
NVOSHA WHISTLEBLOWER INVESTIGATIONS MANUAL



DISCLAIMER

This manual is intended to provide policies and procedures regarding the Nevada Occupational Safety and Health Administration Whistleblower Program. This manual is solely for the benefit of the Nevada state government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Nevada Occupational Safety and Health Administration or the State of Nevada. Statements which reflect court precedents do not necessarily indicate acquiescence with those precedents.

Significant Changes

Chapter 1: Preliminary Matters

VIII. Definitions, 12. Disparate Treatment-definition updated

Chapter 2: Legal Principles

VI. Timeliness, C. Tolling, 1. includes examples

VII. Elements of a Whistleblower Claim, changed to three elements-Protected Activity, Adverse Action, and Causal Link

VII. Elements of a Whistleblower Claim, C. Causal Link, updated to include “but for” test, and include examples of Direct and Indirect Evidence, Employer Knowledge included as part of the Causal Link

VIII., added A. Statutory Duty to Investigate, B. Initial Complaint and NVOSHA’s Gatekeeping Function, C. Reasonable Cause Investigation Standard, and updated D. Burden Shifting

Chapter 3: Intake and Processing of Complaints

III. Documenting and Evaluating Complaints, A. added Attachment A – NVOSHA Whistleblower Complaint Form Example

IV. Processing Complaints, B. Closing Complaints Not Warranting Investigation, 1. & 2. added Attachment B – NVOSHA Whistleblower Complaint Form Example

IV. Processing Complaints, C. Docket and Dismiss Procedures, added Attachment C – NVOSHA Whistleblower Complaint Form Example

Chapter 4: Conducting the Investigation

Added V. Documenting the Investigation in OIS (replaces IMIS)

X. Conduct Rebuttal Interview With Complainant updated

Chapter 5: Remedies

V. Undocumented Workers updated

Chapter 7: Case Disposition

VII. Appeals section updated

Chapter 8: State Plan-Federal OSHA Coordination

II. Federal OSHA’s Relationship to State Plans, III. Federal OSHA Referral Procedures, IV. NVOSHA Referral Procedures, V. Federal Review Procedures, VI. Federal Procedures for Complaints About State Program Administration updated

Chapter 9: Investigative Records & The Nevada Public Records Act

II. The Nevada Public Records Act, IV. NVOSHA's Public Records Request Policy and Procedure updated

V. Retention and Disposition of Whistleblower Records added

Table of Contents

Contents

Chapter 1: Preliminary Matters	3
Chapter 2: Legal Principles.....	3
Chapter 3: Intake and Processing of Complaints	3
Chapter 4: Conducting the Investigation	3
Chapter 5: Remedies	3
Chapter 7: Case Disposition	3
Chapter 8: State Plan-Federal OSHA Coordination	3
Chapter 9: Investigative Records & The Nevada Public Records Act	4
I. Effective Date	1
II. Purpose	1
III. Scope	1

IV.	References	1
A.	Nevada Revised Statutes	1
B.	Federal Statutes	1
C.	Federal Regulations	1
D.	Federal Memorandums of Understanding	2
E.	Federal OSHA Instructions.....	2
F.	Federal Desk Aid.....	2
G.	Federal OSHA Chart	3
H.	NVOSHA Internal Policies	3
V.	Cancellations	3
VI.	Background.....	3
A.	OSH Act	3
B.	State OSHA Plans	4

C.	NVOSHA State Plan	4
VII.	Additional Statutes Enforced by OSHA	4
VIII.	Definitions	4
IX.	NVOSHA Functional Responsibilities Regarding Whistleblower Matters.....	8
A.	NVOSHA Staff.....	8
3.	Program Coordinators and Supervisor, Operational Support Unit.....	9
X.	Other Languages.....	9
CHAPTER 2: LEGAL PRINCIPLES.....		10
I.	Scope	10
II.	Introduction	10
III.	NVOSHA’s Whistleblower Statute: NRS 618.445	10
A.	Provisions of NRS 618.445	10
IV.	Federal OSHA’s Whistleblower Statute: 29 U.S.C. § 660(c).....	11

A.	Provisions of 29 USC 660(c).....	11
V.	Coverage of Parties Under NRS 618.445	11
VI.	Timeliness of a Whistleblower Claim Under NRS 618.445.....	14
C.	Extending the Deadline Through Tolling.....	14
D.	Reasons Not to Toll	15
VII.	Elements of a Whistleblower Claim.....	15
A.	Protected Activity	15
4.	Participating in a NVOSHA inspection or whistleblower investigation.	16
8.	Requesting information from NVOSHA.....	16
10.	Exercising any other right afforded by Chapter 618 of the Nevada Revised Statutes.	17
B.	Adverse Action	17
•	Change in job duties or responsibilities	17
C.	Causal Connection.....	18

1.	“But For” Test	18
2.	Direct and Indirect Evidence of Causal Connection.....	19
a.	Direct Evidence:	19
b.	Indirect Evidence:.....	19
VIII.	Investigation of A Whistleblower Claim & Burden of Proof.....	20
A.	Statutory Duty to Investigate.....	20
B.	Initial Complaint & NIOSH’s Gatekeeping Function.....	21
C.	Reasonable Cause Standard for Investigations	21
D.	Burden Shifting	22
E.	Testing Respondent’s Defense (Pretext Testing)	22
1.	Examples of Evidence That May Show Pretext:	23
2.	Questions To Assess Pretext:	23
3.	Pretext Testing Outcomes.....	24

IX.	Policies and Practices Discouraging Injury/Illness Reporting.....	24
E.	Discipline For Violating a Safety Rule.....	25
I.	Scope	27
II.	Submitting a Complaint or Question	27
III.	Receipt and Assignment of Complaint/Contact	27
A.	NVOSHA Whistleblower Complaint Email	27
IV.	File Date	28
The file date is normally the date the Complainant filed the online complaint or, if unable to file online, the date the Complainant either contacted the NVOSHA whistleblower unit or participated in an intake interview. Exceptions may apply to this general rule, and will be determined on a case by case basis. 28		
V.	Reviewing Complaint	28
A.	Initial Steps	28
VI.	Disposition of Complaint	Error! Bookmark not defined.
A.	Intake Closure	28

B.	Intake Interview	29
C.	Opening of Complaint.....	30
D.	Administrative Closure of Complaint	30
E.	Docket and Dismissal of Complaint.....	31
CHAPTER 4: CONDUCTING THE INVESTIGATION		33
I.	Scope	33
II.	General Principles.....	33
III.	Create and Maintain a Digital Case File.....	33
A.	Organizational Structure and Content of Digital File.....	33
B.	Naming Documents and Other Evidence	34
C.	Activity/Telephone Log.....	34
IV.	Review the Whistleblower Complaint and Supporting Documents	34
V.	Document the Investigation in OIS (OSHA Information System).....	34

VI.	Notify Respondent of the Complaint.....	35
1.	Respondent Notification Packet	35
C.	Respondent Represented by Legal Counsel	36
D.	Early Resolution/Settlement	36
VIII.	Review Respondent’s Position Statement and Supporting Documents.....	36
IX.	Send Redacted Position Statement/Submissions to Complainant	36
X.	Conduct Rebuttal Interview With Complainant	36
XI.	Schedule Witness Interviews.....	37
XII.	Conduct Witness Interviews.....	38
XIII.	Review the Evidence Gathered and Determine if Additional Information is Needed.....	38
XIV.	Keep the Chief informed of the Progress of the Case.	39
XV.	Consult With Division Counsel as Needed	39
XVI.	Other Matters	39

A.	Amended Complaints	39
2.	Amendments Filed After the Statutory Filing Has Expired.	39
3.	Form of the Amendment	39
4.	Processing Amended Complaint	40
B.	Unresponsive/Uncooperative Complainant	40
C.	Make Attempts To Contact Unresponsive Complainant	Error! Bookmark not defined.
D.	Unresponsive/Uncooperative Respondent	41
E.	Case Transfer	41
CHAPTER 5: REMEDIES		42
I.	Scope.	42
II.	Purpose of Remedies	42
III.	Remedies Under NRS 618.445.....	42
A.	Reinstatement	42

B.	Lost Wages (also called Back Pay)	42
1.	Calculating Lost Wages	42
	For all other situations not listed above, lost wages will be calculated using the most fair, reasonable method.	43
C.	Complainant’s Duty to Mitigate Damages.	44
D.	Work Benefits.....	45
E.	Other Remedies	45
IV.	Evidence of Damages	45
V.	Undocumented Workers	45
	CHAPTER 6: SETTLEMENT AGREEMENTS.....	46
I.	Scope	46
II.	Settlement Policy	46
III.	Tax Treatment of Amounts Recovered in a Settlement.....	46

IV.	Settlement Agreements.....	47
A.	General Requirements of Agreements.....	47
B.	The Standard NVOSHA Settlement Agreement	47
1.	Standard NVOSHA Agreement Required Provisions	47
2.	Standard NVOSHA Agreement Optional Provisions.....	49
C.	Private Settlement Agreements.....	50
1.	Reviewing Private Agreements	50
D.	Bilateral Agreements	51
4.	Procedures For Disposing of a Case Via a Bilateral Agreement.	52
	CHAPTER 7: CASE DISPOSITION	53
I.	Scope	53
II.	Types of Disposition.....	53
III.	Procedures for Dismissals (See procedures for Docket and Dismiss in Chapter 3).....	53

B.	Dismissal Based on the Elements and/or Employer Defense	53
3.	The Investigator and Chief will digitally sign the ROI.	54
6.	NVOSHA’s Findings.....	55
C.	Dismissal Based on No Coverage or Untimeliness	55
	Discussion of the elements and the employer defense is not required.....	55
3.	The Investigator and Chief will digitally sign the ROI.	56
D.	Dismissal Based on Lack of Cooperation.....	56
	No ROI is required.....	56
IV.	Procedures For Settlement.....	57
B.	Private Settlement Agreement Between Complainant and Respondent	57
C.	Nevada OSHA Standard Agreement	58
D.	Nevada OSHA Bilateral Agreement.....	58
V.	Procedures For Withdrawal of Complaint.....	59

VI.	Procedures For Referral to Division Counsel for Potential Litigation	60
VII.	APPEALS.....	61
A.	Procedure for Appealing.....	61
B.	NVOSHA Receipt of Appeal	62
C.	Appeals Committee and Review	62
D.	Appeal Outcomes	63
E.	Closure Letter	64
	CHAPTER 8: STATE PLAN – FEDERAL OSHA COORDINATION.....	65
I.	Scope	65
II.	Federal OSHA’s Relationship to State Plans.....	65
	B. Federal OSHA refers 11(c) whistleblower complaints to NVOSHA’s state plan, and reviews dually filed complaints when appropriate.	65
C.	NVOSHA Referrals to Federal OSHA	65

III.	Federal OSHA Referral Procedures	66
1.	Referral of Private-Sector Complaints.....	66
2.	Referral of Public-Sector Complaints.....	67
3.	Exemptions to the Referral Policy	67
IV.	NVOSHA Referral Procedures.....	68
A.	Advising Private Sector Complainants of Their Right to File Section 11(c) Complaint.....	68
B.	Advising Private Sector Complainants of Their Right to Federal Review at the Conclusion of the State Plan Investigation	69
C.	Properly Dually Filed Complaints	69
D.	Referral of Private Sector Complaints Alleging a Violation of one of Federal OSHA’s Whistleblower Statutes Other Than 11(c)	69
V.	Federal Review Procedures	69
A.	Complainant’s Request For Federal Review	70
B.	Complaints Not Meeting Federal Procedural Prerequisites for Review	70

C.	Federal Review	71
D.	Federal Review Outcomes.....	71
2.	No Deferral/New Investigation.....	71
3.	State Plan Evaluation.....	72
VI.	Federal Procedures for Complaints About State Program Administration (CASPA).....	72
CHAPTER 9: INVESTIGATIVE RECORDS & THE NEVADA PUBLIC RECORDS ACT		74
I.	Scope	74
II.	The Nevada Public Records Act.....	74
III.	Whistleblower Records	75
1.	Exception For Disclosure to Complainant and Respondent During an Open Investigation	75
IV.	NVOSHA’s Public Records Request Policy and Procedure	76
V.	Retention and Disposition of Whistleblower Records	76
NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER COMPLAINT		77

NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBOWER COMPLAINT	81
--	----

CHAPTER 1: PRELIMINARY MATTERS

I. Effective Date

This manual is effective September 6, 2024. This manual supersedes the Nevada Occupational Safety and Health Administration's Whistleblower Investigations Manual dated February 10, 2023.

II. Purpose

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

III. Scope

Nevada Occupational Safety and Health Administration (NVOSHA): Statewide

IV. References

A. Nevada Revised Statutes

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

B. Federal Statutes

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

C. Federal Regulations

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

D. Federal Memorandums of Understanding

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

E. Federal OSHA Instructions

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

F. Federal Desk Aid

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

G. Federal OSHA Chart

1. [Whistleblower Statutes Summary Chart](#)

H. NVOSHA Internal Policies

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

V. Cancellations

- A. NVOSHA Whistleblower Investigations Manual, February 10, 2023
- B. OSHA Instruction CPL 02-03-007, Whistleblower Investigations Manual, January 28, 2016
- C. OSHA Instruction CPL 02-03-001, Referral of Section 11(c) Discrimination Complaints to “State Plan” States, February 27, 1986
- D. OSHA Instruction IRT 01-00-016, The IMIS Whistleblower User’s Guide, date unknown

VI. Background

A. OSH Act

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

By the terms of the OSH Act, every person engaged in a business affecting interstate commerce who has employees is required to furnish each employee employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm and, further, to comply with occupational safety and health standards and regulations promulgated under the OSH Act.

