

HIOSH DIRECTIVE

DIRECTIVE NO: TED 01-00-020

EFFECTIVE DATE: October 1, 2016

SUBJECT: Mandatory Training Program for HIOSH Whistleblower Investigators

ABSTRACT

- Purpose:** This instruction provides State personnel with policy and guidelines for implementing competency-based training programs for HIOSH Discrimination/Whistleblower Investigation personnel
- Scope:** HIOSH-wide
- References:** OSHA Instruction CSP 01-00-004, State Plan Policies and Procedures Manual, September 22, 2015
29 CFR Part 1902, State Plans for the Development and Enforcement of State Standards
- Cancellations:** None.
- Action Offices:** All compliance branches.
- Originating Agency:** OSHA. States must comply with same or similar.

Executive Summary

This instruction provides guidance and direction to the Hawaii Occupational Safety and Health Division (HIOSH) concerning the policies and procedures for training Discrimination/Whistleblower Investigators.

In the Hawaii State Plan, senior level compliance officers, i.e. Environmental Health Specialists (EHSs) and Occupational Safety and Health Compliance Officers (OSHCOs) have the responsibility for Occupational Safety and Health compliance inspections; accident, including Fatality/Catastrophe investigations, and Discrimination/Whistleblower Investigations. Throughout this Directive, the term "Whistleblower Investigator" will be used.

It is essential that Whistleblower Investigators have the requisite knowledge, skills, capability and varied professional backgrounds to accomplish HIOSH's mission of promoting workplaces free from retaliation due to whistleblowing for Hawaii's working men and women. In this instruction, HIOSH has provided detailed guidance for training required during a CSHO's (includes both EHS and OSHCO) career as a Whistleblower Investigator. This Instruction identifies training paths that provide assistance to the branch managers in managing their training programs.

The goal of this instruction is to assist Whistleblower Investigators and HIOSH management with direction, guidance and training options that directly contribute to the Whistleblower Investigator's ability to represent HIOSH with a high degree of professional expertise.

Significant Differences with OSHA

This instruction describes how HIOSH will incorporate the new OSHA training program for Whistleblower Investigation personnel into its existing CSHO training. Since HIOSH Whistleblower Investigators are senior level compliance officers, no additional training in interviewing and written communication and report writing is necessary. Rather the Whistleblower Supervisory Investigator (SI) will provide guidance and on-the-job training specific to the nuances of whistleblower investigations.

Legal Concepts for HIOSH will also be on-the-job training and guidance. HIOSH Whistleblower Investigators do not find merit or no merit and do not investigate any other type of retaliation complaint other than the Hawaii equivalent to OSHA's 11(c) statute. HIOSH Whistleblower Investigators conduct full investigations similar to their accident or Fat/Cat Investigations which result in a determination and order of either discrimination with an order for appropriate relief, or no discrimination using preponderance of evidence rather than the "reasonable cause" of OSHA's whistleblower investigations.

Complaint resolution and settlement negotiations are also competencies that will be learned through on-the-job training and guidance from the SI.

The only formal training course to be taken by HIOSH Whistleblower Investigators will be the Whistleblower Investigation Fundamentals Course #1420 offered by the OSHA Training Institute (OTI) during the first year of conducting whistleblower investigations, supplemented by individual guidance covering legal concepts of preponderance of evidence for each whistleblower prima facie element, writing the Report of Investigation, and drafting the Determination Notice and Order.

This Instruction also gives notice that other courses designated as mandatory by OSHA's Assistant Secretary or by the HIOSH Administrator may be added to the CSHO's training program at any time.

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I. Purpose

This instruction provides HIOSH personnel with policy and guidelines for implementing competency-based training programs for HIOSH Whistleblower Investigators.

II. Scope

All CSHOs (OSHCOs and EHSs)

III. References

- A. OSHA Instruction CSP 01-00-004, State Plan Policies and Procedures Manual, September 22, 2015.
- B. 29 CFR 1902, State Plans for the Development and Enforcement of State Standards.

IV. Cancellations

None

V. Action Offices

- A. HIOSH Administrator
- B. Administration and Technical Support Branch
- C. Occupational Health Branch
- D. Occupational Safety Branch

VI. State Plan Impact

Under 29 CFR 1902.3(h) and 1956.10(g), State Plans must have a sufficient number of adequately trained and qualified personnel for the enforcement of standards. State Plans must have a formal documented training program for their Whistleblower Investigators which is revised as necessary to reflect current practices. The State Plan training program must be at least as effective as the federal program and must result in adequately trained personnel who can conduct effective investigations. State Plan training programs are not required to utilize OTI for course work, but may operate and implement state-run training courses.

