to suggest protected activity under other statutes not covered by AKOSH is present, a referral will be made to the Region 10 DWPP Administrator. A copy of the referral will be placed in the case file, along with proof of transmission to Region 10.

2. Referral of Public-Sector Complaints

All occupational safety and health whistleblower complaints (i.e., section 11(c) complaints) from Alaska state and local government employees will be administratively closed for lack of federal authority and referred to AKOSH. If the complaint falls under both section 11(c) as well as an OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA, OSHA will refer the section 11(c) portion to AKOSH, while continuing to process/investigate the component of the complaint falling under the other statute(s). See Chapter 8.II.D.2, *Certain Federal and Non-Federal Public Employees*, above for additional information about how to handle complaints from federal, state and local government employees. AKOSH investigator should refer to Desk Aids, Fact Sheets, and/or statutes for further details on other whistleblower statutes.

3. Filing Periods in Alaska State Plan

The period to file under AS 18.60.089 is 30 days. For information purposes, the following states with other filing periods are as follows: California (6 months), Connecticut (180 days), Hawaii (60 days), Kentucky (120 days), New Jersey (180 days), North Carolina (180 days), Oregon (90 days), and Virginia (60 days).

F. Procedures for Complaints Received by AKOSH

In general, an AS 18.60.089 complaint received directly from a Complainant by AKOSH will be investigated by AKOSH and will not be referred to federal OSHA, unless elements

of the complaint fall under one of the exceptions to State Plan coverage as stated above in Chapter 8.II.D.3, *Exceptions to State Plan Coverage*. AKOSH may not request federal OSHA to handle a section 11(c) case after the expiration of the section 11(c) filing period if the complaint was not timely dually filed by Complainant with federal OSHA.

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

   Because employers in State Plans do not use the federal OSHA poster, the State Plans must advise private-sector Complainants of their right to file a federal section 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to federal protection. This may be accomplished through such means as the following language in the letter of acknowledgment or a handout sent or given to Complainant:

   > *If you are or were employed in the private sector, you may also file a retaliation complaint under section 11(c) of the federal Occupational Safety and Health Act. In order to do this, you must file your complaint with the U.S. Department of Labor - OSHA within thirty (30) days of receiving notice of the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under federal OSHA's section 11(c). Although OSHA will not conduct an investigation while the State Plan is handling the case, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final determination. A final determination is a final decision of the investigating office, a settlement to which Complainant did not consent, or a decision of a tribunal (if there was litigation by the State Plan), whichever comes later. As part of the federal review, OSHA may conduct further investigation. If the U.S. Labor Department (DOL) finds merit, DOL may file suit in federal district court to obtain relief. To file such a complaint, contact the OSHA Regional Office indicated below: ....*

For Complainants to AKOSH, this is accomplished by initial conversations with the AKOSH investigator. The investigator sends an introductory email to individuals whose complaint has some element of retaliation. The above language is contained within the body of the email (which also has several attachments to help them understand the process and choices they may face, with Dual Filing being one.

2. **Notification of Federal Review Option at Conclusion of AKOSH Investigation for Dual Filed Complaints**

   At the conclusion of each AKOSH whistleblower investigation, the Determination letter must notify the Complainant of the investigation outcome (Merit finding, Dismissal) in writing and inform the Complainant of their rights to and the process for requesting review by the Commissioner of DOLWD per 8 AAC 61.530. If a timely complaint was also dual filed with federal OSHA, the determination letter also shall inform the Complainant as follows:

   > *Should you disagree with the outcome of the investigation, you may request a federal review of your retaliation claim under section 11(c) of the OSH Act. Such a request may only be made after a final determination has been made by the state investigation office after exercise of the right to request state review, a*

settlement to which Complainant did not consent, or a final decision of a tribunal, whichever comes later. The request for federal review must be made in writing to the OSHA Regional Office indicated below and postmarked within 15 calendar days after your receipt of this final decision. If you do not request a federal review in writing within the 15 calendar-day period, you will have waived your right to a federal review.

Region 10 (Seattle) Regional Office
U.S. Department of Labor - OSHA
300 Fifth Ave., Suite 1280
Seattle, WA 98104
(206) 757-6700
(206) 757-6705 FAX

3. **Federal Whistleblower Statutes Other than Section 11(c)**

   AKOSH will make Complainants aware of their rights under the federal whistleblower protection statutes (other than section 11(c)) enforced by federal OSHA, which protect activity dealing with other federal agencies and which remain under federal OSHA's exclusive authority. For information on Complainants' rights under other federal whistleblower statutes enforced by federal OSHA, see the Whistleblower Statutes Summary Chart.

G. Properly Dually Filed Complaints

A "properly dually filed complaint" is:

- an occupational safety or health whistleblower complaint filed with federal OSHA and the AKOSH within 30-day filing period, or
- an occupational safety or health whistleblower complaint that was timely filed with federal OSHA, and federal OSHA has referred the complaint to AKOSH. AKOSH will use the date the complaint was filed with OSHA as the filing date for AKOSH.

H. Activating Properly Dually Filed Complaints

Complainants who have concerns about AKOSH's investigation of their whistleblower complaints may request a federal review of the AKOSH investigation. Such a request may only be made after any right to request state review has been exercised and the state has issued a final decision. A final decision is either a final decision of the investigating office, a settlement to which the Complainant did not consent, or a decision from the Attorney General to not litigate the case or pursue reaching a settlement, whichever comes later.

The request for a federal review must be made in writing to the OSHA Regional Office (see Chapter 8.II.F.3, above) and postmarked within 15 calendar days after receipt of the state's final decision. If the request for federal review is not timely filed, the federal section 11(c) case will remain administratively closed.

I. Federal Review Procedures

A **federal review** is a review by OSHA of AKOSH's case file of a dually filed complaint after the Complainant has met the criteria below in section 1. As part of the review, a case

may be sent back to AKOSH so that the state may attempt to correct any deficiencies. If, after review of the AKOSH case file, Federal OSHA determines that AKOSH's investigation was inadequate or that the Complainant's rights were not protected in any other way, Federal OSHA will conduct a full investigation. The Region will docket the complaint in OIS. The legal filing date remains the original filing date. However, instead of reopening the original complaint in OIS, the investigator will open a new case in the database, using as the filing date for OIS the date on which Federal OSHA decided to conduct a section 11(c) investigation. The investigator will note and cross-reference the cases in the tracking text of both the original and new case database entries.

1. **Complainant's Request for Federal Review**

   If the Complainant requests a federal review of his or her occupational safety or health retaliation case after receiving Alaska DOLWD's final determination, federal OSHA will first determine whether the case meets all the following criteria:

   a. Confirm that the complaint is, in fact, a dually filed complaint. That is: Complainant filed the complaint with federal OSHA in a timely manner (see Chapter 8.II.G, *Properly Dually Filed Complaints*, and Chapter 3.III.D.3, *Timeliness of Filing*). Complaints submitted through the OSHA Online Complaint form are considered filed with federal OSHA.

   b. A final determination has been made by Alaska DOLWD. A final determination is a final decision of the investigative office after a review of an initial determination by the Commissioner per 8 AAC 61.530, whichever comes later, except as provided in Chapter 8.II.G, *Properly Dually Filed Complaints,* above.

   c. Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's final determination: and

   d. Complaint is covered under section 11(c).

2. **Complaints Not Meeting Federal Procedural Prerequisites for Review**

   a. If upon request for federal review, the case does not meet the prerequisites for review, Complainant will be notified in writing that no right for review by OSHA will be available. In that notification, Complainant will be informed of the right to file a Complaint About State Program Administration (CASPA), which may initiate an investigation of the State Plan's handling of the case, but not a section 11(c) investigation and, therefore, will not afford individual relief to Complainant.

   b. If Complainant requests federal review before the state's final determination is made, Complainant will be notified that Complainant may request federal review only after the state has made a final determination in the case. However, in cases of a delay of one year or more after the filing of the complaint with federal OSHA or misfeasance by the state, the supervisor may allow a federal review before the issuance of a state's final determination.

3. **Federal Review**

   The OSHA federal review will be conducted as follows:

   a. Under the basic principles of 29 CFR 1977.18(c), in order to defer to the results of the state's proceedings, it must be clear that:

      i. The state proceedings "dealt adequately with all factual issues;" and

      ii. The state proceedings were "fair, regular and free of procedural infirmities;" and

      iii. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."

   b. The federal review will entail a scrutiny of all available information, including the AKOSH's investigative file. OSHA may not defer to the state's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the state case be reopened, and the specific deficiencies be corrected by the state.

4. **Deferral**

   If the AKOSH's proceedings meet the criteria above, federal OSHA may simply defer to the state's findings. The Complainant will be notified and requests for review by DWPP will not be available.