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

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

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

B. State OSHA Plans

Under the OSH Act, states are allowed to develop and operate their own workplace safety and health program, subject to the approval of federal OSHA. State plans are essentially OSHA approved workplace safety and health programs operated by individual states instead of federal OSHA. State plans are monitored by federal OSHA and must be *at least as effective* as OSHA in protecting workers. There are currently 22 state plans covering private and public sector workers (including Nevada), and 7 state plans covering only public sector workers.

C. NVOSHA State Plan

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

VII. Additional Statutes Enforced by OSHA

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

VIII. Definitions

- 1. Administrator:** The head of the Nevada Division of Industrial Relations, which includes NVOSHA. The Administrator decides if a whistleblower

claim will be filed in court.

2. **Adverse Action:** An action that would dissuade a reasonable employee from engaging in a NVOSHA protected activity.
3. **Animus:** Hostility or ill will towards a protected activity.
4. **Bilateral Agreement:** Settlement agreement between NVOSHA and Respondent without Complainant's consent.
5. **But For:** Test to determine causation. Asks whether the adverse action would have occurred "but for" (without) a protected activity.
6. **Cat's Paw Theory:** The theory that an employer can be liable when an employee lacks ultimate decision-making power but has discriminatory bias towards an employee and uses this bias to influence the actions of the ultimate decision-maker.
7. **Chief Administrative Officer (CAO):** The head of the NVOSHA state program. Ensures NVOSHA enforces the statutes outlined in Chapter 618, which includes protecting employee safety and protecting employees from retaliation. Reports directly to the Administrator.
8. **Complaints About State Program Administration (CASP):** Complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to section 11(c) Complainants.
9. **Complainant:** Any person who believes that they have suffered an adverse action in violation of an OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with NVOSHA. When this manual discusses investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.
10. **Confidential Business Information (CBI):** Internal, non-public information about a company.
11. **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in NVOSHA's investigation of a whistleblower complaint. If a representative has been designated, NVOSHA typically communicates with the Complainant or the Respondent through the designated representative, although NVOSHA may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. Findings are sent to both the parties and their representatives.
12. **Disparate Treatment:** Being treated differently than other similarly situated employees who did not engage in a protected activity.
13. **District Office:** Any NVOSHA state office.
14. **Division Counsel:** Represents the Division of Industrial Relations in legal matters, including NVOSHA and provides legal guidance.
15. **Division of Industrial Relations:** A Division of the State of Nevada, which is comprised of six sections: Legal, Mechanical Compliance

(MCS), Mine Safety and Training (MSATS), Occupational Safety and Health Administration (OSHA), Safety Consultation and Training (SCATS), and Workers' Compensation (WCS).

16. **Dual Filing Rights:** The process where a Complainant working in the private sector files a whistleblower complaint with both Federal OSHA and NVOSHA within 30 calendar days after the alleged retaliatory action. Dual filing preserves the Complainant's right to seek a federal remedy should the state not grant appropriate relief.
17. **Employer Knowledge:** Evidence that a person involved in or influenced the decision to take the adverse action knew or suspected the Complainant engaged in the protected activity.
18. **Enforcement Case:** An inspection or investigation conducted by a Safety Associate, Safety Representative or Safety Specialist, Enforcement or Training, or an Industrial Hygienist I, Industrial Hygienist II, or Industrial Hygienist III.
19. **Federal Review:** Complainants who have concerns about a State Plan's investigation of their dually filed section 11(c) whistleblower complaints and who are covered by federal OSHA may request a review by OSHA of the State Plan investigation to afford them the opportunity for reconsideration of the state's dismissal determination and, in merit cases, to have the Secretary file suit in federal district court.
20. **Health Complaint:** A complaint to NVOSHA that alleges health hazards in the workplace.
21. **Industrial Hygienist I, Industrial Hygienist II, or Industrial Hygienist III - DIR:** Inspects workplaces and identifies health hazards in the workplace. The Industrial Hygienist I is an entry level position. After the first year, an individual can promote to an Industrial Hygienist II. After the second year, an individual can promote to an Industrial Hygienist III.
22. **Industrial Hygienist IV - DIR:** Is a first line supervisor over the Industrial Hygienist I, II, and III.
23. **Intake Interview:** An initial interview with a Complainant to determine what their whistleblower complaint allegations are.
24. **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU):** An agreement between two agencies regarding the coordination of related activities.
25. **Nevada Occupational Safety and Health Administration (NVOSHA):** State agency that enforces health and safety standards in the workplace and handles whistleblower complaints related to health and safety in the workplace.
26. **NVOSHA Whistleblower Protection Program:** Enforces the provisions of NVOSHA's whistleblower statute, NRS 618.445.
27. **Nexus:** A link between the protected activity and the adverse action.
28. **Non-Public Disclosure:** A disclosure of information from the investigative case file made to a Complainant or Respondent during the investigation to resolve the complaint.

- 29. **OSHA Information System (OIS):** Replaces the former system called WebIMIS. This system is administered by the Department of Labor. The system has a Whistleblower module and an Enforcement module. For whistleblower purposes, NVOSHA whistleblower staff uses the system to enter administratively closed complaints, opened investigations, closed investigations, and appeals. For enforcement purposes, NVOSHA enforcement staff use the system to enter enforcement complaints, investigations, and inspections. Staff can also use the system to run enforcement and whistleblower reports.
- 30. **Personally Identifiable Information (PII):** Information about an individual that may identify the individual, such as a Social Security number, address, or phone number.
- 31. **Pretext:** A reason given in justification of an action taken that is not the real reason.
- 32. **Prima Facie.** Prima facie is a Latin term that translates to “at first sight” or “on its face.” In legal contexts, the term generally refers to evidence that, on its face or at first impression, appears to be sufficient to prove a particular position or fact unless rebutted or contradicted by additional evidence.
- 33. **Program Coordinator:** Assists the Chief Administrative Officer with managing the NVOSHA state program and reviews appealed whistleblower cases.
- 34. **Properly Dually Filed Complaint:** A properly dually filed complaint is: (1) an occupational safety or health whistleblower complaint filed with federal OSHA and the State Plan within the respective filing periods of both entities or (2) an occupational safety or health whistleblower complaint that was timely filed with federal OSHA and which federal OSHA has referred to the State Plan.
- 35. **Protected Activity:** Engaging in an activity related to safety and/or health in the workplace, such as filing a NVOSHA safety or health complaint, reporting hazards, or reporting a workplace injury.
- 36. **Rebuttal Interview:** Interview with a Complainant to go over the Respondent’s position and allow the Complainant the opportunity to rebut Respondent’s defenses.
- 37. **Report of Investigation (ROI):** The report prepared by a Whistleblower Investigator discussing the Complainant’s claims, analyzing the evidence, drawing conclusions for each element of the whistleblower claim, and making a recommendation.
- 38. **Request for Review (RFR):** When a Complainant requests that federal OSHA review NVOSHA’s determination of their complaint.
- 39. **Respondent:** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term “Respondent” also includes Respondent’s designated representative.
- 40. **Safety Associate, Safety Representative or Safety Specialist, Enforcement - DIR:** Inspects workplaces and identifies safety and health

hazards. The Associate is an entry level position. After the first year, the Associate can promote to a Representative. After the second year, the Representative can promote to a Specialist.

41. **Safety Complaint:** A complaint to NVOSHA that alleges safety hazards in the workplace.
42. **Safety Manager II - DIR:** Supervises Safety Supervisors and directs activities for a District Office.
43. **Safety Representative or Specialist, Enforcement – DIR, Operational Support Unit:** Conducts workplace inspections and trains Safety Associates.
44. **Safety Supervisor, Enforcement - DIR:** Is a first line supervisor over the Safety Associate, Representative, and Specialist.
45. **Safety Supervisor, Enforcement - DIR, Operational Support Unit:** First line supervisor for Safety Representatives and Specialists providing formal training, develops a statewide safety and health training program, and reviews appealed whistleblower cases.
46. **Settlement Agreement:** A legal contract that resolves a whistleblower claim between the Respondent and the Complainant by coming to an agreement.
47. **Temporal Proximity:** The time between when the Complainant engages in a protected activity and when the employer (once they are aware of the protected activity) decides to take an adverse action.
48. **Whistleblower Chief Investigator:** Manages the NVOSHA Whistleblower Program and oversees Whistleblower Investigators.
49. **Whistleblower Complaint:** A complaint filed with NVOSHA alleging a violation of Nevada’s whistleblower statute, NRS 618.445.
50. **Whistleblower Investigator:** Conducts complaint intakes and investigations involving whistleblower claims under NRS 618.445.
51. **Witness Interview:** An interview with a witness who has or may have information relevant to a Complainant’s whistleblower claims.

IX. NVOSHA Functional Responsibilities Regarding Whistleblower Matters

A. NVOSHA Staff

1. **Whistleblower Investigator.** Conducts complaint intakes and decides if intake will be forwarded to the Whistleblower Chief Investigator for investigation or administratively closed with no investigation. Conducts whistleblower investigations.
2. **Whistleblower Chief Investigator.** Reviews complaint intakes, opens and assigns whistleblower investigations to Whistleblower Investigators. Reviews completed investigations and issues findings. Forwards potential merit cases to Division Counsel. Conducts training with staff. Writes whistleblower policies and procedures.

3. **Program Coordinators and Supervisor, Operational Support Unit.** Reviews appealed cases and makes a determination on the appeal.
4. **Chief Administrative Officer.** Ensures Whistleblower Protection Program is at least as effective as federal OSHA. Issues appeal decisions. Responds to CASPAs involving NVOSHA's whistleblower program.
5. **Division Counsel.** Provides legal advice on legal issues regarding whistleblower complaints and investigations. Reviews potential merit cases and makes a recommendation to the Administrator as to whether it should be litigated in court.
6. **Administrator.** Decides whether a potential merit case will be filed in court.

X. Other Languages.

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

CHAPTER 2: LEGAL PRINCIPLES

I. Scope

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

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

II. Introduction

NRS 618.445 is NVOSHA's whistleblower statute. NVOSHA's whistleblower statute is similar to federal OSHA's whistleblower statute. In general, NRS 618.445 states that it is unlawful for an employer to retaliate against an employee because the employee engaged in a protected activity related to safety and/or health in the workplace. In general terms, the purpose of a whistleblower investigation is to evaluate a complaint to determine whether the Complainant has asserted facts to support all elements of a *prima facie* allegation, the complaint is timely, and there is coverage.

III. NVOSHA's Whistleblower Statute: NRS 618.445

A. [Provisions of NRS 618.445](#)

1. *A person shall not discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, has performed an action described in subsection 3 of NRS 618.7315 or because of the exercise by the employee on behalf of himself, herself or others of any right afforded by this chapter.*
2. *Any employee aggrieved by a violation of subsection 1 may file a complaint for the relief afforded under subsection 3 with the Division. Any complaint must be filed with the Division within 30 days after the violation has occurred and must set forth in writing the facts constituting the violation.*
3. *Upon receipt of the complaint by the Division, the Administrator shall cause such investigation to be made as the Administrator deems appropriate. If upon investigation, the Administrator determines that the provisions of subsection 1 have been violated, the Administrator shall*

bring an action in the name of the Administrator in any appropriate district court against the person who has committed the violation.

4. *If the court finds that the employee was discharged or discriminated against in violation of subsection 1, the employee is entitled to reinstatement and reimbursement for lost wages and work benefits.*
5. *Any decision reached by the Administrator relating to the filing of an action pursuant to this section must be made available to the complaining employee within 90 days after the Division's receipt of the complaint.*

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

A. Provisions of 29 USC 660(c)

1. *No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.*
2. *Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.*
3. *Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.*

V. Coverage of Parties Under NRS 618.445

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

1. Definition of *Person*

- a. [NRS 0.039](#)¹ and [NRS 618.145](#) define *person* as “a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization” and “includes a public agency.”
- b. Normally, a person is the employer² (Respondent) of the employee. however, a person is not limited to actions taken by employers against their own employees.
- c. A person may be chargeable with discriminatory action against an employee even if they are not the employee’s employer in the traditional sense.³ Any person who was involved in retaliating against the employee may be considered a person.
- d. A person can be a union or other entity.⁴
- e. **Staffing Agency and Host Employer.** When a staffing agency sends an employee to work at a job assignment for a different business, the business is considered a host employer. In this case, both the host employer and the staffing agency are considered a person.⁵
- f. **Respondents Located Outside of Nevada.** Respondents who have offices and/or management located outside of Nevada may be covered if they have employees working in Nevada and Nevada has jurisdiction over the employer.⁶

¹ In 1985, the Nevada legislature adopted a universal definition of “person” to apply to the Nevada Revised Statutes as a whole. A.B. 200, 63rd Session (Nev. 1985).

² NRS 618.095 defines *employer* as: (1) the State of Nevada, any state agency, county, city, town, school district or other unit of local government; (2) any public or quasi-public corporation; (3) any person, firm, corporation, partnership or association; and (4) any officer or management official having direction or custody of any employment or employee.

³ See *Meek v. United States*, 136 F.2d 679 (1943).

⁴ See *Bowe v. Judson Burns*, 137 F.2d 37 (1943) (concluding that 29 USCA § 203(a), which defines “person” as “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons” is broad enough to include a labor union).

⁵ See [Temporary Worker Initiative, Whistleblower Protection Rights](#).

⁶ Jurisdiction over a foreign employer is beyond the scope of this Manual. If a jurisdictional question arises, the investigator should consult with the Chief. If the Chief feels it is appropriate to contact Division Counsel for guidance, Division Counsel will be contacted.

