
WHISTLEBLOWER INVESTIGATIONS MANUAL



Revised June 17, 2021

DISCLAIMER

This manual is intended to provide policies and procedures regarding whistleblower complaints filed with the Nevada Occupational Safety and Health Administration, and 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

- p. 3, Nevada OSHA Whistleblower Protection Program Staff updated to reflect that the Whistleblower Chief Investigator supervises all whistleblower staff
- p. 7, added provision that the definition of employee includes current and former employees
- p. 9, Elements of a Whistleblower Claim updated
- p. 12, Nexus changed to Causal Connection
- p. 13, elements of a prima facie case of retaliation updated
- p. 15-16, updated to reflect that the complaint can be put in writing either by the Complainant or NVOSHA staff
- p. 18, Updated the elements of a *prima facie* case of retaliation
- p. 19, Updated to reflect that the Complainant may file their complaint verbally and NVOSHA staff will ensure the complaint is reduced to writing
- p. 20, added a hyperlink to all current federal whistleblower statutes
- p. 43-44, updated to allow CAO or their designee to review appeals

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CHAPTER 1: PRELIMINARY MATTERS

I. Effective Date

This manual is effective 6/17/2021. This manual supersedes the Nevada Occupational Safety and Health Administration's Whistleblower Investigations Manual dated 11/9/2018.

II. Purpose

- A. This manual is intended to provide guidance to the Nevada Occupational Safety and Health Administration's whistleblower staff on:
 - 1. Receipt, evaluation and processing of whistleblower complaints,
 - 2. How to conduct investigations,
 - 3. How to dispose of investigations,
 - 4. Remedies and Settlement Agreements,
 - 5. Disclosure of investigative records, and
 - 6. The relationship between the Occupational Safety and Health Administration and the Nevada Occupational Safety and Health Administration
- B. The manual is also intended to provide transparency to the public on how the Nevada Occupational Safety and Health Administration administers their whistleblower program.
- C. Disclaimer: This manual is to be used as a *job aid* in handling whistleblower complaints and investigations. Deviation from the policies and procedures in this manual may be warranted depending on the circumstances of the investigation.

III. Scope

Nevada Occupational Safety and Health Administration (NVOSHA): Statewide

IV. References

Nevada Revised Statute 618.445, Chapter 618 of the Nevada Revised Statutes – Occupational Safety and Health, 29 U.S.C., Chapter 15 – Occupational Safety and Health, 29 U.S.C. § 660 – Judicial Review, 29 CFR Part 1977 – Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act of 1970, federal OSHA Whistleblower Investigations Manual dated 1/28/16, Chapter 239 of the Nevada Revised Statutes – Public Records

V. 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. The Act created the Occupational Safety and Health Administration (OSHA) to set and enforce workplace safety and health standards. Among other things, the Act authorizes the federal government to make occupational safety and health standards, provides for research in the field of occupational safety and health, provides for training for occupational safety and health personnel, and encourages states to establish their own occupational safety and health program. (29 U.S.C. § 651)
- B. State OSHA plans.** Under the OSH Act, states were given the power to create their own workplace safety programs, which allowed them to be responsible for the development and enforcement of occupational safety and health standards in their state. These programs are known as state OSHA plans. Federal OSHA approves and monitors all state plans and provides as much as fifty percent of the funding for each program. State plans are required to be *at least as effective* as the federal OSHA program, which means they must be as strict as the federal standards, and must include processes for appeals, enforcement and penalties.
- C. NIOSHA State Plan Approval.** NIOSHA's state plan was initially approved on 1/4/74. The plan obtained final approval on 4/18/00.
- D. NIOSHA Responsibilities.** NIOSHA is primarily responsible for regulating workplace occupational safety and health in the state of Nevada, and for protecting workers from retaliation for exercising their rights under the Nevada Occupational Safety and Health Act. Nevada's state plan covers all public and private sector employees.

- E. In order to maintain their state plan, NVOSHA is required to have a whistleblower protection program which is *at least as effective* as federal OSHA.
- F. 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.

VI. Nevada OSHA Whistleblower Protection Program

A. Purpose

The NVOSHA Whistleblower Protection Program is designed to investigate potential violations of NVOSHA's whistleblower statute, NRS 618.445, and to enforce the provisions of NRS 618.445.

B. Program Staff

1. **Whistleblower Investigator.** The whistleblower investigator's primary duties include intake and evaluation of potential whistleblower complaints, conducting whistleblower investigations, facilitating settlements, and disposing of investigations.
2. **Whistleblower Chief Investigator (WCI).** The WCI is responsible for managing the NVOSHA Whistleblower Protection Program. The WCI supervises full time Whistleblower Investigators in the Southern and Northern Nevada offices. The WCI assigns investigations, reviews investigations and complaint intakes completed by whistleblower staff, trains staff on whistleblower law, policies and procedures, assists with investigations of a difficult nature, assists with complex settlement negotiations, reviews all cases requesting a review by Division counsel, educates stakeholders on NVOSHA's Whistleblower Protection Program, tracks whistleblower staff statistics, and writes whistleblower policies and procedures.
3. **Chief Administrative Officer (CAO).** The CAO oversees NVOSHA's state plan and is responsible for ensuring NVOSHA has a Whistleblower Protection Program that is at least as effective as federal OSHA's Whistleblower Protection Program. The CAO ensures all NVOSHA personnel have a basic understanding of NVOSHA's whistleblower statute. The CAO directly supervises the Whistleblower Chief

Investigator. The CAO is responsible for responding to complaints about NVOSHA's Whistleblower Protection Program.

4. **Whistleblower Appeals Committee.** The Committee reviews whistleblower investigations that are appealed. The Committee can uphold the original decision, remand the investigation back to the investigator for more investigation, or refer the case to the legal department.
5. **Division Counsel.** Division Counsel reviews cases forwarded to them by the whistleblower unit where there is a potential violation of NRS 618.445. Division Counsel makes recommendations to the Administrator, and files action in District Court when warranted. Other duties include providing guidance to whistleblower staff on legal issues and drafting subpoenas.
6. **Administrator.** The Administrator decides whether NRS 618.445(1) has been violated and brings action in District Court against the person committing the violation.

CHAPTER 2: NEVADA OCCUPATIONAL SAFETY AND HEALTH WHISTLEBLOWER STATUTE

I. Nevada Revised 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 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.*

- B. Summary of NRS 618.445.** In sum, NRS 618.445 provides protection for employees who are retaliated against for engaging in activity such as

voicing concerns to management about their workplace being unsafe and/or unhealthy, filing a safety and/or health complaint with NVOSHA, participating in a NVOSHA inspection, or reporting a workplace injury or illness.

II. 29 U.S.C. 660 (c) (federal whistleblower statute)

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.*

III. Coverage

- A.** NRS 618.445 states that a *person* shall not discharge or in any manner discriminate against any *employee*.

1. Definition of Person

NRS 618.145 defines a *person* as “any individual, firm, association, partnership, corporation, company or public agency.”

Normally, a person is the employer of the employee, however, person is not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee even if they are not the employee’s employer in the traditional sense.¹ A person may also be chargeable with a discriminatory action if they are a union or other entity.²

- a. **Companies Located Outside of Nevada.** Companies who have headquarters 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. In order for the Nevada District Court to render a binding decision against person, they must have personal jurisdiction over the person. To establish personal jurisdiction, the person must have “minimum contacts” with the state.³ Normally, if a person conducts business in Nevada, even if the headquarters are located in another state, personal jurisdiction can be established.

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. Employee includes current and former employees.

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

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

³ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945): <https://www.law.cornell.edu/supremecourt/text/326/310>

c. **Darden factors.** If it is unclear whether Complainant is an employee of an employer, 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.⁴ 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
- 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

B. Temporary Workers

When a staffing agency provides temporary workers to a business, the staffing agency and its client, referred to as the “host employer”, are considered *joint employers* of those workers. Consequently, both the staffing agency and the host employer may be covered under NRS 618.445.⁵

C. Excluded from NVOSHA coverage

⁴ See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992):

<https://www.law.cornell.edu/supct/html/90-1802.ZS.html>

⁵ See OSHA’s TWI Bulletin No. 3: <https://www.osha.gov/Publications/OSHA3781.pdf>

Federal employees, U.S. Postal Service employees and some tribal employees are excluded from NVOSHA coverage.

IV. Elements of a *Prima Facie* Whistleblower Claim

In order to establish a prima facie whistleblower claim under NRS 618.445, there must be: 1) a protected activity, 2) an adverse action, and 3) a causal connection between the protected activity and the adverse action.