5. **No Deferral**

   Should AKOSH's correction be inadequate and/or the Region 10 DWPP supervisor determines that OSHA cannot properly defer to the state's determination pursuant to 29 CFR 1977.18(c), the supervisor will order whatever additional investigation is necessary. The investigation will be entered into OIS and the case will be investigated as quickly as possible. Based on the investigation's findings, the supervisor may dismiss, settle, or recommend litigation. If there is a dismissal, Complainants have the right to request a review by DWPP.

6. **State Plan Evaluation**

   If the federal section 11(c) review reveals issues regarding AKOSH investigation techniques, policies, and procedures, recommendations will be referred to the RA for use in the overall Alaska State Plan evaluation and monitoring.

J. CASPA Procedures

1. OSHA's State Plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a State Plan may file a Complaint About State Program Administration (CASPA). See 29 CFR 1954.20; CSP 01-00-005, Chapter 9.

2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a State Plan made to OSHA by any person or group. A CASPA about a specific case may be filed only after the state has made a final determination, as defined above.

3. Because properly dually filed section 11(c) complaints may undergo federal review under the section 11(c) procedures outlined in Chapter 8. II.F.2, *Notification of Federal Review Option at Conclusion of State Plan Investigation*, and Chapter 8.II.H, *Activating Properly Dually Filed Complaints*, no duplicative CASPA investigation is required for such complaints. If a private-sector retaliation complaint was not dually filed, it is not subject to federal review under section 11(c) procedures and is only entitled to a CASPA review. Complaints about the handling of AKOSH whistleblower investigations from state and local government employees will be considered under CASPA procedures only.

4. Upon receipt of a CASPA complaint relating to AKOSH's handling of a whistleblower case, federal OSHA will review AKOSH's investigative file and conduct other inquiries as necessary to determine if AKOSH's investigation was adequate, whether AKOSH's handling of the case was in accordance with AS 18.60.089 and supported by appropriate available evidence. A review of the AKOSH case file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the AKOSH's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to the Alaska State Plan and Complainant within the required 90 days.

5. A CASPA investigation of a whistleblower complaint may result in recommendations regarding specific findings in the case as well as future AKOSH investigation techniques, policies, and procedures. A CASPA will not be reviewed under the OSHA DWPP request for review process. If the OSHA Regional Office finds that the outcome in an AKOSH whistleblower case is not appropriate (i.e., final state action is contrary to federal practice and is less protective than a federal action would have been; does not follow state law, policies, and procedures; or state law, policies, or procedures are not at least as effective as OSHA's), the Region may require AKOSH to take appropriate action to reopen the case or in some manner correct the outcome, and, whenever possible, make changes to prevent a recurrence. If the federal review finds that there is a deficiency in the state statute, the Chief of Enforcement and/or Director of LSS, after consultation with the DWPP Director and the Directorate of Co-operative and State Programs, may request that the Alaska State Plan recommend legislative changes.

Chapter 9

INFORMATION DISCLOSURE

I. Scope

This chapter explains the procedures for the disclosure of documents in AKOSH's whistleblower investigation files. Whistleblower investigation files are subject to disclosure under OSHA's non-public disclosure policy, the Privacy Act[34], and the Alaska Public Records Act (APRA), AS 40.25.110 - 40.25.125. Under the anti-retaliation provision that AKOSH enforces, while a case is under investigation, information contained in the case file may be disclosed to the parties in order to resolve the complaint; we refer to these disclosures as non-public disclosures. Once a case is closed and the time period for requesting a review of the Director's determination, and either or both a federal review for dually filed cases and a CASPA has passed (see AAC 8.61.503, Chapter 8, above, and Chapter 9.II.B.2, *Processing Requests for Records*, for further discussion), parties to the case and/or third parties may seek disclosure of documents in AKOSH's files under the Privacy Act and APRA.

The disclosure of information in whistleblower investigation files is governed by: (1) the Privacy Act, the goal of which is to protect the privacy of individuals (PII) under whose names government records are kept; (2) APRA, the goal of which is to enable public access to government records; and (3) relevant provisions in AS 18.60.089 and DOLWD's regulations implementing the State Plan including the whistleblower statute. The guidelines below are intended to ensure that AKOSH's Whistleblower Protection Program fulfills its disclosure obligations under the Privacy Act, APRA, and AS 18.60.089.

II. Overview

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

The guidelines in this chapter apply to all investigative materials and records maintained by AKOSH's Whistleblower Protection Programs. These investigative materials or records include interviews, notes, work papers, memoranda, emails, documents, and audio or video recordings received or prepared by an investigator, concerning or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original records are the property of the State of Alaska and must be included in the case file. Under no circumstances is a government employee to destroy, retain, or use investigation notes and work papers for any private purpose. In addition, files must be maintained and destroyed in accordance with official agency schedules for the retention and destruction of records (see archives.alaska.gov). The investigator may retain copies of the final ROI and Director's Findings (Determination) for reference.

[34] The Privacy Act of 1974, a United States federal law, establishes a Code of Fair Information Practice that governs the collection, maintenance, use, and dissemination of personally identifiable information (PII) about individuals that is maintained in systems of records agencies. A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual.

B. Processing Requests for Records in Open or Closed Cases

In most cases, the first question that must be answered in order to process a disclosure request is whether the case is open or closed. The following guidance should be used in determining whether a case is considered open or closed and in processing such requests.

1. **Determining Whether a Case is Open or Closed**

   Generally, cases are open if AKOSH's investigation is ongoing, or the Alaska Attorney General has been requested to settle or litigate the case.

   AKOSH cases should be considered closed when a final determination has been made that litigation will not be pursued. Accordingly, an AKOSH case is considered open even if Director's Findings (Determination) has been issued, but the case is under review by the Commissioner and/or by OSHA. If the case is under review for potential litigation or the Department is litigating the case, the case should be considered open.

2. **Processing Requests for Records**

   Generally, if a case is open, the information contained in the case file may not be disclosed to the public, and a Glomar response (i.e., neither confirm nor deny the existence of the requested records; refer to Exemption 7 for more information) may be appropriate. In the event the matter has become public knowledge, for example, because the Complainant has released information to the media, limited disclosure may be made after consultations with the Director/AAGs and, in high profile cases, with Director/Commissioner.

   If a case is open, AKOSH will generally respond to disclosure requests from Complainants and Respondents under its Non-Public Disclosure policy if the objective is to achieve a settlement. Third-party requests for open cases and all requests for closed cases will be processed as APRA requests. However, AKOSH may make public disclosures of certain information to third parties or other government entities as set forth in the next paragraphs.

C. Public Disclosure of Statistical Data and Disclosure of Case Information to the Press

Disclosure may be made to the Alaska Legislature, the media, researchers, or other interested parties of statistical reports containing aggregate results of program activities and outcomes. Disclosure may be in response to requests made by telephone, email, fax, or letter, by a mutually convenient method.

AKOSH may decide that it is in the public interest or AKOSH's interest to issue a press release or otherwise to disclose to the media the outcome of a complaint. A Complainant's name, however, will only be disclosed with his or her consent. As a result, press releases generally should not include personally identifiable information about Complainant.

D. Sharing Records Between AKOSH and Other Government Entities

1. Appropriate, relevant, necessary, and compatible investigative records may be shared with other state or local agencies responsible for investigating, prosecuting, enforcing, or implementing the general provisions of the statutes where workplace safety and health may overlap with their mission, or where a crime has been alleged

by the Complainant. When sharing records, AKOSH will inform the recipient agency that the records are not public and request that no further disclosures be made. AKOSH shall generally use a referral form when transmitting information initially, and records if necessary.

2. **Sharing Letters**

   Appropriate, relevant, necessary, and compatible investigative records may be shared with another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity, if the activity is authorized by law, and if that agency or instrumentality has made a written request to OSHA, signed by the head of the agency, specifying the particular records sought and the law enforcement activity for which the records are sought.

   A sharing letter makes a limited disclosure to the requesting government agency and asks the recipient government agency to make no further public disclosures. Before entering into a sharing letter agreement with another governmental agency please consult with LAW as some agencies are required by statute to make all records public.

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

   An MOU can also establish a method by which OSHA and another government agency may share whistleblower complaints and findings, as well as a process for the agencies to share information from investigative files.

E. Subpoenas

When AKOSH receives a request for records via a subpoena in a case in which DOLWD is not a party, an APRA Officer must immediately notify the Chief of Enforcement of its receipt, so that the subpoena may be reviewed by the Department of Law for compliance. The investigator and administrative staff shall then follow the Chief of Enforcement's instructions on how to proceed with the subpoena request.

III. AKOSH's Non-Public Disclosure Policy

A non-public disclosure is a release by AKOSH of material from a whistleblower investigation case file to a party to the whistleblower investigation to aid in the investigation or resolution of the whistleblower complaint. Non-public disclosures may occur during an open investigation, including any time during the period for filing for review of the Director's determination. AKOSH's non-public disclosure policy does not create any appeal rights or enforceable disclosure rights.