2. Definition of *Employee*

- a. **NRS 618.085** defines an *employee* as “every person who is required, permitted or directed by any employer to engage in any employment, or to go to work or be at any time in any place of employment, under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.”
- b. Normally, an employee works for (or worked for) and is paid by the employer (Respondent), but there are exceptions. Employee includes current and former employees.
- c. **Staffing Agency Employees.** When a staffing agency sends an employee to work at a job assignment for a different business (host employer), the employee is considered an employee of both the staffing agency and the host employer.
- d. **Darden Factors.** If it is unclear whether the Complainant is an employee, NVOSHA should assess and weigh the factors outlined in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), in determining if the Complainant meets the status of an employee.⁷ These are called the “Darden” factors. The Darden factors are as follows:
 - The hiring party’s right to control the manner and means by which the product is accomplished
 - Skill required
 - Source of the instrumentalities and tools
 - Location of the work
 - Duration of the relationship between the parties
 - Whether the hiring party has the right to assign additional projects to the hired party
 - Extent of the hired party’s discretion over when and how long to work
 - 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

⁷ See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

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

VI. Timeliness of a Whistleblower Claim Under NRS 618.445

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

- A. **When the Clock Starts.** NVOSHA considers the **30 days** as starting the day after the Complainant is notified an adverse action is being taken against them. The 30 days are 30 *calendar* days. For example, if the Complainant was told on January 1, 2024 they were being terminated, the Complainant has up to 30 days starting on January 2, 2024 to file their complaint, so their deadline to file the complaint would be January 31, 2024.
- B. **Weekend or Holiday.** If the last day to file falls on a weekend or a state holiday, or if the NVOSHA office is closed, the next business day will count as the final day to file. For example, if the Complainant’s last day to file is on January 28, 2024 (Sunday), the Complainant will have until January 29, 2024 (Monday) to file their complaint.
- C. **Extending the Deadline Through Tolling**

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

- 1. The employer has actively concealed or misled the employee regarding the existence of the adverse action. Examples of concealed adverse actions would be:
 - After the employee engaged in protected activity, the employer placed a note in the personnel file that will negate the employee’s eligibility for promotion but never informed the employee of the notation; and
 - The employer purports to lay off a group of employees, but immediately rehires all of the employees who did not engage in 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 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 snowstorm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an

appropriate agency within the filing period.

4. The employee mistakenly filed a timely NVOSHA whistleblower complaint with another agency that does not have the authority to grant relief (i.e., Equal Employment Opportunity Commission).
5. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his rights. For example, when an employer repeatedly assured the Complainant that they would be reinstated so that the Complainant reasonably believed that they would be restored to their former position, tolling may be appropriate. However, the mere fact that settlement negotiations were ongoing between the Complainant and the Respondent is not sufficient.

D. Reasons Not to Toll

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

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

VII. Elements of a Whistleblower Claim

The three basic elements of a whistleblower claim are: **(1) a protected activity, (2) an adverse action, and (3) a causal connection (a.k.a. nexus)** between the protected activity and the adverse action.

A. Protected Activity

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

1. **Reporting a workplace safety and/or health complaint to management.** The complaint does not have to be a safety and/or health

issue that violates a NVOSHA standard, rather, the Complainant must have a reasonable belief, based on their training and education, that there is a safety or health hazard.

2. **Filing a safety and/or health complaint with NVOSHA** alleging hazards in the workplace.
3. **Filing a safety and/or health complaint with a state or local government agency other than NVOSHA** that handles workplace hazards, such as the fire department, police department, or health department.
4. **Participating in a NVOSHA inspection or whistleblower investigation.**
5. **Reporting a work-related injury or illness** to management. This includes filing a report of injury under a workers' compensation statute.
6. **Testifying or being called to testify in a proceeding** regarding an issue which falls under Chapter 618 of the Nevada Revised Statutes. A proceeding includes both formal (court) or informal (administrative hearing) proceedings.
7. **Work Refusal.**⁸ Refusing to perform a work task that the employee reasonably believes presents a real danger of death or serious injury. There are five requirements to have a protected work refusal:
 - a. Have a reasonable apprehension of death or serious injury,
 - b. Refuse in good faith,
 - c. Have no reasonable alternative,
 - d. Have insufficient time to eliminate the condition through regular statutory enforcement channels, and
 - e. Where possible, sought help from his or her employer and was unable to obtain a correction of the dangerous condition.
8. **Requesting information from NVOSHA**
9. **Reporting workplace violence**, or seeking the assistance of a public safety agency to respond to an incident of workplace violence under [NRS](#)

⁸ See [U.S. Department of Labor Memo on Clarification of the Work Refusal Standard](#)

[618.7315\(3\).](#)

10. Exercising any other right afforded by Chapter 618 of the Nevada Revised Statutes.

B. Adverse Action

The second element of a whistleblower claim is an adverse action. The general test of whether there is an adverse action is whether a reasonable employee would have found the action “materially adverse.” Materially adverse means the employer’s actions are harmful to the point they could dissuade a reasonable worker from engaging in a protected activity.⁹

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

- **Discharge** – Discharge includes not only straightforward firings, but also situations in which the words or conduct of an employer would lead a reasonable employee to believe they had been terminated. Also, an employer’s interpretation of an employee’s ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may constitute a discharge.
- **Constructive Discharge** – The employee quitting after the employer has deliberately, in response to a protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
- **Layoff**
- **Failure to recall employee back to work**
- **Reduced Hours**
- **Reduction in pay, including denial of overtime**
- **Denial of Benefits**
- **Suspension**
- **Demotion**
- **Failure to Promote**
- **Transfer to a different job** – Placing an employee in an objectively less desirable assignment. To determine if the transfer is objectively less desirable, some factors to consider are: reduction in pay, lengthier commute, less interesting work, harsher physical environment, and reduced opportunities for promotion and training.
- **Change in job duties or responsibilities**
- **Write up, reprimand, or other discipline**
- **Harassment** – Unwelcome conduct in the workplace in retaliation for engaging in a protected activity. Harassment becomes unlawful when

⁹ See [Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 \(2006\)](#) (where not otherwise specified retaliation need not be related to employment; e.g., filing a false criminal charge against a former employee is adverse action)).

enduring the offensive conduct becomes a condition of employment and the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.¹⁰

- **Applying workplace policies to discourage** protected activity, like incentive programs that discourage injury reporting.
- **Drug testing employees in an inconsistent manner**, such as only drug testing employees who are injured at work
- **Blacklisting** – Notifying other potential employers that the Complainant should not be hired or making derogatory comments to discourage them from hiring the Complainant.
- **Threats or Intimidation**
- **Reporting employee to the police or other agencies.**

C. Causal Connection

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

In general, the causation standard is the type of causal link (a.k.a. nexus) required between the protected activity and the adverse action. NRS 618.445 and section 11(c) of the OSH Act use the word “*because*” to express the causation element.

1. “But For” Test

The causation standard is the type of causal link (a.k.a. nexus), required by statute, between the protected activity and the adverse action. The U.S. Supreme Court has found that statutes with the term *because* require the plaintiff show that the employer would not have taken the adverse action “but for” the protected activity.¹¹ Thus, causation exists only if the evidence shows that the Respondent would not have taken the adverse action but for the protected activity.

This test does not require that the protected activity be the sole reason for the adverse action. It also does not require that protected activity be the primary reason for the adverse action. While the “but for” causation test is more stringent than the contributing factor or the motivating factor tests, it does not require a showing that the protected activity was the sole reason for the adverse action, only that it was independently sufficient.¹²

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

¹¹ See *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013).

¹² See *Bostock v. Clay County, Georgia*, 590 U.S. 644 (2020).

2. **Direct and Indirect Evidence of Causal Connection**

Nexus can be demonstrated by direct or indirect evidence:

a. **Direct Evidence:**

Evidence that directly proves a fact without any need for inference or presumption. For example, if the manager who fired the employee wrote in the termination letter that the employee was fired for engaging in the protected activity, there would be direct evidence of nexus.

b. **Indirect Evidence:**

Relevant indirect (a.k.a. circumstantial) evidence can include a wide variety of evidence, such as:

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

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on NVOSHA's evaluation of the facts and the strength of the evidence supporting both the Respondent and the Complainant through "pretext testing" described below (See Testing Respondent's Defense).

3. **Employer Knowledge** – Employer knowledge is essential to proving a causal link. The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected the Complainant engaged in the protected activity.

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

- An OSHA complaint is about an unguarded machine and the Complainant is the only one that uses the unguarded machine
- An OSHA complaint is about slippery floors in a restaurant kitchen, and the Complainant was recently injured due to the slippery floors in the kitchen
- The OSHA complaint is about workplace violence, and the Complainant is the only employee who has been very vocal about workplace violence
- Under the "small plant doctrine", in a small company or group where everyone knows each other, knowledge can be inferred.
- Under the "Cat's Paw" theory, an employer can be liable for retaliation even when the decisionmaker did not act with a retaliatory motive/did not know about the protected activity, but was influenced by another employee who did have a retaliatory motive/knew about the protected activity.

VIII. Investigation of A Whistleblower Claim & Burden of Proof

A. Statutory Duty to Investigate

NRS 618.445(3) requires NVOSHA to investigate "as the Administrator deems appropriate" once an aggrieved employee files a complaint. Subsection 3 further provides that if, upon investigation, NVOSHA determines that a Respondent has violated NRS 618.445(1), NVOSHA "shall bring an action in the name of the Administrator in any appropriate district court against the person who has

committed the violation.”

B. Initial Complaint & NVOSHA’s Gatekeeping Function

The Complainant bears the initial burden to make a *prima facie*¹³ showing of the three required elements. Upon receipt of a complaint, NVOSHA screens it to determine whether the Complainant asserted facts supporting the *prima facie* elements of unlawful retaliation (a “*prima facie* allegation”) and whether other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and, as appropriate, the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of NRS 618.445. The elements of a retaliation claim are described above and the procedures for intake and processing of whistleblower complaints are described in detail in Chapter 3.

C. Reasonable Cause Standard for Investigations

If the case proceeds beyond the screening phase, NVOSHA investigates a complaint by gathering evidence to determine **whether there is reasonable cause (investigation standard currently used by federal OSHA) to believe that retaliation in violation of the relevant whistleblower statute(s) occurred.** *Reasonable cause* means that the evidence gathered in the investigation would lead NVOSHA to believe that unlawful retaliation occurred (i.e., that there could be success in proving a violation if the case proceeded to court based on the required elements described above).

A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent, *but does not generally require as much evidence as would be required at trial.* Although NVOSHA will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, NVOSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred.¹⁴ Because NVOSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a court hearing.

The investigator, not Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation. The investigator will

¹³ See Chapter 1, Section VIII (“Definitions”) regarding *prima facie* definition

¹⁴ See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (plurality opinion) (noting that an OSHA investigator may not be in a position to determine the credibility of witnesses or confront all of conflicting evidence, because the investigator does not have the benefit of a full hearing).

review all relevant documents and interview relevant witnesses to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of Complainant, Respondent, and witnesses.

If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, NVOSHA will consult with the Chief to ensure that the investigation captures as much relevant information as possible so that the Chief can evaluate whether the case is appropriate to refer to Division Counsel for litigation.

If the investigation does not establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed.

D. Burden Shifting

In a whistleblower case, the following burdens apply:

1. When filing a complaint, the Complainant bears the burden to establish a *prima facie* case of retaliation that they engaged in a protected activity, there was an adverse action, and a causal connection exists between the protected activity and the adverse action.
2. NVOSHA investigates the complaint to determine whether there is reasonable cause to believe that a violation of NRS 618.445 has occurred.
3. If NVOSHA determines that Complainant established a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the adverse action.
4. If the employer produces a legitimate, nondiscriminatory reason for taking the adverse action, the Complainant must then provide evidence rebutting the Respondent's defense.
5. If the Complainant can show the Respondent's reason for taking the adverse action is based on retaliation, there is a potential violation of NVOSHA's whistleblower statute, NRS 618.445. If the Complainant is unable to show the reason is based on unlawful retaliation, there is no violation of the whistleblower statute.
6. If NVOSHA ultimately files an action on the Complainant's behalf in district court pursuant to NRS 618.445(4), the court applies a **preponderance of the evidence standard**.

E. Testing Respondent's Defense (Pretext Testing)

Investigators are required to test the evidence supporting and refuting Respondent's defense, which is referred to as pretext testing. Pretext testing evaluates whether the employer took the adverse action against the employee for a legitimate business reason that the employer asserts or whether the action taken against the employee was in fact in retaliation for the Complainant's engaging in protected activity. If the reason the employer provides is pretextual, it means the reason provided conceals the true purpose for taking the adverse action and the real purpose for taking the adverse action was in retaliation for engaging in a protected activity.

1. Examples of Evidence That May Show Pretext:

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

- Employer's shifting explanations for its actions;
- The employer cannot provide evidence substantiating the adverse action taken;
- Temporal proximity between the protected activity and the adverse action;
- Applying workplace policies only to the Complainant and not other similarly situated employees (disparate treatment);
- The employer's behavior toward the Complainant changed after the Complainant engaged (or was suspected of engaging) in protected activity; or
- Other evidence of antagonism or hostility toward protected activity.

2. Questions To Assess Pretext:

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

- Did the Complainant engage in the misconduct or unsatisfactory performance that the Respondent cites as its reason for taking adverse action? If the Complainant did not engage in the misconduct or unsatisfactory performance, does the evidence suggest that Respondent's actions were based on its actual but mistaken belief that there was misconduct or unsatisfactory performance?
- What discipline was issued by Respondent at the time it learned of the

Complainant's misconduct or poor performance? Did Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?

- Did the Complainant's productivity, attitude, or actions change after the protected activity?
- Did the Respondent's behavior toward the Complainant change after the protected activity?
- Did the Respondent discipline similarly situated employees in the same manner?

