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**NVOSHA  
WHISTLEBLOWER  
INVESTIGATIONS  
MANUAL**

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**Revised February 10, 2023**

**DISCLAIMER**

**This manual is intended to provide policies and procedures regarding the Nevada Occupational Safety and Health Administration Whistleblower Program. This manual is solely for the benefit of the Nevada state 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 Nevada Occupational Safety and Health Administration or the State of Nevada. Statements which reflect court precedents do not necessarily indicate acquiescence with those precedents.**

# **Significant Changes**

## **CHAPTER 1: PRELIMINARY MATTERS**

- **IV. References section expanded**
- **V. Cancellations section added**
- **VI. Background section expanded**
- **VII. Additional Statutes Enforced by OSHA section added and link to statutes included**
- **VIII. Definitions section added**
- **X. Other Languages section added**

## **CHAPTER 2: LEGAL PRINCIPLES**

- **Title of Chapter 2 changed to Legal Principles**
- **I. Scope section added**
- **II. Introduction section added**
- **III. A. Provisions of NRS 618.445- link to statute added**
- **IV. A. Provisions of 29 U.S.C. 660 (c) – link to statute added**
- **Elements moved to VII.**
- **VII. C. Causal Connection includes employer knowledge**
- **VII. C. 2. Employer knowledge includes Cat's Paw Theory and small plant doctrine**
- **VIII. C. Gathering Evidence section added**
- **VIII. D. Testing Respondent's Defense added**
- **IX. Policies and Practices Discouraging Injury/Illness Reporting section added**

## **CHAPTER 3: INTAKE AND PROCESSING OF COMPLAINTS**

- **Title changed to Intake and Processing of Complaints**
- **III. Documenting and Evaluating Complaints, Timeliness and tolling rules moved to Chapter 2**
- **III.C.1. naming more than one respondent section added**
- **IV.A. Opening Complaints for Investigation updated**
- **IV.B. Closing Complaints Not Warranting Investigation updated**
- **IV.C. Referring Private Sector Whistleblower Complainants to the National Labor Relations Board (NLRB) section added**
- **IV.D. Additional agencies for referral added**

## **CHAPTER 4: CONDUCTING THE INVESTIGATION**

- **III. Case File structure and contents updated**
- **V. WebIMIS taken out as current system for entering complaints; changed to OIS**
- **Investigative steps updated in VII. Through XIV.**
- **Steps for unresponsive Complainant added in XV.B.**

## **CHAPTER 5: REMEDIES**

- **Title changed from Disposition to Remedies**
- **Expanded IV. B. 1. calculating lost wages to include temporary employees**
- **V. Undocumented workers section added**

## **CHAPTER 6: SETTLEMENT AGREEMENTS**

- **Title changed from Remedies and Settlement to Settlement Agreements**
- **II. Settlement policy expanded**
- **IV. B. Standard NVOSHA Agreement provisions updated**
- **IV. C. Private Settlement Agreements updated**

## **CHAPTER 7: CASE DISPOSITION**

- **Chapter 7 title changed to Case Disposition (previously Chapter 5)**
- **III. Procedures for Dismissals updated**
- **IV. Procedures for Withdrawal updated**
- **V. Procedures for Withdrawal updated**
- **VI. Procedures For Referral to Division Counsel for Potential Litigation updated**
- **VII. Appeals updated**

## **CHAPTER 8: STATE PLAN – FEDERAL OSHA COORDINATION**

- **Title changed to State Plan – Federal OSHA Coordination**
- **Organization and content updated**

## **CHAPTER 9: INVESTIGATIVE RECORDS AND THE NEVADA PUBLIC RECORDS ACT**

- **Moved to chapter 9 (previously chapter 7)**

- **Expanded on the provisions of the Nevada Public Records Act**
- **III. Added how to request records from NVOSHA**
- **V. Added Retention and Disposition of records**

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# CHAPTER 1: PRELIMINARY MATTERS

## I. Effective Date

This manual is effective February 10, 2023. This manual supersedes the Nevada Occupational Safety and Health Administration's Whistleblower Investigations Manual dated 6/18/2021.

## II. Purpose

This manual is intended to provide guidance to the Nevada Occupational Safety and Health Administration (NVOSHA) staff on handling complaints and investigations received pursuant to the NVOSHA whistleblower statute, Nevada Revised Statutes (NRS) 618.445. There may be circumstances where deviation from the policies and procedures listed in the manual is warranted.

## III. Scope

Nevada Occupational Safety and Health Administration (NVOSHA): Statewide

## IV. References

### A. Nevada Revised Statutes

1. [Nevada Revised Statutes 618.445](#)
2. [Chapter 618 of the Nevada Revised Statutes –Occupational Safety and Health](#)
3. [Chapter 239 of the Nevada Revised Statutes – Public Records](#)

### B. Federal Statutes

1. [Occupational Safety and Health Act \(Section 11\(c\)\), 29 U.S.C. § 660 \(c\)](#)

### C. Federal Regulations

1. [29 CFR Part 1977 – Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act of 1970](#)
2. [29 CFR Part 1954.20 – Complaints About State Program Administration](#)
3. [29 CFR Part 1904.35\(b\)\(1\)\(iv\) – Recording and Reporting Occupational Injuries and Illnesses](#)

#### **D. Federal Memorandums of Understanding**

1. [Memorandum of Understanding between The National Labor Relations Board and The Occupational Safety and Health Administration/U.S. Department of Labor, January 12, 2017](#)
2. [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](#)
3. [Expanded Administrative Closure Guidance: Updated Procedures to Close Administrative Law Judge \(ALJ\) Cases that OSHA Lacks Authority to Investigate, September 28, 2017](#)
4. [Clarification of Streamlined Procedures to Close Cases that OSHA Lacks Authority to Investigate \("Docket and Dismiss memo"\), January 12, 2017](#)
5. [Interim Investigation Procedures for Section 29 CFR 1904.35\(b\)\(1\)\(iv\), November 10, 2016](#)
6. [Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. §1904.35\(b\)\(1\)\(iv\), October 11, 2018](#)
7. [New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases, August 23, 2016](#)
8. [Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews, July 15, 2016](#)
9. [Clarification of Guidance for Section 11 \(c\) Cases Involving Temporary Workers, May 11, 2016](#)
10. [Tolling of Limitation Periods Under OSHA Whistleblower Laws by Private Agreements and for Other Reasons, January 28, 2016](#)
11. [Clarification of the Work Refusal Standard Under 29 CFR 1977.12\(b\)\(2\), January 11, 2016](#)
12. [Policy for Enforcing Settlement Agreements, Preliminary Reinstatement Orders, and Final ALJ and ARB Orders, December 21, 2015](#)
13. [Taxability of Settlements Chart, October 1, 2015](#)
14. [Referring Untimely 11\(c\) Complainants to the NLRB, March 6, 2014](#)
15. [Revised Whistleblower Disposition Procedures, April 18, 2012](#)
16. [Employer Safety Incentive and Disincentive Policies and Practices, March 12, 2012](#)

#### **E. Federal OSHA Instructions**

1. [CPL 02-03-011 – Whistleblower Investigations Manual – April 29, 2022](#)
2. [CSP 01-00-005, State Plan Policies and Procedures Manual, May 6, 2020](#)
3. [CPL 02-03-12, Section 11 \(c\), AHERA, and ISCA Request for Review \(RFR\) Program, September 15, 2022](#)

#### **F. Federal Desk Aid**

1. [Occupational Safety and Health Act \(OSH Act\), Section 11 \(c\) Desk Aid](#)

**G. Federal OSHA Chart**

1. [Whistleblower Statutes Summary Chart](#)

**H. NVOSHA Internal Policies**

1. NVOSHA Procedure For Electronic Whistleblower Records, January 25, 2023

**V. Cancellations**

- A. NVOSHA Whistleblower Investigations Manual, June 18, 2021
- B. OSHA Instruction CPL 02-03-007, Whistleblower Investigations Manual, January 28, 2016
- C. OSHA Instruction CPL 02-03-001, Referral of Section 11(c) Discrimination Complaints to “State Plan” States, February 27, 1986
- D. OSHA Instruction IRT 01-00-016, The IMIS Whistleblower User’s Guide, date unknown

**VI. Background**

**A. OSH Act.**

On December 29, 1970, President Nixon signed a bill enacting the Occupational Safety & Health Act (OSH Act). The bill was passed in response to several on-the-job injuries and deaths. The Act was created to protect the safety and health of employees in the workplace.

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. OSHA has overall responsibility for the investigation of retaliation complaints under section 11(c). They have authority to recommend litigation in merit cases, dismiss non-meritorious complaints, approve acceptable withdrawals, and negotiate voluntary settlement of complaints.

## **B. State OSHA Plans**

Under the OSH Act, states are allowed to develop and operate their own workplace safety and health program, subject to the approval of federal OSHA. State plans are essentially OSHA approved workplace safety and health programs operated by individual states instead of federal OSHA. State plans are monitored by federal OSHA, and must be *at least as effective* as OSHA in protecting workers. There are currently 22 state plans covering private and public sector workers (including Nevada), and five state plans covering only public sector workers.

## **C. NVOSHA State Plan.**

NVOSHA's state plan received initial approval on January 4, 1974. The plan obtained final approval on April 18, 2000. NVOSHA's state plan includes a whistleblower protection program. Approval of NVOSHA as a state plan does not affect federal OSHA's authority to investigate and enforce the provisions of the federal OSHA whistleblower statute, 11(c), for private sector employees.

## **VII. Additional Statutes Enforced by OSHA**

In addition to enforcing section 11(c) of the OSHA Act, OSHA is responsible for investigating and enforcing several other whistleblower statutes. These can be found at: <https://www.whistleblowers.gov/statutes>.

## VIII. Definitions

1. **Administrator:** The head of the Division of Industrial Relations, which includes NVOSHA. The Administrator decides if a whistleblower claim will be filed in court.
2. **Adverse Action:** An action that would dissuade a reasonable employee from engaging in a NVOSHA protected activity.
3. **Animus:** Hostility or ill will towards a protected activity
4. **Bilateral Agreement:** Settlement agreement between NVOSHA and Respondent without Complainant's consent.
5. **But For:** Test to determine causation. Asks whether the adverse action would have occurred "but for" (without) a protected activity.
6. **Cat's Paw Theory:** The theory that an employer can be liable when an employee lacks ultimate decision-making power but has discriminatory bias towards an employee and uses this bias to influence the actions of the ultimate decision-maker.
7. **Chief Administrative Officer:** The head of the NVOSHA state program. Reports directly to the Administrator.
8. **Complaints About State Program Administration (CASPA):** Complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to section 11(c) Complainants.
9. **Complainant:** Any person who believes that they have suffered an adverse action in violation of an OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with NVOSHA. When this manual discusses investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.
10. **Confidential Business Information (CBI):** Internal, non-public information about a company.
11. **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in NVOSHA's investigation of a whistleblower complaint. If a representative has been designated, NVOSHA typically communicates with the Complainant or the Respondent through the designated representative, although NVOSHA may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or

inadvisable. Findings are sent to both the parties and their representatives.

12. **Disparate Treatment:** Being treated differently than other employees who did not engage in a protected activity.
13. **District Office:** Any NVOSHA state office.
14. **Division Counsel:** Represents the Division of Industrial Relations in legal matters, including NVOSHA, and also provides legal guidance.
15. **Division of Industrial Relations.** Is a Division of the State of Nevada. It is comprised of six sections: Legal, Mechanical Compliance (MCS), Mine Safety and Training (MSATS), Occupational Safety and Health Administration (OSHA), Safety Consultation and Training (SCATS), and Workers' Compensation (WCS).
16. **Enforcement Case:** An inspection or investigation conducted by a Safety Associate, Safety Representative or Safety Specialist, Enforcement or Training, or an Industrial Hygienist I, Industrial Hygienist II, or Industrial Hygienist III.
17. **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.
18. **Health Complaint:** A complaint to NVOSHA that alleges health hazards in the workplace.
19. **Industrial Hygienist I, Industrial Hygienist II, or Industrial Hygienist III - DIR:** Inspects workplaces and identifies health hazards in the workplace. The Industrial Hygienist I is an entry level position. After the first year, an individual can promote to an Industrial Hygienist II. After the second year, an individual can promote to an Industrial Hygienist III.
20. **Industrial Hygienist IV - DIR:** Is a first line supervisor over the Industrial Hygienist I, II, and III.
21. **Intake Interview:** An initial interview with a Complainant to determine what their whistleblower complaint allegations are.
22. **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU):** An agreement between two agencies regarding the coordination of related activities.
23. **Nevada Occupational Safety and Health Administration (NVOSHA).** State agency that enforces health and safety standards in the workplace, and handles whistleblower complaints related to health and safety in the workplace.
24. **NVOSHA Whistleblower Protection Program:** Enforces the provisions of NVOSHA's whistleblower statute, NRS 618.445.
25. **Nexus:** A link between the protected activity and the adverse action.
26. **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.

27. **OITSS-Whistleblower:** The OSHA IT Support System – Whistleblower, or subsequent whistleblower case management system. OITSS-Whistleblower is the case management system used to process complaint data for OSHA’s WPP, formerly known as WebIMIS.
28. **Personally Identifiable Information (PII):** Information about an individual which may identify the individual, such as a Social Security number, address, phone number.
29. **Pretext:** A reason given in justification of an action taken that is not the real reason.
30. **Program Coordinator:** Assists the Chief Administrative Officer with managing the NVOSHA state program and reviews appealed whistleblower cases.
31. **Protected Activity:** Engaging in an activity related to safety and/or health in the workplace, such as filing a NVOSHA safety or health complaint, reporting hazards, reporting a workplace injury.
32. **Rebuttal Interview:** Interview with Complainant to go over the Respondent’s position and allow the Complainant the opportunity to rebut Respondent’s claims.
33. **Report of Investigation (ROI):** The report prepared by a Whistleblower Investigator discussing the Complainant claims, analyzing the evidence, drawing conclusions for each element of the whistleblower claim, and making a recommendation.
34. **Request for Review (RFR):** When a Complainant requests that federal OSHA review NVOSHA’s determination of their complaint.
35. **Respondent:** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term “Respondent” also includes Respondent’s designated representative.
36. **Safety Associate, Safety Representative or Safety Specialist, Enforcement - DIR:** Inspects workplaces and identifies safety and health hazards. The Associate is an entry level position. After the first year, the Associate can promote to a Representative. After the second year, the Representative can promote to a Specialist.
37. **Safety Complaint:** A complaint to NVOSHA that alleges safety hazards in the workplace.
38. **Safety Manager II - DIR:** Supervises Safety Supervisors and directs activities for a District office.
39. **Safety Representative or Specialist, Enforcement – DIR, Operational Support Unit:** Conducts workplace inspections and trains Safety Associates.
40. **Safety Supervisor, Enforcement - DIR:** Is a first line supervisor over the Safety Associate, Representative and Specialist.
41. **Safety Supervisor, Enforcement - DIR, Operational Support Unit:** First line supervisor for Safety Representatives and Specialists providing formal training, develops a statewide safety and health training program, and reviews appealed whistleblower cases.