A. Protected Activity

In order to have a protected activity, the Complainant must exercise their rights under Chapter 618 of the Nevada Revised Statutes.⁶ Exercising one's rights under Chapter 618 includes, but is not limited to, the following:

1. Filing a safety and/or health complaint orally or in writing with NVOSHA.
2. Filing a safety and/or health complaint orally or in writing with a state or local government agency that deals with workplace hazards, such as the fire department, health department or police department.
3. Filing oral or written complaints with management about safety and/or health concerns in the workplace. The Complainant does not need to show the safety and or health issue they complained about actually violates a NVOSHA safety and/or health standard. Rather, as long as the complaint was made in good faith and a reasonable person in their situation could have raised the same issue, it is protected.
4. Participating in a NVOSHA inspection or whistleblower investigation. This would include being interviewed by a NVOSHA employee.
5. Testifying or being called to testify in a proceeding regarding an issue which falls under Chapter 618 of the Nevada Revised

⁶ See Chapter 618 – Occupational Safety and Health:
<https://www.leg.state.nv.us/Division/Legal/LawLibrary/NRS/NRS-618.html>

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

6. Reporting a work-related injury or illness.
7. **Work Refusal.** Refusing to perform a work task that the employee reasonably believes presents a real danger of death or serious injury. An employee has a right to refuse to perform an assigned task if they:
 - 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.⁷
8. Requesting information from NVOSHA
9. Exercising any other right afforded by Chapter 618 of the Nevada Revised Statutes.

B. Employer Knowledge

The investigation must show that the person(s) involved in the decision to take the adverse action against the employee was aware, or suspected, that the Complainant engaged in protected

⁷ See 29 C.F.R. 1977.12(b)(2):

https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=11340, See U.S. Department of Labor Memo on Clarification of the Work Refusal Standard under 29 C.F.R. 1977.12(b)(2): <https://www.whistleblowers.gov/memo/2016-01-11>

activity. This can be established even if the person who made the decision to take the adverse action had no knowledge of the protected activity, but someone who provided input that led to the decision had knowledge of Complainant's protected activity.

1. **Actual Knowledge.** *Actual* knowledge is established when the evidence directly shows the employer knew about the protected activity. For example, if the evidence showed the person involved in taking the adverse action observed the employee being interviewed by a NIOSH employee, there would be *actual* knowledge. Another example would be if the person involved in taking the adverse action admitted they knew the employee complained about a health or safety complaint, there would be *actual* knowledge.
2. **Inferred Knowledge.** *Inferred* knowledge is when the employer does not have actual knowledge, but could reasonably deduce the Complainant engaged in a protected activity. For example, if the OSHA complaint is about an unsafe laboratory, and the Complainant is the only employee who works in the laboratory, there would be *inferred* knowledge the Complainant is the one who filed the OSHA complaint. Also, when an employee works in a small company or small work group, inferred knowledge can be established.

C. Adverse Action

The evidence must show the employer took an adverse action against the Complainant. The general test of whether there is an adverse action is whether a reasonable employee would have found the action "materially adverse". This means the employer's actions are harmful to the point they could dissuade a reasonable worker from engaging in a protected activity.⁸

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

- Discharge

⁸ See *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006):
<https://www.supremecourt.gov/opinions/05pdf/05-259.pdf>

- Constructive discharge – The employer deliberately made working conditions so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
- Layoff
- Reduced Hours
- Reduction in pay
- Suspension
- Demotion
- Failure to promote
- Transfer to a different job
- Change in job duties
- Reprimand
- Harassment-unwelcome conduct that can take the form of offensive or derogatory comments, or other verbal or physical contact. This type of conduct becomes unlawful when enduring the offensive conduct becomes a condition of continued employment, or it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.
- Blacklisting

D. Causal Connection

A causal connection between the protected activity and the adverse action must be established. A connection may be established by direct or circumstantial evidence, such as employer knowledge (see section B) *timing*, *disparate treatment*, and *animus*:

1. *Timing* is the amount of time that has passed between the protected activity and the adverse action.
2. *Disparate treatment* examines whether the Complainant has been treated unfairly compared to other similarly situated employees. For example, if the Complainant was fired for being late too many times, and the evidence shows other employees who do the same or similar job have also been late several times but were not fired, there is disparate treatment.
3. *Animus* is when the Respondent shows animosity toward the Complainant's protected activity. For example, if NVOSHA did an inspection at the worksite, and shortly after NVOSHA leaves the employer tells its employees they are going to find out who called NVOSHA and fire them, this would be evidence of animus.

V. Burden of Proof

A. 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.⁹ But for means the adverse action would not have occurred if the Complainant did not engage in a protected activity.

B. Burdens in District Court

If a whistleblower case is filed in Court, the following burdens apply:¹⁰

1. First, NVOSHA must establish a *prima facie*¹¹ case of retaliation. A prima facie case of retaliation can be established by showing, by a preponderance of the evidence,¹² that a protected activity, an adverse action, and a causal connection exist.
2. Second, the employer must articulate a legitimate, nondiscriminatory reason for taking the adverse action.
3. Third, NVOSHA must show the Respondent’s reason for taking the adverse action is pretextual and based on retaliation.
4. If NVOSHA cannot show the Respondent’s reason for taking the adverse action is pretextual/based on retaliation, there is no violation of NVOSHA’s whistleblower statute, NRS 618.445.

⁹ See *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ____ (2013): https://www.supremecourt.gov/opinions/12pdf/12-484_o759.pdf

¹⁰ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

¹¹ Latin for “at first sight”: https://www.law.cornell.edu/wex/prima_facie

¹² A requirement that more than 50% of the evidence points to something: https://www.law.cornell.edu/wex/preponderance_of_the_evidence

CHAPTER 3: RECEIPT, EVALUATION 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 of Complaints

- A. Complaints may be received in several ways: online, via email, telephone, referral, mail, fax, or in person.
- B. Federal OSHA will refer complaints alleging retaliation which falls 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 by federal OSHA.
- C. **Complaint Log.** When a complaint is received, it should be documented on a complaint log for tracking purposes. The log should record the date the complaint was received, the method by which it was received, the name and phone number of the Complainant, and the name of the Respondent (if known).
- D. Once the complaint has been documented on the complaint log, it should be assigned to an investigator for evaluation.

III. Evaluation of Complaints

A. Gather Information from Complainant

- 1. Once the investigator is assigned a complaint, the investigator should review all information received, and promptly contact the Complainant to gather information regarding their complaint.
- 2. The investigator should obtain the following information from the Complainant:
 - a) Name, address, phone number, email of Complainant

- b) Name, address, phone number of Respondent
- c) Complainant's job title
- d) How long Complainant has worked for Respondent
- e) Complainant's direct supervisor(s)
- f) Complainant's protected activity
- g) Employer knowledge of Complainant's protected activity
 - (1) If Complainant filed a NVOSHA safety or health complaint, has the Respondent been notified of it yet?
 - (2) Who took the adverse action against Complainant?
 - (3) How would the person who took the adverse action know about Complainant's protected activity?
- h) What adverse action was taken against Complainant?
- i) When was the adverse action taken against Complainant?
- j) How is there a connection between Complainant's protected activity and the adverse action?
 - (1) Is there timing between the protected activity and the adverse action?
 - (2) Is there animus towards the protected activity?
 - (3) Is there disparate treatment?
 - (4) Was the adverse action taken for what appear to be legitimate reasons? Can the Complainant dispute this?
- k) What remedy is Complainant seeking? Is Complainant seeking backpay?
 - (1) What days did Complainant work?
 - (2) How many hours did Complainant work each day?
 - (3) How much did Complainant make per hour?
 - (4) What was the last day of work Complainant was paid for?
- l) Has the Complainant recently filed a NVOSHA safety or health complaint?
- m) Has the Complainant filed complaints with any other agencies? ie, EEOC
- n) If Complainant is union or a government employee, have they filed a grievance? If so, what is the status?
- o) If Complainant was terminated, has the Complainant filed for unemployment? If so, what is the status?

3. Uncooperative Complainant. If the investigator has tried and failed to reach the Complainant at various times during normal work hours, the complaint will be closed with no further action.

B. Evaluate Whether the Complaint Meets the Requirements to Open an Investigation of a Complaint

In order to open a complaint for investigation, the complaint must be timely, must be covered by NVOSHA jurisdiction, must allege a *prima facie* case of retaliation under NRS 618.445, and must be put in writing either by the Complainant or NVOSHA staff.