3. Pretext Testing Outcomes

Respondent must produce evidence to rebut Complainant's allegations of retaliation for a case to be dismissed for lack of nexus. For example, if Respondent alleges that it discharged Complainant for excessive absenteeism, misconduct, or poor performance, Respondent must provide evidence to support its defense. The investigator must analyze the evidence and interviews to evaluate whether the Respondent took the adverse action against the Complainant for the legitimate business reason asserted by the Respondent or whether the action against the employee was in fact retaliation for Complainant's engaging in protected activity.

Pretext Evaluation With Pretext Found: If the Respondent fails to produce evidence supporting a legitimate business reason for the adverse action to rebut Complainant's allegations, then the Respondent's reason for the adverse action is pretextual.

Pretext Evaluation Where Pretext Is Not Found: If evaluation of the interviews and other evidence supports that the Respondent's reason for the adverse action is for a legitimate business reason, then the burden shifts to the Complainant to rebut the Respondent's defenses. If Complainant fails to rebut, then the case can be dismissed for lack of nexus.

IX. Policies and Practices Discouraging Injury/Illness Reporting

- A.** Discharging or discriminating against any employee for reporting a work-related injury or illness is a violation of NRS 618.445 and may be referred to enforcement for further action.
- B.** Drug testing only injured employees and not uninjured employees involved in an incident is a discriminatory policy.

- C. Disciplining all employees who are injured, regardless of fault, is a discriminatory policy.
- D. Discipline for Violating Employer Rule on Time and Manner for Reporting Injuries.

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating NRS 618.445. NVOSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statutes, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

Where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, not only may application of the employer's reporting rules be a pretext for unlawful retaliation, but also the reporting rules may have a chilling effect on injury reporting that may result in inaccurate injury records, and a referral for a recordkeeping investigation of a possible NRS 618.445 violation.

E. Discipline For Violating a Safety Rule

In some cases, an employee is disciplined after disclosing an injury purportedly

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

Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury.

Analysis of the employer's treatment of similarly situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section NRS 618.445.

CHAPTER 3: RECEIPT AND PROCESSING OF COMPLAINTS

I. Scope

This Chapter explains the general process for the submission, receipt, assignment and disposition of whistleblower complaints.

II. Submitting a Complaint or Question

Complainants may file a complaint with the NVOSHA whistleblower unit by submitting a complaint online at whistleblowers.gov (preferred method), calling the designated NVOSHA whistleblower complaint phone number, emailing the designated NVOSHA whistleblower email address, mailing a complaint to the NVOSHA whistleblower unit, or through any other acceptable method. Complainants or others who have questions about filing a NVOSHA whistleblower complaint may contact the whistleblower unit through the designated phone number or email. Any individual outside of the whistleblower unit who receives a whistleblower complaint or related contact should, when possible, forward it to the designated whistleblower complaint email address or phone number to ensure all complaints and contacts are properly addressed.

III. Receipt and Assignment of Complaint/Contact

A. NVOSHA Whistleblower Complaint Email

Every week, a Whistleblower Investigator or designee will be assigned to receive and review complaints/contacts received through the designated whistleblower complaint email. Phone calls to the designated whistleblower complaint number are automatically forwarded to the email. The designated investigator or designee will process all incoming complaints/inquiries for the week as follows:

1. **Log** the complaint/contact on a shared complaint call log.
2. **Contact** all Complainants who need to be contacted.
3. **Refer** Complainants appropriately. If the Complainant would like to file a whistleblower complaint, advise them of their dual filing rights and refer them to first file online at whistleblowers.gov. If they are unable to file online or refuse to do so, they will be assigned to an investigator for review and screening. If the Complainant has a question or matter that falls outside of NVOSHA whistleblower jurisdiction, the investigator should refer them to the appropriate agency.
4. **Assign** any complaints that need to be assigned for review and screening to an investigator on a rotating basis.

IV. File Date

The file date is normally the date the Complainant filed the online complaint or, if unable to file online, the date the Complainant either contacted the NVOSHA whistleblower unit or participated in an intake interview. Exceptions may apply to this general rule, and will be determined on a case by case basis.

V. Initial Review of Complaint

A. Initial Steps

The investigator will take the following steps to process an assigned complaint:

1. **Create** a complaint file.
2. **Review** and prescreen the complaint.
3. **Determine** if the complaint can be disposed of via an Intake Closure (no intake interview needed), or should proceed to an intake interview. Situations in which an intake closure may be recommended are (not an exclusive list):
 - Complainant has not alleged a violation of NVOSHA's whistleblower statute.
 - Complaint is untimely.
 - Complainant's complaint is covered by federal OSHA. **Note:** If the complaint alleges both an 11 (c) violation and a violation of a federal whistleblower statute exclusively covered by federal OSHA, federal OSHA will handle the complaint.
 - Complainant is not an employee.
4. **Proceed** to Intake Closure or Intake Interview.

VI. Intake Closure or Intake Interview

A. Intake Closure

An intake closure is the closure of a complaint after the investigator, based on a review of the complaint and no intake interview, determines the complaint should be closed without an intake interview based on the reasons above and the Complainant agrees. The investigator will take the following steps to proceed with an Intake Closure:

1. **Document** the intake closure on the NVOSHA Whistleblower Complaint Form and reason for intake closure.
2. **Submit** the intake closure to the WCI or designee for approval.
3. **Notify the Complainant** via email or letter explaining why the complaint is being closed, and allow them 10 days (email) /15 days (letter) to respond if they disagree or want to provide additional information for NVOSHA to consider. Refer the Complainant as needed. If the complaint is untimely and appears to fall under the National Labor Relations Board, refer them there.
4. **Proceed** as follows depending on Complainant's response to 3. above:
 - If Complainant doesn't respond within the timeframe, proceed with Intake Closure.
 - If Complainant responds within the timeframe, but doesn't provide additional information that changes the outcome and doesn't disagree, proceed with Intake Closure.
 - If Complainant responds within the timeframe and provides additional information that warrants an intake interview, proceed with scheduling an intake interview.
 - If Complainant disagrees with the Intake Closure, proceed with Docket and Dismiss procedures. Note: The Complainant must make it clear that they disagree, otherwise, NVOSHA will assume they agree and it will not be processed as a Docket and Dismiss.
 - If Complainant responds after the timeframe, it will remain an Intake Closure.
5. **Enter** complaint into OIS as an Intake Closure.
6. **Preserve** complaint file.

B. Intake Interview

If the complaint proceeds to the intake interview stage, the investigator will take the following steps:

1. **Schedule** an intake interview. If the Complainant fails to schedule an intake interview after two attempts, the investigator can proceed with administrative closure procedures. If the Complainant fails to attend the first scheduled intake interview, the investigator will schedule a second intake interview. If

the Complainant fails to attend the second intake interview, the investigator can proceed with administrative closure procedures.

2. **Conduct** an intake interview. The preferred method for intake interviews is via Microsoft Teams. When possible, the interview should be recorded.
3. **Obtain** additional information if needed. If the additional information is necessary to assess the complaint, and the Complainant fails to provide it after two attempts, the investigator can proceed with administrative closure procedures.
4. **Document** the complaint on the NVOSHA Whistleblower Complaint Form.
5. **Evaluate** the complaint to determine the appropriate recommendation.

VII. Disposition Of Complaint

A. Opening of Complaint

If the complaint is timely (or tolling applies), the Complainant is covered, and the Complainant made a prima facie claim of retaliation under NRS 618.445, the investigator may recommend the complaint be opened for investigation. The investigator will take the following steps when recommending a complaint be opened for investigation:

1. **Submit** the complaint and recommendation to the WCI or designee for approval.
2. **Send** the Complainant the finalized complaint and have them confirm the complaint is accurate. Note: Any changes the Complainant requests will be approved or denied on a case by case basis.
3. **Notify** the WCI or designee the complaint has been confirmed so it may be processed for opening. The WCI will then assign the complaint a case number and investigator, create a digital case file, and send the Complainant an opening letter and copy of their complaint.

B. Administrative Closure of Complaint

If, after conducting an intake interview, the complaint is untimely (and tolling does not apply), the Complainant is not covered, and/or Complainant has not made a prima facie claim of retaliation under NRS 618.445, the investigator may recommend the complaint be administratively closed. If the Complainant is uncooperative, the investigator may recommend the complaint be administratively

closed. If the Complainant is highly combative or threatening, the investigator may recommend the complaint be administratively closed. The investigator will take the following steps when recommending a complaint be administratively closed:

1. **Submit** the complaint to the WCI or designee for approval. The investigator must explain why they are recommending administrative closure.
2. **Notify** the Complainant via email or letter explaining why the complaint is being administratively closed, and allow them 10 days (email) /15 days (letter) to respond if they disagree or want to provide additional information for NVOSHA to consider. **Exception:** Complainant does not need to be notified if their complaint is being referred to federal OSHA because it falls under 11 (c) and/or another federal OSHA whistleblower statute.
3. **Proceed** as follows depending on Complainant's response to 3. above:
 - If Complainant doesn't respond within the timeframe, send them an email or letter confirming the administrative closure.
 - If Complainant responds within the timeframe but doesn't add anything that changes the outcome and does not disagree, proceed with administrative closure.
 - If Complainant responds within the timeframe and provides additional information that meets the requirements for opening, proceed with Opening procedures.
 - If Complainant disagrees with Administrative Closure, proceed with Docket and Dismiss procedures. Note: The Complainant must make it clear that they disagree, otherwise NVOSHA will assume they agree and it will not be processed as a Docket and Dismiss.
4. **Administratively** close the complaint in OIS.
5. **Preserve** the complaint file.

C. **Docket and Dismissal of Complaint**

If the Complainant disagrees with an intake closure or administrative closure, the investigator will recommend the complaint be docketed and dismissed. This means the complaint will be assigned a case number, but will be dismissed without an investigation. By doing so, the Complainant is provided will appeal rights. The investigator will take the following steps when recommending a complaint be opened for investigation:

1. **Submit** the complaint and recommendation to the WCI or designee for approval. The investigator must explain why they are recommending the complaint be docketed and dismissed.
2. **Docket** the complaint in OIS. The WCI will then assign the complaint a case number, create a digital case file, send the Complainant and Respondent a closure letter and copy of the complaint, and close the case file in OIS.
3. **Preserve** the case file.

CHAPTER 4: CONDUCTING THE INVESTIGATION

I. Scope

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

II. General Principles

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

III. Create and Maintain a Digital Case File

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

A. Organizational Structure and Content of Digital File.

- 1.** The digital case file will be named as follows:

(Case Number)_(Last Name of Complainant)_v_(Respondent Name)
For example: 22-001_Doe_v_HappyConstruction

2. Every digital file will have the same nine (9) subfolders below, and an activity log:

- **1_Correspondence** – CP Notification Letter, RP Notification Letter, Designation of Representative form, Emails. Emails should be put in a pst file when possible.
- **2_WBcomplaint** – NIOSHA and online whistleblower complaint, intake interviews, CP submissions during intake process
- **3_CP** – CP submissions after case is opened, CP interviews
- **4_RP** – RP submissions, RP interviews
- **5_InvestigatorNotes** – handwritten or typed notes
- **6_Settlement** – settlement agreement, settlement check
- **7_OSHAinspection** – If CP's protected activity includes a safety/health complaint, this folder should contain the complaint, RP notification of complaint, RP response to complaint
- **8_ROI** – final Report of Investigation and Exhibits
- **9_OISCaseSummary** – printed summary of OIS case information

B. Naming Documents and Other Evidence

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

C. Activity/Telephone Log

Activity related to the investigation (work conducted on the investigation) and any supervisor review/approval will be documented on an activity/telephone log. If the description of the activity conducted is in an email, the investigator can note on the log to refer to the email for details.

IV. Review the Whistleblower Complaint and Supporting Documents

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

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

The investigator will promptly enter the investigation details into OIS. See OIS user

guide for the specific case information that is entered into OIS.

VI. Notify Respondent of the Complaint

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

1. Respondent Notification Packet

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

- a.** **Respondent Notification Letter:** This letter notifies the Respondent a whistleblower complaint has been filed and requests a response and supporting documents from the Respondent within 10 business days.
 - b.** **Designation of Representative Form:** If the Respondent is designating a representative, they should complete this form or provide a letter of representation.
 - c.** **Redacted copy of the Complainant's complaint** and any relevant Complainant submissions.
- 2.** The Respondent may be notified via email, certified mail, or in person. The investigator should try to determine who to give the notification to by requesting the email/contact information of upper management or Human Resources from the Complainant, or by finding it online. If the investigator is uncertain where to send the notification, they can send it to the registered agent for the company, provided there is one. If the investigator cannot find a person to give the packet to, they should consult with the Chief.
 - 3.** A copy of the Respondent notification packet and proof that the Respondent was notified must be placed in the case file.

C. Respondent Represented by Legal Counsel

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

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

D. Early Resolution/Settlement

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

- VII. Postponement.** NVOSHA may decide to delay an investigation if the Complainant has submitted a request contesting the adverse action through another avenue such as a grievance, through a collective bargaining agreement, or through an arbitration agreement.

VIII. Review Respondent's Position Statement and Supporting Documents

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

IX. Send Redacted Position Statement/Submissions to Complainant

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

X. Conduct Rebuttal Interview With Complainant

In most cases, the rebuttal interview with the Complainant is scheduled after the

investigator has sent the position statement and before witness interviews are conducted. The rebuttal interview may be scheduled at a later stage in the investigation when it makes sense to do so.

The purpose of the rebuttal interview is to allow the Complainant an opportunity to rebut the Respondent's allegations. The Respondent must provide evidence to support its defense. If the Respondent fails to provide evidence to rebut Complainant's allegations of retaliation, the element of causation can be established. If the Respondent provides evidence to support its defenses (i.e., provides a legitimate business reason for the adverse action), the investigator will provide the Complainant an opportunity to rebut the response/defense given by the Respondent within a reasonable timeframe. If the Complainant fails to respond or there is insufficient evidence to rebut the Respondent's defenses, especially why the adverse action was taken, the case should be dismissed at this stage.