42. **Settlement Agreement:** A legal contract that resolves a whistleblower claim between the Respondent and the Complainant by coming to an agreement.
43. **Temporal Proximity:** The timing between when the Complainant engages in a protected activity and when the employer (once they are aware of the protected activity) decides to take and adverse action.
44. **Whistleblower Chief Investigator:** Manages the NVOSHA Whistleblower Program and oversees Whistleblower Investigators.
45. **Whistleblower Complaint:** A complaint filed with NVOSHA alleging a violation of their whistleblower statute, NRS 618.445.
46. **Whistleblower Investigator:** Conducts complaint intakes and investigations involving whistleblower claims under NRS 618.445.
47. **Witness Interview:** An interview with a witness who has or may have information relevant to a Complainant's whistleblower claims.

## IX. NVOSHA Functional Responsibilities Regarding Whistleblower Matters

### A. NVOSHA Staff

1. **Whistleblower Investigator.** Conducts complaint intakes and decides if intake will be forwarded to the Whistleblower Chief Investigator for investigation or administratively closed with no investigation. Conducts whistleblower investigations.
2. **Whistleblower Chief Investigator.** Reviews complaint intakes, opens and assigns whistleblower investigations to Whistleblower Investigators. Reviews completed investigations and issues findings. Forwards potential merit cases to Division Counsel. Conducts training with staff. Writes whistleblower policies and procedures.
3. **Program Coordinators and Supervisor, Operational Support Unit.** Reviews appealed cases and makes a determination on the appeal.
4. **Chief Administrative Officer.** Ensures Whistleblower Protection Program is at least as effective as federal OSHA. Issues appeal decisions. Responds to CASPAs involving NVOSHA's whistleblower program.
5. **Division Counsel.** Provides legal advice on legal issues regarding whistleblower complaints and investigations. Reviews potential merit cases and makes a recommendation to the Administrator as to whether it should be litigated in court.
6. **Administrator.** Decides whether a potential merit case will be filed in court.

**X. Other Languages**

NVOSHA will request a bilingual staff member to assist with translation in complaints where the individual mainly speaks and understands Spanish. For other languages, the investigator will work with administrative staff to process an expenditure request for a translator through a statewide contract. A translator may not be readily available, so there may be a delay in processing these complaints and/or investigations.

# CHAPTER 2: LEGAL PRINCIPLES

## I. Scope

This Chapter explains the legal principles applicable to complaints and investigations under NVOSHA's whistleblower law, including:

- Provisions of NVOSHA's whistleblower statute - NRS 618.445
- Provisions of federal OSHA's whistleblower statute - 29 USC 660 (c)
- Coverage of parties
- Timeliness
- Elements of a *prima facie* whistleblower claim
- Burden of proof

## II. Introduction

NRS 618.445 is NVOSHA's whistleblower statute. NVOSHA's whistleblower statute is similar to federal OSHA's whistleblower statute. In general, NRS 618.445 states it is unlawful for an employer to retaliate against an employee because the employee engaged in a protected activity related to safety and/or health in the workplace. In order to accept a complaint for investigation, the Complainant must make a *prima facie* allegation claiming certain elements, and must meet the coverage and timeliness requirements. To prove a violation, NVOSHA must prove the elements of a whistleblower claim and meet the burden of proof.

## III. NVOSHA's Whistleblower Statute: NRS 618.445

### A. [Provisions of NRS 618.445](#)

1. *A person shall not discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, has performed an action described in subsection 3 of NRS 618.7315 or because of the exercise by the employee on behalf of himself, herself or others of any right afforded by this chapter.*
2. *Any employee aggrieved by a violation of subsection 1 may file a complaint for the relief afforded under subsection 3 with the Division. Any complaint must be filed with the Division within 30*

*days after the violation has occurred and must set forth in writing the facts constituting the violation.*

- 3. Upon receipt of the complaint by the Division, the Administrator shall cause such investigation to be made as the Administrator deems appropriate. If upon investigation, the Administrator determines that the provisions of subsection 1 have been violated, the Administrator shall bring an action in the name of the Administrator in any appropriate district court against the person who has committed the violation.*
- 4. If the court finds that the employee was discharged or discriminated against in violation of subsection 1, the employee is entitled to reinstatement and reimbursement for lost wages and work benefits.*
- 5. Any decision reached by the Administrator relating to the filing of an action pursuant to this section must be made available to the complaining employee within 90 days after the Division's receipt of the complaint.*

#### **IV. Federal OSHA's Whistleblower Statute: 29 U.S.C. § 660 (c)**

##### **A. Provisions of 29 USC 660 (c)**

- 1. 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 chapter 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 chapter.*
- 2. Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring*

*or reinstatement of the employee to his former position with back pay.*

3. *Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the Complainant of his determination under paragraph (2) of this subsection.*

## V. Coverage of Parties Under NRS 618.445

- A. In order for NVOSHA to accept and/or prove a whistleblower claim, the parties must be covered under NRS 618.445 (1). NRS 618.445 (1) states that a “*person shall not discharge or in any manner discriminate against any employee....*”. This section will define what a *person* and an *employee* is.

### 1. Definition of *Person*

- a. **NRS 618.145** defines a *person* as “any individual, firm, association, partnership, corporation, company or public agency.”
- b. Normally, a person is the employer (Respondent) of the employee, however, person is not limited to actions taken by employers against their own employees.
- c. A person may be chargeable with discriminatory action against an employee even if they are not the employee’s employer in the traditional sense.<sup>1</sup> Any person who was involved in retaliating against the employee may be considered a person.
- d. A person can be a union or other entity.<sup>2</sup>
- e. **Staffing Agency and Host Employer.** When a staffing agency sends an employee to work at a job assignment for a different business, the business is considered a host employer. In this case, both the host employer and the staffing agency are considered a person.<sup>3</sup>

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<sup>1</sup> See Meek v. United States, 136 F.2d 679 (1943): <https://casetext.com/case/meek-v-united-states>

<sup>2</sup> See Bowe v. Judson Burns, 137 F.2d 37 (1943): <https://law.justia.com/cases/federal/appellate-courts/F2/137/37/1484160/>

<sup>3</sup> See Temporary Worker Initiative, Whistleblower Protection Rights: <https://www.osha.gov/sites/default/files/publications/OSHA3781.pdf>

- f. **Respondents Located Outside of Nevada.** Respondents who have offices and/or management located outside of Nevada can still be covered as long as they have employees working in Nevada or sufficient contacts to tie them to the state of Nevada.<sup>4</sup>

## 2. Definition of *Employee*

- a. **NRS 618.085** defines an *employee* as “every person who is required, permitted or directed by any employer to engage in any employment, or to go to work or be at any time in any place of employment, under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.”
- b. Normally, an employee works for (or worked for) and is paid by the employer (Respondent), but there are exceptions. Employee includes current and former employees.
- c. **Staffing Agency Employees.** When a staffing agency sends an employee to a work at a job assignment for a different business (host employer), the employee is considered an employee of both the staffing agency and the host employer.
- d. **Darden factors.** If it is unclear whether Complainant is an employee, NVOSHA should assess and weigh the factors outlined in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), in determining if the Complainant meets the status of an employee.<sup>5</sup> These are called the “Darden” factors. The Darden factors are as follows:
- The hiring party's right to control the manner and means by which the product is accomplished
  - Skill required
  - Source of the instrumentalities and tools
  - Location of the work
  - Duration of the relationship between the parties
  - Whether the hiring party has the right to assign additional projects to the hired party
  - Extent of the hired party's discretion over when and how long to work

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<sup>4</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945): <https://www.law.cornell.edu/supremecourt/text/326/310>

<sup>5</sup> See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992): <https://www.law.cornell.edu/supct/html/90-1802.ZS.html>

- Method of payment
- Hired party's role in hiring and paying assistants
- Whether the work is part of the regular business of the hiring party
- Whether the hiring party is in business
- Provision of employee benefits
- Tax treatment of the hired party

- e. **Excluded from NVOSHA coverage.** Federal employees, U.S. Postal Service employees and tribal employees are excluded from NVOSHA coverage.

## VI. **Timeliness of a Whistleblower Claim Under NRS 618.445**

Per NRS 618.445 (2), “*Any complaint must be filed with the Division within 30 days after the violation has occurred*”.

- A. **When the Clock Starts.** NVOSHA considers the 30 days as starting the day after the Complainant is notified an adverse action is being taken against them. The 30 days is 30 *calendar* days. For example, if the Complainant was told on January 1, 2023 they were being terminated, the Complainant has up to 30 days starting on January 2, 2023 to file their complaint, so their deadline to file the complaint would be January 31, 2023.
- B. **Weekend or Holiday.** If the last day to file falls on a weekend or a state holiday, or if the NVOSHA office is closed, the next business day will count as the final day to file. For example, if the Complainant’s last day to file is on January 29, 2023 (Sunday), the Complainant will have until January 30, 2023 (Monday) to file their complaint.
- C. **Extending the Deadline Through Tolling**

The following reasons below may justify the tolling (extending) of the 30 day deadline to file. This list is not all-inclusive, and tolling will be granted on a case by case basis.

1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action in such a way as to prevent the Complainant from knowing or discovering the requisite elements of a prima facie case, such as presenting the Complainant with forged documents purporting to negate any basis for supposing that the adverse action was relating to protected activity. Mere

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

2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
3. The employee is unable to file within the required period due to a major natural or man-made disaster such as a major snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
4. The employee mistakenly filed a timely NVOSHA whistleblower complaint with another agency that does not have the authority to grant relief. (ie, Equal Employment Opportunity Commission)
5. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his rights. For example, when an employer repeatedly assured the Complainant that he would be reinstated so that the Complainant reasonably believed that he would be restored to his former position, tolling may be appropriate. However, the mere fact that settlement negotiations were ongoing between the Complainant and the Respondent is not sufficient.

**D. Reasons Not to Toll**

There are also reasons the deadline will not be extended. Again, the list below is not all inclusive and whether tolling will apply will be decided on a case-by-case basis.

1. Ignorance of the statutory filing period.
2. Waiting to file until a decision is made on their unemployment compensation claim.
3. Filing late because the Complainant was awaiting the outcome of a workers' compensation claim.
4. Waiting to file until they file a private lawsuit

5. Waiting to file until a decision is made on their grievance.

## VII. Elements of a Whistleblower Claim

In order to establish a whistleblower claim under NRS 618.445, the Complainant must allege: **1) a protected activity, 2) an adverse action, and 3) a causal connection** between the protected activity and the adverse action.<sup>6</sup> In order to establish a whistleblower violation, NVOSHA must prove these three elements exist.

### A. Protected Activity

The first element of a whistleblower claim is a protected activity covered under [Chapter 618](#) of the Nevada Revised Statutes. **The protected activity must be reasonable and be made in good faith.** The below list contains examples of protected activities that fall under Chapter 618 and is not all inclusive.

1. **Reporting a workplace safety and/or health complaint to management.** The complaint does not have to be a safety and/or health issue that actually violates a NVOSHA standard, rather, the Complainant must have a reasonable belief, based on their training and education, that there is a safety or health hazard.
2. **Filing a safety and/or health complaint with NVOSHA** alleging hazards in the workplace.
3. **Filing a safety and/or health complaint with a state or local government agency other than NVOSHA** that handles workplace hazards, such as the fire department, police department, or health department.
4. **Participating in a NVOSHA inspection or whistleblower investigation.**
5. **Reporting a work-related injury or illness to management.**<sup>7</sup> This includes filing a report of injury under a workers' compensation statute.
6. **Testifying or being called to testify in a proceeding** regarding an issue which falls under Chapter 618 of the Nevada Revised

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<sup>6</sup> See [Brooks v. City of San Mateo, 229 F.3d 917, 928](#) (9<sup>th</sup> Cir. 2000)

<sup>7</sup> See [1904.35\(b\)\(2\)\(iv\)](#)

Statutes. A proceeding includes both formal (court) or informal (administrative hearing) proceedings.

7. **Work Refusal.**<sup>8</sup> Refusing to perform a work task that the employee reasonably believes presents a real danger of death or serious injury. There are five requirements to have a protected work refusal:
  - a. Have a reasonable apprehension of death or serious injury,
  - b. Refuse in good faith,
  - c. Have no reasonable alternative,
  - d. Have insufficient time to eliminate the condition through regular statutory enforcement channels, and
  - e. Where possible, sought help from his or her employer and was unable to obtain a correction of the dangerous condition.
8. **Requesting information from NVOSHA**
9. **Reporting workplace violence**, or seeking the assistance of a public safety agency to respond to an incident of workplace violence under NRS [618.7315\(3\)](#).
10. **Exercising any other right afforded by Chapter 618 of the Nevada Revised Statutes.**

## **B. Adverse Action**

The second element of a whistleblower claim is an adverse action. The general test of whether there is an adverse action is whether a reasonable employee would have found the action “materially adverse”. Materially adverse means the

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<sup>8</sup> See [29 C.F.R. 1977.12\(b\)\(2\)](#); See U.S. Department of Labor Memo on Clarification of the Work Refusal Standard <https://www.whistleblowers.gov/memo/2016-01-11>

employer's actions are harmful to the point they could dissuade a reasonable worker from engaging in a protected activity.<sup>9</sup>

Some examples of an adverse action include, but are not limited to:

- **Discharge** – Discharge includes not only straightforward firings, but also situations in which the words or conduct of an employer would lead a reasonable employee to believe they had been terminated. Also, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may constitute a discharge.
- **Constructive discharge** – The employee quitting after the employer has deliberately, in response to a protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
- **Layoff**
- **Failure to recall employee back to work**
- **Reduced Hours**
- **Reduction in pay, including denial of overtime**
- **Denial of benefits**
- **Suspension**
- **Demotion**
- **Failure to promote**
- **Transfer to a different job** -Placing an employee in an objectively less desirable assignment. In determining if the transfer is objectively less desirable, some factors to consider are reduction in pay, lengthier commute, less interesting work, harsher physical environment, and reduced opportunities for promotion and training.
- **Change in job duties or responsibilities**
- **Reprimand or other discipline**
- **Harassment**-unwelcome conduct in the workplace in retaliation for engaging in a protected activity. Harassment becomes unlawful when enduring the offensive conduct becomes a condition of employment and the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.<sup>10</sup>
- **Applying workplace policies to discourage** protected activity, like incentive programs that discourage injury reporting.
- **Drug testing employees in an inconsistent manner**, such as only drug testing employees who are injured at work

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<sup>9</sup> See [Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 \(2006\)](#)

<sup>10</sup> See U.S. Equal Employment Opportunity Commission – Harassment: <https://www.eeoc.gov/harassment>

- **Blacklisting** – Notifying other potential employers that the Complainant should not be hired or making derogatory comments to discourage them from hiring the Complainant.
- **Threats or intimidation**
- **Reporting employee to the police or other agencies.**

### C. Causal Connection

The third element of a whistleblower claim is a causal connection between the protected activity and the adverse action. If there is a causal connection, it indicates the protected activity may have caused the adverse action.