During an investigation, requests for material from whistleblower investigation case files from third-party requesters must be directed to the appropriate APRA Officer who will process the request in compliance with Departmental APRA regulations and the guidance below. See AS 40.25.110 - 40.25.125.

A. Procedures for Non-Public Disclosures

1. AKOSH will request that the parties provide each other with a copy of all submissions they have made to AKOSH related to the complaint (This is communicated in the Notification letters to the parties). If a party does not provide its

submissions to the other party, OSHA will follow the guidelines below so that the parties can fully respond to each other's positions and the investigation can proceed to a final resolution.

2. During an investigation, a disclosure must be made to the Respondent (or Respondent's legal counsel) of the filing of the complaint, the allegations contained in the complaint, and the substance of the evidence supporting the complaint. AKOSH generally will accomplish this disclosure by providing the Respondent with a copy of the complaint and any additional information provided by the Complainant that is related to the allegation stating that the Respondent doesn't already have as part of their business records. In circumstances in which providing the actual documents would be inadvisable (for example, if providing the redacted versions of the documents is not possible without compromising the identity of potential confidential witnesses (such as non-management, employee witnesses identified by Complainant) or risking retaliation against employees), AKOSH, in its discretion, may provide a summary of the complaint and additional information to the Respondent. Before providing materials to the Respondent, AKOSH will redact them (see Chapter 9.III.A.4, *Information That May Be Withheld Or Redacted In a Non-Public Disclosure*, below).

3. During an investigation, AKOSH will provide to the Complainant (or Complainant's legal counsel) the substance of the Respondent's response (Position Statement/Defense) if the Respondent hasn't done so itself, as requested in the Notification letter from AKOSH. AKOSH generally will accomplish this disclosure by providing the Complainant with a copy of the Respondent's response and any additional information provided by the Respondent that is related to the complaint (e.g., Exhibits, Affidavits, etc.). In circumstances in which providing the actual documents would be inadvisable [for example, if Respondent has indicated that certain documents contain information covered by the Trade Secrets Act, 18 U.S.C. § 1905, discussed below in Chapter 9.III.B.1, *Trade Secrets*, and the Respondent has provided justification for same (NOTE: some RPs include very broad confidentiality claims that may not be able to be justified under Trade Secrets); or if AKOSH believes providing the redacted versions of the documents might lead to an incident of workplace violence], AKOSH, in its discretion, may provide a summary of the response and additional information to the Complainant. Before providing materials to the Complainant, AKOSH may, if the Respondent has not, redact them (see Chapter 9.III.A.4, *Information That May Be Withheld Or Redacted In a Non-Public Disclosure*, below).

   Non-public disclosure must not cite APRA exemptions, but redactions generally should be consistent with the redactions that would be made if the documents were being released under APRA. Copies of redacted documents sent to parties under non-public disclosure procedures should be identified and maintained as such in the case file, typically categorized as 'notification', position statement', 'rebuttal', and sometimes agency 'request for information' of one party may be shared with the other party, although this is less frequent.

4. **Information That May Be Withheld or Redacted in a Non-Public Disclosure**

The following are examples of the types of information that may be withheld or redacted in a non-public disclosure. Please note that the redactions described below need only be made when providing information to the party that did not submit the information to AKOSH:

a. **Personal Identifiable Information (PII)**

Names of individuals other than the Complainant and management officials representing the Respondent and personally identifiable information (PII) about individuals, including management officials, may need to be redacted when such information could violate those individuals' privacy rights, or cause intimidation or harassment to those persons. PII may include:

i. Comparative data such as wages, bonuses, and the substance of promotion recommendations;

ii. Supervisory assessments of professional conduct and ability, or disciplinary actions;

iii. Information related to medical conditions;

iv. Social Security numbers;

v. Criminal history records;

vi. Intimate personal information; and/or

vii. Information about gender where such information could identify an individual.

See the discussion under Exemption 3 for additional identifying characteristics that may be withheld. (Chapter 9.IV.E.4, *Exemption 3*)

b. **Witness Statements**

While confidentiality should always be determined on a case-by-case basis, witnesses' identities should be protected when they have provided information unless they have expressly waived the confidentiality of their identity in writing as part of the statement or recorded interview, and in any circumstance where AAG determines it is appropriate for privilege purposes. Statements of non-management witnesses other than the Complainant may be withheld or summarized/redacted as needed in order to protect those individuals' identities as confidential witnesses. AKOSH officers shall take care to redact all information that may be used to identify a confidential informant – not only names and addresses but also details including (but not limited to) hire date, a specific position, geographic location, specific duties, etc. In such circumstances where AKOSH cannot provide the statement itself, AKOSH will provide summaries of such statements.

In taking statements from individuals other than management officials representing the Respondent, the investigator should specifically ask if confidentiality is being requested and document the answer in the case file (use of

the Employee Statement packet that Enforcement uses includes forms needed to document a written waiver of confidentiality). Witnesses who request confidentiality shall be advised that their identity and all AKOSH's records of the interview (including interview statements, audio or video recordings, transcripts, and investigator's notes) will be kept confidential to the fullest extent allowed by law, but that if they are going to testify in a proceeding, the statement and their identity may need to be disclosed. In addition, all confidential interview statements obtained from non-managers (including former employees including former managers or employees of employers not named in the complaint) shall be clearly marked in such a way as to prevent the unintentional disclosure of the statement. See Chapter 4. VIII, *Confidentiality*.

In some circumstances, AKOSH may need to consider whether a witness has caused a confidentiality waiver. Once confidentiality is waived, then witness information and statements should no longer be withheld as confidential, but some information may still be redacted if the document contains Personally Identifiable Information (PII) or Confidential Business Information (CBI). For example, if a non-management witness willingly provided a statement to AKOSH with a management representative in the room or emailed his statement to AKOSH but copied his own supervisor, then confidentiality would be waived, and the statements should no longer be withheld except for any PII or CBI.

c. **Confidential Business Information (CBI)**

See discussions below at Chapter 9.III.B, *CBI and Trade Secrets*, for more information regarding what constitutes CBI and the disclosure rules applicable to such information.

d. **Intra-Agency Memoranda**

Non-public disclosure generally refers to the disclosure of documents and evidence submitted by the parties to a whistleblower investigation and evidence that OSHA gathered in the investigation. Thus, intra-agency memoranda are generally not subject to non-public disclosure – this does not include the inter-agency referral form. However, if for some reason AKOSH is considering releasing intra-agency memoranda as part of a non-public disclosure, then intra-agency deliberations and communications with LAW (attorney work product) should be withheld under AKOSH's non-public disclosure policy to the same extent that they would be withheld in response to an APRA request. See discussion below in Chapter 9.IV.E.3, Exemption 5, regarding APRA Exemption 5 and intra-agency deliberations.

B. CBI and Trade Secrets

Confidential or privileged commercial or financial information that would be protected from disclosure under APRA Exemption 12 shall also be redacted or withheld under AKOSH's non-public disclosure policy when providing the information to Complainant or Complainant's representative. Such information is referred to as confidential business information or CBI or Trade Secrets throughout this chapter. In redacting or withholding such information from non-public disclosure, AKOSH will not cite APRA exemptions that

would otherwise be applicable. The general rules applicable to the types of CBI most frequently at issue in a whistleblower investigation are discussed below:

1. **Trade Secrets**

   Trade secrets are defined as a secret, commercially valuable plan, formula, process, or device that is used in making, preparing, or processing a trade commodity (e.g., manufacturing descriptions, product formulations, and schematics or drawings). Trade secrets should not be disclosed to Complainants unless the trade secret has already been made public or Respondent has permitted the release. Trade Secrets already in possession of the Complainant, as part of the Complainant's employment, will be withheld from the Respondent, as the Complainant does not have to prove the hazard exists, only that they have a reasonable belief thereof. (NOTE: quite possibly in such a case there also is a concurrent Enforcement case with AKOSH.)

2. **Traditional CBI**

   a. Information is considered CBI if it is commercial or financial, obtained from a person, and privileged or confidential[35]. Commercial or financial information that is customarily and actually withheld from the public by the person from whom it was obtained and was submitted to AKOSH, under an assurance or expectation of confidentiality, is considered CBI. CBI already in possession of the Complainant, as part of the Complainant's employment, will be withheld from the Respondent, as the Complainant does not have to prove the hazard exists, only that they have a reasonable belief thereof.

   b. In the context of whistleblower investigations, much of the confidential business information in AKOSH investigation files may have been submitted by the Respondent or the Complainant, and the party submitting the CBI may not have labeled it as such. If the investigator believes that information is CBI that has not been identified as such by the submitter, AKOSH should treat the information as potential CBI, and mark those exhibits accordingly. Examples of information that may be CBI include business plans, payroll information, and technical manuals for proprietary software or machinery.