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

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

XI. Schedule Witness Interviews

Witness interviews should be scheduled as needed to vet out the allegations and determine whether there is a violation of the whistleblower statute or not. In some cases, there will be sufficient documentary or other evidence to vet out the allegations and determine if there is a violation or not, and witness interviews will not be needed.

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

For management interviews, if the Respondent has a designated representative, normally the investigator must go through the representative to schedule the interviews. There

may be limited circumstances where a management interview is scheduled directly, without going through the representative.

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

XII. Conduct Witness Interviews

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

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

The investigator should be prepared for all witness interviews. The interview should be thorough, and the witness should be asked any questions about the Complainant’s allegations and the Respondent’s position that they may have knowledge of. If there is a discrepancy, the witness should be asked about it.

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

XIII. Review the Evidence Gathered and Determine if Additional Information is Needed

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

XIV. Keep the Chief informed of the Progress of the Case.

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

XV. Consult With Division Counsel as Needed

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

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

XVI. Other Matters

A. Amended Complaints

1. Amendments Filed within Statutory Filing Period

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

2. Amendments Filed After the Statutory Filing Has Expired.

If amendments are received after the statutory filing period for the original complaint has expired, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional Respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint and the investigation remains open, then it must be accepted as an amendment, unless new allegation should also be docketed as a new complaint when an amendment to the original complaint would unduly delay a determination of the original complaint.¹⁶ If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed accordingly.

3. Form of the Amendment

¹⁶ If there is a question as to whether an amendment can legally be added, the investigator will consult with the Chief, who will consult with Division Counsel if necessary.

The amended complaint will be written on the NVOSHA Whistleblower Complaint Form, and will notate on the complaint that it is an amended complaint. (See Attachment A – NVOSHA Whistleblower Complaint Form Example)

4. Processing Amended Complaint

As with the original complaint, the Respondent must be notified about the amendment, provided with a copy of the amended complaint, and given the opportunity to respond to it. If the Respondent has not yet submitted their position statement for the original complaint, they may combine their response to the original and amended complaint into one statement.

B. Uncooperative Complainant

A complainant is expected to reasonably cooperate with the Agency's investigation by responding to requests for information, attending scheduled interviews, providing relevant documents within the complainant's possession or control, and identifying information reasonably necessary to investigate the allegations.

1. A Complainant may be considered uncooperative when they:
 - repeatedly fail to respond to reasonable requests for information;
 - fail to attend scheduled interviews without explanation;
 - refuse to participate in a necessary interview;
 - refuse to provide documents in their possession that are necessary to investigate the allegations;
 - refuse to identify reasonably necessary witnesses or explain why they cannot do so;
 - repeatedly demand extensions that materially delay or prevent the investigation;
 - provide contradictory or incomplete information and refuse reasonable opportunities to clarify it;
 - engage in harassment, threats, intimidation, or abusive conduct toward staff; or
 - otherwise engage in conduct that makes it impossible or impracticable to complete the investigation.
2. If the Complainant is deemed uncooperative, email or call the Complainant and allow them two days to respond.
3. If, after two days, they are still uncooperative, email or call the Complainant and let them know they must cooperate or the agency may dismiss their complaint for noncooperation.
4. If the Complainant doesn't respond after the two attempts in 2. & 3., the investigator should consider if the Complainant had a legitimate reason

for being uncooperative. If they do not, the investigator may recommend the case be closed due to noncooperation.

C. Unresponsive/Uncooperative Respondent

1. When a Respondent is unresponsive and/or uncooperative, the investigator should make reasonable efforts to obtain their cooperation. If, despite the investigator's efforts, the Respondent still refuses to respond/cooperate, the investigator should inform the Chief. The Chief will then decide what the next steps will be.
2. **Consult With Division Counsel.** The Chief and the investigator may consult with Division Counsel as needed to obtain Respondent's cooperation. As a last resort, subpoenas may be issued.
 - a. **Subpoenas.** Division Counsel will decide whether to issue subpoena(s) for an unresponsive/uncooperative Respondent. Subpoenas may also be issued to compel witness interviews and/or for the production of documentary evidence. If Division Counsel agrees to issue subpoena(s), Division Counsel will work with the investigator to draft and serve the subpoena(s).

D. Case Transfer

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

CHAPTER 5: REMEDIES

I. Scope.

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

II. Purpose of Remedies

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

III. Remedies Under NRS 618.445

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

A. Reinstatement

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

B. Lost Wages (also called Back Pay)

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

1. Calculating Lost Wages

- a.** To accurately determine how much the Complainant earned, investigators should obtain documentary evidence showing the Complainant's earnings, such as a W-2, paystubs, etc.

- b. Lost wages are normally a gross amount, meaning before taxes are withheld.

If the Complainant was paid hourly, the gross lost wages would be calculated by multiplying the number of hours the Complainant would have worked by the hourly wage. For example, if the Complainant made \$12.00/hour and would have worked 40 hours, the gross lost wages would be \$480.00 ($\$12/\text{hour} \times 40$). *If the Complainant's hours fluctuated* from week to week, his/her gross lost wages would be calculated by taking an average of the hours Complainant worked each week, and then multiplying that average by the hourly rate.

If the Complainant worked overtime, the gross overtime hours would be calculated by the number of overtime hours the Complainant would have worked by the overtime hourly wage (normally time and a half). So if the Complainant made \$12.00/hour and would have worked 10 hours of overtime, his gross lost overtime wages would be \$180 ($\$18/\text{hour} \times 10$). In the above example, if the Complainant would have worked 40 hours and 10 hours of overtime, his gross lost wages would be \$660 ($\$480 + \180).

If the Complainant was paid a salary, the lost wages would be calculated by: (1) dividing the salary by 2,080 (the number of work hours in a year) to calculate an hourly rate, and (2) multiplying the hourly rate by the hours the Complainant would have worked.

For all other situations not listed above, lost wages will be calculated using the most fair, reasonable method.

- c. **Temporary employees.** A Complainant who is a temporary employee may receive back pay beyond the length of the temporary assignment from which they were terminated if there is evidence indicating that Complainant would have continued their employment beyond the temporary assignment.
- d. **Lost wages may include** bonuses, cost-of-living increases, or raises the Complainant would have received if they continued working.
- e. **Unemployment benefits should not be deducted from lost wages.** Caveat: The Complainant should be informed that any settlement payment received may be reported to the Department

of Employment, Training and Rehabilitation, Unemployment Insurance Division, resulting in the Complainant having to pay back some or all of their unemployment benefits.

- f. **Workers' compensation benefits. Workers' compensation benefits should be deducted from lost wages.** Workers' compensation earnings are earnings that replace some of your lost wages during a period in which you cannot work due to a work-related injury/illness suffered while working for your employer.
- g. **Interim earnings. Interim earnings should be deducted from lost wages.** Interim earnings are earnings the Complainant received from other employment after their termination, layoff demotion or transfer. Interim earnings may also include expenses incurred as a result of retaining an interim job if those expenses would not have been incurred at the former job. Examples of these earnings are expenses for tools and equipment, mileage for driving an increased distance, training costs, etc.
- h. **When Respondent's Liability for Lost Wages Stops.** A Respondent's liability for back pay stops when the Complainant rejects a *bona fide* offer of reinstatement. A *bona fide* offer of reinstatement occurs when the Respondent offers the Complainant a job substantially equivalent to their former position. A Respondent's liability may also stop when the Respondent goes out of business, closes the location where Complainant worked without retaining any employees who worked at the location, or when the Complainant becomes totally disabled or otherwise unable to perform their former job.

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

The Complainant has a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a Complainant must exercise reasonable diligence in seeking alternate employment, except as noted below. However, Complainants need not succeed in finding new employment; they are required only to make an honest, good faith effort to do so. The investigator should ask Complainant for evidence of their job search and keep the evidence in the case file. Complainant's obligation to mitigate their damages does not normally require that Complainant go into another line of work or accept a demotion. However, generally, Complainants who are unable to secure substantially equivalent employment after a reasonable period of time should consider other available and suitable employment. In certain circumstances, such as when retaliation or the underlying safety issue causes disabling physical ailments, Complainants do not need to look for substantially equivalent employment.

D. 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.

E. Other Remedies

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

IV. Evidence of Damages

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

V. Undocumented Workers

Undocumented workers are not entitled to reinstatement or front pay, but may be entitled to back pay.¹⁷ Other remedies may be awarded as appropriate, such as expungement of discipline record or a neutral reference.

¹⁷ Although some courts have interpreted the federal case of *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) as precluding any monetary remedy for undocumented workers, Nevada courts have never specifically addressed its application to Nevada law. However, the Nevada Supreme Court has recognized that "IRCA makes it unlawful to knowingly employ an undocumented alien, but IRCA says nothing about paying an undocumented alien benefits that compensate for an injury." See *Associated Risk Mgmt. v. Ibanez*, 478 P.3d 372 (Nev. 2020) (confirming that "as a matter of state law, undocumented aliens [are] not entitled to vocational training that would only be available . . . because of [the worker's] undocumented status," but affirming an award of disability benefits to an undocumented alien).

In the workers' compensation context, the Nevada Supreme Court has held that there is no conflict with federal law when an insurer pays compensatory benefits and that such "benefits are not only available because of the worker's undocumented status; they are available to any worker, lawfully or unlawfully employed, who is injured by accident arising out of and in the course of employment." See *Associated Risk Mgmt. v. Ibanez*; see also *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (2001).

NRS Chapter 618 has a similar definition of employee: "whether lawfully or unlawfully employed." See NRS 618.085. Thus, it is likely that if the Nevada Supreme Court ever addressed the remedy issue in the OSHA whistleblower context, it may similarly hold that NRS 618.445 does not preclude all forms of monetary relief.

CHAPTER 6: SETTLEMENT AGREEMENTS

I. Scope

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

II. Settlement Policy

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

III. Tax Treatment of Amounts Recovered in a Settlement

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

IV. Settlement Agreements

A. General Requirements of Agreements

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

B. The Standard NVOSHA Settlement Agreement

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

1. Standard NVOSHA Agreement Required Provisions

The standard NVOSHA agreement normally contains the following provisions:

- a. **Compliance with NVOSHA Whistleblower Statute.**
Respondent will not retaliate against the Complainant or any other employee in violation of NRS 618.445.
- b. **Reinstatement.** This provision should contain one of the two options:
 - i. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits that Complainant would have earned but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [If accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].

ii. N/A. Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.

c. **Payment.** This provision should contain one of the following options:

i. Respondent agrees to pay the Complainant [put gross amount] in lost wages. [put in how the details of how and when the payment will be issued to the Complainant.]

ii. Respondent agrees to pay the Complainant a lump sum of [put in gross amount]. [put in how the details of how and when the payment will be issued to the Complainant.]

iii. N/A. Respondent is not offering payment and/or Complainant is not seeking payment.

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

d. **Personnel Record.** This should contain one of the following options:

i. Respondent shall expunge (put in what they are expunging – name, date) from Complainant’s personnel records and will not mention (put in what they are expunging) in any responses to future requests for employment references.

ii. N/A. Respondent is not offering expungement of any documents and/or Complainant is not seeking expungement of any documents.

e. **Non-disparagement and Neutral Reference.** Complainant will not knowingly disparage, criticize, or make other derogatory statements about the Respondent. The Respondent will provide a neutral employment reference to all those requesting information regarding Complainant’s employment with the Company. The foregoing will not apply to any statements that are made truthfully in response to a subpoena or other compulsory legal process.

f. **Commencement of Obligations.** The obligations of both parties in this agreement shall begin immediately after the Agreement is signed by both parties and approved by NVOSHA.

g. **Non-Admission.** By signing this agreement, Respondent is not

admitting to any violation of NRS 618.445.

- h. Closure of Complaint.** Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against (Respondent's name) arising out of (Case No.), and will cause their complaint to be closed.
- i. Non-Waiver of Rights by Complainant.** Nothing in this Agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program (such as, but not limited to, the SEC or IRS whistleblower award programs) for providing information directly to a government agency. Nothing in this agreement is intended to or shall prevent, impede, or interfere with Complainant's filing of a future claim related to an exposure to a hazard, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date Complainant signed this agreement.
- j. Enforcement of settlement.** A violation of this settlement agreement is a breach of contract. If this settlement is breached by either party, Division Counsel for the Division of Industrial Relations may seek redress by filing a civil action in the appropriate court.

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

2. Standard NVOSHA Agreement Optional Provisions

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

- a. Confidentiality.** Respondent and Complainant have agreed to keep the settlement agreement confidential. The settlement agreement is part of NVOSHA's records and is subject to disclosure under the Nevada Public Records Act. Complainant and Respondent have requested that NVOSHA designate the agreement as containing potentially confidential information and

request predisclosure notification of any Nevada Public Records Act request. (Agreement should be marked as confidential and potentially exempt from disclosure).

- b. Posting of Notice.** A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirements of the applicable whistleblower law pursuant to a settlement agreement.
- c. Posting of An Informational Poster.** A provision requiring Respondent to post an appropriate poster, which may include the mandatory OSH Act poster or any appropriate fact sheet that summarizes the rights and responsibilities under the relevant OSHA-enforced whistleblower statute.
- d. Training.** A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under the relevant whistleblower protection statute.

C. Private Settlement Agreements

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

1. Reviewing Private Agreements

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

Some guidelines to consider when reviewing an agreement are:

- a.** NVOSHA cannot be a party to the agreement.
- b.** If the agreement has a confidentiality clause, NVOSHA will inform the parties that the agreement is subject to disclosure by the Nevada Public Records Act.