Circumstantial evidence that may support a causal connection includes, but are not limited to:

1. **Temporal proximity (timing)**- Length of time between when the employer became aware of the protected activity and when they made the decision to take adverse action. A short time between the two may support a conclusion of a causal connection, especially where there is no intervening event that would independently justify the adverse action.
2. **Employer Knowledge** – Evidence that a person involved in or influenced the decision to take the adverse action knew or suspected the Complainant engaged in the protected activity.<sup>11</sup> Under the “Cat’s Paw” theory, an employer can be liable for retaliation even when the decisionmaker did not act with a retaliatory motive/did not know about the protected activity, but was influenced by another employee who did have a retaliatory motive/knew about the protected activity. Employer knowledge can be actual (shown by direct evidence), or inferred (shown by circumstantial evidence). Under the “small plant doctrine”, in a small company or group where everyone knows each other, knowledge can be inferred.
3. **Animus** – 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.
4. **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

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<sup>11</sup> See [Reich v. Hoy Shoe, Inc., 32 F.3d 361, 368 \(8th Cir. 1994\)](#)

in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity.

5. **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.

## VIII. Burden of Proof

### A. But For

In order to prove a whistleblower violation, NVOSHA must show the Respondent retaliated against the Complainant *because* they engaged in a protected activity. The Supreme Court has indicated that statutes with the term *because* require proof that the desire to retaliate was the “but-for” cause of the adverse action.<sup>12</sup> But for means the adverse action would not have occurred if the Complainant did not engage in a protected activity.

### B. Burden Shifting

In a whistleblower case that proceeds to court, the following burdens apply:<sup>13</sup>

1. First, NVOSHA must establish a *prima facie* case of retaliation.<sup>14</sup> A *prima facie* case of retaliation can be established by showing, by a preponderance of the evidence,<sup>15</sup> that a protected activity, an adverse action, and a causal connection exist.

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<sup>12</sup> See [University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 \(2013\)](#)

<sup>13</sup> See [McDonnell Douglas Corp. v. Green, 411 U.S. 792 \(1973\)](#)

<sup>14</sup> Latin for “at first sight”: [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie)

<sup>15</sup> A requirement that more than 50% of the evidence points to something: [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence)

2. Once a prima facie case is established, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the adverse action.
3. If the employer produces a legitimate, nondiscriminatory reason for taking the adverse action, NVOSHA must then show the Respondent's reason for taking the adverse action is pretextual and based on retaliation.
4. If NVOSHA can show the Respondent's reason for taking the adverse action is pretextual/based on retaliation, there is a violation of NVOSHA's whistleblower statute, NRS 618.445. If NVOSHA cannot show the reason is pretextual, there is no violation of the whistleblower statute.

### **C. Gathering Evidence**

The investigator must gather sufficient evidence to support a whistleblower violation, or to support a finding of no whistleblower violation. The two types of evidence that may be gathered to support or not support a violation are direct evidence and indirect evidence.

1. Direct evidence is evidence that directly proves a key fact at issue. For example, if you interviewed a manager, and they told you they fired the employee for engaging in a protected activity, this would be direct evidence of a causal connection between the protected activity and the adverse action.
2. Indirect evidence, also referred to as circumstantial evidence, is a fact or set of facts that if true, allow a person to infer (conclude) a fact at issue. For example, if a short time passed between when the employer found out about the protected activity and when the employer made the decision to take an adverse action, and there was no event justifying the adverse action, this would be indirect evidence that shows a causal connection between the protected activity and the adverse action.

### **D. Testing Respondent's Defense (Pretext Testing)**

Investigators should test the employer's defense, which is referred to as pretext testing. 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 taken against the employee was in fact in retaliation for Complainant's engaging in protected activity. If the reason the employer provides is pretextual, it means the reason provided conceals the true purpose for taking the

adverse action and the real purpose for taking the adverse action was in retaliation for engaging in a protected activity.

**1. Examples of Evidence That May Show Pretext:**

- Employer's shifting explanations for its actions
- The employer cannot provide evidence substantiating the adverse action taken
- Temporal proximity between the protected activity and the adverse action
- Applying workplace policies only to the Complainant and not other similarly situated employees (disparate treatment)

**2. Questions To Ask To Assess Pretext:**

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

**IX. Policies and Practices Discouraging Injury/Illness Reporting**

- A.** Discharging or discriminating against any employee for reporting a work-related injury or illness is a violation of 1904.35(b)(1)(iv) and may be referred to enforcement for further action.
- B.** Drug testing only injured employees and not uninjured employees involved in an incident is a discriminatory policy.
- C.** Disciplining all employees who are injured, regardless of fault, is a discriminatory policy.
- D. 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 NRS 618.445. NVOSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statutes, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

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

#### **E. Discipline For Violating a Safety Rule**

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

Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees “maintain situational awareness” or “work carefully” may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer’s treatment of similarly-situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section NRS 618.445.

# CHAPTER 3: INTAKE AND PROCESSING OF COMPLAINTS

## I. Scope

This Chapter explains the general process for the receipt and evaluation of whistleblower complaints filed under NRS 618.445, the process for opening a complaint for investigation and the process for closing a complaint with no further action.

## II. Receipt and Intake of Complaints

A. NVOSHA's follows a specific process in the receipt and intake of complaints.

### 1. Designated Email For Incoming Complaints.

The majority of complaints are routed to a designated email for whistleblower complaints, [nvoshawhistle@dir.nv.gov](mailto:nvoshawhistle@dir.nv.gov). Complaints come into the email in several ways: phone call, email, online complaint, or a referral. Every week, a Whistleblower Investigator is assigned to check the designated email for incoming complaints, and also to receive any complaints that come in from other sources than the designated email. Investigators are assigned to the complaint email on a rotating basis.

a. **Complaints Received From Federal OSHA.** Federal OSHA will refer complaints filed with them that fall under NVOSHA's whistleblower statute to NVOSHA. If the complaint also alleges retaliation covered under a federal OSHA whistleblower statute other than 11(c), those allegations will be investigated separately by federal OSHA.

### 2. Log For Incoming Complaints.

All incoming complaints are to be recorded on a shared complaint log. The investigator should record the following on the log: 1) when the complaint was received, 2) Complainant's name, 3) Complainant's phone number or other contact information, and 5) initials of the investigator.

### 3. Contact Complainant.

The Complainant should be contacted within 7 working days of receiving the complaint. Once the investigator reaches the Complainant, if they are private sector and have not yet filed online, the investigator should tell them about dual filing, and the first step is to dually file their complaint at [whistleblowers.gov](http://whistleblowers.gov). This will preserve the Complainant's dual filing rights. If the Complainant has already filed online or is unable to file online, the investigator should set up an intake interview with the Complainant as soon as possible. Note: If represented, NVOSHA should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.

- a. **Nonresponsive Complainant.** See "When Complainant Has Not Responded to NVOSHA's Attempts to Conduct an Intake Interview or to Obtain Additional Information".

**4. Create a Complaint Case File.**

A digital case file should be made for all incoming complaints. First, investigators should make a folder named as follows: Last Name of Complainant underscore, First Name of Complainant underscore, Complaint. For example, Smith\_John\_Complaint. Second, investigators should create a Complaint Intake Activity Log, which documents all contacts with Complainant and any other relevant activity. The Activity Log, all interviews conducted with Complainant, Complainant submissions, and any other relevant information should be put in the complaint folder.

**5. Conduct Intake Interview.**

Oftentimes, the initial complaint received does not contain enough information to fully understand exactly what the Complainant's whistleblower allegations are. Therefore, an intake interview with the Complainant should be completed to get a full understanding of their whistleblower allegations. The intake interview should be recorded when possible, and the investigator must get the Complainant's consent to record during the interview. The Complainant may have a representative in the interview if they complete a Designation of Representative form or provide a letter of representation. The interview should be thorough and address the following:

- a. Complainant's name, address, phone number, email and, if applicable, their representative's name and contact information
- b. Name, address, and phone number of Respondent
- c. Complainant's job title
- d. How long Complainant has worked for Respondent

- e. Complainant's work schedule, pay and benefits
- f. Complainant's direct supervisor(s)
- g. Complainant's protected activity and the details of who, what when, where why and how
- h. Complainant's adverse action and the details of who, what, when, where, why and how
- i. Complainant's allegation that there is a causal connection and the details of who, what, when, where, why and how
- j. Respondent's reason for taking the adverse action and the details of who, what, when, where, why and how
- k. Complainant's allegation of pretext
- l. Has the Complainant filed complaints with any other agencies (EEOC) and what is the status?
- m. Has the Complainant filed with unemployment and what is the status?
- n. Has the Complainant filed a grievance and what is the status?
- o. What remedy is the Complainant seeking?

The Complainant should be informed that they have a duty to mitigate damages and failure to do so could result in a reduction in the amount of back pay they would be entitled to. The Complainant should be informed that if the Respondent makes a bona fide offer of reinstatement and Complainant declines, the Respondent's liability for back pay stops. The investigator should inform the Complainant to preserve all records related to their whistleblower complaint.

**6. Obtain Supporting Documentation From Complainant.**

The investigator should attempt to obtain all documentation from Complainant that supports their whistleblower claim. For example, termination notice, written reprimand, pay stubs, complaints with other agencies, company handbooks, emails.

**III. Documenting and Evaluating Complaints**

- A. All complaints must be reduced to writing.** After the intake interview, complaints must be put on the NVOSHA Whistleblower Complaint Form, and all boxes on the form should be completed.
- B. Determine if Complaint is Timely.** The first thing the investigator should determine when receiving a complaint is whether it is timely. Per NVOSHA's statute, a complaint must be filed within 30 days after the adverse action. If the complaint is not filed within 30 days after the adverse action, it is NVOSHA's policy to determine if tolling applies. (See Chapter 2 on Timeliness and Tolling.)

**1. Filed Date**

NVOSHA normally considers the date filed as the date that the Complainant makes a complete whistleblower claim. There will be exceptions to this rule. Examples of exceptions are:

- a.** If the Complainant filed online with federal OSHA, the date of the online complaint will be considered the date filed. There will be exceptions to this as well, such as when the Complainant files an online complaint before the adverse action occurs, or files an online complaint after NVOSHA has already received a complete claim from them.
- b.** If the Complainant contacted the whistleblower unit within the 30 days, but staff is unable to coordinate an intake interview with the Complainant or obtain additional information needed to assess the complaint until after the 30 days, the date the Complainant contacted the whistleblower unit within the 30 days will be considered the date filed.

**C. Determine if Complainant and Respondent are Covered Parties.**

The second thing the investigator should determine is if the Complainant and the Respondent are covered under the whistleblower statute. The statute covers a “person” who retaliates against an “employee.” (See Coverage, Chapter 2.)

- 1.** Where more than one Respondent is named, make sure all appropriate Respondents are listed on the complaint. If the investigator later discovers an additional Respondent should be added, the complaint can be amended to add the Respondent. Examples where you may have more than one Respondent are where the Complainant is paid by a staffing company, but works for a host employer, or when a Complainant works at a jobsite for one company, but another company controls the operations of the jobsite.

**D. Determine if Complainant Has Made a Whistleblower Claim That Falls Under NVOSHA’s Whistleblower Statute.**

Ensure Complainant has alleged all three elements of a whistleblower claim: protected activity, adverse action, and causal connection.

**IV. Processing Complaints**

**A. Opening Complaints for Investigation**

1. **Forward Complaint to Supervisor.** If the complaint is timely, coverage applies, and the Complainant has made a complete whistleblower claim, the investigator should promptly forward the complaint to the Whistleblower Chief Investigator or their designee for review.
  
2. **Whistleblower Chief Investigator to Review and Approve Complaint.** The Chief will verify that all complaint requirements for opening an investigation are met. If the supervisor needs more information, they will return the complaint to the investigator to obtain the additional information.
  
3. **Investigator to Have Complainant Confirm Complaint.** Once the Chief has approved the complaint, the investigator will send the complaint to the Complainant to have them confirm it is accurate. If the Complainant requests changes to the complaint, the investigator will decide what changes will be allowed, make the changes, have the Chief approve the changes, and then have the Complainant confirm the complaint.
  
4. **Docket the Complaint.** To “docket” a complaint means to open the complaint up for investigation and document the case as an open investigation in OIS. The following docketing procedures will be followed:
  - a. **Assign a Case Number.** Once the complaint is confirmed, a case number will be assigned to the complaint. The case number is generated from the Case Assignment Log for the relevant fiscal year. Case numbers follow the following format: (last two digits of the fiscal year) – (3 digit case number). If the fiscal year is 2022 and it is the first case for the year, the case number will be 22-001. Each case after that will be assigned in chronological order (22-002, 22-003, etc.) Cases involving **multiple Respondents** will ordinarily be assigned under **one** case number, unless the allegations are so different that they must be investigated separately. Cases involving **multiple Complainants** will be assigned under **separate** case numbers. The case number will be added to the NVOSHA Whistleblower Complaint.
  
  - b. **Assign an Investigator.** After the case number is assigned, the Chief will assign an investigator to the case. The Chief will try to assign the case to the investigator who handled the complaint, but this is not always possible. The assigned investigator will be added to the NVOSHA Whistleblower Complaint.