1. Complaint Must Be Timely or Tolling Must Apply

Per NRS 618.445, NVOSHA whistleblower complaints must be filed *within 30 days after the adverse action*. The first day of the time period for filing starts the day after the Complainant becomes aware of the adverse action. For example, if the Complainant was told on 3/1 they were being terminated with the effective termination date being 3/1, the Complainant has up to 30 days after 3/1 (until 3/31) to file their complaint. If the employer made the decision to terminate the Complainant on 3/1, but did not notify the Complainant of this until 3/15, the Complainant has up to 30 days after 3/15 (until 4/14), to file their complaint.

a) When the last day for filing falls on weekend or holiday. If the last day of the statutory filing period 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. For example, if the Complainant's last day to file is 4/14, and that day falls on a Saturday, the Complainant will have until that Monday, 4/16, to file their complaint.

b) Date Complaint is considered filed

Generally, a complaint is considered filed the day the investigator receives sufficient information to determine if the complaint meets all complaint requirements. However, if the Complainant contacted NVOSHA within the 30 day timeline but the investigator did not receive enough information to fully evaluate the complaint until after the 30 day timeline, the complaint will be considered filed the day the Complainant first contacted NVOSHA. For complaints filed online with federal OSHA, the date the online complaint was filed is considered the date filed. Materials indicating the date the complaint was filed must be retained with the complaint.

c) Untimely Complaints

Complaints filed past the 30 day timeline will be closed with no further investigation, unless there is a justified reason to extend, or “toll” the timeline.

d) Reasons for Tolling

The following reasons may justify the tolling of the 30 day timeline. These circumstances are not all-inclusive.

- (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 retaliation complaint relating to a whistleblower statute enforced by NIOSH with another agency that does not have the authority to grant relief.
- (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.

e) Reasons Not to Toll

- (1)** Ignorance of the statutory filing period
- (2)** Filing an unemployment compensation claim
- (3)** Filing late because the Complainant is awaiting the outcome of a workers' compensation claim, or has received an unfavorable determination of their workers' compensation claim
- (4)** Filing a private lawsuit
- (5)** Filing a grievance or arbitration action
- (6)** Filing a retaliation complaint with another agency that has the authority to grant the requested relief

2. Complainant Must be an "Employee" and Respondent Must be a "Person" per NRS 618.445

The Complainant must be an "employee" as defined in NRS 618.085. The Respondent must be a "person" as defined in NRS 618.145. If unsure whether there is an employer employee relationship, the Darden factors should be applied.

3. Complaint Must Allege a *Prima Facie* Case of Retaliation

Complainant must allege there is a *prima facie* case of retaliation either by direct or circumstantial evidence. A *prima facie* case requires: 1) involvement in a protected activity; 2) an adverse employment action; and 3) a causal link between the protected activity and the adverse action.¹³

¹³ See *Hollowell v. Kaiser Foundation Health Plan of the Northwest*, No. 14-35882 (2017): <https://caselaw.findlaw.com/us-9th-circuit/1866840.html>

4. Complaint Must be in Writing

NRS 618.445 requires that all complaints be in writing. The Complainant is not required to file their complaint in writing and may file their complaint verbally, but the complaint must be reduced to writing by NVOSHA staff.

a. NVOSHA Whistleblower Complaint Form

The investigator must reduce all complaints to writing. Complaints should be documented on the NVOSHA Whistleblower Complaint form.

b. Complaint Contents

The following information should be documented on the NVOSHA Whistleblower Complaint Form:

- Date the complaint is filed,
- Complainant's full name, address, phone number, and email, if applicable,
- Respondent's name, address, and phone number,
- Summary of the alleged retaliation, including all elements of a whistleblower claim,
- Statement about why Complainant feels they are being retaliated against,
- Desired remedy,
- Name and title of NVOSHA employee who took the complaint,
- Name and title of supervisor who reviewed the complaint

The complaint should be clear and concise, so the employer can easily understand what the Complainant's allegation(s) is/are.

C. Advise Private Sector Complainants of Their Right to Dually File a Complaint With Federal OSHA

1. Complainants who work in the *private sector* have the right to also file their complaint with federal OSHA. This is called "dual filing". Dual

filing allows the Complainant to request a federal review of their complaint if they disagree with NVOSHA's determination. As with filing a complaint with NVOSHA, the Complainant has 30 days after the adverse action to dually file their complaint with federal OSHA.

IV. Referral of Whistleblower Complaints Exclusively Under Federal OSHA Jurisdiction

- A.** 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.

V. Processing Complaints

A. Opening Complaints for Investigation

- 1. Forward Complaint to Supervisor.** If the complaint meets all the requirements for NVOSHA to open up an investigation, the investigator should promptly forward the complaint to their supervisor for review.
- 2. Supervisor to Review Complaint.** The supervisor will verify that all complaint requirements for opening an investigation are met. Once this is verified, the whistleblower complaint will be opened for investigation. If the supervisor needs more information to verify all complaint requirements are met, they will return the complaint to the investigator to obtain the additional information.
- 3. Assign a Case Number.** Once a decision is made to open an investigation of a whistleblower complaint, the WCI will assign a case number to the complaint. The case number will be 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 2018 and it is the first case for the year, the case number will be 18-001. Each case after that will be assigned in chronological order (18-002, 18-003, 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.

4. **Assign Case to an Investigator.** When deciding who the investigation will be assigned to, the supervisor should take into consideration the investigator's current caseload and experience. In cases involving complex issues or unusual circumstances, the case may be assigned to a team of investigators or a supervisor.
5. **Notify the Complainant.** The supervisor will draft a letter to the Complainant informing them their complaint has been opened for investigation. The name, email and telephone number of the assigned investigator will be included in the letter. The letter will inform the Complainant of their right to dually file with federal OSHA if they are employed in the private-sector. The letter will include an attached Designation of Representative Form, allowing the Complainant to designate a representative. The letter and Designation of Representative form will be sent to the Complainant via email or U.S. certified mail, return receipt requested, or hand delivered. Proof of delivery should be kept with the letter.
6. **Determine if a NVOSHA Inspection is Pending.** The supervisor will determine if a safety and/or health complaint involving the Respondent has recently been filed with NVOSHA. If a safety and/or health complaint has been filed with NVOSHA, but NVOSHA has not yet notified the Respondent a safety or health complaint has been filed against them, the supervisor will relay this information to the assigned whistleblower investigator, and instruct the investigator to wait until the Respondent has been notified of the health or safety complaint before notifying the Respondent of the whistleblower complaint. This will avoid giving the Respondent potential advanced notice of an inspection.
7. **Prepare Case File.** Administrative staff will prepare a case file for the investigator. A label with the case number and name should be prepared using the following format: Case No. XX-XXX (Fiscal Year – Case Number) / Complainant's Name v. Respondent's Name. For example, Case No. 18-001 / John Doe v. ABC Company. A copy of the complaint should be placed in the file.
8. **Give Case File to Investigator.** The file will be given to the investigator to start their investigation. The date the file is given to the investigator will generally be considered the actual date the case was assigned.

9. **Update Assignment Log.** The WCI will document on the Assignment Log next to the case number the Complainant name, the Respondent name, the date filed, the assigned investigator, the date the case was assigned to the investigator, and the status of the case (“open”).

B. Closing Complaints Not Warranting Investigation

1. If the complaint lacks one of the requirements for NVOSHA to open an investigation, the complaint will be closed with no further action, unless the Complainant disagrees with the closure.
2. If the Complainant agrees with the closure, the complaint information will be entered into the WebIMIS database and be administratively closed.

3. When Complainant Disagrees with Closure

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

- a) The complaint will be assigned a case number.
- b) A case file will be made.
- c) The complaint will be entered into the WebIMIS database and docketed.
- d) The Respondent will not be notified and no investigation will be completed. Instead, the supervisor will draft a closure letter to the Complainant which informs the Complainant their complaint is being closed and why (untimely, no protected activity, etc.). The closure letter will also inform the Complainant of their appeal rights.

C. Referring Complaints to Another Agency

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 may cover Complainant's allegations include:

1. **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.
2. **Nevada Equal Rights Commission (NERC):** state agency that investigates discrimination of the above.
3. **Nevada Attorney for Injured Workers (NAIW):** state agency who represents people who have been hurt at work.
4. **National Labor Relations Board (NLRB):** federal agency that protects private sector employees' right to form, join or assist a labor organization for collective bargaining, or form working together to improve terms and conditions of employment, or refraining from any such activity.
5. **Occupational Safety and Health Administration (OSHA):** federal agency that covers whistleblower complaints that fall under the 21 other federal whistleblower statutes such as STAA, FAA, SOX.