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

D. Bilateral Agreements

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

1. **When to Use.** A bilateral agreement should only be used when:
 - a. The settlement offer by the Respondent is reasonable in light of the back pay offered, reinstatement offered, and the merits of the case. Generally, as the likelihood of prevailing in litigation increases, the type of relief offered to make the Complainant whole should also increase. 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 that 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 Disposing of a Case Via a Bilateral Agreement.**
 - a. **Consult With Chief.** If an investigator feels a bilateral agreement is warranted, they must discuss it with the Chief.
 - b. **Submit Agreement and Memo to Chief.** If the Chief agrees a bilateral agreement is warranted, the investigator must submit: (1) a draft bilateral agreement, (2) a memo summarizing the merits of the case, including an explanation of why such an agreement is being recommended and the amount of money being offered, and (3) any relevant exhibits.
 - c. **Chief to Review Agreement and Memo.** The Chief will review the agreement, memo, and exhibits. If more information is needed the Chief will send it back to the investigator to obtain additional information. If the Chief concurs with the memo and agreement, the Chief and the investigator will send it to Division Counsel for review and approval. If Division Counsel would like to discuss it, a meeting will be set up to do so.
 - d. **Get Approval From Division Counsel.** The Chief and investigator should get approval to proceed with the bilateral agreement from Division Counsel. If Division Counsel would like more information before approving it, the investigator will obtain the additional information.
 - e. **Have Respondent Sign Agreement.** If Division Counsel approves of the agreement, the investigator will have the Respondent sign the agreement.
 - f. **Have the NVOSHA CAO Sign the Agreement.** Once the Respondent has signed the agreement, the investigator will send the agreement and memo to the CAO to approve and sign the agreement.
 - g. **Verify Payment if Applicable.** Provide the fully executed agreement to the Respondent, and if they agreed to pay money to the Complainant, obtain a copy of the payment and proof of delivery. The payment should be sent directly to the Complainant.

CHAPTER 7: CASE DISPOSITION

I. Scope

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

II. Types of Disposition

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

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

III. Procedures for Dismissals (See procedures for Docket and Dismiss in Chapter 3)

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

1. No coverage
2. Untimeliness
3. Noncooperation by the Complainant
4. One or more of the elements of the whistleblower claim not established
5. Respondent provided a legitimate reason for the adverse action and, after consideration of Complainant's rebuttal interview (and any other evidence), the information adequately rebuts the conclusion that there is reasonable cause to believe unlawful retaliation occurred
6. Deferral to another proceeding

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

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

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

At a minimum, the ROI should address the following:

- Assigned Investigator

- Case Number/Name
- Name of Parties
- Summary of Complainant's Allegation
- Applicable Statute
- Timeliness of the complaint
- Coverage of the Parties
- Chronology of Events
- Analysis of Protected Activity, Adverse Action, and Causal Link as applicable¹⁸
- Employer's Reason for Taking the Adverse Action
- Evidence of Pretext
- If applicable, Other Relevant Information
- Investigator's Recommended Determination

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

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

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

- **Do not reveal the identity of witnesses interviewed**, especially if

¹⁸ For example, if no protected activity is found, the investigator does not need to analyze the remaining elements and can proceed to their recommendation.

- they request confidentiality.
 - If the Complainant attempts to offer any new evidence or allegations, the investigator will decide whether the new evidence and/or allegations should be investigated.
 - If the Complainant becomes argumentative or combative during the closing conference, the investigator may end the conference and note this in their activity log.
5. Once the closing conference is completed, or the investigator attempted to do the closing conference and the Complainant did not respond, the investigator will submit the case file to the Chief for closure.
 6. **NVOSHA's Findings**

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

C. Dismissal Based on No Coverage or Untimeliness

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

1. The investigator will complete an **abbreviated Report of Investigation (ROI)** with exhibits and submit it to the Chief for review and approval. The ROI can be limited to the following:
 - Assigned Investigator
 - Case Number/Name
 - Name of Parties
 - Summary of Complainant's Allegation
 - Applicable Statute
 - Coverage
 - Timeliness
 - If applicable, Other Relevant Information
 - Investigator's Recommended Determination

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

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

D. Dismissal Based on Lack of Cooperation

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

1. **Ensure you have made reasonable efforts** to contact the Complainant as listed in Chapter 4, Unresponsive Complainant.
2. Submit the case to the Chief for closure due to noncooperation.
No ROI is required.
3. **The Chief will review the case file.** If approved, an abbreviated findings letter will be sent to the Complainant. If more information is needed, the Chief will send the case file back to the investigator.
4. **NVOSHA's findings.** Findings will be written in a letter and sent to the Complainant and Respondent via email (if provided) or mail. The findings will be abbreviated. They will inform the Complainant the complaint is being dismissed for lack of cooperation and advise the Complainant of their appeal rights and dual filing rights.
5. **OIS.** The Chief will enter the determination in OIS and close out the case.

IV. Procedures For Settlement

- A.** The procedure for settlements will be based on the type of settlement. There are three (3) ways a case can be settled:
- 1. Private Agreement** between the Complainant and the Respondent (most common)
 - 2. NVOSHA Agreement** signed by Complainant, Respondent, and NVOSHA.
 - 3. NVOSHA Bilateral Agreement** signed by Respondent and NVOSHA.

B. Private Settlement Agreement Between Complainant and Respondent

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

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

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

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

C. Nevada OSHA Standard Agreement

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

1. The investigator will draft a standard Nevada OSHA Agreement using the guidance in Chapter 6 – Settlements.
2. The investigator will submit the agreement to the Chief for review and approval.
3. If the Chief approves the agreement, the investigator will have the Respondent and Complainant sign it. If the Chief wants changes to the agreement, it will be sent back to the investigator to have the Respondent make the changes. Once both parties sign the agreement, the investigator will give it to the Chief to sign.
4. The Chief will review and sign the agreement. The investigator will put a copy of the fully executed agreement (signed by both parties and NVOSHA) in the case file.
5. If the settlement involves payment to the Complainant, the investigator will have the Respondent provide a copy of the payment and proof of delivery to the Complainant. The investigator will put a copy of the payment and proof of delivery in the case file.
6. Once the settlement agreement is signed and, if applicable, payment to the Complainant has been made, the investigator will submit the case file to the Chief for closure.

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

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

D. Nevada OSHA Bilateral Agreement

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

1. The investigator will draft a memo to Division Counsel summarizing the merits of the case, attach exhibits, and draft a Bilateral Agreement using the guidance in Chapter 6 – Settlements. The investigator will submit all of this to the Chief for review.
2. The Chief will review the memo, exhibits, and agreement. If the Chief approves it, the Chief will set up a meeting to discuss the bilateral packet with Division Counsel. If the Chief needs changes or more information, the packet will be returned to the investigator.
3. The investigator, Chief, and Division Counsel will meet and discuss the memo, exhibits, and agreement. Division Counsel will decide if they approve or disapprove of the bilateral agreement.
4. If approved by Division Counsel, the investigator will send the agreement to the Respondent to sign.
5. Once the Respondent signs the agreement, the investigator will send the agreement to the Chief Administrative Officer to sign.
6. Once the Chief Administrative Officer signs the agreement, if payment is being issued to the Complainant, the investigator will have the Respondent provide a copy of the payment and proof of delivery. This will be placed in the case file.
7. Once the settlement agreement is signed and if applicable, payment to the Complainant has been made, the investigator will submit the case file to the Chief for closure.
8. The Chief will email the Complainant and Respondent and inform them the case is being closed due to settlement. The Chief will attach a copy of the fully executed settlement agreement to the email. (If there is no email for one or both parties, a letter informing them the case is being closed and a copy of the settlement agreement will be mailed to them.)

V. Procedures For Withdrawal of Complaint

- A. A Complainant may withdraw their complaint at any time during NVOSHA's investigation of the complaint. If a Complainant decides to withdraw their complaint, the following procedures will be followed:
 1. If the Complainant indicates they want to withdraw, the investigator will send the Complainant an email asking if they want to withdraw;

informing them by withdrawing their complaint, they are waiving their rights to seek review or object; and informing them that their case will not be reopened. If the Complainant cannot be reached via email, the investigator will call the Complainant, record the conversation, if possible, ask them if they want to withdraw, and inform them that by withdrawing their complaint, they are waiving their rights to seek review or object, and their case will not be reopened

2. If the Complainant confirms they want to withdraw, the investigator will place the withdrawal confirmation in the case file and submit the case file to the Chief for closure based on withdrawal. If the Complainant never confirms they want to withdraw, the investigation will proceed and be disposed of one of the other ways (dismissal, settlement, etc.) depending on the outcome.
3. The Chief will review the case file for withdrawal. If approved, the Chief will send an email to both parties informing them that the case is being closed due to withdrawal and the Complainant is waiving their right to appeal or object, and the case will not be reopened.
4. **OIS.** The Chief will close out the case in OIS as a withdrawal.

VI. Procedures For Referral to Division Counsel for Potential Litigation

- A. If an investigator feels a case has enough evidence to prove a violation of the whistleblower statute, the following procedures should be followed:
 1. The investigator will discuss the case with the Chief.
 2. If the Chief agrees the case warrants further discussion with Division Counsel, the Chief will set up a meeting with the investigator, Chief, and Division Counsel to discuss.
 3. If Division Counsel believes there may be a violation, the investigator will complete an ROI recommending referral to the Division Counsel. If Division Counsel wants more information, the investigator will obtain the additional information and have a second discussion with Division Counsel. If Division Counsel disagrees with the referral, they will explain why and the case will be dismissed based on Division Counsel's reasoning and will be disposed of as a Dismissal on the merits.
 4. If Division Counsel agrees there may be a violation, the investigator will complete a Report of Investigation (ROI) with exhibits and submit it to the Chief for review and approval. At a minimum, the ROI should address the following:

- Assigned Investigator
 - Case Number/Name
 - Name of Parties
 - Summary of Complainant's Allegation
 - Applicable Statute
 - Timeliness of the complaint
 - Coverage of the Parties
 - Chronology of Events
 - Analysis of Protected Activity, Adverse Action and Causal Link
 - Employer's Reason for Taking the Adverse Action
 - Evidence of Pretext
 - Amount of damages owed to the Complainant
 - If applicable, Other Relevant Information
 - Investigator's Recommended Determination
5. The Chief will review the ROI to ensure accuracy, proper analysis of the elements and employer defense, and appropriateness of the recommendation. If the Chief would like additional information, the ROI will be sent back to the investigator to obtain the additional information. If there are errors in the ROI, the Chief will send it back to the investigator to correct. Once the ROI is deemed complete, the Chief will approve it.
 6. The Investigator and Chief will digitally sign the ROI.
 7. The ROI and exhibits will be sent to Division Counsel and a meeting will be set up with them to discuss.

VII. APPEALS

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

A. Procedure for Appealing

1. The Complainant must mail or email a **written request** to appeal to the NVOSHA Appeals Committee **within 15 calendar days** after their receipt of NVOSHA's dismissal letter. Mailed requests should be sent to: Nevada OSHA Whistleblower Appeals Committee, 3360 W. Sahara Ave., Ste. 200, Las Vegas, NV 89102. Emailed requests should be sent to whistleblowerappeals@dir.nv.gov, with a copy to the Chief for tracking purposes.
2. There is no specific written format for requesting an appeal. The Complainant can simply say they are appealing or want a review of their case.

3. **Date Appeal is Considered Filed.** The appeal is considered filed the day the NVOSHA Appeals Committee receives the email, or if mailed, the date of the postmark.
4. If the last day to appeal falls on a weekend or a holiday, or the NVOSHA office is closed, the next business day will count as the final day.
5. **Late Appeals.** If the appeal is filed after the 15 calendar days, NVOSHA Appeals will determine if tolling applies. If tolling does not apply, the appeal will be considered untimely.

B. NVOSHA Receipt of Appeal

1. Upon receipt of an appeal, the Chief or Appeals Committee will move the appealed case file into the shared Appeals folder and enter the appeal into OIS.
2. The Appeals Committee will determine if the appeal is timely, or if tolling applies.

If the appeal is timely or tolling applies, the Committee will send a letter to the Complainant and Respondent acknowledging their receipt of the appeal. If the appeal is untimely or tolling does not apply, the Committee will send the Complainant a letter that their appeal was untimely.

C. Appeals Committee and Review

1. The Appeals Committee is an official committee within Nevada OSHA that is comprised of three authorized management representatives. The CAO appoints each member of the committee without a term limit and members are changed based on availability of trained staff. The CAO may participate in committee discussions as needed.
2. Appeals will be reviewed within **60** calendar days of receiving the appeal.
3. The Appeals Committee can, with proper justification, request a 30-day extension to provide a decision to the CAO. This request must be approved by the CAO. The request and the CAO's response must be maintained within the file.
4. 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.

5. 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. Upon receipt of the Committee's unanimous decision, the Chief Administrative Officer has 30 calendar days to approve or reject the decision.

D. Appeal Outcomes

1. If NVOSHA's decision to dismiss the case is supported by the evidence and is consistent with the law, the Committee will uphold the original decision.
2. If the Committee does not feel there is sufficient evidence to support a dismissal, the Committee will explain why they feel there is insufficient evidence to support a dismissal and send the case back for further investigation and specify what information they are seeking.
 - a. If the results of the additional investigation do not change the initial decision to dismiss, the original decision will be upheld, and a letter will be sent to the Complainant and Respondent notifying them the original decision has been upheld.
 - b. If the results of the additional investigation indicate the case may be meritorious, the Committee will consult with Division Counsel. If Division Counsel agrees, the case will be returned for further action. Note: If the Administrator later decides not to file an action in court, NVOSHA will dismiss the case and no further requests to appeal will be allowed.
3. If the Complainant withdraws their appeal, the Appeals Committee will send a closure letter to the Complainant and Respondent notifying them the appeal has been withdrawn.
4. If the parties reach a settlement while an appeal is pending, the appeal will be treated as withdrawn and the Committee will send a closure letter to the Complainant and Respondent notifying them the appeal has been withdrawn due to a settlement.
5. If the Complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief to the Complainant, such as a union arbitration procedure, the hearing of the appeal may be postponed pending a determination in the other forum, after which the Appeals Committee must either recommend deferring to the other determination, if it appears fair and equitable, or proceed with hearing the case.