- c. **Send the Complainant an Opening Letter.** The Complainant will be sent a Complainant Opening Letter and a Designation of Representative form advising them that a complaint is being opened and noting who their assigned investigator is. The letter will also advise private sector Complainant of their dual filing rights. This letter will be emailed if the Complainant has a valid email address, otherwise it will be sent via USPS mail. The assigned investigator will be cc'd on the email to notify them the case is being assigned to them.

## **B. Closing Complaints Not Warranting Investigation**

If the complaint lacks one of the requirements for NVOSHA to open an investigation (timeliness, coverage, prima facie allegation), or the Complainant has not responded to NVOSHA's attempts to conduct an intake interview or obtain additional information needed to docket the case, the complaint will be administratively closed with no further action, unless the Complainant disagrees with the closure.

- 1. If the Complainant **lacks one or more of the requirements** for NVOSHA to open an investigation the following steps will be taken:
  - a. Investigator will discuss the complaint with the Chief. If the Chief agrees that the complaint lacks one of the requirements to investigate and should be administratively closed, the investigator will move on to the next step. If the Chief doesn't agree with the recommendation to administratively close the complaint, the complaint will be opened for investigation.
  - b. The investigator will notify the Complainant either verbally or in writing of the following:
    - i. A brief explanation of the reason(s) the complaint cannot be investigated.
    - ii. That they are recommending the case be administratively closed, which means it will not be investigated, the complaint will not be forwarded to the Respondent, and the Complainant will not have the opportunity to object to or request review of OSHA's decision.
    - iii. That the Complainant has 10 calendar days to respond whether they agree or disagree. If they do not respond at all, NVOSHA will take their nonresponse as an agreement.
    - iv. That if they disagree within the 10 calendar days, and provide additional information that may change the

recommendation to administratively close the complaint, their complaint may be opened for investigation.

- v. That if they disagree within 10 calendar days and don't provide any additional information that would change the recommendation to administratively close their complaint, it will be docketed and dismissed. This means their complaint will not be investigated, but will give them appeal rights. It also means their employer will be notified of their complaint and the dismissal.

c. **If the Complainant agrees with the closure**, the following steps will be taken:

- i. The investigator will send an email or letter to the Complainant confirming they agreed to the administrative closure and their complaint has been administratively closed. This email or letter will be placed in the complaint file.
- ii. The investigator will enter the complaint into the OIS database and administratively close it. The investigator should pick the correct reason for administratively closing the complaint.
- iii. The Chief will review and approve the administrative closure and document this in the case file.
- iv. The investigator will ensure all information gathered related to the complaint is placed in the complaint file. The investigator will then move the complaint file to the Administrative Closures folder on the shared drive.

d. **If the Complainant disagrees** with the closure and has provided additional information that would warrant opening the complaint up for investigation, the complaint will be opened for investigation using the IV.B.1.procedures in this chapter. If the Complainant disagrees with the closure and has not provided any additional information that would warrant opening up the complaint for investigation, the complaint will be disposed of using the Docket and Dismiss procedures listed below (IV.B.3.).

e. **If the Complainant agrees and later changes their mind**, whether the complaint will remain administratively closed, be

opened up or be docketed and dismissed will be decided on a case by case basis. The investigator should look at how much time has passed since the case was administratively closed, the reason the Complainant contacted NVOSHA later, and whether there is any new information to support opening an investigation.

**2. When Complainant has not responded to NVOSHA's attempts to conduct an intake interview and/or to obtain additional information, the following steps will be taken:**

- a.** The investigator must have attempted to contact the Complainant as follows:
  - i.** Call and email the Complainant and allow them two (2) working days to respond.
  - ii.** After two working days, call or email the Complainant again and allow them two (2) more working days to respond.
  - iii.** If the Complainant has not responded to the above attempts, email the Complainant (if provided) or send a letter informing the Complainant that if they don't contact NVOSHA and/or provide the requested information within 10 calendar days, they will be recommending the complaint be administratively closed for noncooperation, which means:
    - a.** Their complaint will not be investigated, the complaint will not be forwarded to the Respondent, and the Complainant will not have the opportunity to object to or request review of OSHA's decision.
  - iv.** If the Complainant responds and/or provides the additional information, the investigator will determine if the complaint should be opened up for investigation or administratively closed. If the recommendation is to administratively close, the investigator will use the steps listed in IV.B.1. in this chapter. If the recommendation is to open, the steps in IV.A. in this chapter will be used.
  - v.** If the Complainant doesn't respond and/or provide the additional information, the complaint will be administratively closed using the procedures in IV.B.1.c. of this chapter.
  - vi.** All attempts to contact the Complainant must be documented in the activity log.

### 3. **Docket and Dismiss Procedures When Complainant Disagrees**

If the Complainant disagrees with the closure, the following steps will be taken:

- a. The investigator will document the complaint on a NVOSHA Whistleblower Complaint form, explain why they are recommending closure, and submit it to the Chief for review.
- b. The Chief will review the complaint.
- c. If the Chief agrees with the recommendation to close the complaint, the complaint will be given a case number and docketed in OIS. A digital case file will be created. **Complainant and Respondent will not receive notification letters.**
- d. The Chief will send a docket and dismiss letter to the Complainant via email if they have a valid email, otherwise it will be sent via USPS mail. The Respondent will be cc'd on the letter. The letter will explain why the case is being dismissed and advise the Complainant of their appeal rights.
- e. After the dismissal letter has been sent, the Chief will close the case out in OIS.

### C. **Referring Private Sector Whistleblower Complainants to the National Labor Relations Board (NLRB)**

If a **private sector** employee files a NVOSHA whistleblower complaint 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:

1. If the complaint is timely, OSHA shall inform the employee of the additional right to file a charge with the NLRB, as well as provide contact information for the appropriate NLRB Regional Office.
2. If the complaint is untimely and six (6) months or less has passed since the adverse action was taken, NVOSHA will advise Complainant that they may file a charge with the NLRB as they have six (6) months to file their complaint with NLRB. NVOSHA will give Complainant the contact information for the appropriate NLRB Field Office.

**D. When Complainant Alleges a Violation Which Falls Under Another Agency's Jurisdiction**

If the investigator believes the complaint alleges a violation which falls under the jurisdiction of another agency, the investigator shall provide the Complainant with the other agency's contact information or forward the complaint to that agency. Some of the agencies that the Complainant may be referred to are:

1. **Federal OSHA.** Federal OSHA has exclusive jurisdiction over many other whistleblower statutes. These statutes can be found at: <https://www.whistleblowers.gov/>. Complaints alleging a violation of these statutes will be referred to federal OSHA for review and evaluation.
2. **Equal Employment Opportunity Commission (EEOC):** federal agency that investigates discrimination based on the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.
3. **National Labor Relations Board:** federal agency that investigates retaliation for engaging in union activities and concerted protected activity
4. **Nevada Equal Rights Commission (NERC):** state agency that investigates discrimination based on a person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.
5. **Nevada Office of the Labor Commissioner:** state agency that investigates wage and hour violations.
6. **Nevada Attorney for Injured Workers (NAIW):** state agency that represents people who have been hurt at work.
7. **Nevada Workers' Compensation Section:** state agency that ensures employers carry workers' compensation insurance and are following all workers' compensation laws and regulations
8. **Nevada Department of Health and Human Services:** promotes health and well being of residents
9. **Local Police Department:** for criminal violations

10. **Local Fire Department:** enforcement of fire codes; respond to fires
11. **Southern Nevada Health District:** promotes health and well-being of Southern Nevada communities

# CHAPTER 4: CONDUCTING THE INVESTIGATION

## I. Scope

This chapter sets forth the steps the investigator should take in conducting an investigation, and the policies and procedures investigators should follow during those steps. These procedures are in place to ensure complaints are thoroughly and efficiently investigated. Professional discretion will be exercised in situations that are not covered by these policies.

## II. General Principles

- A. The investigator should remain impartial and objective throughout every investigation.
- B. The investigator should maintain the highest integrity while conducting investigations.
- C. The investigator should treat the Complainant, Respondent, and any other witnesses with respect, and remain professional at all times.
- D. The investigator is responsible for deciding what information is relevant to the investigation. The investigator, not the parties, will decide which witnesses will be interviewed and what evidence will be gathered.
- E. The investigator is responsible for ensuring confidential information gathered during the investigation remains confidential. This includes witness testimony and documentary evidence.
- F. All investigations must be reviewed and approved by the Chief or their designee before an investigation can be closed.

## III. Create and Maintain a Digital Case File

Once a complaint is opened for investigation and assigned to an investigator, a digital case file will be created and maintained by the investigator. The investigator must keep and maintain a digital case file for every investigation. The structure of the case file should be the same for every investigation. All information gathered during the investigation should be placed in the digital case file soon after receiving it, and named appropriately. When evidence is submitted in a form other than digital, the evidence

should be converted to digital format and then added to the case file. The original document can then be destroyed

#### **A. Organizational Structure and Content of Digital File.**

1. The digital case file will be named as follows:
  - (Case Number)\_(Last Name of Complainant)\_v\_(Respondent Name)
  - For example, 22-001\_Doe\_v\_HappyConstruction.
  
2. Every digital file will have the same nine (9) subfolders below, and an activity log:
  - **1\_Correspondence** – CP Notification Letter, RP Notification Letter, Designation of Representative form, Emails. Emails should be put in a pst file when possible.
  - **2\_WBcomplaint** – NVOSHA and online whistleblower complaint, intake interviews, CP submissions during intake process
  - **3\_CP** – CP submissions after case is opened, CP interviews
  - **4\_RP** – RP submissions, RP interviews
  - **5\_InvestigatorNotes** – handwritten or typed notes
  - **6\_Settlement** – settlement agreement, settlement check
  - **7\_OSHAinspection** – If CP's protected activity includes a safety/health complaint, this folder should contain the complaint, RP notification of complaint, RP response to complaint
  - **8\_ROI** – final Report of Investigation and Exhibits
  - **9\_OISCaseSummary** – printed summary of OIS case information

#### **B. Naming Documents and Other Evidence**

1. Documents should be named as follows:
  - (Date of Document in YYYYMMDD format)\_(CaseNumber)\_(Brief Description of Document)
  - For example, if the Respondent submitted a position statement on 12/9/2022 for Case No. 23-001, the document would be named 20221209\_23-001\_PositionStatment.

#### **C. Activity/Telephone Log**

Activity related to the investigation and work conducted on the investigation should be documented on an activity/telephone log. If the description of the activity conducted is in an email, the investigator can note on the log to refer to the email for details.

#### **IV. Review the Whistleblower Complaint and Supporting Documents**

When the investigator receives the case file, they should review the complaint and any other documents in the digital file. The investigator should ensure they have a good understanding of the Complainant's allegations.

#### **V. Document the Investigation in OIS (OSHA Information System)**

- A.** The OSHA Information System (OIS) is the database federal OSHA uses to document whistleblower investigations and intakes, and also safety/health complaints. OIS replaced federal OSHA's previous whistleblower database, webIMIS, in July 2022. Any NVOSHA cases/complaints before July 2022 will be in the webIMIS system. Any cases/complaints after July 2022 will be entered into OIS.
- B.** When an investigator is assigned a new investigation, they should promptly enter and docket the case into the OIS database.

#### **VI. Notify Respondent of the Complaint**

- A.** The Respondent (employer) must be notified of the complaint. Prior to sending the notification letter, the investigator should determine whether it appears from the complaint and/or the initial contact with Complainant that a safety/health inspection may be pending with the enforcement section of one of the two NVOSHA District Offices. If it appears that an inspection/investigation may be pending, the supervisor or investigator should find out the status from the enforcement section. If enforcement has not yet notified the employer of the alleged hazard(s), the investigator should wait until that notification is completed before notifying the employer of the whistleblower complaint.
- B.** Barring any delay due to a pending inspection/investigation or other reason, the assigned investigator should notify the Respondent of the Complainant's complaint within 7 working days after they receive the case assignment.

##### **1. Respondent Notification Packet**

When notifying the Respondent(s), the Respondent(s) should be provided with the following:

- a.** **Respondent Notification Letter:** This letter notifies the Respondent a whistleblower complaint has been filed, and

requests a response and supporting documents from the Respondent within 10 business days.

- b. **Designation of Representative form:** If the Respondent is designating a representative, they should complete this form or provide a letter of representation.
- c. **Redacted copy of the Complainant's complaint** and any relevant Complainant submissions.

- 2. The Respondent may be notified via email, certified mail, or in person. The investigator should try to determine who to give the notification to by requesting the email/contact information of upper management or Human Resources from the Complainant, or by finding it online. If the investigator is uncertain where to send the notification, they can send it to the registered agent for the company, provided there is one. If the investigator can't find a person to give the packet to, they should consult with the Chief.
- 3. A copy of the Respondent notification packet and proof that the Respondent was notified must be placed in the case file.

### C. **Respondent Represented by Legal Counsel**

If the Respondent obtains legal counsel or another representative to represent them, a Designation of Representative form or a letter of representation should be completed by the representative and forwarded to the investigator. Once the investigator is notified the Respondent has obtained a representative, they should ensure all requests for information and management interviews are made through the representative.

- 1. **Extension Requests.** If the Respondent asks for an extension to submit their position statement and supporting documents, the extension should be granted, provided it is reasonable.

### D. **Early Resolution/Settlement**

If the Respondent is open to resolving the complaint in its early stages via a settlement offer, the investigator should work with the Respondent and the Complainant to facilitate an early resolution. An early resolution is often beneficial to both parties because potential losses are at a minimum. If the Respondent indicates a desire to settle, their deadline to provide a position statement will be pended while they attempt to resolve the complaint via a settlement.

## **VII. Review Position Statement and Supporting Documents**

When the investigator receives the position statement and any supporting documents, they should review them as soon as possible. If the position statement/supporting documents are missing requested information, the investigator should make an additional request for that information. **Note:** The Respondent must provide evidence supporting its defense.

## **VIII. Send Redacted Position Statement/Submissions to Complainant**

After the investigator has reviewed the position statement/submissions, they must provide a redacted copy to the Complainant. They can send it via email, mail or in person.

## **IX. Conduct Rebuttal Interview With Complainant**

In most cases, the rebuttal interview with the Complainant is scheduled after the investigator has sent them the position statement and before witness interviews are conducted. The rebuttal interview may be scheduled at a later stage in the investigation when it makes sense to do so. The purpose of the rebuttal interview is to allow the Complainant to respond to the Respondent's claims in their position statement, and/or for the Complainant to decide if they wish to continue with the investigation.

The Complainant should be given some time to review the position statement before scheduling the interview; normally a week will suffice. The interview should be scheduled at a reasonable time. If the Respondent was allowed an extension to provide their position statement, the Complainant should also be allowed an extension to do their rebuttal interview if needed.