CHAPTER 4: CONDUCTING THE INVESTIGATION

I. Scope

This chapter sets forth the policies and procedures investigators should generally follow during the course of an investigation.

II. General Principles

- A.** The investigator should remain impartial and objective throughout every investigation. The investigator should refrain from taking sides and making unwarranted assumptions.
- B.** The investigator should maintain the highest integrity while conducting investigations.
- C.** 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.
- D.** The investigator is responsible for ensuring confidential information gathered during the investigation remains confidential. This includes witness testimony and documentary evidence.

III. Case File

The investigator must keep and maintain a digital or paper case file for every investigation. All information collected and notes taken during an investigation must be kept in either a paper or digital case file and cannot be destroyed, unless it is a duplicate. Information includes, but is not limited to, emails, documents, video, interviews, recordings, notes and official letters.

In an effort to reduce paper and become more efficient, NVOSHA's goal is to reduce all case files to digital form.

A. Case File Organization

For digital case files, a digital folder with the case name and number will be made. Subfolders will be made within that folder for correspondence, whistleblower complaint, interviews, Complainant submissions, Respondent submissions, and any other appropriate subfolders. The digital file should be organized in such a way that the user can easily find the items they are looking for.

B. 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. The Web Integrated Management Information System (WebIMIS)

- A.** The Web Integrated Management Information System (WebIMIS) is a web based system which enables users to enter data for whistleblower complaints and investigations.
- B.** WebIMIS is administered and maintained by federal OSHA.
- C.** When an investigator is assigned a new investigation, they should promptly enter and docket the case into the WebIMIS database.

V. Scheduling the Investigation

The investigator should consider the date the case was received as well as the gravity of the situation when deciding the order in which their cases will be investigated.

VI. Preliminary Investigation

A. Review the Case File

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

B. Notify Respondent of the Complaint

1. The assigned investigator should notify the Respondent of the Complainant's complaint no later than 7 working days after they receive the case assignment, unless justification exists for notifying them later (i.e., current OSHA inspection not opened yet).
2. If the investigator is waiting on an OSHA inspection to be opened up first, they should follow up with the assigned Compliance Safety and Health Officer (CSHO) on a weekly basis to see if the inspection has been opened. Once the investigator receives confirmation the inspection was opened, the investigator should notify the Respondent of the whistleblower complaint within 5 working days.
3. Before serving the complaint, the investigator should try to determine who the best person to serve the notification on would be, i.e., registered agent, Human Resources, specific manager, etc. They should also try to find the correct location to serve the complaint, as the location where the Complainant works is not always the best location to serve the complaint. Finding this information out beforehand will often save time in the investigation.
4. When notifying the Respondent of a complaint, the investigator should provide the Respondent 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. In this letter, the investigator should request documents that are responsive to Complainant's allegations. In all cases, evidence supporting or not supporting disparate treatment should be requested.
 - b. Designation of Representative form: This allows the Respondent to designate a representative to represent them throughout the investigation.
 - c. Redacted copy of the Complainant's complaint and any relevant Complainant submissions

5. The Respondent may be notified via certified mail, email or in person. Proof that the Respondent received these documents should be obtained and put in the case file.

C. Early Resolution

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.

D. Respondent Represented by Legal Counsel

If the Respondent obtains legal counsel or another representative to represent them, a Designation of Representative form should be completed by the representative and forwarded to the investigator. Once the investigator is notified of the representation, 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.

VII. Amended Complaints

- A. After filing a retaliation complaint with NVOSHA, a Complainant may amend their complaint to add additional allegations and/or additional Respondents, as long as their original complaint is still being investigated and they notify NVOSHA in a timely manner.
- B. As with the original complaint, the amended complaint must be in writing, must be covered by NVOSHA, and must allege a *prima facie* case of retaliation.
- C. **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.
- D. **Additional Respondents.** The Complainant may amend their complaint to add additional Respondents if they discover the additional Respondent may be involved in taking the adverse action against the Complainant.

- E.** 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.
- F.** 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.

VIII. 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, address, and telephone number of the newly-assigned investigator. This transfer must also be documented in IMIS.

IX. The Investigation

The investigator should attempt to gather all information that is relevant to the investigation. In general, the two types of information obtained in a whistleblower case are *documentary* (documents, photographs, video) and *testimonial* (witness testimony).

A. Documentary Evidence

1. Complainant's Documentation

- a)** The investigator should obtain from the Complainant any documentation in their possession or that they can obtain that supports their allegations.
- b)** The investigator should also obtain any complaints, grievances, or claims the Complainant has filed with other agencies such as unemployment, EEOC, OSHA, etc.
- c)** If the Complainant lost pay, the Complainant should provide records of their earnings. If the Complainant was terminated or laid off, the Complainant should be advised of their obligation to seek other employment and to keep

records of earnings from other employment. Failure to seek other similar employment may cause a reduction in the amount of back pay the Complainant is entitled to. In addition, the Complainant should also be advised the Respondent's liability for back pay normally stops when the Complainant refuses a bona fide, unconditional offer of employment. If the Complainant is seeking medical bills, retirement benefits, etc., they should provide proof of these items as well.

2. Respondent's Documentation

a) Initial Position Statement and Supporting Documents

Once the investigator receives the Respondent's initial position statement and supporting documents, they should be carefully reviewed. The review will allow the investigator to understand what the Respondent's position is, and also allow the investigator to determine if they need additional information from the Respondent. If additional information is needed, the investigator should make an additional request for the information.

b) Respondent's Defense

The investigator should obtain documentation that supports the Respondent's defense. For example, if the Respondent said they terminated the Complainant for consistently being late to work, the investigator should obtain documents such as the Complainant's scheduled shift and their timesheets.

c) Respondent's Disciplinary Policy

The investigator should request a copy of Respondent's disciplinary policy. The investigator should determine if the Respondent followed their own progressive disciplinary policy/procedure in taking the adverse action against the Complainant.

d) Disparate Treatment

The investigator should request information to determine if there was disparate treatment. For example, if the Respondent terminated the Complainant, a sales manager, for work performance, the investigator should ask the Respondent to provide copies of termination notices for other managers who were terminated for work performance.

B. Testimonial Evidence

The investigator should attempt to interview witnesses that have or may have knowledge about the Complainant's allegations and the Respondent's response.

There may be some situations where documentary information contains sufficient evidence to determine if Complainant's allegations are valid or not, and witness interviews are unnecessary.

1. Respondent Management Witness Interviews

The investigator should attempt to interview Respondent management witnesses and former Respondent management witnesses who they feel have or may have information relevant to Complainant's allegations and to the elements of a whistleblower violation.

a) Scheduling Interviews

- (1)** If the Respondent has designated an attorney or other representative to represent the company, the investigator should schedule Respondent management witness interviews through the designated attorney or representative, because the attorney or other representative has a right to be present in these interviews.
- (2)** If the Respondent's designated representative is a potential witness in the case, the investigator should have the Respondent designate another representative to be present in the interview.

- (3) If there is a reason to interview a manager without a representative present, such as where the manager doesn't want the Respondent to know about their interview, the interview will be scheduled directly with the manager and held without the Respondent's representative present.
- (4) The investigator will determine the best location for the interview. Depending on the situation, the interview may be conducted at the NVOSHA office, at the Respondent's worksite, at another agreed upon location, or on the telephone. While it is preferable to conduct interviews in person, it is not always feasible.

b) Conducting Interviews

- (1) All witness interviews should be recorded if possible. **Before the interview begins, the witness must be asked if it is okay to record the interview.** If the witness agrees, the investigator will have the witness reconfirm this on the recording. If the witness does not agree to the recording, the interview must proceed without being recorded.
- (2) Before the interview begins, the witness should be advised of their rights under the Nevada whistleblower statute, and be advised they may contact NVOSHA if they feel they are being retaliated against for participating in the interview.
- (3) In the beginning of the interview, the investigator should note the date, time and location of the interview, and the individuals present in the interview.
- (4) In the interview, the investigator should establish the witness's connection to the Complainant (ie, supervisor, coworker), and ask questions relevant to the Complainant's allegations and the Respondent's position.