E. Closure Letter

1. Once the Appeals Committee has made a determination, the Committee will send the closure letter to the Complainant and the Respondent. The closure letter must explain the process for the Complainant to exercise their dual filing rights.

CHAPTER 8: STATE PLAN – FEDERAL OSHA COORDINATION

I. Scope

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

II. Federal OSHA's Relationship to State Plans

A. Federal OSHA oversees NVOSHA's state plan, including the whistleblower program.

According to federal regulation, a state that is implementing its own occupational safety and health enforcement program (including whistleblower) must have provisions as effective as those of the federal whistleblower statute, 11(c).¹⁹ Federal OSHA conducts audits of NVOSHA's program to ensure it is at least as effective as the federal program.

While NVOSHA's program covers state and local government employees, as well as most private sector employees, **Section 11(c) does not cover state and local government employees.** Thus, complaints from state and local government employees are covered only by NVOSHA's program.

B. Federal OSHA refers 11(c) whistleblower complaints to NVOSHA's state plan, and reviews dually filed complaints when appropriate.

According to federal regulation, federal OSHA may exercise jurisdiction over the NVOSHA's private sector complaints and may also refer complaints to NVOSHA's state plan.²⁰ This is because complaints alleging a violation of NVOSHA's whistleblower statute, also fall under 11(c).

Federal OSHA normally refers private sector complaints alleging a violation of Nevada's whistleblower statute, to the Nevada state plan. Federal OSHA will not conduct a parallel investigation. Federal OSHA normally reviews these complaints only after NVOSHA has completed their investigation, Complainant has exhausted their appeal rights, and when Complainant has properly dually filed with federal OSHA.

C. NVOSHA Referrals to Federal OSHA

¹⁹ 29 CFR [1902.4 \(c\)\(2\)\(v\)](#)

²⁰ [29 CFR 1977.23](#)

In general, NVOSHA investigates 11(c) analog complaints received directly from a Complainant and will not refer them to federal OSHA, unless an exception applies (see below). NVOSHA must advise private-sector Complainants of their dual filing rights and, if a timely complaint was also filed with federal OSHA, NVOSHA must inform Complainants of their right to request federal review at the conclusion of the state's investigation.

Where applicable, NVOSHA will make Complainants aware of their rights under the federal whistleblower protection statutes (other than section 11(c)) enforced by federal OSHA, which protect activity dealing with other federal agencies and which remain under federal OSHA's exclusive authority.²¹

III. Federal OSHA Referral Procedures

- A.** In general, federally filed complaints alleging retaliation for occupational safety or health activity under NVOSHA authority, i.e., complaints by private-sector and state and local government employees, will be referred by Federal OSHA to NVOSHA for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate.

The federal OSHA referral is a filing of the complaint with the State Plan. The referral must be made promptly, preferably by e-mail, fax, or expedited delivery. It should be made within NVOSHA's filing period if possible. The administratively closed federal case file will include a copy of the complaint, the referral email (or letter) to NVOSHA, and the OIS case summary.

1. Referral of Private-Sector Complaints

A private-sector employee may file an occupational safety and health whistleblower complaint with both federal OSHA under section 11(c) and with Nevada under NRS 618.445. Except as otherwise provided, when such a complaint is received by federal OSHA, the complaint will be administratively closed as a federal section 11(c) complaint. The date of the filing with federal OSHA will be recorded in OIS. The case will then be referred to NVOSHA, generally where Complainant's workplace is located, for handling. If the adverse action or protected activity took place in another state, federal OSHA will determine if the case should be referred to the other State Plan or handled by federal OSHA.

Federal OSHA will not screen complaints that, on their face, implicate only section 11(c) and Nevada's section 11(c) equivalent (NRS 618.445). Instead, Federal OSHA refers the complaint to NVOSHA for screening and, if the complaint was timely filed with federal OSHA, federal OSHA

²¹ For information on Complainants' rights under other federal whistleblower statutes enforced by federal OSHA, see the [Whistleblower Statutes Summary Chart](#).

considers the complaint dually filed so that the complaint can be acted upon under the federal review procedures, if needed.

2. Referral of Public-Sector Complaints

All occupational safety and health whistleblower complaints (i.e., section 11(c) complaints) from state and local government employees of Nevada will be administratively closed for lack of federal authority and referred to NVOSHA. If the complaint falls under both section 11(c) as well as an OSHA whistleblower statute covering public-sector employees, such as NTSSA and AHERA, federal OSHA refers the section 11(c) portion of the complaint to NVOSHA, while continuing to process/investigate the remaining component of the complaint falling under the other federal statute.

3. Exemptions to the Referral Policy

Some exceptions to federal OSHA's referral policies exist, such as:

- a. **Multi-Statute Complaint:** If federal OSHA receives a *private sector* complaint that is covered by section 11(c) and another OSHA whistleblower statute, federal OSHA will not refer the case to NVOSHA. However, federal OSHA should notify NVOSHA that it has received the complaint and will be conducting the investigation.
- b. **Certain Federal and Non-Federal Public Employees:** Complaints from federal employees and complaints from state and local government employees in states without State Plans will not be referred to a state and will be administratively closed with concurrence or dismissed for lack of section 11(c) coverage, unless the complaint falls under another OSHA whistleblower statute covering public-sector employees.
- c. **Exceptions to State Plan Coverage:** Most State Plans have exceptions to State Plan coverage, and in these areas federal OSHA retains coverage of both safety and health complaints and section 11(c) complaints. Complaints from such employees received by federal OSHA are not referred to the State Plans. For details about the areas of State Plan coverage, see each State Plan's webpage at: <https://www.osha.gov/stateplans>.

Nevada's Plan applies to private sector workplaces in the state with the exception of: maritime employment (including shipyard employment, marine terminals, and longshoring); federal government employers, including USPS; contractors and

subcontractors on land under exclusive federal jurisdiction; private-sector employment on military facilities and bases; employment on Indian land; aircraft cabin crewmembers onboard aircraft in operation; and any hazard, industry, geographical area, operation or facility over which the state is unable to effectively exercise jurisdiction for reasons not related to the required performance or structure of the plan. Nevada's Plan also applies to state and local government employers, but does not apply to federal government employers.

- d. **Multi-State Contacts:** When federal OSHA encounters a section 11(c) case with multi-state contacts and one or more of the states is a State Plan, there may be various complexities with coverage under a State Plan. The nationwide applicability of section 11(c) solves these problems. Federal OSHA takes such cases and communicates with the State Plan when it does so.
- e. **Whistleblower Statutes Solely Under Federal OSHA Jurisdiction:** If a complaint is filed regarding one of the whistleblower statutes which is solely under federal jurisdiction (STAA, FRSA, etc.), federal OSHA will not refer it to the State Plan. However, State Plans refer whistleblower complaints that fall under one of these other whistleblower statutes to federal OSHA.²²
- f. **Inadequate Enforcement of Whistleblower Protections:** When federal OSHA receives a section 11(c) complaint concerning an employee covered by a State Plan, federal OSHA may determine, based on monitoring findings or legislative or judicial actions, that a State Plan does not adequately enforce whistleblower protections or fails to provide protection equivalent to that provided by federal OSHA policies. In such situations, federal OSHA may elect to process private-sector section 11(c) complaints from employees covered by the affected State Plan in accordance with procedures in non-plan states.

IV. NVOSHA Referral Procedures

In general, a complaint alleging a violation of section 11(c) will be investigated by NVOSHA and will not be referred to federal OSHA, unless an exemption above applies.

A. Advising Private Sector Complainants of Their Right to File Section 11(c) Complaint

²² See federal whistleblower statutes at: https://www.whistleblowers.gov/whistleblower_acts-desk_reference

When private sector Complainants first contact NVOSHA to file a whistleblower complaint, NVOSHA must advise them of their right to also file a federal section 11(c) complaint within the 30-day statutory filing period if they want to maintain their rights to federal protection. This is referred to as *dual filing*.

When a private-sector Complainant contacts the NVOSHA whistleblower unit to file a complaint, the Complainant is told to file their complaint online to preserve their dual filing rights. (See chapter 3 for more information on advising Complainants of their dual filing rights.) Additionally, the Complaint Acknowledgement letter that is sent to them if their complaint is opened for investigation also informs them of their dual filing rights.

B. Advising Private Sector Complainants of Their Right to Federal Review at the Conclusion of the State Plan Investigation

At the conclusion of a whistleblower investigation where the outcome is a dismissal, NVOSHA must notify private sector Complainants of the process for requesting review by federal OSHA. If the Complainant dually filed a timely complaint with federal OSHA and they are in the private sector, 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.

Note: Public sector Complainants will be reviewed under CASPA, not federal review procedures (see below).

C. Properly Dually Filed Complaints

A “properly dually filed complaint” is:

- an occupational safety or health whistleblower complaint filed with federal OSHA and NVOSHA within the respective filing periods of both entities, or
- an occupational safety or health whistleblower complaint that was timely filed with federal OSHA, and federal OSHA has referred the complaint to NVOSHA.

D. Referral of Private Sector Complaints Alleging a Violation of one of Federal OSHA’s Whistleblower Statutes Other Than 11(c)

If the Complainant alleges a violation of one the other federal whistleblower statutes covered exclusively by federal OSHA, NVOSHA will refer the complaint to federal OSHA to review for coverage under that statute (*see* “Whistleblower Statutes Solely Under Federal OSHA Jurisdiction” above).

V. Federal Review Procedures

A **federal review** is OSHA's review of NVOSHA's case file of a properly dually filed complaint after Complainant meets all of the criteria below in section A. As part of the review, a case may be sent back to Nevada so it may attempt to correct any deficiencies. If, after federal review of NVOSHA's case file, federal OSHA determines that Nevada's proceedings met the criteria listed below in section C, it may simply defer to Nevada's findings (see section D(1) below). Alternatively, if federal OSHA determines that Nevada's investigation was inadequate or that the Complainant's rights were not protected in any other way, federal OSHA will conduct a full investigation(see section D(2) below).

A. Complainant's Request For Federal Review

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

1. Confirm that the complaint is, in fact, a dually filed complaint. That is, Complainant filed the complaint with federal OSHA in a timely manner (within 30 days). Complaints submitted through the OSHA Online Complaint form are considered filed with federal OSHA.
2. A final determination has been made by Nevada. A ***final determination*** is a final decision of the investigative office after a review of an initial determination or a final decision of a tribunal, such as an administrative law judge or court, whichever comes later.
3. Complainant makes a request for federal review of the complaint to the federal OSHA's Regional Office, in writing, that is postmarked within 15 calendar days of receiving Nevada's final determination; and
4. Complaint is covered under section 11(c).

B. Complaints Not Meeting Federal Procedural Prerequisites for Review

1. If upon request for federal review, the case does not meet the prerequisites for review (i.e., Complainant works in the public sector, complaint is untimely), Complainant will be notified in writing that no right for review by federal OSHA will be available. In that notification, Complainant will be informed of the right to file a **Complaint About State Program Administration (CASPA)**, which may initiate an investigation of NVOSHA's handling of the case, but not a section 11(c) investigation and, therefore, will not afford individual relief to Complainant.
2. If Complainant requests federal review before Nevada's final determination is made, Complainant will be notified that they may

request federal review only after Nevada has made a final determination in the case. However, in cases of a delay of one year or more after the filing of the complaint with federal OSHA or misfeasance by Nevada, federal OSHA may allow a federal review before the issuance of Nevada's final determination.

C. Federal Review

Federal OSHA conducts its review as follows:

1. Under 29 CFR 1977.18(c), federal OSHA can only defer to the results of NVOSHA's proceedings, if it is clear that:
 - a. Nevada's proceedings "dealt adequately with all factual issues;"
 - b. Nevada's proceedings were "fair, regular and free of procedural infirmities;" and
 - c. The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."
2. The federal review will entail a scrutiny of all available information, including NVOSHA's investigative file. Federal OSHA may not defer to Nevada's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, federal OSHA may request that the Nevada case be reopened and the specific deficiencies be corrected by Nevada.

D. Federal Review Outcomes

1. Deferral

If federal OSHA determines that NVOSHA's proceedings met the criteria above, federal OSHA may simply defer to Nevada's findings. Complainant will be notified and requests for review by DWPP (Directorate of Whistleblower Protection Programs) will not be available. Federal OSHA shall copy Respondent on the closing notification. No new federal OSHA case will be opened.

2. No Deferral/New Investigation

Should federal OSHA determine that state correction would be inadequate and/or the supervisor determines that federal OSHA cannot properly defer to Nevada's determination pursuant to 29 CFR 1977.18(c), the supervisor will order whatever additional investigation is necessary. The Region will docket the complaint. The legal filing date remains the

original filing date. Federal OSHA investigates the case as quickly as possible. Based on the investigation's findings, federal OSHA may dismiss, settle, or recommend litigation. If there is a dismissal, Complainants have the right to request review by DWPP.