      Thus, if, during the course of an investigation, the investigator obtains information that he or she believes is CBI or the submitter has clearly labeled and explained in writing why a document submitted is confidential commercial or financial information, the investigator should place it under a separate tab prominently labeled "Confidential Business Information," or "CBI" or similarly segregate and secure the information in an electronic case file. This tab is separate from any "Trade Secrets" tab. If the information was obtained under subpoena, it should be under a separate tab (or otherwise segregated and secured in an electronic case file) with the subpoena under which it was obtained (Subpoenaed INFORMATION). If requested, assurance may be made in writing that the information will be held in confidence to the extent allowed by law, and that AKOSH will comply with Executive Order No. 12600, 3 CFR 235 (1988),

[35] Alaska Statute 45.50.940(3)(A) – 45.50.940(3)(B).

(E.O. 12600) or any subsequent Executive Order issued in light of the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 588 U.S. __ 2019, 139 S. Ct. 2356 (2019), and Alaska Statute 45.50.910 – 45.50.945 (Alaska Uniform Trade Secrets Act). Submitters of confidential commercial or financial information will be notified in writing of a pending APRA request for disclosure of such information and will be given an opportunity to explain why it should not be released. As required by EO 12600, if AKOSH does not agree with the submitter that materials identified by the submitter as CBI should be protected, prior to disclosing the documents, AKOSH should give the submitter written notice, which must include: a statement of the reason(s) why AKOSH disagreed with each of the submitter's disclosure objections, a description of the information to be disclosed; and a specified disclosure date (e.g., 10 days from the date of AKOSH's written notice it will disclose the documents).

c. If a CBI issue arises in a Whistleblower case, staff shall familiarize themselves with the requirements of the Alaska Uniform Trade Secrets Act and the Alaska Public Records Act.

3. **Information From an Attorney-Complainant**

In some cases, the Complainant is a current or former attorney for the Respondent. In such cases, the attorney-complainant may use privileged information to the extent necessary to prove his or her whistleblower claims, regardless of the employer's claims of attorney-client or work-product privilege. Such material is a type of CBI, as the submitter would not generally disclose it to the public. AKOSH will generally withhold such attorney-client communications to the same extent that it withholds other CBI.

Thus, in cases involving an attorney-complainant, AKOSH should assure the parties that evidence submitted during the investigation of the whistleblower's claim that the employer would normally regard as attorney-client privileged or attorney work-product will receive special handling, will be shared only with the parties, will be secured from unauthorized access, and will be withheld, to the extent allowed by law, from public disclosure invoking attorney-client privilege. Generally, if the Respondent has asserted that the information referred to in the complaint is privileged, the entire case file should be clearly labeled as containing information that is to be withheld because the Complainant is an attorney bound by attorney-client privilege. If the Respondent asserts that only certain information is privileged, then that information should be sealed in an envelope, labeled as above, and placed under a clearly labeled tab or similarly segregated in an electronic case file.

Finally, in a case in which the Complainant is a current or former attorney for Respondent, a Respondent who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.

The guidance above applies only when there is an attorney-complainant. In cases where the Complainant is not an attorney or former attorney for the Respondent, AKOSH will not accept blanket claims of privilege. Rather, the Respondent will be required to make specific, document-by-document claims, which AKOSH will assess

according to the procedures in E.O. 12600.

IV. Public Disclosure and Post-Investigation Disclosure

If a member of the general public requests documents from a whistleblower case file at any time, or if a Complainant or Respondent requests such documents following the close of AKOSH's investigation and any period for requesting a review of AKOSH's determination, AKOSH will process the request according to its procedures under APRA.

A. Alaska Public Record Act (APRA) Coverage of Whistleblower Investigation Case Files

Under APRA, a person has a right to access state agency records unless an exemption applies.

1. Apart from the nonpublic disclosures explained above, AKOSH's policy regarding the disclosure of documents in investigation and other files is governed by the APRA AS 40.25.110 - 40.25.125, and other relevant guidance.
2. **Records.** State records include books, papers, maps, photographs, digital materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the State of Alaska under state law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government, or because of the informational value of the data in them. See DLMS 1-513, citing 44 U.S.C. § 3301.
3. Please note that not all records maintained in AKOSH files are AKOSH records. AKOSH may also be in possession of records from another agency or agency component; if so, follow the guidance in Chapter 9.V.C.5, *Reports or Other Documents Obtained from State or Local Entities or Other Federal Agencies*. When records originate with AKOSH but contain within them information of interest to another agency, consult with that other agency prior to making a release determination.

B. General Procedures for Processing APRA Requests, Including Post-Investigation Requests for Documents from Complainant or Respondent

The following section describes procedures for processing requests for information under APRA, which includes the procedures for processing post-investigation requests for documents from Complainant or Respondent. APRA generally applies when Whistleblower investigation is closed. In the case when the investigation is open, AKOSH generally should seek to handle a request from Complainant or Respondent for documents as a non-public disclosure, unless directed otherwise by Chief of Enforcement after consulting with the Department of Law.

1. Upon receipt of a request (whether it is in writing or orally (2 AAC 96.310)), the AKOSH APRA Officer must determine whether the investigation is open or closed by checking OITSS-Whistleblower or OSHA Information System (OIS). Additionally, the status of any related safety and health complaint will be checked to be sure that processing the APRA will not interfere with a related enforcement investigation. The APRA Officer should additionally determine if the requestor is

involved in litigation. If this is the case, the Chief of Enforcement should consult with the Department of Law to determine whether to inform the requestor to make the request in accordance with the applicable court or administrative rules. Whether the investigation is closed or not, the APRA Officer must inform the Chief of Enforcement in writing via email of the records receipt. The request for information is logged into the APRA tracking spreadsheet. The following information is logged: the date the request was received by AKOSH, the name of the requestor, whether notice of receipt of the request was sent to the requestor under 2 AAC 96.310, and the date that any clarification was requested under 2 AAC 96.315. AKOSH cannot request an explanation or justification "of need or intended use" (2 AAC 96.220).

a. If the investigation is open:

   i. If the request is from Complainant or Respondent, contact the requester and explain that AKOSH prefers to handle the request as a non-public disclosure, so that it may provide more information to the requester than would generally be available pursuant to APRA in an open investigation. If the requester agrees, handle the request as a non-public disclosure and close the request as withdrawn. Emails or communications documenting the withdrawal of the APRA request should be retained in the case file. Otherwise, process the request under APRA.

   ii. If the request is from a Third-Party Requester – review the file for information that can be released. If the request is for records involving a particular Complainant and the existence of an investigation involving the Complainant is not already publicly known, a Glomar response is appropriate. In a Glomar response, AKOSH will neither confirm nor deny the existence of responsive records or the existence of an investigation. Please check with your FOIA officer and/or SOL before using a Glomar response. A Glomar response is not appropriate if AKOSH, Complainant, or Respondent has publicized the investigation. A Glomar response also is not appropriate if the request seeks information involving a particular Respondent.

   In cases where AKOSH is not making a Glomar response, review the case file for information that would impair the on-going investigation or litigation. Withhold all such information under Exemption 6(A). Often this review releases publicly available records in the file and withholds all other remaining records under Exemption 6(A). In the rare event the processors determine a discretionary disclosure can be made, care should be taken to review the file, being sure to withhold Complainant's name, contact information (including postal tracking codes on correspondence sent to the complaint), and other contextual identifiers (e.g., job titles) under Exemption 6(A).

b. **If the investigation is closed:**

   i. APRA request is from Complainant – release all of Complainant's documents to Complainant (or Complainant's attorney) and process the remaining

documents under the APRA.[36]

ii. APRA request is from Respondent – release all of Respondent's documents to Respondent (or Respondent's attorney) and process the remaining documents under the APRA.

iii. APRA request is from a Third-Party Requester – process the request under the APRA. As discussed above, in some cases, a Glomar response may be appropriate even for a closed case (e.g., a broad request for investigations concerning a specific Complainant). If the APRA request seeks whistleblower file records containing a corporate name, process the APRA request using the appropriate APRA exemptions.

iv. Follow the guidance below in Chapter 9.V, *Guidance for APRA-Processing of Documents Typically Found in Whistleblower Investigation Case Files*, in determining whether the exhibits found in the investigative file are releasable in whole or in part. Make a copy of the file and redact where appropriate.

v. Scan clarification letters or emails and final response to the APRA request into the Tracking System and close out in the Tracking System database. (Refer to Tracking System manual for additional guidance).

2. **Time Requirements:**

Within 10 working days after receiving a request, the requestor may be asked to clarify the request (2 AAC 96.135(a). Within 10 working days after receiving the response to a request for clarification, AKOSH officer may ask the requestor for additional clarification of needed. The time limits for responding to requests begin anew upon receiving clarification (2 AAC 96.315(b).