The Complainant may have a representative in the interview if they have designated one. The interview should be recorded if the Complainant gives their consent to record. In the interview, the investigator should obtain the Complainant's response to the allegations in the position statement and any other submissions provided. If the Complainant makes an allegation of pretext, this should be explored. If the Complainant brings up new allegations, the investigator should ask them if they wish to amend their original complaint. (see amended complaints) The investigator should do their best to obtain a definitive answer to all of their questions.

## **X. Schedule Witness Interviews**

In most cases, the investigator should not rely solely on the position statement/submissions as evidence, and should conduct witness interviews to vet out

Respondent's claims, to resolve discrepancies, and/or to obtain information that was requested but not provided.

The investigator should interview relevant witnesses, which are usually the ones that can respond to the Complainant's whistleblower claim and/or substantiate the Respondent's allegations. If the investigator is unsure if a witness is relevant, they should consult with the Chief. While being thorough is important, if an investigator has a heavy caseload, they should be efficient when scheduling interviews, making sure to interview only those that are necessary.

For management interviews, if the Respondent has a designated representative, normally the investigator must go through the representative to schedule the interviews. There may be limited circumstances where a management interview is scheduled directly, without going through the representative.

For non-management interviews, the investigator may contact the witness directly. NRS 618.325 allows investigators to question any employee privately. Contacting the witness directly is ideal, as they may be more willing to participate and provide truthful answers. If the investigator does not have contact information for the non-management witnesses, they should request it from the Respondent and/or Complainant. If necessary, the investigator may schedule non-management interviews through the representative.

## **XI. Conduct Witness Interviews**

All witness interviews should be recorded, provided the witness consents. Interviews may be conducted in person, via telephone, or via Microsoft Teams. At the beginning of each witness interview, the investigator will state the following:

- a.** Do I have your permission to record this interview? (obtain a "yes")
- b.** Per NRS 618.705, making a false statement or representation of material fact is against the law and is punishable by a fine and imprisonment.
- c.** Per NRS 618.445, your participation in this interview is a protected activity. If you believe you are later retaliated against for participating in the this interview, you may file a complaint with us.
- d.** Are you requesting confidentiality? (**only ask if it is a non-management interview**) If the answer is yes, state the following: "Your interview will be kept confidential to the fullest extent of the law".

The investigator should be prepared for all witness interviews. The interview should be thorough, and the witness should be asked any questions about the Complainant's

allegations and the Respondent's position that they may have knowledge of. If there is a discrepancy, the witness should be asked about it.

Each interview should be reduced to writing and put on a witness interview form. The investigator should assess the credibility of each witness.

## **XII. Review the Evidence Gathered and Determine if Additional Information is Needed**

After receiving the position statement and conducting interviews, the investigator should review all the evidence gathered and determine if there are discrepancies, and/or if they have enough information to make a determination. If additional information or interviews are needed, the investigator should request the additional information and/or interviews. If the investigator is unsure whether they need additional information/interviews, they should consult with the Chief.

## **XIII. Keep the Chief informed of the Progress of the Case.**

It is important to keep the Chief informed of the case progress so the Chief can provide direction and assistance to ensure the case is investigated in a thorough and efficient manner. This will also keep the Chief informed of any concerns or complaints about the investigation that the Chief needs to address.

## **XIV. Consult With Division Counsel as Needed**

If the investigator and the Chief believe they have a case that may be referred to Division Counsel for litigation, they should involve Division Counsel in discussions about the case as early as possible. Division Counsel can provide their preliminary opinion of the case and guidance on what additional information would be needed.

If during the course of the investigation, a legal question comes up, the investigator should consult with the Chief. If the Chief feels it is appropriate to contact Division Counsel for guidance, Division Counsel will be contacted.

## **XV. Other Matters**

### **A. Amended Complaints**

After filing a retaliation complaint with NIOSH, a Complainant may amend their complaint to add additional allegations and/or additional Respondents, as long as their original complaint is still being investigated.

1. **Additional Adverse Actions.** The Complainant may amend their complaint to add additional adverse actions, provided it is filed within 30 days after the additional adverse action(s).
2. **Additional Respondents.** The Complainant may amend their complaint to add additional Respondents if they discover during the investigation that the additional Respondent may be involved in taking the adverse action against the Complainant.
3. The amended complaint should be written on the NVOSHA Whistleblower Complaint Form, and it should be noted somewhere on the complaint that it is an amended complaint.
4. As with the original complaint, the Respondent must be notified and provided a copy of the amended complaint, and given the opportunity to respond to the amended complaint. If the Respondent has not yet submitted their position statement for the original complaint, they may combine their response to the original and amended complaint into one statement.

**B. Unresponsive/Uncooperative Complainant**

At any time during the investigation, complaints may be dismissed for Lack of Cooperation on the part of the Complainant. Some examples of being uncooperative and/or unresponsive include:

1. Failure to be available for an interview
2. Failure to respond to contacts from NVOSHA
3. Harassment, threats of violence or other inappropriate behavior towards the investigator or other staff
4. Interfering with the investigation

**Unresponsiveness.** If the investigator is having difficulty contacting Complainant to continue the investigation, the following steps should be taken:

1. Call and email (if email provided) the Complainant and allow them 48 hours to respond.
2. If they have not responded after 48 hours, email (if email provided) or send a letter to the Complainant and notify them that they have unsuccessfully attempted to contact the Complainant, and the

Complainant must contact the investigator within 10 calendar days, or the investigator will recommend the case be closed for noncooperation. The 10 days will begin the day after the email or letter is sent.

3. The attempts to contact must be documented in the complaint activity log.

#### **C. Unresponsive/Uncooperative Respondent**

1. When a Respondent is unresponsive and/or uncooperative, the investigator should do what they can to persuade the Respondent to respond/cooperate, and also give the Respondent a reasonable amount of time to respond/cooperate. If, despite the investigator's efforts, the Respondent still refuses to respond/cooperate, the investigator should let the Chief know so they can decide what the next steps should be. Usually, the next step will be to consult with Division Counsel and explore the issuance of subpoenas.
2. **Subpoenas.** Division Counsel will decide if subpoenas will be issued for an unresponsive/uncooperative Respondent. Subpoenas may be issued for witness interviews and/or documentary evidence. A *Subpoena Ad Testificandum* is issued for interviews. A *Subpoenas Duces Tecum* is issued for documentary evidence. If Division Counsel agrees to draft subpoenas, Division Counsel will tell the investigator what information they need for the subpoena and the investigator will provide that information. Once subpoenas are drafted, Division Counsel will advise the investigator on the proper way to serve the subpoena.

#### **D. Case Transfer**

If caseload or case priority considerations warrant the transfer of a case, a reassignment letter should be sent to the Complainant and Respondent with the name and email of the newly-assigned investigator. This transfer must also be documented in OIS.

## CHAPTER 5: REMEDIES

### I. Scope.

This Chapter discusses what remedies the Complainant is entitled to if there is a violation of the NVOSHA whistleblower statute. The Respondent can also voluntarily provide one or all of these remedies when resolving a complaint via a settlement agreement. If the investigator is unsure what remedies will be allowed, they should consult with the Chief, who may contact Division Counsel for guidance.

### II. Purpose of Remedies

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

### III. Remedies Under NRS 618.445

NRS 618.445 (4) states: "If the court finds that the employee was discharged or discriminated against in violation of subsection 1, the employee is entitled to **reinstatement and reimbursement for lost wages and work benefits.**"

#### A. Reinstatement

Reinstatement is putting the Complainant back into the job they lost. Reinstatement is applicable in cases involving termination, layoff, demotion, or a transfer.

#### B. Lost Wages (also called Back Pay)

Lost wages are the earnings the Complainant would have earned had the adverse action not been taken. Lost wages are often referred to as "back pay". Lost wages are normally an issue in cases where the Complainant was terminated or laid off, removed from a job without pay for a period of time, or demoted.

##### 1. Calculating Lost Wages

- a. In order to accurately determine how much the Complainant earned, investigators should obtain documentary evidence showing the Complainant's earnings, such as a W-2, paystubs, etc.
  
- b. Lost wages are normally a gross amount, meaning before taxes are withheld. **If the Complainant was paid hourly**, the gross lost wages would be calculated by multiplying the number of hours the Complainant would have worked by the hourly wage. For example, if the Complainant made \$12.00/hour and would have worked 40 hours, the gross lost wages would be \$480.00 (\$12/hour x 40). *If the Complainant's hours fluctuated* from week to week, his/her gross lost wages would be calculated by taking an average of the hours Complainant worked each week, and then multiplying that average by the hourly rate. **If the Complainant worked overtime**, the gross overtime hours would be calculated by the number of overtime hours the Complainant would have worked by the overtime hourly wage (normally time and a half). So if the Complainant made \$12.00/ hour and would have worked 10 hours of overtime, his gross lost overtime wages would be \$180 (\$18/hour x 10). In the above example, if the Complainant would have worked 40 hours and 10 hours of overtime, his gross lost wages would be \$660 (\$480 + \$180). **If the Complainant was paid a salary**, the lost wages would be calculated by: 1) dividing the salary by 2,080 (the number of work hours in a year) to calculate an hourly rate, and 2) multiplying the hourly rate by the hours the Complainant would have worked. For all other situations not listed above, lost wages will be calculated using the most fair, reasonable method.
  
- c. **Temporary employees.** A Complainant who is a temporary employee may receive back pay beyond the length of the temporary assignment from which they were terminated if there is evidence indicating that Complainant would have continued their employment beyond the temporary assignment.
  
- d. **Lost wages may include** bonuses, cost-of-living increases, or raises the Complainant would have received if they continued working.
  
- e. **Unemployment benefits should not be deducted from lost wages.** Caveat: The Complainant should be informed that any settlement payment received may be reported to the Department of Employment, Training and Rehabilitation, Unemployment

Insurance Division, resulting in the Complainant having to pay back some or all of their unemployment benefits.

- f. Workers' compensation benefits. Workers' compensation benefits should be deducted from lost wages.** Workers' compensation earnings are earnings that replace some of your lost wages during a period in which you cannot work due to a work-related injury/illness suffered while working for your employer.
- g. Interim earnings. Interim earnings should be deducted from lost wages.** Interim earnings are earnings the Complainant received from other employment after their termination, layoff demotion or transfer. Interim earnings may also include expenses incurred as a result of retaining an interim job if those expenses would not have been incurred at the former job. Examples of these earnings are expenses for tools and equipment, mileage for driving an increased distance, training costs, etc.
- h. When Respondent's Liability for Lost Wages Stops.** A Respondent's liability for back pay stops when the Complainant rejects a *bona fide* offer of reinstatement. A *bona fide* offer of reinstatement occurs when the Respondent offers the Complainant a job substantially equivalent to their former position. A Respondent's liability may also stop when the Respondent goes out of business, closes the location where Complainant worked without retaining any employees who worked at the location, or when the Complainant becomes totally disabled or otherwise unable to perform their former job.
- i. Complainant's Duty to Mitigate Damages.** The Complainant has a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a Complainant must exercise reasonable diligence in seeking alternate employment, except as noted below. However, Complainants need not succeed in finding new employment; they are required only to make an honest, good faith effort to do so. The investigator should ask Complainant for evidence of their job search and keep the evidence in the case file. Complainant's obligation to mitigate their damages does not normally require that Complainant go into another line of work or accept a demotion. However, generally, Complainants who are unable to secure substantially equivalent employment after a reasonable period of time should consider other available and suitable employment. In certain circumstances, such as when retaliation or the underlying

safety issue causes disabling physical ailments, Complainants do not need to look for substantially equivalent employment.

**C. Work Benefits**

Work benefits include, but are not limited to, health insurance, dental insurance, life insurance, paid time off, stock options, retirement benefits, and pension plans.

**D. Other Remedies**

Although not provided for by statute, the Respondent may agree to offer other remedies such as front pay, compensatory damages, expungement of discipline issued to the Complainant, a job reassignment, and providing the Complainant's prospective employers with a neutral reference.

**IV. Evidence of Damages**

Investigators should collect and document evidence in the case file to support any calculation of damages. Evidence may include pay stubs, W-2, bills, receipts, bank statements, health insurance bills, retirement statements, and any other evidence of damages.

**V. Undocumented Workers**

Undocumented workers are not entitled to reinstatement, front pay, or back pay.<sup>16</sup> Other remedies may be awarded as appropriate, such as expungement of discipline or a neutral reference.

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<sup>16</sup> See *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002)

## **CHAPTER 6: SETTLEMENT AGREEMENTS**

### **I. Scope**

This chapter provides guidance on facilitating settlement agreements between the Complainant and the Respondent. This chapter will cover standard NVOSHA settlement agreements, private settlement agreements, and bilateral agreements.

### **II. Settlement Policy**

- A.** A settlement is an official agreement intended to resolve a dispute or conflict. It creates mutual obligations for both parties and is enforceable by law. In order to have a valid agreement, there must be an offer by one party, acceptance by the other party, valid consideration, and mutual agreement to all the terms.
- B.** When possible, investigators should actively assist the parties in reaching a settlement agreement. This can occur at any point prior to the completion of the investigation.
- C.** The appropriate relief in each case must be determined by the investigator. Full restitution should be sought whenever possible, but investigators are not required to obtain all possible relief if the Complainant accepts less than full relief. Concessions by both the Complainant and the Respondent may be necessary to obtain a mutually acceptable resolution of the matter.
- D.** NVOSHA will seek settlement of all cases determined to be meritorious before referring the case to Division Counsel.
- E.** When possible, the Complainant and Respondent should be encouraged to use the NVOSHA standard settlement agreement.
- F.** If the Respondent has made a fair offer to the Complainant based on the merits of the case, and the Complainant refuses the offer, investigators are encouraged to explore the possibility of a bilateral agreement.
- G.** NVOSHA will not approve settlement agreements unless they are entered into knowingly and voluntarily, provide fair and equitable relief, and are consistent with public policy.

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

The Complainant and Respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with the Internal Revenue Service requirements.

#### **IV. Settlement Agreements**

##### **A. General Requirements of Agreements**

1. Must be in writing.
2. Must be entered into knowingly and voluntarily – the parties should understand the terms and have an opportunity to consult with counsel before signing.
3. Must provide appropriate relief to the Complainant – should specify the remedies offered.
4. Must be consistent with public policy, ie Agreements should not prohibit a Complainant from exercising their rights under Chapter 618 of the NRS, and/or under the whistleblower statutes enforced by federal OSHA.
5. Must be signed by all parties.