VII. Goals and Objectives of Whistleblower Investigator Training.

The goal of this instruction is to assist Whistleblower Investigators and their management with training options that will directly contribute to the Whistleblower Investigator's professional expertise

A. Competency-Based Curriculum.

1. The OSHA Training Institute offers formal training for CSHOs with a competency-based approach to curriculum, using the Whistleblower Investigator Functional Competency Model as the guide. A copy of the Competency Model and related OTI curriculum can be found on OSHA's Directorate of Training and Education Intranet web pages.

2. It is important to note that competence cannot be achieved through formal training alone. Proficiency requires a mix of experiences over time, personal initiative to develop to the highest level of professionalism possible, and structured on-the-job training as well as formal training.
- B. The Training Program. OTI has developed a flexible program that incorporates technology-enabled learning, self-study packages, on-the-job experiences and formal training to accommodate the varying levels of experience and competence.
1. Course #1420 Whistleblower Investigation Fundamentals: CSHOs selected for the responsibility of whistleblower investigations will be required to complete the #1420 Whistleblower Investigation Fundamentals course offered by OTI during their first year of assignment.
 2. CSHOs will not be assigned to whistleblower investigations until they have successfully demonstrated the competencies of conducting complex investigations which require a high degree of skill in:
 - a. Planning and organizing the conduct of an investigation to optimize evidence gathering and documentation;
 - b. Interviewing both management and non-management personnel to elicit information necessary for resolution of the case, including obtaining written interview statements;
 - c. Report writing that is factual, concise, covering all required and pertinent facts that that contains succinct analyses of the legal issues as well as respondent defenses; and
 - d. Awareness of the legal aspects of the investigation being conducted, including the ability to research judicial or quasi-judicial cases, interpretations, and technical literature.
 3. Complementing the #1420 course, the Supervisory Investigator (SI) will ensure that before and after course attending, students are made aware of the structural and legal differences between HIOSH and OSHA Whistleblower investigations.
- C. Assistant Secretary or HIOSH Administrator Training Requirements. This Instruction gives notice that other courses designated as mandatory by OSHA's Assistant Secretary or by the HIOSH Administrator may be added to the CSHO's training program at any time.

VIII. Mandatory Whistleblower Investigator Training.

- A. Course #1420 Whistleblower Investigation Fundamentals Course. This is the only required formal training course for HIOSH Whistleblower Investigators.
- B. Technical Courses are not required for HIOSH Whistleblower Investigators as only seasoned investigators are assigned to Whistleblower cases. See VII.B.2. above.
- C. The Supervisory Investigator (SI) will work closely with all CSHOs assigned to whistleblower investigations to ensure that the investigations are thorough, efficiently conducted, and meet all HIOSH legal requirements. Where early settlement is determined to be of benefit to the complainant and reflects on the goal of whistleblower investigations to remove the chilling effect of retaliation on potential whistleblowers, the SI will provide guidance throughout the settlement process.

IX. Organizational Responsibilities.

A. Administrator

1. Ensure that money is budgeted and available to the Branches for identified CSHOs to attend Course #1420, Whistleblower Investigation Fundamentals Course within the first year of their assignment.
2. Evaluate and monitor the assignment of CSHOs to whistleblower cases to ensure that only those with the requisite skills are assigned.

B. Compliance Branch Managers. Branch Managers are responsible for ensuring and facilitating the development and training of the CSHOs under his/her supervision in order to meet the needs of the division. With regard to Whistleblower Investigations as will all complex investigations, the Branch Managers must ensure that each CSHO is provide the training and opportunity to develop professionally as a senior level CSHO. See TED 01-00-019, Mandatory Training Program for HIOSH Compliance Personnel.

C. Supervisory Investigator: The SI is responsible for working closely with the Branch Managers, both Occupational Safety and Occupational Health, to ensure that only qualified CSHOs are assigned to Whistleblower Investigations. SI responsibilities include, but are not limited to:

1. Review of the CSHO's training record and past performance evaluations to help determine which CSHOs are ready for the opportunity to further develop their investigative skills by conducting whistleblower investigations. Successful demonstration of conducting effective whistleblower investigations may result in re-allocation to a higher salary rating (SR) and other promotional opportunities;
2. The responsibility to provide potential whistleblower investigators with the requisite informal and on-the-job training necessary for successful performance under Hawaii Law. This also includes briefing CSHOs with the differences in the law and investigation process between that of HIOSH and OSHA; and
3. The responsibility for continued guidance and on-the-job training of HIOSH whistleblower investigators.