3. **Estimate the Recoverable Costs:**

Within 10 working days of receiving a clear request, the APRA officer shall notify the requestor in writing if the response to r requestor's requests exceeds 5 (five) the search and copying costs if any. If the response to all the requestor's requests exceeds 5 (five) person-hours, the requestor may pay for the entire amount of time required to perform those tasks. (AS 40.25.110(c). Other time spent responding to a request, including reviewing records for protected information, is not recoverable. For AKOSH records, the requestor is charged the salary and benefit costs of the person performing the work (AS 40.25.110(c). Within 10 working days after receiving a clear request, APRA officer should provide the requestor the estimate of recoverable costs with instructions to make the check payable to the State of Alaska. If there will be recoverable costs, AKOSH should receive payment before beginning work. If an estimated payment is exhausted before the search or copying is completed, APRA officer should suspend the work, estimate the cost of completing the search or copying, and provide it to the requestor. The requestor can withdraw the request, and the amount paid will be returned; or the requestor can pay the chargeable fess to

[36] Note that Complainant's documents in this circumstance would not include documents that Respondent alleges, with a reasonable explanation or evidence showing it was unauthorized, or AKOSH suspects that Complainant obtained without authorization and provided to AKOSH.

complete the response tasks. In some circumstances, the requestor may opt to receive the records collected instead of having the estimated payment returned. The Department of Law Can help determine whether this option is available.

4. **Exceptions on Charging Fees**

   a. Note that under the Privacy Act, Complainant cannot be charged for the first copy of the case file (not including any records disclosed to Complainant under non-public disclosure). For subsequent requests, AKOSH should inform Complainant that there may be a fee for processing the request.

5. **Extension**

   In some circumstances, AKOSH may not be able to fully process an APRA request within the statutory timeline or an alternative timeline agreed to with the requester. The time to respond can be extended for an additional 10 working days if at least one of the criteria in 2 AAC 96.325(d) applies: "(1) there is a need to search for and collect the requested records from field or other offices that are separate from the office responsible for maintaining the records; (2) there is a need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request; (3) there is a need for consultation with an officer or employees who is absent on approved leave or official business; (4) the basic response period comes during a peak workload period; or (5) there is need to consult with legal counsel to ensure that protected interest of private or government persons or entities are not infringed." In such circumstances, AKOSH must contact the requester to notify him/her of the delay and the reasons for delay. This notice should be sent before the initial ten-working-day period for search and copying expires. The notice must include a statement that the extension is not invoked for the purposes of delay.

   If more than 20 working days are needed to avoid "substantially impair(ing) the other functions of the public agency of an office responsible for maintaining the requested records," the agency head may ask the attorney general to grant an additional extension (2 AAC 96.325(e)).

C. APRA Fees Reductions or Waivers

Prefatory Note: The amounts listed in this discussion may change due to statutory or regulatory changes. APRA regulations should always be consulted for the current amounts.

1. **Agreement to Pay Fees**

AKOSH may waive a fee of $5 or less if the fee is less that the cost of arranging for payment (AS 40.25.110(d)). Who the requestor is and why the records are sought are irrelevant. (2 AAC 96.220; 2 AAC 96.230). Consult with the Chief of Enforcement before responding to a request for a fee reduction or waiver.

2. **Exceptions on Charging Fees:**

   Under the Privacy Act, Complainant cannot be charged a fee for the first copy of the investigation case file (not including any documents that the Complainant received during the investigation under non-public disclosure). However, the Complainant, making a subsequent request under the Privacy Act or APRA,

should be told that the Department may charge the requester fees.

3. **Fees and Fee Types May be Subject to Change**

   Please see AS 40.25.110-115 for the most current information on types of fees and fee categories.

D. Common APRA Exemptions

AKOSH's policy is to disclose documents in whistleblower case files unless disclosure is prohibited by law or if disclosure would harm an interest protected by one of the statutory exemptions. This section discusses the most common APRA exemptions that apply to documents in whistleblower files. If you believe another exemption applies, contact your APRA officer or Chief of Enforcement/AAG.

1. **Exemption 4**

   Under Exemption 4, AS 40.25.120 an agency shall withhold matters which are specifically exempted from disclosure by a federal law or regulation or by state law:

   a. Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

   b. Establishes particular criteria for withholding or refers to particular matters to be withheld; and

   c. If enacted after the date of enactment of the AS 40.25.120.

2. **Exemption 12**

   Exemption 12, AS 40.25.120 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. This exemption is intended to protect two categories of information that the submitter would have claimed AT THE TIME OF SUBMISSION were in one or both of these categories (e.g., Respondent makes a broad claim of confidentiality in their response):

   a. **Trade Secrets:** A trade secret is defined as a secret, commercially valuable plan, formula, process or device that is used in making, preparing, or processing a trade commodity (e.g., manufacturing descriptions, product formulations and schematics or drawings). Trade secrets are not commonly found in investigation case files or safety and health inspection records.

   b. **Confidential Business Information (CBI):** CBI is commercial or financial information obtained from a person that is privileged or confidential. Information is CBI if it is: (i) confidential business data submitted to the government, either because the submission is mandated or because the person voluntarily provided it, and (ii) the information would harm an identifiable private or governmental interest if disclosed (e.g., overhead costs, unit prices, copyrighted videos, proprietary manuals or software). CBI is often found in investigation case files and in safety and health inspection records.

   c. **Processing Exemption 12 Material:** To process CBI pursuant to Exemption 12, first, identify which documents contain CBI and/or trade secrets. Second, after categorizing these documents or materials, copy these documents and determine if

they are tangential to the file (slightly or indirectly related to something; not closely connected to something; relating to a tangent; peripheral). Evaluate the legitimacy of the claim using the below criteria. Third, notify the requester that there may be a processing delay and give the requester an opportunity to modify the request (or if the CBI/trade secrets are tangential to the file, you may segregate them from the file and process the remainder of the request). **Does the submitter customarily keep the information private or closely held? (This inquiry may in appropriate contexts be determined from industry practices concerning the information.)**

- If no, the information is not confidential under Exemption 4 and should be released.
- If yes, answer question 2.

1. **Did the government provide an express or implied assurance of confidentiality when the information was shared with the government?**
    - If no, answer question 3.
    - If yes, the information is confidential under Exemption 4 (this is the situation that was present in Argus Leader).
2. **Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?**
    - If no, the information is "confidential" under Exemption 12 (the government has effectively been silent – it hasn't indicated the information would be protected or disclosed – so a submitter's practice of keeping the information private will be sufficient to warrant confidential status).
    - If yes, and no other sufficient countervailing factors exist, the submitter could not reasonably expect confidentiality upon submission and so the information is not confidential under Exemption 12.

Withhold or redact the documents containing CBI consistent with the above analysis. **Tangential CBI:** Note that if the CBI requested is related only tangentially to the investigation (the CBI is small in quantity and did not affect the inspection's outcome) that is the subject of the request, use the following Exemption 12 work-around language in the determination letter:

> *The file contains [LIST COMMERCIAL INFORMATION] that arguably may be protected under Exemption 12. We are taking no action on the release of this information because it relates only tangentially to the investigation that is the subject of your request.*

3. **Exemption 5**

Exemption 5, 5 U.S.C. § 552(b)(5), allows an agency to withhold inter-agency or intra-agency information that normally would be privileged in the civil discovery context. Inter-agency and intra-agency communications can be withheld for any of the following reasons:

a. Records that are subject to the "deliberative process privilege" because they are pre-decisional and deliberative in nature. This privilege may be asserted when: (1) the information was generated prior to, and in contemplation of, a decision by a part of the Department; (2) the information is not purely factual and does not concern recommendations that the Department expressly adopted or incorporated by reference in the ultimate decision; and (3) disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes. The third element of the privilege is referred to as the "foreseeable harm analysis."

   A foreseeable harm analysis must be performed before invoking the deliberative process privilege. In making a foreseeable harm determination, "speculative or abstract fears" are not a sufficient basis for withholding records. Instead, the agency must reasonably foresee that disclosure would harm an interest protected by Exemption 5 or disclosure is prohibited by law.

   Pursuant to the FOIA Improvement Act of 2016, the deliberative process privilege of Exemption 5 cannot be invoked for records older than 25 years.

b. "Attorney work-product privilege" includes documents that are prepared by an attorney (or under an attorney's direction) in anticipation of litigation. Factual information may be protected in this context.

c. "Attorney-client privilege" includes confidential communications between a client (AKOSH) and an attorney (AAG). Internal AKOSH communications between AKOSH personnel generally would not qualify for the privilege. However, internal AKOSH communications discussing AAG-provided guidance might be protected. Consult with AAG as appropriate.

   When AKOSH encounters Exemption 5 material in a whistleblower investigation case file to which any of these attorney privileges apply in paragraphs b and c above, AKOSH must withhold the material.

4. **Exemption 3**

Exemption 3, AS 40.25.120(a)(3), permits the withholding of information contained in personnel and medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

a. Disclosure determinations under Exemption 3 require a balancing of any privacy interest (an individual's right to privacy) against the public interest in disclosure (shedding light on an agency's operations or activities). Individuals have a privacy interest with respect to information such as marital status, legitimacy of children, welfare payments information, family fights and reputations, medical conditions, date of birth, religious affiliation, citizenship data, genealogical history establishing membership in a Native American tribe, Social Security numbers, criminal history records, incarceration of U.S. citizens in a foreign prison, sexual associations, financial status, and any other information connected to them.

b. Privacy rights are limited to living individuals. The Supreme Court has recognized, however, that in some cases, surviving family members may have

privacy interests in information concerning deceased individuals such as the decedent's home addresses at the time of death.