- (5) All witness interviews should be reduced to a written summary. The written summary should include the date and time of the interview, location of the interview, witness's name, address and phone number, and if applicable, the name of the representative present. The summary should include statements the witness made which are relevant to the Complainant's allegations, the Respondent's response.
- (6) **Witness Credibility Assessment.** The investigator should assess the credibility of each witness to determine how much weight their statement will be given. In determining credibility, the investigator should ask themselves:
- Does the witness have a motive to be untruthful?
 - Did the witness give inconsistent statements?
 - Does what the witness is saying make sense?

2. Respondent Non-Management Witness Interviews

a) Scheduling Interviews

- (1) Respondent non-management witnesses have the right to be interviewed privately, meaning, without the Respondent's representative present in the interview. These witnesses may have their own representative in the interview if they so choose.
- (2) In general, there are two ways to schedule interviews with non-management witnesses. The investigator can try to set up the interview privately with the witness, or schedule the interview through the Respondent. The benefit of setting up the interview privately with the witness is that the witness may be more willing to provide information in a private setting due to concerns about being retaliated against by their employer. If

the investigator wants to contact the witness privately, some of the ways to obtain the witness's contact information are by requesting contact information from the employer, the Complainant, another witness, or from an inspection file.

- (3) If the investigator decides to set up the interview through the Respondent, they should inform the Respondent the Complainant has a right to be interviewed privately, without the Respondent's representative present. **The Respondent's representative should not be present in the interview unless the witness wants the representative in the interview.** In this case, the investigator should have the representative explain to the witness who they represent, and ensure the witness is aware of who the representative represents. If the witness indicates they understand this and still request the representative be present in the interview, the interview may proceed with the Respondent's representative present.
- (4) The investigator will determine the best location for the interview. Depending on the situation, the interview may be conducted at the NIOSH office, at another agreed upon location, at the witness's work location, or on the telephone. If the witness appears to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator should conduct the interview away from the workplace. While it is preferable to conduct interviews in person, this is not always feasible.
- (5) **Witness Credibility Assessment.** The investigator should assess the credibility of each witness.

b) Conducting Interviews

- (1) All witness interviews should be recorded if possible. Before the interview begins, the witness

should be asked if it is okay to record the interview. If the witness agrees, the investigator will have the witness reconfirm this on the recording. If the witness does not agree to the recording, the interview must proceed without being recorded.

- (2)** Before the interview begins, the witness should be asked if they would like their interview to be confidential, meaning not disclosed to anyone. If the witness wants confidentiality, the investigator should reconfirm this with the witness on the recording, and tell the witness the following: “Your interview will be protected to the fullest extent of the law”. If the witness has questions about what that statement means, the investigator will limit their answer to the following: “If you to testify in a proceeding, your statement and identity may need to be disclosed. In addition, your statement and identity may be disclosed to another government agency.”
- (3)** Before the interview begins, the witness should be advised of their rights under the Nevada whistleblower statute, and be advised they may contact NVOSHA if they feel they are being retaliated against for participating in the interview.
- (4)** In the beginning of the interview, the investigator should note the date, time and location of the interview, and the individuals present in the interview.
- (5)** In the interview, the investigator should establish the witness’s connection to the Complainant (ie, supervisor, coworker), and ask questions relevant to the Complainant’s allegations and the Respondent’s position.
- (6)** All witness interviews should be reduced to a written summary. The written summary should include the date and time of the interview, location

of the interview, witness's name, address and phone number, and if applicable, the name of the representative present. The summary should include statements the witness made which are relevant to the Complainant's allegations and the Respondent's defense. In addition, all interviews in which the witness requested confidentiality should indicate this and be clearly marked as "Confidential" to prevent disclosure of the statement.

3. Complainant Interview

- a) The investigator should interview the Complainant to resolve any discrepancies and to obtain their response to the Respondent's position statement and supporting evidence.
- b) The investigator should confirm the remedy being sought by the Complainant. Sometimes the Complainant changes their mind on what remedy they are seeking during the course of the investigation.
- c) The Complainant may have a representative in their interview.
- d) The interview should be recorded if possible. Before the interview begins, the Complainant should be asked if it is okay to record the interview. If the Complainant agrees, the investigator will have the witness reconfirm this on the recording. If the Complainant does not agree to the recording, the interview must proceed without being recorded.
- e) In the beginning of the interview, the investigator should note the date, time and location of the interview, and the individuals present in the interview.

C. Uncooperative Complainant

1. If the investigator is having difficulty contacting Complainant to continue the investigation, the following steps should be taken:
 - a) Telephone the Complainant at various times during the week.
 - b) If the Complainant has provided a working email, email the Complainant a letter informing them to contact the investigator within 10 days. If the Complainant has no email, send the letter certified mail, return receipt requested.
 - c) If the Complainant fails to respond to the investigator after 10 days of their receipt of the noncooperation letter or the letter is returned as unclaimed, the investigator may recommend the complaint be dismissed due to Complainant's noncooperation.
 - d) The supervisor may approve closure of the investigation due to noncooperation. If approved, the supervisor will send a letter to the Complainant informing them their complaint is being closed due to noncooperation.
2. Alternatively, if the investigator is able to contact the Complainant but the Complainant engages in behavior which NVOSHA feels is uncooperative, the complaint may be dismissed for noncooperation. Examples of uncooperative behavior are:
 - a) Failing to provide documents or witnesses which the investigator needs to complete a thorough investigation.
 - b) Failing to show up for scheduled interviews.
 - c) Behaving in a way NVOSHA staff feels is disruptive, intimidating, harassing or threatening.

D. Uncooperative Respondent

1. **Failure to Provide Position Statement.** If the Respondent has failed to provide a response to the complaint by the investigator's deadline, the investigator should follow up with the Respondent. After the investigator has made several attempts to obtain a

response with no success, the investigator should consult with their supervisor. Division counsel may need to be contacted for assistance. The same rules apply for any additional requests for documentation that have not been received.

2. **Failure to Set Up Witness Interviews.** If the investigator is having difficulty setting up interviews through the Respondent after making several attempts, the investigator should consult with their supervisor for guidance. Again, Division counsel may need to be contacted for assistance.
3. **Subpoenas.** Division counsel is responsible for drafting and issuing subpoenas. If a subpoena is needed, the investigator will inform Division counsel what information they are seeking, and will work with them as needed. If a subpoena is issued, Division counsel will advise the investigator of how to serve the subpoena. If the Respondent fails to cooperate with a subpoena, Division counsel will be contacted for assistance.

X. ANALYZING AND WEIGHING THE INFORMATION GATHERED IN THE INVESTIGATION

Once the investigator has gathered all the information in the investigation, they should carefully examine the information, and decide which pieces of information are relevant to the Complainant's whistleblower claim. The investigator should decide how much weight to give each piece of information. Once the investigator has examined and weighed the information, they should be able make a decision about whether the Complainant's allegations are supported or not, and decide which pieces of evidence will be used to support their findings.

XI. DOCUMENTING THE INVESTIGATION

A. Report of Investigation

A Report of Investigation (ROI) must be completed for all cases where dismissal of the complaint based on the elements and/or the employer's defense is recommended, and also for all cases being referred to Division counsel for review to pursue possible litigation. The ROI is the investigator's summary of their findings and recommendation. The ROI should address the following:

- NVOSHA's basis for jurisdiction (coverage)

- Timeliness of the complaint
- Investigator's recommended disposition of the complaint
- Employer's defense
- Chronology of events
- Elements of the Complainant's whistleblower claim and whether they were established by a preponderance of the evidence or not
- Investigator's conclusion
- Any other relevant information

The report should be signed by both the investigator and their supervisor. If the report is being forwarded to Division counsel, it should also include a breakdown of any compensation the Complainant would be owed such as back pay, retirement benefits, or health coverage.

CHAPTER 5: CASE DISPOSITION

I. TYPES OF DISPOSITION

In general, there are four ways a whistleblower case can be disposed of:

- Dismissal
- Settlement
- Withdrawal by Complainant
- Referral to the legal department for possible litigation.

A. Dismissal

The investigation may be dismissed due to one of the following or a combination of the following:

- No coverage
- Untimeliness
- Noncooperation by the Complainant
- At least one of the elements of the whistleblower claim not established by a preponderance of the evidence
- No evidence to support the Respondent's reason for the adverse action is pretextual

1. Dismissal Disposition Procedures

a) **Report of Investigation (ROI).** If the investigator recommends the case be dismissed based on the elements or employer defense, they must report the results of their investigative findings in a Report of Investigation (ROI), and provide evidence which supports their findings.