D. Compliance Safety and Health Officer (CSHO)

(Includes OSHCOs and EHSs)

The CSHO has the responsibility to perform to the best of his/her ability in all training programs. Specifically, the CSHO shall:

1. Discuss his/her performance and training progress with their supervisors.
2. Participate in the planning of training activities.
3. Fully attend, participate in, and complete all assigned training courses, seminars, and other events.

E. Administration and Technical Services Branch Manager and Staff

1. Work closely with the Administrator and the other Compliance Branch Managers to identify approximately how many CSHOs may be eligible for assignment to whistleblower investigations in a given year, such that the cost may be budgeted,

projected enrollment information can be provided to Region IX or OTI, and actual enrollment is made to secure a class slot.

2. Evaluate the effectiveness of the division training program and make recommendations for course improvement and/or additional training.

X. OSHA Training Institute Courses for Whistleblower Investigators.

Required Training. In the interest of nationwide consistency, OSHA expects that Whistleblower Investigator will attend the required course outlined in this instruction offered by the OSHA Training Institute.

XI. Waiver from Required Training Program.

There will be no waivers granted from taking Course #1420, Whistleblower Investigation Fundamentals Course.

No waivers are necessary for the OSHA Technical Courses (#1610, Interviewing Techniques for Whistleblower Investigators; #1630, Written Communication and Report Writing for Whistleblower Investigators; #2710, Legal Concepts for Whistleblower Investigators, and #2720, Whistleblower Complaint Resolution and Settlement Negotiations) as they are not necessary in achieving HIOSH's mission of promoting workplaces free from retaliation due to whistleblowing for Hawaii's working men and women. As HIOSH only assigns seasoned CSHOs with the requisite skills of conducting complex investigations to whistleblower investigations, the only formal course needed is the #1420 Fundamentals Course.

XII. Time Extensions.

Time extensions may be required when the OSHA Training Institute does not offer the #1420 course within the first year of the CSHO's assignment, or the course is full and the CSHO is on a wait list.

No formal documentation of time extensions is needed other than a brief note in the CSHOs training log.

XIII. Monitoring the Training Program.

Monitoring the CSHO's progress as whistleblower investigator throughout the first few whistleblower cases is critical to ensure the success of the whistleblower program. The Supervisory Investigator must work closely with new whistleblower investigators until he or she has demonstrated a sound understanding of the law and investigative techniques.

A. The Supervisory Investigator (SI). The Supervisory Investigator (SI) shall:

1. Conduct a review with the CSHO following each training activity (self-study, OJT or classroom). This review provides the supervisor with information on the progress of the Whistleblower Investigator and can assist in identifying areas requiring further training.
2. Determine when the Whistleblower Investigator has sufficient experience to participate fully in developing the actual case file; the OJT review may be discontinued when this has been effectively accomplished.

3. If recurring issues arise during the SI's case file review, determine what additional training or guidance is necessary in order to resolve performance issues.

B. Administration and Technical Services (ATS) Manager. The Administration and Technical Services Branch has responsibility for the review of cases resulting in complainant contests. As such, the input of the reviewers is vital in the performance evaluation of Whistleblower Investigators. The ATS Manager is part of the HIOSH team whose responsibility is to evaluate program effectiveness, including all components of the program (such as training), and make recommendations for improvement.

XIV. Continuation of Whistleblower Investigator Development

A. Continuing Education. Non-mandatory. Whistleblower Investigators may wish to continue to develop the knowledge and skills necessary to conduct investigations. There are many training opportunities outside traditional OSHA Training Institute courses, including but not limited to:

1. Local community college and university courses related to report writing and business operations.
2. Online courses offered through Learning Link and private sector training groups
3. Technical training sessions at conferences related to whistleblower protection.
4. Public sector training institutes that offer courses related to whistleblower or related investigation
5. Independent study on topics related to whistleblower investigations

The Whistleblower Investigator should be provided time to attend training sessions and/or conduct independent study on materials related to investigations as identified in their Individual Development Plan (IDP).