##### **B. The Standard NVOSHA Settlement Agreement**

When possible, it is preferable to have the parties sign a standard NVOSHA settlement agreement. The standard agreement ensures that settlement requirements are met, and can be enforced by NVOSHA should either party breach the agreement.

##### **1. Standard NVOSHA Agreement Required Provisions**

The standard NVOSHA agreement normally contains the following provisions:

- a. **Compliance with NVOSHA Whistleblower Statute.**  
Respondent will not retaliate against the Complainant or any other employee in violation of NRS 618.445.
- b. **Reinstatement.** This provision should contain one of the two options:

- i. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits that Complainant would have earned but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [If accepted: Complainant’s job title will be [insert title] and Complainant will start on [insert date].
  - ii. **N/A.** Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.
- c. **Payment.** This provision should contain one of the following options:
- i. Respondent agrees to pay the Complainant [put gross amount] in lost wages. [put in how the details of how the payment will be issued to the Complainant.]
  - ii. Respondent agrees to pay the Complainant a lump sum of [put in gross amount]. [put in how the details of how the payment will be issued to the Complainant.]
  - iii. **N/A.** Respondent is not offering payment and/or Complainant is not seeking payment.

If the Respondent pays the Complainant for other items such as medical bills or in other ways such as stock options, NVOSHA will make an alternate provision specifying that.

- d. **Personnel Record.** This should contain one of the following options:
- i. Respondent shall expunge (put in what they are expunging – name, date) from Complainant’s personnel records and will not mention (put in what they are expunging) in any responses to future requests for employment references.
  - ii. **N/A.** Respondent is not offering expungement of any documents and/or Complainant is not seeking expungement of any documents.
- e. **Non-disparagement and Neutral Reference.** Complainant will not knowingly disparage, criticize, or make other derogatory statements about the Respondent. The Respondent will provide a neutral employment reference to all those requesting information regarding Complainant’s employment with the Company. The foregoing will not apply to any statements that are made truthfully in response to a subpoena or other compulsory legal process.

- f. Commencement of Obligations.** The obligations of both parties in this agreement shall begin immediately after the Agreement is signed by both parties and approved by NVOSHA.
- g. Non-Admission.** By signing this agreement, Respondent is not admitting to a violation of NRS 618.445.
- h. Closure of Complaint.** Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against (Respondent's name) arising out of Case No. \_\_\_\_\_, and will cause their complaint to be closed.
- i. Non-Waiver of Rights by Complainant.** Nothing in this Agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program (such as, but not limited to, the SEC or IRS whistleblower award programs) for providing information directly to a government agency. 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.
- j. Enforcement of settlement.** A violation of this settlement agreement is a breach of contract. If this settlement is breached by either party, the Division of Industrial Relations Division Counsel may seek redress by filing a civil action in the appropriate court.

In general, NVOSHA's standard settlement agreement should be limited to the provisions above. Any changes and/or additions made to the standard settlement agreement provisions must be approved in pre-settlement discussions with management.

## **2. Standard NVOSHA Agreement Optional Provisions**

Some of the optional provisions that may be added to the agreement with management approval are:

- a. **Confidentiality.** Respondent and Complainant have agreed to keep the settlement agreement confidential. The settlement agreement is part of NVOSHA's records, and is subject to disclosure under the Nevada Public Records Act. Complainant and Respondent have requested that NVOSHA designate the agreement as containing potentially confidential information and request predisclosure notification of any Nevada Public Records Act request. (agreement should be marked as confidential and potentially exempt from disclosure)
- b. **POSTING OF NOTICE.** A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirements of the applicable whistleblower law pursuant to a settlement agreement.
- c. **POSTING OF AN INFORMATIONAL POSTER.** A provision requiring Respondent to post an appropriate poster, which may include the mandatory OSH Act poster or any appropriate fact sheet that summarizes the rights and responsibilities under the relevant OSHA-enforced whistleblower statute.
- d. **TRAINING.** A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under the relevant whistleblower protection statute.

## C. Private Settlement Agreements

In some cases, the Respondent prefers to use their own settlement agreement, rather than NVOSHA's standard settlement agreement. Because voluntary resolutions of disputes is desirable, it is NVOSHA's policy to defer to privately-negotiated settlement agreements, as long as the Complainant entered into it knowingly and voluntarily.

### 1. Reviewing Private Agreements

Investigators are not experts on what provisions are enforceable in a settlement agreement. Investigators should review the private agreement to the best of their ability, and may ask the Respondent to change or add language. Investigators should let the Complainant know they are not experts on these agreements, and should give the Complainant time to have an attorney review the agreement before signing it. If the Complainant would like clarification on a provision(s), the investigator should ask the Respondent to provide clarification.

Some guidelines to consider when reviewing an agreement are:

- a. NVOSHA cannot be a party to the agreement.
  - b. If the agreement has a confidentiality clause, NVOSHA will inform the parties that the agreement is subject to disclosure by the Nevada Public Records Act.
  - c. Provisions restricting Complainant's right to exercise their rights under Chapter 618 should be scrutinized.
  - d. Certain provisions waiving certain legal rights may be unenforceable. It is best to contact Division Counsel if you are unsure.
2. **Enforcement of Private Settlement Agreements.** While NVOSHA may accept a private settlement agreement and close a whistleblower complaint, NVOSHA cannot enforce the private settlement agreement. Should there be a breach of the agreement, the Complainant will have to seek private counsel to enforce the agreement. Investigators should make every effort to explain this to the parties involved to ensure they understand NVOSHA's role in private settlements.
3. If the parties are agreeable to signing the standard NVOSHA settlement agreement in addition to the private settlement agreement, the investigator should have the parties do so.

#### **D. Bilateral Agreements**

A bilateral settlement agreement is an agreement between NVOSHA and the Respondent which resolves a NVOSHA whistleblower complaint without the Complainant's consent.

1. **When to Use.** A bilateral agreement should only be used when:
  - a. The settlement offer by the Respondent is reasonable in light of the back pay offered, reinstatement offered, and the merits of the case. As the likelihood of prevailing in litigation increases, so should the make-whole relief offered. Although the desired goal is to obtain reinstatement and back pay, the give and take of settlement negotiations may result in less than complete relief.



- f. Have the NVOSHA CAO Sign the Agreement.** Once the Respondent has signed the agreement, the investigator will send the agreement and memo to the CAO to approve and sign the agreement.
  
- g. Verify Payment if Applicable.** Provide the fully executed agreement to the Respondent, and if they agreed to pay money to the Complainant, obtain a copy of the payment and proof of delivery. The payment should be sent directly to the Complainant.

# CHAPTER 7: CASE DISPOSITION

## I. Scope

This chapter discusses the policies and procedures for disposing of a whistleblower case.

## II. Types of Disposition

A. In general, there are four (4) ways a whistleblower case can be disposed of:

1. Dismissal
2. Settlement
3. Withdrawal
4. Referral to Division Counsel for possible litigation

## III. Procedures for Dismissals

A. The procedure for a dismissal will depend on the reason the case is being dismissed. The investigation may be dismissed due to one of the following or a combination of the following:

1. No coverage
2. Untimeliness
3. Noncooperation by the Complainant
4. One or more of the elements of the whistleblower claim not established
5. Respondent provided a legitimate reason for the adverse action, and there is no evidence to show the reason is pretextual.
6. Deferral to another proceeding

### B. Dismissal Based on the Elements and/or Employer Defense

If the investigator determines that one or more of the elements for the whistleblower claim is not established, and/or the Respondent provides a legitimate reason for taking the adverse action, the case must be disposed of as follows:

1. The investigator will complete a **Report of Investigation (ROI)** with exhibits and submit it to the Chief for review and approval. The ROI is the investigator's summary of their findings and recommendation. The exhibits are supporting evidence for the ROI. At a minimum, the ROI should address the following:

- Assigned Investigator
- Case Number/Name
- Name of Parties
- Summary of Complainant's Allegation
- Applicable Statute
- Timeliness of the complaint
- Coverage of the Parties
- Chronology of Events
- Analysis of Protected Activity, Adverse Action and Causal Link as applicable<sup>17</sup>
- Employer's Reason for Taking the Adverse Action
- Evidence of Pretext
- If applicable, Other Relevant Information
- Investigator's Recommended Determination

The exhibits should support the investigator's findings in the ROI. For example, if the investigator states that the Complainant engaged in a protected activity when he emailed his supervisor that the workplace was unsafe, the investigator should attach that email as an exhibit.

2. **The Chief will review the ROI** to ensure accuracy, proper analysis of the elements and employer defense, and appropriateness of the recommendation. If the Chief would like additional information, the ROI will be sent back to the investigator to obtain the additional information. If there are errors in the ROI, the Chief will send it back to the investigator to correct. Once the ROI is deemed complete, the Chief will approve it.
3. **The Investigator and Chief will digitally sign the ROI.**
4. **Closing Conference.** The investigator will conduct a closing conference with the Complainant. If the Complainant provided a phone number and an email address, the investigator should attempt to contact the Complainant through both methods to conduct the closing conference, and allow the Complainant 48 hours to respond. The investigator must notate their attempts to contact the Complainant in their activity log.

In the closing conference, the investigator will provide the Complainant with a brief verbal summary of the ROI findings and recommendation, and advise them of their right to appeal the findings. Some points to remember for the closing conference are:

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<sup>17</sup> For example, if no protected activity is found, the investigator does not need to analyze the remaining elements and can proceed to their recommendation.

- **Do not reveal the identity of witnesses interviewed**, especially if they requested confidentiality.
  - If the Complainant attempts to offer any new evidence or allegations, the investigator will decide whether the new evidence and/or allegations should be investigated.
  - If the Complainant becomes argumentative or combative during the closing conference, the investigator may end the conference and note this in their activity log.
5. Once the closing conference is completed, or the investigator attempted to do the closing conference and the Complainant did not respond, the investigator will submit the case file to the Chief for closure.

**6. NIOSH’s Findings**

NIOSH’s findings will be written in a letter and sent to the Complainant and Respondent via email (if provided) or mail. The findings will briefly discuss Complainant’s allegation, applicable statute, coverage, timeliness, analysis of the elements of the Complainant’s whistleblower claim, employer’s defense, and determination on whether the whistleblower statute was violated or not. The findings will also inform the Complainant of their appeal rights and dual filing rights.

6. **OIS.** The Chief will enter the determination in OIS and close out the case.

**C. Dismissal Based on No Coverage or Untimeliness**

If the investigator determines that there is no coverage of the parties or the complaint is untimely, the case must be disposed of as follows:

1. The investigator will complete an **abbreviated Report of Investigation (ROI)** with exhibits, and submit it to the Chief for review and approval. The ROI can be limited to the following:

- Assigned Investigator
- Case Number/Name
- Name of Parties
- Summary of Complainant’s Allegation
- Applicable Statute
- Coverage
- Timeliness
- If applicable, Other Relevant Information
- Investigator’s Recommended Determination

**Discussion of the elements and the employer defense is not required.**

2. **The Chief will review the ROI** to ensure accuracy, proper analysis of coverage or timeliness, and appropriateness of the recommendation. If the Chief would like additional information, the ROI will be sent back to the investigator to obtain the additional information. If there are errors in the ROI, the Chief will send it back to the investigator to correct. Once the ROI is deemed complete, the Chief will approve it.
3. **The Investigator and Chief will digitally sign the ROI.**
4. **Closing Conference.** The investigator will conduct a closing conference with the Complainant. See above procedure for closing conference.
5. **NVOSHA's Findings.** NVOSHA's findings will be written in a letter and sent to the Complainant and Respondent via email (if provided) or mail. The findings will be abbreviated. If there is no coverage, the findings will state that and why. No further findings are needed. If the complaint is untimely, the findings will state that and why. No further findings are needed. The findings will advise the Complainant of their appeal rights and dual filing rights.
6. **OIS.** The Chief will enter the determination in OIS and close out the case.

**D. Dismissal Based on Lack of Cooperation**

If the Complainant is uncooperative, the case will be disposed of as follows:

1. **Ensure you have made reasonable efforts** to contact the Complainant as listed in Chapter 4, Unresponsive Complainant.
2. Submit the case to the Chief for closure due to noncooperation. **No ROI is required.**
3. **The Chief will review the case file.** If approved, an abbreviated findings letter will be sent to the Complainant. If more information is needed, the Chief will send the case file back to the investigator.

4. **NVOSHA's findings.** Findings will be written in a letter and sent to the Complainant and Respondent via email (if provided) or mail. The findings will be abbreviated. They will inform the Complainant the complaint is being dismissed for lack of cooperation and advise the Complainant of their appeal rights and dual filing rights.
5. **OIS.** The Chief will enter the determination in OIS and close out the case.

## **E. Dismissal Based on Deferral to Another Proceeding**

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

### **1. Postponement**

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

### **2. Deferral**

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

investigator and supervisor must review the results of the proceeding to ensure that:

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

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

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

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

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

In cases where the investigator recommends a deferral to another agency's or tribunal's decision, grievance proceeding, arbitration, or other appropriate determination, abbreviated NVOSHA Findings based on the deferral will be issued dismissing the case. The parties will be notified of their right to object or request a review, depending on the whistleblower statute. The case will be considered closed at the time of the deferral and will be recorded in OITSS-Whistleblower as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in Chapter 6 & 7.

#### **IV. Procedures For Settlement**

**A.** The procedure for settlements will be based on the type of settlement. There are three (3) ways a case can be settled:

- 1. Private agreement** between the Complainant and the Respondent (most common)
- 2. NVOSHA agreement** signed by Complainant, Respondent, and NVOSHA.
- 3. NVOSHA bilateral agreement** signed by Respondent and NVOSHA.

#### **B. Private Settlement Agreement Between Complainant and Respondent**

If the parties resolve the complaint via a private settlement agreement, the following procedures will be followed:

- 1.** Respondent will submit a draft of their proposed agreement to the investigator.
- 2.** Investigator will review the agreement using the guidelines in Chapter 6 – Settlements, and send it to the Chief for approval.
- 3.** If the Chief approves the agreement, the investigator will have the Respondent and Complainant sign it. If the Chief wants changes to the agreement, it will be sent back to the investigator to have the Respondent make the changes. Once the agreement with both signatures is received, the investigator will put a copy of the fully executed agreement (signed by both parties) in the case file.
- 4.** If the settlement involves payment to the Complainant, the investigator will have the Respondent provide a copy of the payment and proof of delivery to the Complainant. The investigator will put a copy of the payment and proof of delivery in the case file.
- 5.** Once the settlement agreement is signed and if applicable, payment to the Complainant has been made, the investigator will submit the case file to the Chief for closure.
- 6.** The Chief will review the case file and ensure all settlement documents are in the file.