(1) **Abbreviated ROI.** If the complaint is being dismissed due to no coverage, untimeliness or noncooperation, the findings may be put in the case comments section in webIMIS in lieu of doing a full ROI. The investigator must then print out a Case Summary from webIMIS, which includes their case comments. The Case Summary will serve as an abbreviated ROI.

- b) **Supervisor Review.** The supervisor will review the ROI and case file. If the supervisor feels more investigation is needed, the case file will be given back to the investigator to conduct more investigation. If the supervisor concurs with the investigator's findings, they will sign the ROI, and have the investigator sign the ROI.
- c) **Closing Conference.** The investigator will conduct a closing conference with the Complainant, where they explain their findings to the Complainant. During the closing, the investigator should review their ROI with the Complainant. In doing so, the investigator should ensure they don't reveal the names of any confidential witnesses or information. After reviewing their findings, the investigator should allow the Complainant time to ask questions and voice concerns. If the Complainant attempts to offer any new evidence or witnesses, the investigator will determine if such information is relevant and whether it would change the original determination to dismiss the complaint. If the investigator decides the new evidence and/or witnesses are irrelevant or would not be valuable in reaching a different decision, they will explain that to the Complainant. In the closing, the investigator should inform the Complainant of their appeal rights.

If the Complainant cannot be reached in order to conduct a closing conference, this will be noted in the file, and the closure letter with the findings will be sent to the Complainant.

- d) **Nevada OSHA Closure Letter.** NVOSHA's findings will be issued for all dismissals. The findings inform the parties of NVOSHA's determination and findings. The findings also inform the Complainant of their right to appeal and the procedure for appealing the findings. The findings will either be sent certified mail, return receipt requested or via email to the Complainant and the Respondent. A copy of the closure letter and proof of delivery must be placed in the file.
- e) **Enter Closure into webIMIS.** After the findings are sent, the final determination will be entered into the IMIS database. The determination date is the date the NVOSHA closure letter is sent to the Complainant.

B. Settlement

The investigation may be resolved by a settlement agreement between the Respondent and the Complainant, or in certain cases, between the Respondent and NVOSHA. For detailed guidance on settlements, see Chapter 6.

1. Settlement Disposition Procedures

- a) **Agreement Signatures.** Ensure all parties sign the settlement agreement. If the parties are using NVOSHA's standard agreement, make sure it is signed by the Complainant, the Respondent, the investigator, and NVOSHA's CAO or designee. If it is a private agreement, it must be signed by the Complainant and the Respondent.
- b) **Payment.** If the Respondent agreed to pay the Complainant, the investigator must make a copy of the payment for the file and give the original payment to the Complainant. The investigator should have the Complainant acknowledge in writing they received payment.
- c) Place a copy of the fully executed settlement agreement and if applicable, proof of settlement payment to the Complainant (ie, copy of check) in the case file.
- d) **WebIMIS.** In the case comments tab in webIMIS, write a brief summary of the settlement terms and any payment made.
- e) **Supervisor review.** Submit case file to supervisor for review. The supervisor will review the file to ensure all required documents are in the file.
- f) **Closure Letter.** The supervisor will send a settlement closure letter and copy of the agreement to the Complainant and Respondent.
- g) **WebIMIS.** The determination must be entered into webIMIS. If a private agreement was executed, select "Settled Other." If a NVOSHA agreement was executed, choose "Settled." If payment

was made, put the **gross** amount paid in the appropriate box (back pay, compensatory). Once the determination is entered, the investigator should print out an IMIS Case Summary and place it in the file.

C. Withdrawal

A Complainant may withdraw their complaint at any time during NVOSHA's investigation of the complaint. If a Complainant decides to withdraw, the Complainant will be informed that by entering a withdrawal on their case, they are forfeiting their rights to appeal or object, and the case will not be reopened. Withdrawals may be requested orally or in writing, but it is preferable to obtain the withdrawal in writing.

1. Withdrawal Disposition Procedures

- a)** If the Complainant agreed to withdraw their case in writing, put proof of this in the case file (ie, copy of email, letter).
- b)** In the case comments section of webIMIS, write a brief summary of brief reason why the Complainant decided to withdraw their complaint.
- c)** Submit case file to supervisor.
- d)** The supervisor will review the file.
- e)** The supervisor will send a withdrawal approval closure letter to the Complainant and Respondent.
- f)** The determination must be entered into webIMIS as "Agency Withdrawn". An IMIS Case Summary must be printed out and placed in the file.

D. Referral to Division Counsel

If an investigator feels a case has enough evidence to prove a violation of the whistleblower statute, the investigator should recommend the case be reviewed by the legal department.

1. Referring a case to Division Counsel

- a) The investigator will submit the case file, ROI and supporting evidence to the supervisor, with the recommendation that it be reviewed by Division counsel.
- b) If the supervisor agrees with the recommendation, the ROI and supporting evidence will be submitted to the Whistleblower Chief Investigator (WCI) for review.
- c) The WCI will review the ROI and evidence and submit their recommendation to the Chief Administrative Officer (CAO).
- d) The CAO will review the ROI and evidence. If the CAO feels the case warrants review by the legal department, the CAO will submit a copy of the ROI and supporting evidence to Division counsel.
- e) Division counsel may request that additional information be gathered by the investigator at any time while it is under review with Division counsel. The investigator will assist Division counsel with obtaining the additional information.

II. 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

If a Complainant does not agree with NVOSHA's determination to dismiss their complaint, they must request an appeal in writing within 15 calendar days of their receipt of NVOSHA's dismissal letter. This appeal must be sent to NVOSHA's Whistleblower Appeals Committee, with a copy to the Whistleblower Chief Investigator.

B. NVOSHA Receipt of Appeal

- 1. Upon receipt of an appeal, the Whistleblower Chief Investigator will document the date the appeal was received on the Case Assignment log.
- 2. The WCI will give the CAO a copy of the appealed case file.
- 3. The CAO or other designee will determine if the appeal is timely.

- a) If the appeal is timely, the CAO or other designee will send the Complainant a letter acknowledging their appeal.
- b) If the appeal is untimely, the CAO or other designee may toll the appeal if justification exists, or may close the appeal with no further consideration. If the appeal is closed, the Committee will send the Complainant a letter informing them of this.

- 4. The WCI will update webIMIS to indicate the case has been appealed.

C. Appeals Committee

- 1. The Appeals Committee will be comprised of NVOSHA's Chief Administrative Officer or other designee and two management officials from NVOSHA.
- 2. 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.
- 3. 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.

D. Appeal Outcomes

- 1. If the Committee feels NVOSHA's original determination should be upheld (affirmed), the appeal will be denied.
- 2. If the Committee disagrees with NVOSHA's original determination, the original determination will be reversed or modified.
- 3. If the Committee feels more investigation and/or analysis is needed, the case will be remanded to the investigator originally assigned to the case to conduct more investigation and/or analysis.

- a)** If the case is remanded to the investigator and the results of the reinvestigation or reanalysis do not change the initial determination, the appeal will be denied.
 - b)** If the case is remanded to the investigator and the reinvestigation or reanalysis results in a settlement or referral to the legal department, the appeal will be upheld.
- 4.** If the Complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief, such as a union proceeding, the review of the appeal may be postponed pending a determination from the other forum. If a fair and equitable resolution is obtained from the other forum, the Appeals Committee may defer their review of the appeal to the forum's determination. If no resolution is obtained or it appears unfair, the Committee will proceed with reviewing the appeal.

CHAPTER 6: REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope.

This Chapter discusses NVOSHA's settlement policy, remedies allowed under Nevada law, and guidance on drafting settlement agreements.

II. Settlement Policy

- A.** Voluntary resolution of disputes is desirable, and investigators are encouraged to actively assist the parties in reaching an agreement. At any point prior to the completion of the investigation, NVOSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.
- B.** NVOSHA should not enter into or approve settlements unless they provide fair and equitable relief for the Complainant. Additionally, settlements should not undermine the protection of the Nevada whistleblower statute, and should not be contrary to public policy.

III. Settlement Relief

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.

IV. Remedies

The Nevada OSHA whistleblower statute provides for "reinstatement and reimbursement for lost wages and work benefits". NVOSHA's goal is to make the Complainant whole by restoring the Complainant to the terms, conditions, and privileges of their employment or former employment as they existed prior to the adverse action.

A. Reinstatement

Reinstatement is putting the Complainant back to the job they lost.