B. Role of Individual Development Plans. Mandatory. An Individual Development Plan (IDP) is a dynamic plan that helps the Whistleblower Investigator achieve organizational and career goals by identifying needs, actionable training goals, and documenting progress. IDPs are required and must be updated annually. An IDP can help a CSHO as Whistleblower Investigator:

1. Acquire knowledge and skills required to achieve the functional competencies of a Whistleblower Investigator.
2. Build expertise as a HIOSH Whistleblower Investigator.
3. Continue professional development throughout his/her career.

XV. Evaluation

- A. OTI and DTE distribute course evaluation surveys at the end of each class. They provide valuable feedback from the student's perspective to determine the perceived value and impact of instruction. It also serves as a tool to affect changes to course objectives, course content and presentation methods.
- B. OTI and DTE administer written tests to students both at the beginning (pre-test) and at the end (post-test) of all instructor-led courses. The pre- and post-test results can

be compared to measure the effectiveness of the training to convey the objectives of the course. The results of the comparison serve as a tool for continued improvement of course content and delivery.

- C. Following attendance at an instructor-led course at OTI, after a particular time interval, DTE and OTI request feedback from the student and the student's supervisor to assess the transference of learning from the classroom to practical application in the field. This feedback contributes to continued improvement in the course and curriculum.

Appendix A. Recommended Whistleblower Investigator Training

Background and Description of Appendix A. This Appendix is recommended as a guideline for the Supervisory Investigator.

The OSHA Training Institute (OTI) offers formalized training for Whistleblower Investigators through its competency-based approach to curriculum. As a professional, the Whistleblower Investigator will acquire additional knowledge, skills, abilities and behaviors through other sources such as Self-Instruction (SI) and On-the-Job Training (OJT) which enhance the formal training a newly-assigned Whistleblower Investigator receives at OTI. This Appendix offers recommendations for both SI and OJT.

Time allotted to accomplish SI and OJT assignments should be compatible with the newly-assigned Whistleblower Investigator’s current knowledge, skill, and experience. The Supervisory Investigator should verify the Whistleblower Investigator’s successful completion of SI and OJT assignments. Training assignments may also be supplemented by other comparable task assignments deemed appropriate and/or equivalent by the Supervisory Investigator.

Type of Activity	Activity Description	Date Completed & Initials ¹
SI	Review Section 396-8(e), Hawaii Revised Statutes – the HIOSH Discrimination/Whistleblower Law Review Chapter 12-57, Hawaii Administrative Rules, “Discrimination Against Employees Exercising Rights Under Chapter 396, Hawaii Revised Statutes.”	
SI	Review the Whistleblower Investigator Training Directive, TED 01-00-020, effective October 1, 2016.	
SI/OJT	Review and become familiar with the HIOSH Discrimination Investigation Manual, CPL 2-03-007, effective September 1, 2016	
Attend OTI Course #1420, Whistleblower Investigator Investigation Fundamentals (anytime during initial 12 months of assignment to whistleblower investigations)		
OJT	Describe and apply the elements of a <i>prima facie</i> case and understand the law on timeliness of complaints.	
SI	Review past whistleblower case files	
OJT	Investigate Resources and Tools <ul style="list-style-type: none"> • The DWPP website, www.whistleblowers.gov – for statutes, regulations, instructions and cases relevant to OSHA’s 11(c) whistleblower cases 	

¹ Initials of both supervisor and CSHO required.

Type of Activity	Activity Description	Date Completed & Initials ²
OJT	Accompany Senior level CSHO (EHS IV or OSHCO IV) on a discrimination/whistleblower investigation to learn: <ul style="list-style-type: none"> • Complaint intake and screening • Opening with the complainant • Docketing/preparation and sending letters • Preparation for investigation • Opening with Respondent • Interviews • Request for data/documents • Reviewing Respondent's position statement • Complainant's rebuttal • Determining damages in order to determine appropriate relief • Compose Report of Investigation (ROI) • Closing with Respondent and Complainant • Drafting Administrator's Determination Notice and Order (DNO) • Creating, organizing, and maintaining a case file • Settlement and negotiation • Redacting documents prior to sending case to contest and for requests for information. 	
OJT	Conduct intake and screening of complaints	
OJT	Accompany Senior Level Whistleblower Investigator at least one more time, taking on greater responsibility with the case	
OJT	Conduct a whistleblower investigation independently.	