7. The Chief will email the Complainant and Respondent and inform them the case is being closed due to settlement. The Chief will attach a copy of the fully executed settlement agreement to the email. (If there is no email for one or both parties, a letter informing them the case is being closed and a copy of the settlement agreement will be mailed to them.)
8. **OIS.** The case will be closed out as settled in OIS.

**C. Nevada OSHA Standard Agreement**

If the parties resolve the complaint via a Nevada OSHA settlement agreement, the following procedures will be followed:

1. The investigator will draft a standard Nevada OSHA Agreement using the guidance in Chapter 6 – Settlements.
2. The investigator will submit the agreement to the Chief for review and approval.
3. If the Chief approves the agreement, the investigator will have the Respondent and Complainant sign it. If the Chief wants changes to the agreement, it will be sent back to the investigator to have the Respondent make the changes. Once both parties sign the agreement, the investigator will give it to the Chief to sign.
4. The Chief will review and sign the agreement. The investigator will put a copy of the fully executed agreement (signed by both parties and NVOSHA) in the case file.
5. If the settlement involves payment to the Complainant, the investigator will have the Respondent provide a copy of the payment and proof of delivery to the Complainant. The investigator will put a copy of the payment and proof of delivery in the case file.
6. Once the settlement agreement is signed and if applicable, payment to the Complainant has been made, the investigator will submit the case file to the Chief for closure.
7. The Chief will email the Complainant and Respondent and inform them the case is being closed due to settlement. The Chief will attach a copy of the fully executed settlement agreement to the email. (If there is no email

for one or both parties, a letter informing them the case is being closed and a copy of the settlement agreement will be mailed to them.)

8. **OIS.** The case will be closed out as settled in OIS.

**D. Nevada OSHA Bilateral Agreement**

If the Respondent and NVOSHA resolve the complaint via a bilateral settlement agreement, the following procedures will be followed:

1. The investigator will draft a memo to Division Counsel summarizing the merits of the case, attach exhibits, and draft a Bilateral Agreement using the guidance in Chapter 6- Settlements. The investigator will submit all of this to the Chief for review.
2. The Chief will review the memo, exhibits and agreement. If the Chief approves it, the Chief will set up a meeting to discuss the bilateral packet with Division Counsel. If the Chief needs changes or more information, the packet will be returned to the investigator.
3. The investigator, Chief and Division Counsel will meet and discuss the memo, exhibits and agreement. Division Counsel will decide if they approve or disapprove of the bilateral agreement.
4. If approved by Division Counsel, the investigator will send the agreement to the Respondent to sign.
5. Once the Respondent signs the agreement, the investigator will send the agreement to the Chief Administrative Officer to sign.
6. Once the Chief Administrative Officer signs the agreement, if payment is being issued to the Complainant, the investigator will have the Respondent provide a copy of the payment and proof of delivery. This will be placed in the case file.
7. Once the settlement agreement is signed and if applicable, payment to the Complainant has been made, the investigator will submit the case file to the Chief for closure.

8. The Chief will email the Complainant and Respondent and inform them the case is being closed due to settlement. The Chief will attach a copy of the fully executed settlement agreement to the email. (If there is no email for one or both parties, a letter informing them the case is being closed and a copy of the settlement agreement will be mailed to them.)

## **V. Procedures For Withdrawal**

- A. A Complainant may withdraw their complaint at any time during NVOSHA's investigation of the complaint. If a Complainant decides to withdraw their complaint, the following procedures will be followed:
  1. If the Complainant indicates they want to withdraw, the investigator will send the Complainant an email asking if they want to withdraw, and inform them by withdrawing they are waiving their rights to seek review or object, and their case will not be reopened. If the Complainant cannot be reached via email, the investigator will call the Complainant, record the conversation if possible, ask them if they want to withdraw, and inform them by withdrawing they are waiving their rights to seek review or object, and their case will not be reopened
  2. If the Complainant confirms they want to withdraw, the investigator will place the withdrawal confirmation in the case file and submit the case file to the Chief for closure based on withdrawal. If the Complainant never confirms they want to withdraw, the investigation will proceed and be disposed of one of the other ways (dismissal, settlement, etc.) depending on the outcome.
  3. The Chief will review the case file for withdrawal. If approved, the Chief will send an email to both parties informing them that the case is being closed due to withdrawal and the Complainant is waiving their right to appeal or object, and the case will not be reopened.
  4. **OIS.** The Chief will close out the case in OIS as a withdrawal.

## **VI. Procedures For Referral to Division Counsel for Potential Litigation**

- A. If an investigator feels a case has enough evidence to prove a violation of the whistleblower statute, the following procedures should be followed:
  1. The investigator will discuss the case with the Chief.
  2. If the Chief agrees the case warrants further discussion with Division Counsel, the Chief will set up a meeting with the investigator, Chief and Division Counsel to discuss.

3. If Division Counsel believes there may be a violation, the investigator will complete an ROI recommending referral to the Division Counsel. If Division Counsel wants more information, the investigator will obtain the additional information and have a second discussion with Division Counsel. If Division Counsel disagrees with the referral, they will explain why and the case will be dismissed based on Division Counsel's reasoning, and will be disposed of as a Dismissal on the merits.
4. If Division Counsel agrees there may be a violation, the investigator will complete a Report of Investigation (ROI) with exhibits and submit it to the Chief for review and approval. At a minimum, the ROI should address the following:
  - Assigned Investigator
  - Case Number/Name
  - Name of Parties
  - Summary of Complainant's Allegation
  - Applicable Statute
  - Timeliness of the complaint
  - Coverage of the Parties
  - Chronology of Events
  - Analysis of Protected Activity, Adverse Action and Causal Link as applicable
  - Employer's Reason for Taking the Adverse Action
  - Evidence of Pretext
  - Amount of damages owed to the Complainant
  - If applicable, Other Relevant Information
  - Investigator's Recommended Determination
5. The Chief will review the ROI to ensure accuracy, proper analysis of the elements and employer defense, and appropriateness of the recommendation. If the Chief would like additional information, the ROI will be sent back to the investigator to obtain the additional information. If there are errors in the ROI, the Chief will send it back to the investigator to correct. Once the ROI is deemed complete, the Chief will approve it.
6. The Investigator and Chief will digitally sign the ROI.
7. The ROI and exhibits will be sent to Division Counsel and a meeting will be set up with them to discuss.

## VII. APPEALS

Although not specifically provided for by statute, it is NVOSHA's policy to provide Complainants with the right to appeal NVOSHA's decision to dismiss a complaint.

### A. Procedure for Appealing

1. The Complainant must mail or email a **written request** to appeal to the NVOSHA Appeals Committee **within 15 calendar days** after their receipt of NVOSHA's dismissal letter. Mailed requests should be sent to: Nevada OSHA Whistleblower Appeals Committee, 3360 W. Sahara Ave., Ste. 200, Las Vegas, NV 89102. Emailed requests should be sent to [whistleblowerappeals@dir.nv.gov](mailto:whistleblowerappeals@dir.nv.gov), with a copy to the Chief for tracking purposes.
2. There is no specific written format for requesting an appeal. The Complainant can simply say they are appealing or want a review of their case.
3. **Date Appeal is Considered Filed.** The appeal is considered filed the day the NVOSHA Appeals Committee receives the email, or if mailed, the date of the postmark.
4. If the last day to appeal falls on a weekend or a holiday, or the NVOSHA office is closed, the next business day will count as the final day.
5. **Late Appeals.** If the appeal is filed after the 15 calendar days, NVOSHA Appeals will determine if tolling applies. If tolling does not apply, the appeal will be considered untimely.

### B. NVOSHA Receipt of Appeal

1. Upon receipt of an appeal, the Chief or Appeals Committee will move the appealed case file into the shared Appeals folder, and enter the appeal into OIS.
2. The Appeals Committee will determine if the appeal is timely, or if tolling applies.
3. If the appeal is timely or tolling applies, the Committee will send a letter to the Complainant and Respondent acknowledging their receipt of the

appeal. If the appeal is untimely or tolling does not apply, the Committee will send the Complainant a letter that their appeal was untimely.

### **C. Appeals Committee and Review**

1. The Appeals Committee will be comprised of three management officials from NVOSHA (Program Coordinators and Supervisors).
2. Appeals will be reviewed within **60** calendar days of receiving the appeal.
3. Each member of the Appeals Committee will independently review the case being appealed. The Committee members will review the case file and any post-investigation documentation submitted to them by the Complainant. Committee members will complete the NVOSHA Appeal Review and Evaluation Form when reviewing the appeal.
4. After each member of the Committee has reviewed the case file, the Committee will meet to make a final decision. The decision must be unanimous, and approved by the Chief Administrative Officer within **30** calendar days of the review deadline.

### **D. Appeal Outcomes**

1. If NVOSHA's decision to dismiss the case is supported by the evidence, the Committee will uphold the original decision. The Committee will send a closure letter to the Complainant and Respondent notifying them the original decision has been upheld.
2. If the Committee does not feel there is sufficient evidence to support a dismissal, the Committee will send the case back for further investigation and specify what information they are seeking.
  - a. If the results of the additional investigation do not change the initial decision to dismiss, the original decision will be upheld, and a letter will be sent to the Complainant and Respondent notifying them the original decision has been upheld.
  - b. If the results of the additional investigation indicate the case may be meritorious, the Committee will consult with Division Counsel. If Division Counsel agrees, the case will be returned for further action. Note: If the Administrator later decides not to file an action in court, NVOSHA will dismiss the case and no further requests to appeal will be allowed.

3. If the Complainant withdraws their appeal, the Appeals Committee will send a closure letter to the Complainant and Respondent notifying them the appeal has been withdrawn.
4. If the parties reach a settlement while an appeal is pending, the appeal will be treated as withdrawn and the Committee will send a closure letter to the Complainant and Respondent notifying them the appeal has been withdrawn due to a settlement.
5. If the Complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief to the Complainant, such as a union arbitration procedure, the hearing of the appeal may be postponed pending a determination in the other forum, after which the Appeals Committee must either recommend deferring to the other determination, if it appears fair and equitable, or proceed with hearing the case

# CHAPTER 8: STATE PLAN – FEDERAL OSHA

## COORDINATION

### I. Scope

Complaints filed by private sector employees pursuant to NVOSHA’s whistleblower statute also fall under federal OSHA’s whistleblower statute – 11 (c). The purpose of this chapter is to describe procedures for the coordination of cases that are covered by the NVOSHA whistleblower statute, and are also covered under section 11 (c).

### II. Federal OSHA’s Relationship to State Plans

**A. Federal OSHA oversees NVOSHA’s state plan, including the whistleblower program.** According to federal regulation, a state that is implementing its own occupational safety and health enforcement program (including whistleblower) must have provisions as effective as those of the federal whistleblower statute, 11(c).<sup>18</sup> Federal OSHA conducts audits of NVOSHA’s program to ensure it is at least as effective as the federal program.

**B. Federal OSHA refers 11(c) whistleblower complaints to NVOSHA’s state plan, and reviews complaints when appropriate.** According to federal regulation, federal OSHA may exercise jurisdiction over the NVOSHA’s private sector complaints, and may also refer complaints to NVOSHA’s state plan.<sup>19</sup> This is because complaints alleging a violation of NVOSHA’s whistleblower statute, also fall under 11(c). Federal OSHA normally refers private sector complaints alleging a violation of Nevada’s whistleblower statute, to the Nevada state plan. Federal OSHA will normally review these complaints only after NVOSHA has completed their investigation, Complainant has exhausted their appeal rights, and Complainant has properly dually filed with federal OSHA.

**C. Federal OSHA responds to CASPAs.** A CASPA is a Complaint About State Program Administration, which is an oral or written complaint about some aspect of the operation or administration of a state plan. Anyone can file a CASPA.<sup>20</sup>

### III. Federal OSHA Referral Procedures

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<sup>18</sup> [1902.4 \(c\)\(2\)\(v\)](#)

<sup>19</sup> [29 CFR 1977.23](#)

<sup>20</sup> [1954.20](#)

- A. In general, federally filed complaints alleging retaliation for occupational safety or health activity under State Plan authority, i.e., complaints by private-sector and state and local government employees, will be referred to the appropriate State Plan official for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. Generally, the complaint shall be referred to the State Plan where Complainant's workplace is located. The federal OSHA referral is a filing of the complaint with the State Plan. The referral must be made promptly, preferably by e-mail, fax, or expedited delivery. It should be made within the State Plan's filing period if possible. The administratively closed federal case file will include a copy of the complaint, the referral email (or letter) to the State Plan, and the OITSS-Whistleblower case summary.

### **1. Referral of Private-Sector Complaints**

A private-sector employee may file an occupational safety and health whistleblower complaint with both federal OSHA under section 11(c) and with the State Plan under the State Plan's section 11(c) equivalent. Except as otherwise provided, when such a complaint is received by federal OSHA, the complaint will be administratively closed as a federal section 11(c) complaint. The date of the filing with federal OSHA will be recorded in OITSS-Whistleblower. The case will then be referred to the State Plan, generally where Complainant's workplace is located, for handling. If the adverse action or protected activity took place in another state, the supervisor should consult with their counsel to determine if the case should be referred to the State Plan or handled by federal OSHA.

Complaints that on their face implicate only section 11(c) and a State Plan's section 11(c) equivalent should be immediately referred to the State Plan. The requirement of a screening interview is waived with such complaints.

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

### **2. Referral of Public-Sector Complaints**

All occupational safety and health whistleblower complaints (i.e., section 11(c) complaints) from state and local government employees will be administratively closed for lack of federal authority and referred to the State Plan. If the complaint falls under both section 11(c) as well as an

OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA, OSHA will refer the section 11(c) portion to the state plan, while continuing to process/investigate the component of the complaint falling under the other statute.

### 3. 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 *private sector* 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.
3. **Exceptions to State Plan Coverage:** Most State Plans have carved out exceptions to State Plan coverage, and in these areas federal OSHA retains coverage of both safety and health complaints and section 11(c) complaints. Such areas include complaints from: employees of USPS, employees of contractor-operated facilities engaged in USPS mail operations, employees of tribal enterprises or Indian-owned enterprises on reservations or trust lands, employees working in workplaces on federal enclaves where the state has not retained authority, maritime employees not covered by the State Plan (generally, longshoremen, shipyard workers, marine terminal workers, and seamen), and employees working in aircraft cabins in flight (as defined by the FAA Policy Statement). Complaints from such employees received by federal OSHA will not be referred to the State Plans. For details about the areas of State Plan coverage, see each State Plan's webpage at: <https://www.osha.gov/>.