B. Lost Wages

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 calculate the Complainant’s lost wages, the investigator will need to determine what the Complainant’s earnings were, normally by reviewing Complainant’s paychecks.
- b.** If the Complainant was paid an hourly rate, their lost wages will be calculated by taking the total amount of hours the Complainant would have worked, and multiplying them by the hourly rate. If the Complainant’s hours fluctuated from week to week, their lost wages will be calculated by taking an average of the hours Complainant worked each week, and then multiplying that average by the hourly rate.
- c.** If the Complainant was paid a salary, their lost wages will be calculated by breaking them down to a daily rate, and then multiplying the daily rate by the number of days the Complainant would have worked.
- d.** For all other instances, lost wages will be calculated using the most fair, reasonable method.
- e.** **Interim earnings.** Interim earnings are earnings the Complainant received from other employment while they were separated from employment with Respondent. Interim earnings should be deducted from the lost wages amount.
- f.** **Workers’ compensation earnings.** 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

suffered while working for Respondent. Workers' compensation earnings should be deducted from the lost wages amount.

- f. **Unemployment benefits.** Unemployment benefits should not be deducted from lost wages, however, the Complainant should be informed that any settlement payment received may be reported to unemployment, resulting in the Complainant having to pay back unemployment.
- g. **Respondent offer of reinstatement.** 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.

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.

V. **Evidence of Damages**

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

VI. **Complainant's Duty to Mitigate Damages**

Complainants have a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to lost wages, a Complainant must exercise reasonable diligence in seeking alternate employment. Complainants must make an honest, good faith effort to obtain employment. A Complainant's obligation to seek

other employment does not require the Complainant to initially go into another line of work or accept a demotion, but Complainants who are unable to secure substantially similar employment after a reasonable period of time must consider other available employment which may require them to work in a different field or accept a lower wage.

Investigators should ask the Complainant for evidence they have been making an honest, good faith effort in seeking employment, and put this evidence in the case file.

VII. 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.

VIII. Settlement Agreements

A. General Principles

1. Agreements should be fair and equitable.
2. The provisions of the agreement should clearly define what the parties are agreeing to.
3. 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.

B. The Standard Nevada OSHA Settlement Agreement

It is optimal to have the parties sign a standard NVOSHA settlement agreement when possible. The standard agreement ensures the general principles of settlements are followed, and can be enforced by NVOSHA should either party breach the agreement.

1. Agreement Requirements

- a) The standard NVOSHA agreement must be in writing.

- b) In order to be valid, the agreement must be signed by the designated NVOSHA management official (normally the CAO), a Respondent management official authorized to sign on behalf of the Respondent, and the Complainant. The exception to this is bilateral agreement, which the Complainant does not sign.
- c) **Agreement Provisions.** The standard NVOSHA agreement normally contains the following provisions:
- (1) **Compliance with Acts.** Respondent will not retaliate against the Complainant or any other employee in violation of NRS 618.445.
 - (2) **Reinstatement.** 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. (If reinstatement is not applicable, put N/A).
 - (3) **Monies.** Respondent agrees to make the Complainant whole by payment of \$_____, OR Respondent agrees to pay Complainant a lump sum of \$_____. Complainant agrees to comply with applicable tax laws requiring the reporting of income. Any check shall be made payable to the Complainant and mailed or delivered to the Nevada OSHA Area Office at (put office address). (If no money will be paid, put N/A).
 - (4) **Personnel Record.** Respondent shall expunge any adverse references from Complainant's personnel records relating to the adverse action and not make any negative references relating to the adverse action in any future requests for employment references.
 - (5) **Inquiries Concerning Complainant.** Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to any third party that could be construed as damaging the name, character, or employment of Complainant.

- (6) **Performance.** Performance by both parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved.
 - (7) **Enforcement of settlement.** Failure to comply with this settlement constitutes a violation of NRS 618.445 for which the Division of Industrial Relations legal department may seek redress by filing a civil action in District Court.
 - (8) **Non-Admission.** Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation enforced by the Nevada Occupational Safety and Health Administration. Nothing in this Agreement may be used against either party except for the enforcement of its terms and provisions.
 - (9) **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 Complainant's complaint filed with NVOSHA on (date), and will cause the complaint to be closed.
-
- d) In general, Nevada OSHA'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.
 - e) Standard agreements must not contain provisions that prohibit the Complainant from engaging in a protected activity.
 - f) Standard agreements must not contain provisions that prohibit Complainant from working for employers in the industry to which they belong.
 - g) Standard agreements must not contain provisions that prohibit NVOSHA's release of the agreement to the general public, unless a Nevada statute or regulation prohibits its release.

C. Private Settlement Agreement

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.

1. NVOSHA deferral to private agreements does not mean NVOSHA agrees with all provisions in the agreement. Provisions NVOSHA may encounter but not concur with are:
 - a) Provisions that prohibit the Complainant from exercising their rights under Chapter 618 of the NRS and/or the federal whistleblower statutes.
 - b) Provisions prohibiting Complainant from participating in NVOSHA/OSHA investigations or testifying regarding NVOSHA/OSHA matters.
 - c) **Unfair waiver of future employment clauses.** Waiver of future employment clauses usually say the Complainant waives their right to seek future employment with the Respondent. Whether a waiver is fair depends on several factors such as:
 - (1) Did the Complainant received reasonable consideration (payment) for agreeing to the waiver?
 - (2) Does the waiver severely limit Complainant's ability to work in their chosen field where they live?
 - (3) Does the waiver restrict Complainant from working for a company that is later acquired by or merges with Respondent? Does it restrict Complainant from working for companies with which the Respondent does business?
 - (4) Has the Complainant already found employment that is not affected by the waiver?

d) Unfair or unreasonable noncompete clauses. A noncompete clause is a clause under which one party (usually an employee) agrees not to enter into or start a similar profession or trade in competition against another party (usually the employer). In determining whether a noncompete is unfair, things to consider are:

(1) Is the clause necessary to protect a legitimate business interest?

(2) Is it reasonably limited in duration, geographic area and scope?

(3) Was the Complainant given sufficient consideration in exchange for agreeing to the clause?

2. Complainants should be given sufficient time to have legal counsel review the agreement before signing it if they so choose. Complainant's consent to the agreement should be knowing and voluntary.

3. 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 ensure this is done. The standard NVOSHA agreement should have a provision that says "Respondent and Complainant have signed a separate agreement encompassing matters not within NVOSHA's authority. NVOSHA's authority over that agreement is limited to the statutes within its authority. Therefore, NVOSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to NRS 618.445."

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.
 - b)** The Complainant refuses to accept the settlement offer by the Respondent. Complainant's reasons for refusing to accept the settlement should be noted in the case file.
- 2.** When discussing the proposed bilateral agreement with the Complainant, the investigator should explain the delays and potential risks associated with litigation, and NVOSHA may settle the case without Complainant's consent. The investigator should also inform the Complainant the case cannot be appealed once it is settled.
- 3.** The general format and wording of the standard NVOSHA settlement agreement should be used for bilateral agreements, with changes that reflect the agreement is between NVOSHA and the Respondent.
- 4. Procedures for recommending a bilateral agreement.**
 - a) Consult with supervisor.** If an investigator feels a bilateral agreement is warranted, they must consult with their supervisor first.
 - b) Draft agreement and memo.** If the supervisor agrees a bilateral is warranted, the investigator will draft a bilateral agreement and a memo explaining why they feel a bilateral agreement is warranted. The supervisor will review the memo and agreement.

- c) **Send agreement and memo to Whistleblower Chief Investigator.** If the supervisor concurs with the memo and agreement, they will send it to the WCI for review.
 - d) **Send agreement and memo to Division counsel.** If the WCI concurs, they will have Division counsel review it.
 - e) **Have Respondent sign agreement.** If Division counsel approves of the agreement, the investigator will have the Respondent sign the agreement. The investigator will then have the designated NVOSHA management official (normally the CAO) review the memo and agreement. If the designated NVOSHA official agrees, they will sign the agreement.
5. Any check from the Respondent must be sent via certified mail or hand delivered to the Complainant even if he or she did not agree with the settlement. The delivery of the check must be documented in the case file. If the check is returned to NVOSHA, NVOSHA will document this fact and return the check to the Respondent.

IX. Enforcement of Settlements

If a Respondent fails to comply with a NVOSHA settlement agreement, Division counsel should be contacted for assistance. The investigator should also inform the Complainant that a violation of a settlement agreement is a breach of contract for which the Complainant may seek redress in an appropriate court. If the Respondent fails to comply with a private settlement agreement, the Complainant should be advised to seek private legal counsel as NVOSHA cannot enforce a private settlement agreement.