5. **Exemption 6**

Exemption 6, AS 40.25.120(a)(6), allows agencies to withhold records compiled for law enforcement purposes under any one of six circumstances (identified as Exemption 6(A) through 6(G)). Law enforcement within the meaning of Exemption 6 includes enforcement of both civil and criminal statutes, including the laws enforced by AKOSH.

a. **6(A) –**

Disclosure could reasonably be expected to interfere with a pending law enforcement matter (includes both pending and contemplated law enforcement proceedings where disclosure would cause some sort of identifiable harm). A Glomar (neither confirm nor deny) response may be appropriate to protect the privacy of the individuals named in investigatory files and who are the subject of a APRA request.

b. **6(C) –**

Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy of a suspect, defendant, victim, or witness (See Chapter 9.III.A.4.a, *Personal Identifiable Information (PII)*, for examples).

i. The statutory threshold for withholding information under Exemption 6(C) is somewhat lower than the threshold for withholding information under Exemption 3 because law enforcement files are inherently more invasive of personal privacy than other types of records. Individuals have a strong privacy interest in not being associated with law enforcement activity.

ii. Information that AKOSH may withhold under exemption 6(C), and if appropriate under Exemption 6(D) below, includes not only individuals' names but also "contextual identifiers." Contextual identifiers are identifying factors that would reveal the identity of an individual. Common contextual identifiers include job titles, educational background, and physical descriptions. Statements an individual makes may also be contextual identifiers if the statement would reveal the individual's identity.

iii. A Glomar (neither confirm nor deny) response may be appropriate to protect privacy of the individuals named in investigatory files and who are the subject of a APRA request even when the case file is closed.

c. **6(D) –**

Disclosure could reasonably be expected to identify persons who provide information to the government in confidence or under circumstances implying confidentiality. Witnesses' identities are protected when they have provided information either under an express promise of confidentiality or under circumstances from which such as assurance could be reasonably inferred. However, confidentiality must still be determined on a case-by-case basis and whether a witness has caused a waiver of his or her confidentiality must be

considered. Once confidentiality is waived, then witness information and statements should no longer be withheld under this exemption, but Exemptions 4 and 6(C) may still apply to material in the statement.

In rare circumstances, a Glomar response may be appropriate if a more specific response to a narrowly targeted request would disclose whether or not an individual acted as a confidential witness. A Glomar response may also be used when disclosure would permit the linking of a witness to specific witness-provided information.

d. **6(E) –**

Disclosure would reveal investigative techniques and procedures for law enforcement investigations or prosecutions if disclosure could result in circumvention of the law. Exemption 6(E) protects techniques that are not generally known to the public as well as law enforcement guides or manuals that are not available to the public, where disclosure could reasonably be expected to risk circumvention of the law.

E. Other APRA Exemptions

Several other exemptions exist that are not discussed in this chapter. Exemptions 1, 2, 6(B), 6(F), 6(G), 7, 9, 10, 11 (repealed), and 13-18 should rarely be invoked and should an office wish to invoke any of these exemptions, it should contact AAG. These APRA exemptions are discussed in the Attachment A.

F. Denials Under the APRA

In addition to the APRA exemptions, APRA Officers may also deny a request in full or in part for several reasons. These reasons should be documented in the administrative record and communicated to the requester. Such reasons include:

1. No responsive records were located, or the requested records do not exist.
2. The request was referred to another component or agency; notify the requester that the request was referred to another agency.
3. The requester refuses to assume responsibility for fees associated with processing their request.
4. The request was not for an agency record; notify the requester that the request was not for an agency record.

G. Partial Release of Records: Reasonably Segregable Disclosable and Non-Disclosable Records

When making decisions regarding whether to release, redact, or withhold material under APRA, care should be taken to review material thoroughly. The APRA requires that any reasonably segregable portion of a record must be released after the application of the APRA exemptions. Partial disclosures should be made whenever full release is not possible. Release portions of records that can be reasonably segregated from the information that is being withheld under the APRA. If substantially all of a document would have to be redacted so that no meaningful content would remain, the document should be withheld in full.

These same rules apply to photographs, audio recordings, video recordings, and electronic records. For example, if a photograph must be released and a portion contains an image covered by Exemption 6(C), the photograph must be disclosed with the Exemption 6(C) material redacted.

H. Retention of APRA Files

APRA files must be maintained separately from whistleblower case files and must have 1) a clean copy of all information reviewed, 2) a copy of any materials released to the requester, and 3) a copy of all communications about the APRA (e.g., request letter, closing letter, clarifications about fees or search parameters, and response). A best practice is to maintain a copy of the redacted records without the redactions applied. APRA records should be retained in accordance with the disposition periods contained in the Records Retention Schedule. In general, APRA records must be retained for six years. In the event of an APRA appeal, the record must be maintained six years from the date of the appeal conclusion. If litigation ensues, the record must be retained for three years from the date of the APRA litigation conclusion. When more specific information or guidance is necessary, the APRA Officer and/or AKOSH's Records Officer should be consulted.

V. Guidance for APRA-Processing of Documents Typically Found in Whistleblower Investigation Case Files

The guidance below is aimed at providing APRA processors with general information about the APRA exemptions that most typically apply to the documents found in whistleblower investigation case files. However, each request is different and must be processed accordingly. When responding to a APRA request for material from whistleblower investigation case files, AKOSH must review the responsive documents thoroughly to determine whether the document contains different or additional information that should be withheld as exempt from the APRA. As previously noted, the APRA requires that any reasonably segregable portion of a record must be released after the application of the APRA exemptions. Only if substantially all of a document would have to be redacted so that no meaningful content would remain may the document be withheld in full.

With respect to specific documents in case files, the following guidance may not apply in all cases. Please be aware that many of these documents may be withheld, redacted or released in full depending on the content of the document. The guidance below should not be substituted for a thorough review of each and every document in the case file. For example, a document such as an Assignment Memorandum, in some circumstances, may contain deliberative discussions that would be subject to protection under Exemption 5.

A. Case File - Administrative Materials

1. **Assignment Memorandum**

   a. **Complainant or Respondent Requester** – Redact non-management AKOSH employee names, job titles, contact information and other contextual identifiers under Exemption 6(C). Redact any material subject to Exemption 5.

   b. **Third Party Requester** – Redact Complainant and non-management AKOSH employee names, job titles, contact information and other contextual identifiers under Exemption 6(C). Redact any material subject to Exemption

5.

2. **Complainant Notification**

   a. **Complainant** – Release in full.

   b. **Respondent Requester** – Redact contextual identifiers such as the postal carrier tracking number under Exemption 6(C).

   c. **Third Party Requester** – Redact Complainant and non-management AKOSH employee names, job titles, contact information, and other contextual identifiers under Exemption 6(C).

3. **Respondent Notification**

   a. **Complainant** – Redact contextual identifiers such as the postal carrier tracking number under Exemption 6(C).

   b. **Respondent Requester** – Release in full.

   c. **Third Party Requester** – Redact Complainant and non-management AKOSH employee names, job titles, contact information, and other contextual identifiers under Exemption 6(C).

4. **Designation of Representative**

   a. **Complainant or Respondent Requester** – Release in full.

   b. **Third Party Requester** – Redact Complainant's name, job title, contact information, and other contextual identifiers under Exemption 6(C).

5. **Correspondence to/from Complainant or Respondent**

   a. **Complainant Requester** – Release in full correspondence to or from Complainant. Review correspondence for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld from correspondence to or from Respondent under Exemption 6(C). Process CBI pursuant to Exemption 12.

   b. **Respondent Requester** – Release in full correspondence to or from Respondent. Review correspondence for non-management witness/employee names, job titles and other contextual identifiers that may need to be withheld from correspondence to/from Complainant under Exemption 6(C). If there are multiple respondents, CBI should be processed pursuant to Exemption 12 if the requester is not the same respondent as the submitter.

   c. **Third Party Requester** – Review for Complainant and witness/employee names, job titles contact information, and other contextual identifiers; management employee's personal contact information; and all respondent and AKOSH non-management employee names and contact information that may need to be withheld under Exemption 6(C). (For example, Delivery Service Tracking Numbers may provide contextual identifiers that would reveal the identities of AKOSH or respondent staff that would have signed for deliveries). Process CBI pursuant to Exemption 12.

6. **Determination Letter**

   a. **Complainant or Respondent Requester** – Release in full.

   b. **Third Party Requester** – Review for Complainant and non-management witness names, job titles and other contextual identifiers that may need to be withheld under Exemption 6(C).