4. **Multi-State Contacts:** When federal OSHA encounters a section 11(c) case with multi-state contacts and one or more of the states is a State Plan, it is best to avoid the complexities a State Plan may face in attempting to cover the case. For example, if the unsafe conditions which the employee complained about are not within the State Plan, the State Plan may have a coverage problem. Another problem relates to the possible inability of the State Plan to serve process on the employer because the employer is headquartered in another state; this may often happen with construction businesses. The nation-wide applicability of section 11(c) solves these problems. Federal OSHA must take such cases and should communicate with the State Plan when it does so.
5. **Whistleblower Statutes Solely Under Federal OSHA Jurisdiction:** If a complaint is filed regarding one of the whistleblower statutes which is solely under federal jurisdiction (STAA, FRSA, etc.), federal OSHA will not refer it to the state plan. However, state plans will refer whistleblower complaints that fall under one of these other whistleblower statutes to federal OSHA.<sup>21</sup>
6. **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.

#### IV. Dual Filing With Federal OSHA

##### A. Notifying Complainants of Their Dual Filing Rights

1. 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 want to maintain their rights to federal protection. When a Complainant contacts the NVOSHA whistleblower unit to file a

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<sup>21</sup> See federal whistleblower statutes at: [https://www.whistleblowers.gov/whistleblower\\_acts-desk\\_reference](https://www.whistleblowers.gov/whistleblower_acts-desk_reference)

complaint, the Complainant is told to file their complaint online to preserve their dual filing rights. Additionally, the Complaint Acknowledgement letter that is sent to them if their complaint is opened up for investigation also informs them of their dual filing rights.

2. At the conclusion of a whistleblower investigation where the outcome is a dismissal, the state plan must notify the Complainant of the process for requesting review by the state, and also informing them of how to request a federal review of their complaint.
3. If the private-sector Complainant dually files with federal OSHA, they can exercise their right to request federal OSHA review their case after NIOSH has made a determination to dismiss their case and the Complainant has exhausted their appeal rights.

#### **B. Complainant's Request for Federal Review**

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

1. Confirm that the complaint is, in fact, a dually filed complaint. That is, Complainant filed the complaint with federal OSHA in a timely manner (within 30 days). Complaints submitted through the OSHA Online Complaint form are considered filed with federal OSHA.
2. A final determination has been made by the state. A final determination is a final decision of the investigative office after a review of an initial determination or a final decision of a tribunal, such as an administrative law judge or court, whichever comes later.
3. 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
4. Complaint is covered under section 11(c).

#### **C. Complaints Not Meeting Federal Procedural Prerequisites for Review**

1. 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.

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

#### **D. Federal Review**

The OSHA federal review will be conducted as follows:

1. 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:
  - a. The state proceedings "dealt adequately with all factual issues;" and
  - b. The state proceedings were "fair, regular and free of procedural infirmities;" and
  - c. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
2. The federal review will entail a scrutiny of all available information, including the State Plan's investigative file. OSHA may not defer to the state's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the state case be reopened and the specific deficiencies be corrected by the state.

#### **E. Federal Review Outcomes**

##### **1. Deferral**

If the state's proceedings meet the criteria above, federal OSHA may simply defer to the state's findings. Complainant will be notified and requests for review by DWPP (Directorate of Whistleblower Protection Programs) will not be available. The closing notification will use both federal OSHA's existing, administratively-closed case number and the State Plan's case number in its subject heading. Federal OSHA shall copy Respondent on the closing notification. Federal OSHA will note the

federal review and the deferral in the original, pre-existing federal OSHA OITSS-Whistleblower entry. No new case will be opened or new entry added into OITSS-Whistleblower.

**2. No Deferral/New Investigation**

Should state correction be inadequate and/or the supervisor determines that OSHA cannot properly defer to the state's determination pursuant to 29 CFR 1977.18(c), the supervisor will order whatever additional investigation is necessary. The Region will docket the complaint in OITSS-Whistleblower. The legal filing date remains the original filing date. However, instead of reopening the original complaint in OITSS-Whistleblower, the investigator will open a new case in the database, using as the filing date for OITSS-Whistleblower the date on which federal OSHA decided to conduct a section 11(c) investigation. The investigator will note and cross reference the cases in the tracking text of both the original and new case database entries. The case will be investigated as quickly as possible. Based on the investigation's findings, the supervisor may dismiss, settle, or recommend litigation. If there is a dismissal, Complainants have the right to request review by DWPP.

**3. State Plan Evaluation**

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

**V. Complaints About State Program Administration (CASPA)**

- A.** 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](#).
- B.** 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.
- C.** Because properly dually filed section 11(c) complaints may undergo federal review under the section 11(c) procedures outlined above, 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, but is entitled to a CASPA review. Complaints about the

handling of State Plan whistleblower investigations from state and local government employees will be considered under CASPA procedures only.

- D.** Upon receipt of a CASPA complaint relating to a State Plan's handling of a whistleblower case, federal OSHA will review the State Plan's investigative file and conduct other inquiries as necessary to determine if the State Plan's investigation was adequate and whether the State Plan's handling of the case was in accordance with the state's section 11(c) equivalent, and supported by appropriate available evidence. A review of the State Plan's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the State Plan's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to the State Plan and Complainant within the required 90 days.
- E.** A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future State Plan investigation techniques, policies, and procedures. A CASPA will not be reviewed under the OSHA DWPP request for review process. If the OSHA Regional Office finds that the outcome in a specific state whistleblower case is not appropriate (i.e., final state action is contrary to federal practice and is less protective than a federal action would have been; does not follow state law, policies, and procedures; or state law, policies, and procedures are not at least as effective as OSHA's), the Region should require the state to take appropriate action to reopen the case or in some manner correct the outcome, and, whenever possible, make changes to prevent recurrence. If there is a deficiency in the state statute, the supervisor, after consultation with the DWPP Director and the Directorate of Co-operative and State Programs, should request that the State Plan recommend legislative changes.

# CHAPTER 9: INVESTIGATIVE RECORDS AND THE NEVADA PUBLIC RECORDS ACT

## I. Scope

This chapter explains the procedures for the handling and disclosure of NVOSHA's whistleblower records to the public, and retention or disposition of records.

The Nevada Public Records Act governs the handling, disclosure, and retention or disposition of Nevada state government public records, which includes NVOSHA's whistleblower records. *The federal Freedom of Information Act (FOIA), does not apply to requests for Nevada state government public records, but applies to requests for records maintained by the federal government.*

## II. The Nevada Public Records Act

A. The Nevada Public Records Act (NPRA) is codified in Nevada Revised Statutes, Chapter 239 – Public Records.<sup>22</sup>

B. **Purpose of Act.** The purpose of the Act is to provide members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law. The provisions of Chapter 239 should be interpreted liberally to achieve this purpose. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly. (NRS 239.001(1)(2)(3))

C. Unless provided in an NRS or declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. (NRS 239.010(1))

### D. Definition of a Public Record

Per NRS 239.005(6), an “official state record” (public record) includes, without limitation, “materials that are made or received by a state agency and preserved by that agency or its successor as evidence of the organization, operation, policy

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<sup>22</sup> <https://www.leg.state.nv.us/nrs/nrs-239.html#NRS239Sec080>

or any other activity of that agency or because of the information contained in the material.”

**1. Whistleblower records** would be considered a public record that is subject to disclosure under the NPRA. Whistleblower records may include, but are not limited to:

- Complaint intake activity log, interviews, notes, submissions
- Case activity log
- Whistleblower complaint
- Complainant submissions
- Respondent submissions
- Complainant interview transcription
- Witness interview transcription
- NVOSHA enforcement documents (inspection notes, interviews, complaints)
- Investigator Notes
- NVOSHA correspondence (letters, emails, memos)
- Reports of Investigation and exhibits
- Settlement Agreements
- Appeal documents
- OIS printouts

**E. Disclosure With Redaction.** When a record contains confidential information, it doesn't mean the record in whole must be denied. Rather, the agency can “redact, delete, conceal or separate” confidential information and produce the remainder of the record. Every redaction is considered an “in part” denial of the request.

**F. NVOSHA Records that are Confidential by Statute**

NVOSHA must keep confidential any information which is part of a current investigation by the Division. The fact that an investigation is being conducted is public information. (NRS 618.341)

**G. Burden of Proof Where Government Entity Asserts a Record is Confidential.**

The government entity that has legal custody and control of a record has the burden of proving by a preponderance of the evidence the public record is confidential. (NRS 239.0113)

**H. Balancing Test.** If a government entity is withholding a requested record that is not specifically declared confidential by law, they must use the balancing test in

Donrey v. Bradshaw to justify the withholding.<sup>23</sup> This means before determining the record will not be released, the agency should balance the governmental entity's public policy interest in withholding the document against the general policy in favor of open government.

- I. **Deliberative Process Privilege.** To allow an agency to withhold public records under this privilege, the records must be “predecisional” and “deliberative”.

### III. Requesting NVOSHA Whistleblower Records Under the NPRA

- A. Any agency must respond in writing to records requests by not later than the end of the fifth business day after the request is received. (NRS 239.0107(1)). The response to the records request are: 1) provide a copy, 2) allow inspection at office, 3) don't disclose as it is confidential, 4) agency needs more time, or 5) agency does not have it.
- B. Requestor can request it in writing or orally. (NRS 239.0107(1))
- C. Under NRS 239.0107(1), obligation is to provide access to records the agency has legal custody or control over. (ie, if case file in archives, we don't have legal custody). Agency must provide name and address of govt agency that has custody.
- D. Agency may charge fees. NRS 239.052.
- E. The NVOSHA Public Record Request Policy and Procedure can be found at: <https://dir.nv.gov>. NVOSHA requires all records requests to be submitted online at: [https://hal.nv.gov/form/NV\\_OSHA/NV\\_OSHA\\_Public\\_Records\\_Request](https://hal.nv.gov/form/NV_OSHA/NV_OSHA_Public_Records_Request). A fee may be charged depending on the method of delivery.

### VI. NVOSHA Guidelines for Disclosing Public Records

#### A. Open v. Closed Investigation

The first question that must be answered in order to process a public records request is whether the case is open or closed.

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

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<sup>23</sup> Donrey v. Bradshaw, 106 Nev. 630, 798 P.2d 199 (1990)

- a. **Open Investigation.** An investigation is considered open when NVOSHA is actively investigating the complaint, the complaint is in litigation, or the complaint is on an active appeal.
- b. **Closed Investigation.** An investigation is considered closed when NVOSHA has made a final determination. A final determination would occur when: 1) the case was settled or withdrawn, 2) the case was dismissed and the Complainant did not exercise their appeal rights, 3) the case was dismissed, the Complainant exercised their appeal rights, and their appeal was denied or upheld, or 4) the case was referred to Division Counsel for litigation, and litigation was not pursued.

**B. Disclosure to Parties During an Open Investigation (Non-Public Disclosure)**

During an open investigation, certain disclosures of information will be made to the Complainant and the Respondent (or their representatives) so that parties can fully respond to each others' positions and the investigation can proceed. The procedures for disclosure to these parties are as follows:

1. During an investigation, NVOSHA should provide the Respondent (or the Respondent's representative if applicable) a copy of the complaint and any additional information provided by the Complainant that is pertinent to their complaint. Before providing these materials to the Respondent, NVOSHA will redact anything they consider confidential under Nevada law, or inadvisable – ie, might cause the Respondent to further retaliate, identify potential confidential witnesses.
2. During an investigation, NVOSHA should provide the Complainant (or the Complainant's representative if applicable) a copy of the Respondent's position statement and all other Respondent submissions that are responsive to the Complainant's whistleblower complaint. Before providing these materials to the Complainant, NVOSHA will redact anything they consider confidential under Nevada law, or inadvisable – ie, might lead to an incident of intimidation or violence against a witness, contains personnel information or health information of a co-worker.
3. What to redact in a non-public disclosure will be determined on a case by case basis. Items that should always be redacted are personally identifiable information of others. Personally identifiable information is information that alone or in combination with other information, may be used to identify a person or an electronic device used by the person. The term includes, without limitation, the name, address, telephone number, date of birth or other identifying information.

### C. Disclosure to Non-Parties During an Open Investigation

1. With limited exceptions, investigative records should not be released to the public during an open investigation. The only thing that can be disclosed to the public is that an investigation is being conducted, but no details of the investigation should be provided. Per NRS 618.341 (3), “information which is part of a current investigation shall be kept confidential. The fact that an investigation is being conducted can be disclosed, but no details or other information can be released.”
2. Records may be released to law enforcement. Per NRS 618.341 (4) NVOSHA “shall, upon the receipt of a written request from a law enforcement agency, disclose otherwise confidential information to that law enforcement agency for the limited purpose of pursuing a criminal investigation”.
3. Records may be released to federal OSHA, but NVOSHA should inform them the records are not public and request they not disclose the records to anyone else.

### D. Disclosure Once an Investigation is Closed

1. Once an investigation is closed, investigative records will be disclosed pursuant to the Nevada Public Records Act (NPRa).
2. **Personally identifiable information** of others should not be disclosed. Personally, identifiable information is defined as “information that, alone or in combination with other information, may be used to identify a person or an electronic device used by the person. The term includes, without limitation, the name, address, telephone number, date of birth, and directory information of a person.” (NRS 603A.040) For whistleblower purposes, this would include, but is not limited to: witness names and contact information, information in witness interviews that could identify the witness, comparative data such as wages, employee evaluations or disciplinary actions, medical conditions, social security numbers, and criminal history records.
3. **Proprietary information regarding a trade secret** of businesses should not be disclosed. (NRS 333.333)
4. **Attorney client privileged** information should not be disclosed.
5. **When in doubt** as to whether an investigative record can be released or not, it is best to consult with Division counsel before releasing the record.

**V. Retention and Disposition of Whistleblower Records**

NVOSHA whistleblower records are to be retained permanently per the agency's retention schedule dated 6/12/2019. See schedule: [ld.php \(nv.gov\)](http://ld.php(nv.gov)). NVOSHA is required to retain legal custody of these records for three (3) calendar years from the closure of the case. After three years, NVOSHA is required to then transfer the records to State Archives for permanent storage.