3. State Plan Evaluation

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

VI. Federal Procedures for Complaints About State Program Administration (CASPA)

- A.** OSHA's State Plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a State Plan may file a Complaint About State Program Administration (CASPA). See [29 CFR 1954.20](#); [CSP 01-00-005](#).
- B.** A CASPA is an oral or written complaint about some aspect of the operation or administration of a State Plan made to OSHA by any person or group. A CASPA about a specific case may be filed only after the state has made a final determination, as defined above.
- C.** Because properly dually filed section 11(c) complaints may undergo federal review under the section 11(c) procedures outlined above, no duplicative CASPA investigation is required for such complaints. If a private-sector retaliation complaint was not dually filed or the Complainant works in the public sector, it is not subject to federal review under section 11(c) procedures, but is entitled to a CASPA review. Complaints about the handling of State Plan whistleblower investigations from state and local government employees will be considered under CASPA procedures only.
- D.** Upon receipt of a CASPA complaint relating to NVOSHA's handling of a whistleblower case, federal OSHA will review NVOSHA's investigative file and conduct other inquiries as necessary to determine if NVOSHA's investigation was adequate and whether NVOSHA's handling of the case was in accordance with the state's section 11(c) (NRS 618.445) equivalent and supported by appropriate available evidence. A review of NVOSHA's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of NVOSHA's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to NVOSHA and Complainant within the required 90 days.
- E.** A CASPA investigation of a whistleblower complaint may result in recommendations regarding specific findings in the case as well as future

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

CHAPTER 9: INVESTIGATIVE RECORDS & THE NEVADA PUBLIC RECORDS ACT

I. Scope

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

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

II. The Nevada Public Records Act

- A. The Nevada Public Records Act (NPRO) is codified in [Nevada Revised Statutes, Chapter 239 – Public Records](#).
- B. **Purpose of Act.** The purpose of the Act is to provide members of the public with prompt access to inspect, copy, or receive a copy of public books and records to the extent permitted by law.
 - 1. The provisions of Chapter 239 should be interpreted liberally to achieve this purpose.
 - 2. Any exemption, exception, or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.
- C. Unless provided in a specific statute of the Nevada Revised Statutes or otherwise declared by law to be confidential, all public books and records of a governmental entity are subject to disclosure.
 - 1. NVOSHA shall not deny a request for a public record that contains confidential information if they can redact, delete, conceal, or separate the confidential information from the non-confidential information.
- D. If the confidentiality of a public record is at issue in a judicial or administrative proceeding, NVOSHA has the burden of proving, by a preponderance of the evidence, that the record is confidential.
- E. A public employee who acts in good faith in disclosing or refusing to disclose information is immune from liability.
- F. The head of each agency of the Executive Department (including NVOSHA)

shall designate at least one employee as the records official for the agency. The records official is only responsible for records in their legal custody and control.

- G. The records official must fulfill a request for records by the fifth business day after receiving the request, or, if the official is unable to provide the record(s) by then, the official must inform the requestor when the official will be able to provide the public record(s).
- H. The agency may charge a fee for providing copies of a public record(s).

III. Whistleblower Records

- A. **Whistleblower records would be considered a public record that is subject to disclosure under the Nevada Public Records Act. Whistleblower records may include, but are not limited to:**

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

- B. **Whistleblower Records That are Confidential.** Per NRS 618.341(3), any information that is part of a current investigation is confidential. The fact that an investigation is being conducted is public information. As used in NRS 618.341(3), “current investigation” means “any investigation conducted before the issuance of a citation or notice of violation or, if no citation or notice of violation is issued, an investigation which is not closed.”

- 1. **Exception For Disclosure to Complainant and Respondent During an Open Investigation**

- a. During a current (open) investigation, records from the Complainant and Respondent may be provided to each other to fully investigate the complaint and/or facilitate a resolution.

- b. In most cases, NVOSHA provides the Respondent a copy of Complainant's complaint and any relevant submissions.
 - c. In most cases, NVOSHA provides the Complainant with the Respondent's response and any relevant submissions.
 - d. All disclosures to each party are redacted as appropriate.
- 2. **Exception For Law Enforcement.** Per NRS 618.341, NVOSHA shall disclose otherwise confidential information to law enforcement for the purpose of pursuing a criminal investigation.
 - 3. **Exception For Federal OSHA.** Otherwise confidential records may be released to federal OSHA with the request that they not be disclosed to the public.

IV. NVOSHA's Public Records Request Policy and Procedure

- A. The NVOSHA Public Record Request Policy and Procedure can be found at: <https://dir.nv.gov>. This policy applies to both enforcement and whistleblower records.
- B. To request records, the requestor must normally complete the [Public Records Request Form](#) and submit it to the designated records request email. The records official will then process the request according to the NVOSHA Public Record Request Policy and Procedure.

V. Retention and Disposition of Whistleblower Records

- A. Per NRS 239.080, an official state record (public record) may only be disposed of according to an approved retention and disposition schedule.
- B. NVOSHA's current agency retention schedule requires that NVOSHA retain legal custody of whistleblower records for three (3) calendar years from the closure of the matter. After this, NVOSHA is required to transfer the records to Nevada State Archives for permanent storage. See retention schedule at nsla.nv.gov/ld.php.

ATTACHMENT A – NVOSHA Whistleblower Complaint Form Example

NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER COMPLAINT

DATE COMPLAINT FILED	MM/DD/YYYY Example: 08/20/2024 (If complaint is later amended, add the amended date here.)
NVOSHA WB CASE NO.	Last 2 digits of Fiscal Year – 001, 002, etc. Example: 25-001
COMPLAINANT INFORMATION	List Complainant’s name, address, phone number and email. Example: William Smith 555 Sparrow Way Las Vegas, NV 89123 (702) 445-5252 Johnsmith@gmail.com
RESPONDENT INFORMATION	List Respondent’s name, address, phone number and email. Example: Sturdy Construction 265 Meadow Ridge Drive Las Vegas, NV 89123 (702) 523-8181 sturdyconstruction@yahoo.com
SUMMARY OF ALLEGATION	- Write the details of Complainant’s job, including start date, position, duties, hours and wage. Example: Complainant started working for Respondent on 5/1/2024. Complainant was hired as a laborer to help build residential roofs. Complainant worked Monday through Friday, from 7 AM – 3 PM. Complainant made \$20/hour. - Write a brief chronology of the events leading up to the adverse action, including their alleged protected activity, alleged adverse action, and alleged causal link. Include the who, what, when, where, why.

	Example: On 8/19/2024, around 8:00 AM, Complainant's supervisor John told him in person to fix a residential roof even though Complainant wasn't provided fall protection. On 8/19/2024, around 4:00 PM, Complainant told his supervisor John in person that he did not feel safe working on the roof any longer without fall protection. On 8/20/2024, around 1:00 PM, John told Complainant in person he was being terminated for insubordination. 3. If Complainant was provided with a reason the adverse action was taken, explain what Complainant's claim of pretext is. Example: Complainant was never insubordinate and recently received a good evaluation from John. 4. Write a summarized statement of what Complainant's whistleblower claim is. Example: Complainant believes he was terminated on 8/20/2024 in retaliation for voicing concerns to manager John about not being provided fall protection on 8/19/2024.
REQUESTED REMEDY	List Complainant requested remedies. (only include reasonable remedies) Example: Complainant would like lost wages and a neutral reference.
COMPLAINT TAKEN BY	List name and title of the investigator who took complaint.
REVIEWED AND APPROVED BY	List name and title of the manager who approved the complaint.
INVESTIGATION ASSIGNED TO	List name and title of the investigator who is assigned the complaint.

ATTACHMENT B – NVOSHA Whistleblower Complaint Form Example (Intake Closure)

**NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
WHISTLEBLOWER COMPLAINT**

DATE COMPLAINT FILED	MM/DD/YYYY Example: 10/01/2024
INTAKE CLOSURE NO.	N/A
COMPLAINANT INFORMATION	List Complainant's name, address, phone number and email. Example: William Smith 555 Sparrow Way Las Vegas, NV 89123 (702) 445-5252 Johnsmith@gmail.com
RESPONDENT INFORMATION	List Respondent's name, address, phone number and email. Example: Sturdy Construction 265 Meadow Ridge Drive Las Vegas, NV 89123 (702) 523-8181 sturdyconstruction@yahoo.com
SUMMARY OF ALLEGATION	Put in a very brief description of the allegation or unknown if unclear.

REASON FOR INTAKE CLOSURE	le-untimely, etc.
REQUESTED REMEDY	N/A
COMPLAINT TAKEN BY	List name and title of the investigator who took complaint.
REVIEWED AND APPROVED BY	List name and title of the manager who approved the complaint.
INVESTIGATION ASSIGNED TO	N/A

ATTACHMENT C – NVOSHA Whistleblower Complaint Form Example (Administratively Closed Complaint)

NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER COMPLAINT

DATE COMPLAINT FILED	MM/DD/YYYY Example: 10/01/2024
NVOSHA WB CASE NO.	N/A
COMPLAINANT INFORMATION	List Complainant's name, address, phone number and email. Example: William Smith 555 Sparrow Way Las Vegas, NV 89123 (702) 445-5252 Johnsmith@gmail.com
RESPONDENT INFORMATION	List Respondent's name, address, phone number and email. Example: Sturdy Construction 265 Meadow Ridge Drive Las Vegas, NV 89123 (702) 523-8181 sturdyconstruction@yahoo.com
SUMMARY OF ALLEGATION	Note: If the Complainant is uncooperative/unresponsive, write as much of the requested information below as possible based on the information you have. 1. Write the details of Complainant's job, including start date, position, duties, hours and wage. Example: Complainant started working for Respondent on 5/1/2024. Complainant was hired as a laborer to help build residential roofs. Complainant worked Monday through Friday, from 7 AM – 3 PM. Complainant made \$20/hour.

	2. Write a brief chronology of the events leading up to the adverse action, including their alleged protected activity, alleged adverse action, and alleged causal link. Include the who, what, when, where, why. Example: On 8/19/2024, around 8:00 AM, Complainant's supervisor John told him in person to fix a residential roof even though Complainant wasn't provided fall protection. On 8/19/2024, around 4:00 PM, Complainant told his supervisor John in person that he did not feel safe working on the roof any longer without fall protection. On 8/20/2024, around 1:00 PM, John told Complainant in person he was being terminated for insubordination. 3. If Complainant was provided with a reason the adverse action was taken, explain what Complainant's claim of pretext is. Example: Complainant was never insubordinate and recently received a good evaluation from John. 4. Write a summarized statement of what Complainant's whistleblower claim is. Example: Complainant believes he was terminated on 8/20/2024 in retaliation for voicing concerns to manager John about not being provided fall protection on 8/19/2024.
REASON FOR ADMINISTRATIVE CLOSURE	Per NRS 618.445, a complaint must be filed within 30 days after the adverse action. Complainant's adverse action was on 8/20/2024, and they did not file their complaint until 10/01/2024. Complainant filed their complaint past the 30 day deadline, so their complaint is being administratively closed due to untimeliness.
REQUESTED REMEDY	N/A
COMPLAINT TAKEN BY	List name and title of the investigator who took complaint.
REVIEWED AND APPROVED BY	List name and title of the manager who approved the complaint.
INVESTIGATION ASSIGNED TO	N/A

ATTACHMENT D – NVOSHA Whistleblower Complaint Form (Docket and Dismissed Complaint)

NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER COMPLAINT

DATE COMPLAINT FILED	MM/DD/YYYY Example: 09/01/2024
NVOSHA WB CASE NO.	Last 2 digits of Fiscal Year – 001, 002, etc. Example: 25-001
COMPLAINANT INFORMATION	List Complainant's name, address, phone number and email. Example: William Smith 555 Sparrow Way Las Vegas, NV 89123 (702) 445-5252 Johnsmith@gmail.com
RESPONDENT INFORMATION	List Respondent's name, address, phone number and email. Example: Sturdy Construction 265 Meadow Ridge Drive Las Vegas, NV 89123 (702) 523-8181 sturdyconstruction@yahoo.com
SUMMARY OF ALLEGATION	1. Write the details of Complainant's job, including start date, position, duties, hours and wage. Example: Complainant started working for Respondent on 5/1/2024. Complainant was hired as a laborer to help build residential roofs. Complainant worked Monday through Friday, from 7 AM – 3 PM. Complainant made \$20/hour.

	2. Write a brief chronology of the events leading up to the adverse action, including their alleged protected activity, alleged adverse action, and alleged causal link. Include the who, what, when, where, why. Example: On 8/19/2024, around 8:00 AM, Complainant's supervisor John told him in person to fix a residential roof even though Complainant wasn't provided fall protection. On 8/19/2024, around 4:00 PM, Complainant told his supervisor John in person that he did not feel safe working on the roof any longer without fall protection. On 8/20/2024, around 8:00 AM, John asked Complainant to put some tools away and Complainant refused to do so. Complainant and John got into a verbal altercation. Complainant admitted he yelled profanities at John. On 8/20/2024, around 1:00 PM, John told Complainant in person he was being terminated for insubordination. 3. Write a summarized statement of what Complainant's whistleblower claim is. Example: Complainant believes he was terminated on 8/20/2024 in retaliation for voicing concerns to manager John about not being provided fall protection on 8/19/2024.
REASON FOR DOCKET AND DISMISS	During his intake interview, Complainant admitted he was insubordinate to his supervisor John the morning of 8/20/2024 and yelled profanities at him. Complainant admitted this would be grounds for termination. Based on Complainant's admissions, there is no causal link between Complainant's protected activity and his adverse action. Investigator recommended the complaint be administratively closed due to no causal link, but Complainant disagrees with the recommendation to administratively close his complaint.
REQUESTED REMEDY	N/A
COMPLAINT TAKEN BY	List name and title of the investigator who took complaint.
REVIEWED AND APPROVED BY	List name and title of the manager who approved the complaint.
INVESTIGATION ASSIGNED TO	List the name and title of the investigator who is assigned the docket and dismissed complaint.