7. **Commissioner Review Files (Request for Commissioner Review Letter/DWPP (Dual File) Review and Evaluation Form /Review Determination Letter)**

   a. **Complainant Requester** – Release the Request for Commissioner Review and Determination Letter in full. Review documents for deliberative material or LSS/DOLWD-AKOSH communications that may be withheld under Exemption 5. Review documents for non-management AKOSH or respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 6(C) or 6(D). Process CBI pursuant to Exemption 12.

   b. **Respondent Requester** – Release the Request for Commissioner Review and Determination Letter in full. Review documents for deliberative material or AAG/LSS-AKOSH communications that may be withheld or redacted under Exemption 5. Review documents for non-management AKOSH or respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 6(C) or 6(D).

   c. **Third Party Requester** – Review documents for deliberative material or AAG/LSS-OSHA communications that may be withheld or redacted under Exemption 5. Review documents for Complainant and non-management AKOSH or respondent employee names, job titles, and other contextual identifiers that may need to be withheld under Exemption 6(C) or 6(D). Process CBI pursuant to Exemption 12.

B. Case File - Evidentiary Materials

1. **Complaint/Intake Form (Event, OSHA or DWPP referral documents, or equivalent forms)**

   a. **Complainant or Respondent Requester** – Withhold the names of non-management AKOSH employees, job titles, and other contextual identifiers under Exemption 6(C).

   b. **Third Party Requester** – Withhold Complainant and non-management AKOSH employee names, job titles, and other contextual identifiers under Exemption 6(C).

2. **Safety and Health Intake Form (Notice of Alleged Safety or Health Hazards, AKOSH Complaint Form, OSHA –7 or equivalent e-mail)**

   a. **Complainant Requester** – Release in full only if Complainant is the safety and health complainant. Otherwise, review for safety and health complainant and non-management respondent and AKOSH/OSHA employee names, job titles, contact information, and contextual identifiers that may need to be withheld under Exemption 6(C) or 6(D).

b. **Respondent or Third-Party Requester** – Review for safety and health complainant and non-management respondent and AKOSH/OSHA employee names, job titles, contact information, and contextual identifiers that may need to be withheld under Exemption 6(C) or 6(D).

3. **Complainant's Statement(s) and Documents, Photographs, or Audio/Video Records Provided by Complainant**

   The guidance below applies to Complainant's statement(s) to AKOSH and any documents or other evidence that Complainant provides to AKOSH during the investigation. Such other evidence may include photographs, audio or video recordings taken by Complainant.

   a. **Complainant Requester** – Generally release in full. However, in some cases, Complainant may have submitted documents that contain CBI of Respondent. If AKOSH believes that Complainant submitted respondent's CBI (for example if Complainant submitted documents that AKOSH believes that Complainant obtained without permission, such documents might contain CBI), then such CBI must be processed pursuant to Exemption 12.

   b. **Respondent Requester** – Unless AKOSH provided an unredacted version of the statement or documents to Respondent during the investigation, review material for non-management witness/employee names, job titles, contact information and other contextual identifiers that may need to be withheld under Exemption 6(C). Redactions made should be consistent with any version of the statement or documents given to Respondent during the investigation.

   c. **Third Party Requester** – Review material for Complainant and all non-management witness/employee names, job titles, contact information and other contextual identifiers and management's personal contact information that may need to be withheld under Exemption 6(C). Process CBI pursuant to Exemption 12.

4. **Documents Obtained from Safety and Health Investigation Files**

   a. Please verify with the Chief of AKOSH Enforcement/ AAGs officers regarding whether safety and health inspection records within the WB case file be released and whether deliberative/law enforcement exceptions occur.

   b. **All APRA Requesters** – Review documents for deliberative material or AAG-AKOSH communications that may be withheld or redacted under Exemption 5. Review documents for non-management witness and non-management AKOSH employee names, job titles and other contextual identifiers that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12.

5. **Witness Statements and Interview Questions and Answers**

   Witness statements must be treated with care to ensure that AKOSH provides the appropriate information but does not disclose the identity of witnesses who provided information to AKOSH in confidence. Confidential witnesses' names and contextual identifiers should be withheld from all requesters under Exemption 6(C). If the statement cannot be redacted to protect the identity of the confidential witness, the

statement may be withheld in full under Exemptions 6(C) and 6(D).

While the confidentiality of a witness should always be determined on a case-by-case basis, witnesses (who are also employees of the Respondent)' identities should be protected unless they have provided in writing a waiver of the confidentiality of their identity. Non-employee witnesses should be berated as confidential under 6(C) or 6(D). Confidential witness statements will often, but not always, be marked as such and segregated in the case file. Do NOT count on that being the case!

In rare circumstances, AKOSH may need to consider whether a witness has caused a waiver of confidentiality. Once confidentiality is waived, then witness information and statements should no longer be withheld – this is particularly applicable to witnesses who are NOT employees of the Respondent. For example, if a non-management witness willingly provided a statement to AKOSH with a management representative in the room or emailed his statement to AKOSH but copied his own supervisor, then confidentiality would be waived and the statements should no longer be withheld under Exemption 6(D), unless, in a separate communication to AKOSH they communicate that they wish to provide further information privately (confidentially). However, Exemptions 12 and 6(C) could still apply to portions of the witness statement.

When reviewing witness statements in response to an APRA request, reviewers also should consider whether the witness was speaking on behalf of Respondent in his or her statement to AKOSH. If the witness was speaking for Respondent, then the witness cannot be a confidential witness and the witness's identity should not be redacted from the witness statement, although certain information that could cause an invasion of the witness's privacy, such as the witness's personal contact information, may be redacted.

Often the fact that the witness is a manager or high-level company official is sufficient to determine that the witness is speaking on behalf of the Respondent. However, the job title alone is not always determinative. Whether a person can speak on behalf of the Respondent may depend on the particular facts and circumstances. For example, a human resource specialist may be an expert on company policy but may not be able to speak on behalf of the Respondent. Also, in some circumstances, a manager or high-level company official may ask to speak to AKOSH confidentially and without the Respondent's counsel present. In that circumstance, the manager or high-level company official is a confidential witness and the witness's name and all contextual identifiers identifying the witness would be withheld under exemptions 6(C) and 6(D).

Below are general guidelines for the APRA processing of witness statements, as well as interview questions and answers, in a whistleblower investigation case file. The guidance below applies regardless of whether the witness statements are written, recorded, or videotaped:

a. **Complainant Requester** – Review for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12.

b. **Respondent Requester** – Review for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemptions 6(C) and/or 6(D).

c. **Third Party Requester** – Review for Complainant and non-management witness/employee names, job titles, contact information, and other contextual identifiers and management employees' personal contact information that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12.

6. **Respondent Position Statement and Documents, Photographs, or Audio/Video Recordings Provided by Respondent**

The guidance below applies to Respondent's position statement(s) to AKOSH and any documents or other evidence that Respondent provides to AKOSH during the investigation. Such other evidence may include photographs, audio, or video recordings taken by the Respondent. [NOTE: need to address (1) if this information was obtained by subpoena and (2) how to redact such items.]

a. **Complainant Requester** – Unless OSHA provided an unredacted version of the statement to Complainant during the investigation, review the position statement for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 6(C). Redactions made should be consistent with the version of the statement given to Complainant during the investigation. Process CBI pursuant to Exemption 12.

b. **Respondent Requester** – Release in full.

c. **Third Party Requester** – Review the position statement for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees' personal contact information that may need to be withheld under Exemption 6(C). Process CBI under Exemption 12.

7. **Investigator's Notes, Memoranda to File, and Report of Investigation**

a. **Complainant Requester** – Review notes and memos to file for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12. Review documents for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

b. **Respondent Requester** – Review notes and memos to file for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemptions 6(C) and/or 6(D). Review documents for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

c. **Third Party Requester** – Review notes and memos to file for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees' personal contact information that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12. Review documents for deliberative material or AAG-AKOSH

communications that may be withheld under Exemption 5.

8. **Case Activity Log, Telephone Log, and Table of Contents**

   a. **Complainant Requester** – Review log for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12. Review log for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

   b. **Respondent Requester** – Review log for non-management witness/employee names, job titles, contact information, and other contextual identifiers that may need to be withheld under Exemption 6(C) and/or 6(D). Review documents for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

   c. **Third Party Requester** – Review log for Complainant and witness/employee names, job titles, contact information, and other contextual identifiers and management employees' personal contact information that may need to be withheld under Exemption 6(C) and/or 6(D). Process CBI under Exemption 12. Review documents for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

C. Other Documents That May Be Found in Whistleblower Case Files

1. **OITSS-Whistleblower (IMIS) Case Summary**

   a. **Complainant or Respondent Requester** – Review summary for non-management witness/employee and non-management agency employee names, job titles, contact information, and other contextual identifiers under Exemption 6(C) and/or 6(D). Review documents for deliberative material or AAG-AKOSH communications that may be withheld or redacted under Exemption 5.

   b. **Third Party Requester** – Review summary for Complainant, non-management witness/employee and non-management agency employee names, job title, contact information, and other contextual identifiers; and portions of settlement information, if appropriate, that may need to be withheld under Exemption 6(C). Review summary for deliberative material or AAG-AKOSH communications that may be withheld under Exemption 5.