CHAPTER 7: INVESTIGATIVE RECORDS AND THE NEVADA PUBLIC RECORDS ACT

I. Investigative Records

Investigative records include all information produced or gathered in relation to the investigation of a whistleblower claim.

A. Records normally include, but are not limited to:

- a. Complaint intake notes
- b. Whistleblower complaint
- c. Complainant submissions
- d. Respondent submissions
- e. Complainant interview
- f. Witness interviews
- g. NVOSHA enforcement documents (inspection notes, interviews, complaints)
- h. Investigator Notes
- i. NVOSHA correspondence
- j. Case Activity Log
- k. Reports of Investigation
- l. Settlement Agreements
- m. Emails between Nevada OSHA and both parties

B. All investigative records should be placed in the case file.

C. Investigative records should not be destroyed or used by a NVOSHA employee for any reason other than to carry out their official duties as a NVOSHA employee.

D. Investigative records are to be maintained according to NVOSHA's schedule for the retention of whistleblower records.

II. Nevada Public Records Act

A. The Nevada Public Records law was enacted to ensure government documents are available to the public. Disclosure of government documents to the public ensures accountability and transparency of government agencies.

- B.** The Nevada Public Records Act can be found in NRS Chapter 239. NRS 239.010 states: “Unless otherwise 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.”
- C.** There is a presumption that all agency records are open to public inspection and copying unless they are declared confidential by law.
- D.** In cases where the NRS has not specified whether a particular record be kept confidential, the Nevada Attorney General has determined that the balancing test under *Donrey of Nevada v. Bradshaw* (1990) be applied to determine if the record is public and subject to the Nevada Public Records Act. Under *Donrey of Nevada v. Bradshaw* (1990), if the government feels there is an exception to the Nevada Public Records Act that justifies the withholding of a requested record, they must balance their public policy interest in withholding the document against the general policy in favor of open government. One of the public policy interests the court has acknowledged is confidential sources.

III. NVOSHA Guidelines for Disclosing Public Records

A. Open v. Closed Investigation

- 1.** An investigation is considered open when NVOSHA is actively investigating the complaint or the complaint is on an active appeal.
- 2.** An investigation is considered closed when NVOSHA has made a final determination. If the Complainant fails to exercise their appeal rights in the required timeframe, NVOSHA’s determination is final. If the Complainant exercises their appeal rights, NVOSHA’s determination is final once NVOSHA has denied the appeal.

B. Disclosure to Parties During an Open Investigation

During an open investigation, certain disclosures of information will be made to the Complainant and the Respondent (or their representatives). 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.

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.

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".

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. If NVOSHA feels an exception to the Act may be warranted, NVOSHA should conduct the balancing test pursuant to *Donrey of Nevada v. Bradshaw*.
2. If disclosing personal, identifiable information of witnesses would violate their privacy rights, cause intimidation or harassment to those persons, or impair future investigations, it should not be disclosed.
3. Copies of documents pertaining to NVOSHA safety and/or health inspections should not be disclosed by the whistleblower unit. The

requestor will need to submit a request to the enforcement section to obtain these documents.

- 4.** 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.

CHAPTER 8: DUAL FILING AND COMPLAINTS AGAINST STATE PROGRAM ACTION

I. General

- A. Once NVOSHA has completed their whistleblower investigation for *private sector* employees, and any appeal rights have been exhausted, the Complainant can exercise their dual filing rights with federal OSHA.
- B. Anyone alleging inadequacies with NVOSHA's whistleblower program may file a Complaint Against State Program Action (CASPA).

II. Dual Filing With Federal OSHA

- A. *Private sector* employees filing a whistleblower complaint with NVOSHA have the right to also file their complaint with federal OSHA.
- B. When a private sector employee complaint is received by NVOSHA, NVOSHA will advise the employee they have 30 days after the adverse action to dually file a complaint with federal OSHA.
- C. If the Complainant dually files with federal OSHA, they can exercise their right to request federal OSHA review their case *after NVOSHA has made a determination to dismiss their case and the Complainant has exhausted their appeal rights*.
- D. At the conclusion of each NVOSHA whistleblower investigation which results in the complaint being dismissed, the dismissal letter to the Complainant will inform them of the procedure for requesting a federal review of their complaint.

III. OSHA'S Procedure for Processing Dually-Filed Complaints

- A. If a Complainant requests federal review of a dually filed complaint under Section 11(c), OSHA will evaluate it to determine whether it has been properly dually-filed. **In order to be properly dually-filed, the following criteria must be met:**
 - 1. Complainant filed the complaint with OSHA in a timely manner (within 30 days after the adverse action).

2. A final administrative determination has been made by NVOSHA. A final administrative determination occurs when the Complainant either does not exercise their appeal rights with NVOSHA, or if they do exercise their appeal rights, once they are notified by NVOSHA that their appeal is being denied.
 3. Complainant requests federal review of the complaint to the appropriate OSHA Regional Office in writing within 15 calendar days of receiving NVOSHA's final administrative determination letter.
 4. Complainant and Respondent are covered under Section 11 (c).
- B.** If upon request for review, federal OSHA determines the complaint is not properly dually-filed, the complaint will be administratively closed and the Complainant will be notified. Section 11 (c) appeal rights will not be available. Further review of such complaints will be conducted under Complaint Against State Program Action procedures.
- C.** If the Complainant requests federal review before NVOSHA's final determination is made, the Complainant shall be notified that he or she may request review only *after* NVOSHA has made a determination. However, in cases of extraordinary delay or misfeasance by the state, the Regional Administrator may allow a federal review before the issuance of a state determination.

V. OSHA Review of Properly Dually-Filed Complaints

- A.** Before deferring to NVOSHA's determination, OSHA will conduct a preliminary review of the dually filed complaint. It must be clear to OSHA that:
1. The state proceedings "dealt adequately with all factual issues", and
 2. The state proceedings were "fair, regular, and free of procedural infirmities", and
 3. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
- B.** The preliminary review will be conducted on a case-by-case basis, after careful scrutiny of all available information, including NVOSHA's investigative file. If appropriate, as part of the review, OSHA may request that NVOSHA reopen the

case and correct specific deficiencies. NVOSHA will decide whether the case will be reopened or not.

- C. Deferral.** If NVOSHA's proceedings meet the criteria above, OSHA may defer to the state's findings. The complaint will be administratively closed and the Complainant will be notified. Appeal rights will not be available.
- D. No Deferral.** If OSHA cannot defer to NVOSHA's determination, OSHA will conduct whatever additional investigation is necessary, with every effort being made not to duplicate any portion of the state investigation that was adequately performed and documented. Based on OSHA's investigative findings, OSHA may either dismiss, settle, or recommend litigation.
- E. State Plan Evaluation.** Should any recommendations for needed corrective action by NVOSHA arise out of a properly dually-filed complaint, those recommendations will be referred to the Regional Administrator for use in the state plan evaluation.

VI. Complaints About State Program Administration (CASPA)

- A.** OSHA state plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a state's program may file a CASPA with the appropriate Regional Administrator.
- 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. The CASPA process provides a mechanism for employers, employees, and the public to notify OSHA of specific issues, systemic problems, or concerns about a state program. A CASPA may reflect a generic criticism of the state program administration or it may relate to a specific investigation.
- C.** Because properly dually-filed 11 (c) complaints undergo federal review, no duplicative CASPA investigation is required for such complaints. Complaints about the handling of state whistleblower investigation from public sector employees, and from private-sector employees who have not properly dually-filed their complaint will be considered under CASPA procedures.
- D.** Upon receipt of a CASPA complaint relating to NVOSHA's handling of a whistleblower case, OSHA at the regional level will review the state's investigative file and conduct other investigation as necessary to determine if the state's investigation was adequate and that the determination was supported by the appropriate available evidence. A review of the state's file will

be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of OSHA's Whistleblower Protection Program.

- 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 investigations techniques, policies and procedures. A review under CASPA procedures is not an appeal and a review under CASPA procedures will not be reviewed by the Appeals Committee; however, it should always be possible to reopen a discrimination case for corrective action. If the Region finds that the outcome in a NVOsha whistleblower investigation is not appropriate, the Region should require the state to take appropriate action to reopen the case or in some manner correct the outcome, whenever possible, as well as make procedural changes to prevent recurrence.