2. **Settlement Agreements**

   The following guidance applies to all final, signed settlement agreements in whistleblower investigation files, whether the settlement agreement is on AKOSH's standard settlement form or is an agreement negotiated by Complainant and Respondent that AKOSH has approved.

   a. **Complainant or Respondent Requester** – Release in full.

   b. **Third Party Requester** – Withhold Complainant's name, job title, contact information, and other contextual identifiers under Exemption 6(C). Process CBI under Exemption 12. For further guidance on settlement agreements and Exemption 12, contact your APRA officer.

3. **Complainant's Personnel and Medical Files Provided by Respondent**

   Medical records may occasionally be found in whistleblower case files and consist of medical information along with direct or contextual identifiers. (NOTE: Not all medical records in WB case file are provided by Respondent.) An Employee Medical Record is a record concerning the health status of an employee, which is made or maintained by a physician, nurse, or other health care personnel, or technician.

   AKOSH personnel who encounter medical records should be mindful of the guidance set forth in OSHA's medical access regulations at 29 CFR 1913.10, which applies to investigations under the OSH Act. Care should also be taken during the copying and redaction of such files to limit disclosures within the office.

   a. **Complainant or Respondent Requester** – Release in full.

   b. **Third Party Requester** – Withhold in full under Exemption 7(C).

4. **Complainant's Personnel and Medical Files Provided by Complainant**

   a. **Complainant Requester** – Release in full.

   b. **Respondent Requester** – Release personnel file in full. Review file for a signed medical release by Complainant. If there is no signed medical release, withhold any medical information under Exemption 6(C).

   c. **Third Party Requester** – Withhold in full under Exemption 6(C).

5. **Reports or Other Documents Obtained from State or Local Entities or Other Federal Agencies**

   Notify the APRA requester in your APRA response letter that the AKOSH file contains a copy of such a report or documents. Identify the report or documents and the state, local or federal entity from which AKOSH obtained the report or documents. Provide the requester with the information needed to request the report from the federal, state, or local entity. This guidance applies to reports such as police reports, fire reports, or a coroner's report, as well as to documents AKOSH may have from another agency's investigation of a matter related to the whistleblower investigation.

ATTACHMENT A

List of APRA Exemptions

AS 40.25.120
Sec. 40.25.120. Public records; exceptions; certified copies.
(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(1) records of vital statistics and adoption proceedings, which shall be treated in the manner required by AS 18.50;

(2) records pertaining to juveniles unless disclosure is authorized by law;

(3) medical and related public health records;

(4) records required to be kept confidential by a federal law or regulation or by state law;

(5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance;

(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;

(D) could reasonably be expected to disclose the identity of a confidential source;

(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;

(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or

(G) could reasonably be expected to endanger the life or physical safety of an individual;

(7) names, addresses, and other information identifying a person as a participant in the Alaska Higher Education Savings Trust under AS 14.40.802 or the advance college tuition savings program under AS 14.40.803 — 14.40.817;

(8) public records containing information that would disclose or might lead to the disclosure of a component in the process used to execute or adopt an electronic signature if the disclosure would or might cause the electronic signature to cease being under the sole control of the person using it;

(9) reports submitted under AS 05.25.030 concerning certain collisions, accidents, or other casualties involving boats;

(10) records or information pertaining to a plan, program, or procedures for establishing, maintaining, or restoring security in the state, or to a detailed description or evaluation of systems, facilities, or infrastructure in the state, but only to the extent that the production of the records or information

(A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program, or procedures;

(B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or

(C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare;

(11) [Repealed, § 23 ch. 7 SLA 2018.]

(12) records that are

(A) proprietary, privileged, or a trade secret in accordance with AS 43.90.150 or 43.90.220(e);

(B) applications that are received under AS 43.90 until notice is published under AS 43.90.160;

(13) information of the Alaska Gasline Development Corporation created under AS 31.25.010 or a subsidiary of the Alaska Gasline Development Corporation that is confidential by law or under a valid confidentiality agreement;

(14) information under AS 38.05.020(b)(11) that is subject to a confidentiality agreement under AS 38.05.020(b)(12);

(15) records relating to proceedings under AS 09.58 (Alaska Medical Assistance False Claim and Reporting Act);

(16) names, addresses, and other information identifying a person as a participant in the Alaska savings program for eligible individuals under AS 06.65;

(17) artists' submissions made in response to an inquiry or solicitation initiated by the Alaska State Council on the Arts under AS 44.27.060;

(18) records that are

(A) investigative files under AS 45.55.910; or

(B) confidential under AS 45.56.620.

(b) Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the fees under AS 40.25.110 — 40.25.115 a certified copy of the record, and the copy shall in all cases be evidence of the original.

(c) Recorders shall permit memoranda, transcripts, and copies of the public records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants, subject to reasonable rules and regulations as are necessary for the protection of the records and to prevent interference with the regular discharge of the duties of the recorders and their employees.

ATTACHMENT B

APRA REQUESTERS & FEES[37]

Requester	Permissible Charges	Fee Reduction/Waivers	Non-Permissible Charges	Comments
Commercial	Search, Reproduction & Review Costs (Add charges for mailing, aggregating & authentication if applicable)	Do not charge anything if total costs are $25.00 or less	N/A – All charges are permissible	Partially defined as a person who will further his or her commercial, trade or profit interests. Interest charges are applicable for debt collection purposes.
Educational or Non-Commercial Scientific Institution	Reproduction (Add charges for mailing, aggregating & authentication if applicable)	First 100 reproduced pages are free Do not charge anything if total costs are $25.00 or less	Search & Review	Partially defined as preschool, public or private elementary or secondary school, institution of undergraduate higher education, institution of graduate higher education, an institution of professional education, or an institution of vocational education AND who operates a program of scholarly research. FOIA request records must directly relate to the scholarly research of the

[37] This information is current as June 7, 2023.

				institution and not an individual's pursuits. Interest charges are applicable for debt collection purposes.
Requester	**Permissible Charges**	**Fee Reduction/Waivers**	**Non-Permissible Charges**	**Comments**
Representatives of the News Media	Reproduction (Add charges for mailing, aggregating & authentication if applicable)	First 100 reproduced pages are free Do not charge anything if total costs are $25.00 or less	Search & Review	Partially defined as representatives of the news media actively gathering news for an entity that is organized & operated to publish or broadcast news to the public. Please see 29 CFR Part 70 for additional information. Interest charges are applicable for debt collection purposes.
All Other Requesters	Search & Reproduction (Add charges for mailing, aggregating & authentication if applicable)	First 100 reproduced pages are free First two hours of search time are free Computer searches – The monetary value of two hours at the professional search level are free Do not charge anything if total costs are $25.00 or less	Review	Partially defined as those requesters that do not fit into the other three categories. Interest charges are applicable for debt collection purposes.

ATTACHMENT C

Index of Common Whistleblower Documents

Open Investigation	**Complainant and Respondent Requester**	**Third Party Requester**
Review file for information that can be released which would not damage or hurt an on-going investigation or litigation (i.e., public documents) and withhold other records under the appropriate exemptions	Refer to Non-Public Disclosure Guidance in Chapter 9, Section III.	Refer to Glomar discussion and Exemption 7(A) discussion in Chapter 9, Section IV.E.5.
Closed Investigation	**Complainant and Respondent Requester**	**Third Party**
Assignment Memo	See Section V.A.1	See Section V.A.1.b
Complainant Notification	See Section V.A.2	See Section V.A.2.c.
Respondent Notification	See Section V.A.3	See Section V.A.3.c
Designation of Representatives	See Section V.A.4	See Section V.A.4.b.
Complainant/Respondent Correspondence	See Section V.A.5	See Section V.A.5.c
Determination Letter	See Section V.A.6	See Section V.A.6.b.
OITSS-Whistleblower (IMIS) Summary	See Section V.C.1	See Section V.C.1.b.
Request for Commissioner/OSHA Review Files; CASPA	See Section V.A.7	See Section V.A.7.c.

Review Form/Determination)		
OSHA-7/Complaint	See Section V.B.2	See Section V.B.2.b.
Complainant's Statement	See Section V.B.3	See Section V.B.3.c.
CSHO Statement	See Section V.B.4	See Section V.B.4
Witness Statement(s)	See Section V.B.5	See Section V.B.5.c.
Investigator's Notes/Memos to File	See Section V.B.7	See Section V.B.7.c
Case Activity/Telephone Log	See Section V.B.8	See Section V.B.8.c.
Report of Investigation	See Section V.B.7	See Section V.B.7.c.
Table of Contents/Exhibit Log	See Section V.B.8	See Section V.B.8.c.