Discrimination Investigation Manual

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
January 1, 2018

HIOSH INSTRUCTION

DIRECTIVE NO.: CPL 02-03-007	**EFFECTIVE DATE:** January 1, 2018
SUBJECT: DISCRIMINATION (WHISTLEBLOWER) INVESTIGATION MANUAL	

ABSTRACT

Purpose: This Instruction implements the HIOSH Discrimination (Whistleblower) Investigation Manual and supersedes the September 1, 2016 Instruction. This manual outlines procedures and other information relative to the handling of retaliation complaints under the Hawaii discrimination statute, §396-8(e), Hawaii Revised Statutes (HRS), and may be used as a ready reference.

Scope: HIOSH-wide.

References: §396-8(e), HRS

Chapter 57, Hawaii Administrative Rules (HAR): Discrimination Against Employees Exercising Rights Under Chapter 396, H RS.

OSHA Instruction CPL 02-03-007, *Whistleblower Investigations Manual*, effective January 29, 2016.

HIOSH Instruction CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, August 22, 2007, adopted by HIOSH on December 19, 2007

HIOSH Instruction CPL 02-00-098 (formerly CPL 2.98), *Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, October 12, 1993, adopted by HIOSH on December 20, 1993.

Cancellations: HIOSH Instruction Discrimination Investigation Manual dated September 1, 2016, CPL 02-03-002 *Whistleblower Investigations Manual* and any other previous version of the Discrimination (Whistleblower) Investigation Manual.

State Impact: Notice of Intent, Adoption, and Submission of a Plan Change Supplement Required. See Chapter 1, Paragraph VI.

Action Offices: All compliance branches

Originating Agency: OSHA. States must comply with same or equivalent.

Abstract

Approval: By and Under the Authority of:

Norman Ahu
Administrator, Hawaii Occupational Safety & Health Division

DISCLAIMER

This manual is intended to provide guidance regarding some of the internal operations of the Hawaii Occupational Safety and Health Division (HIOSH), and is solely for the benefit of the State. 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 HIOSH or the Department of Labor and Industrial Relations (DLIR). Statements which reflect current court precedents do not necessarily indicate acquiescence with those precedents.

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Chapter 1
PRELIMINARY MATTERS

I. Purpose

This instruction implements the HIOSH Discrimination (Whistleblower) Investigations Manual, and supersedes all prior instructions. This manual outlines procedures, and other information relative to the handling of retaliation complaints under §396-8(e), Hawaii Revised Statutes (HRS), and may be used as a ready reference.

II. Scope

HIOSH-wide.

III. References

§396-8(e), HRS

Chapter 57, Hawaii Administrative Rules (HAR): Discrimination Against Employees Exercising Rights Under Chapter 396, Hawaii Revised Statutes.

OSHA Instruction CPL 02-03-003, *Whistleblower Investigations Manual*, effective September 20, 2011.

HIOSH Field Operations Manual, CPL 02-00-159, effective April 15, 2016.

HIOSH Instruction CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, August 22, 2007, adopted by HIOSH on December 19, 2007

HIOSH Instruction CPL 02-00-098 (formerly CPL 2.98), *Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, October 12, 1993, adopted by HIOSH on December 20, 1993.

IV. Cancellations

HIOSH Instruction DIS 0-0.9, *Discrimination Investigation Manual* dated, September 1, 2016; CPL 02-03-002 Whistleblower Investigations Manual and any other previous version of the Discrimination (Whistleblower) Investigation Manual.

V. Action Information

A. Responsible Office

HIOSH Administrator

B. Action Offices

Compliance Branches, and ATS Branch

C. Information Offices

Consultation and Training Branch.

VI. State Impact

A. Notice of Intent and Equivalency Required

The Hawaii State Plan has statutory authority parallel to section 11(c) of the OSH Act, and has established policies and procedures for occupational safety and health protection that exceed federal 11(c) implementing policies.

B. Appeal Process

The Hawaii State Plan, by state law, includes an appeal process for both complainants and employers. In addition, either party may request an informal conference to present additional information or other points of view which may result in a redetermination.

C. Dual Filing

The Hawaii State Plan describes the procedures for informing private sector complainants of their right to concurrently file a complaint under section 11(c) with Federal OSHA within 30 days of the alleged retaliatory action. Briefly, such information is included in the state's Job Safety and Health Poster and complaint intake procedures include notifying private sector complainants of their right to file with Federal OSHA.

D. Reopening Cases

HIOSH does not have the authority to reopen cases, as determinations become final if not contested within 20 calendar days. However, if contested, the Hawaii Labor Relations Board will hear the cases *de novo* at which time new facts or other circumstances may be introduced.

E. Referrals

Hawaii State Plan procedures include training of CSHOs and others involved in complaint intake in federal whistleblower statutes administered by OSHA so that appropriate referrals can be made.

F. Action

Hawaii policies and procedures are at least as effective as those of OSHA.

VII. Background

A. The Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is the enabling legislation designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the state. By terms of the Law, every employer is required to furnish each employee employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm and,

further, to comply with occupational safety and health standards promulgated under the Law.

B. The Law provides, among other things, for the adoption of occupational safety and health standards, inspections and investigations of workplaces, and record keeping requirements. Enforcement proceedings initiated by the Department of Labor and Industrial Relations, review proceedings before an independent quasi-judicial agency (Hawaii Labor Relations Board), and judicial review are provided by the Law.

C. Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Law, Chapter 396, HRS. Moreover, effective implementation of the Law and achievement of its goals depend in large measure upon the active and orderly participation of employees, individually and through their representatives, at every level of safety and health activity. Such participation and employee rights are essential to the realization of the fundamental purposes of the Law.

D. §396-8(e), HRS, provides, in general, that no person shall discharge, suspend or in any manner discriminate (retaliate) against any employee because the employee has exercised his/her rights under the Law. The Administrator has over-all responsibility for the investigation of discrimination complaints under Section §396-8(e), HRS. The Administrator has authority to investigate all complaints and render a Determination Notice and Order, as well as negotiate settlement of complaints on behalf of the complainant.

VIII. The Hawaii Occupational Safety and Health Discrimination Law, Section 396-8(e), Hawaii Revised Statutes

The Hawaii Occupational Safety and Health Division (HIOSH) administers only one discrimination or whistleblower law. Section 396-8(e), HRS is substantially similar to that of OSHA's 11(c) whistleblower statute. Rules pertaining to the administration of Section 396-8(e), HRS are contained in §12-57, Hawaii Administrative Rules (HAR).

A. Coverage

1. Any private or public-sector employee employed within the state of Hawaii with the exception of employees covered by OSHA, e.g., employees of the U.S. Postal Service (USPS), and those within the jurisdiction of other Federal agencies (see Chapter 17 of the HIOSH FOM); and Federal employees who are covered under Executive Order 12196 and 29 CFR 1960.46.
2. Private sector employees are also covered by OSHA and may choose to dual file with OSHA to afford the greatest opportunity for satisfactory resolution of their complaint. See Chapter 7, III.D.

B. Protected Activity

Activities protected by Section 396-8(e), HRS include, but are not limited to, the following:

1. Occupational safety or health complaints filed orally or in writing with OSHA, HOSH, the National Institute of Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as the fire department, health department, or police department. The time of the filing of the safety or health complaint in relation to the alleged retaliation and employer knowledge are often the focus of investigations involving this protected activity. Section 396-8(d), HRS requires HIOSH to notify complainants when the division decides not to take compliance action, stating the reasons therefor, and including the procedures for informal review of such a decision.
2. Filing oral or written complaints about occupational safety or health with the employee's supervisor or other management personnel.
3. Instituting or causing to be instituted any proceeding under or related to HIOSH Law or the OSH Act. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a §396-8(d) complainant of a determination not to take compliance action, employee contests of abatement dates, employee initiation for modification or revocation of a variance, employee judicial challenge to an OSHA, and employee appeal of a Hawaii Labor Relations Board decision and order. Filing an occupational safety and health grievance under a collective bargaining agreement would also fall under this category. Communicating with the media about an unsafe or unhealthful workplace condition is also in this category. *Donovan v. R.D. Andersen Construction Company, Inc.,* 552 F.Supp. 249 (D. Kansas, 1982).
4. Providing testimony or getting ready to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, depositions during inspections and investigations.
5. Exercising any right afforded by HIOSH Law. The following is not an exhaustive list. The broad category includes communicating orally or in writing with the employee's supervisor or other management personnel about occupational safety and health matters, including asking questions; expressing concerns; reporting a work-related injury or illness; requesting a safety data sheet (SDS); and requesting access to records, copies of the HIOSH Law/OSH Act, HIOSH/OSHA regulations, HIOSH/OSHA standards, or plans for compliance (such as the hazard communication program or the bloodborne pathogens exposure control plan), as allowed by the standards and regulations. This right is derived both from the employer's obligation to comply with HIOSH/OSHA standards (Section 396-6, HRS and administrative rules, Title 12, Subtitle 8), and to keep the workplace free from recognized hazards causing or likely to cause death or serious physical harm, as well as the employee's obligation to comply with HIOSH/OSHA standards and regulations (§396-8(a), HRS). Such communication is essential to the effectuation of these provisions. *Cf. Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980) (right to refuse imminently dangerous work appropriate aid to

the full effectuation of the general duty clause). This communication also carries out methods noted by the Law to implement its goal of assuring safe and healthful working conditions, i.e., "…encouraging employers and employees in their efforts of employment and to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions…, providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions… [and] …encouraging joint-labor management efforts to reduce injuries and disease arising out of employment." 29 U.S.C., §651(b)(1), (2), and (13).

Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with union officials or co-workers. This right is derived from the employer and employee obligations and 29 U.S.C. §651(b)(1), (2), and (13) noted in the paragraph above. Such communication is vital to the fulfillment of those provisions. See Memorandum of Understanding between OSHA and NLRB, 40 FR 20083 (June 16, 1975). (Section 11(c) rights overlap with the right under section 7 of the National Labor Relations Act to "…engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"; cases involving the exercise of such rights in connection with occupational safety or health should primarily be handled as 11(c) cases.)

This category (exercising any right afforded by the Law/Act), also includes refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury. The HIOSH administrative rule regarding work refusals can be found at §12-57-7(b), HAR. An employee has the right to refuse to perform an assigned task if he or she:

a. Has a reasonable apprehension of death or serious injury, and

b. Refuses in good faith, and

c. Has no reasonable alternative, and

d. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting HIOSH, and

e. Where possible, sought from his or her employee, and was unable to obtain, a correction of the dangerous condition.

An employee also has the right to comply with, and to obtain the benefits of, HIOSH/OSHA standards and rules, regulations, and orders applicable to this or her own actions or conduct. This right is derived from Section 396-6, HRS, which requires employers to comply with HIOSH/OSHA standards and from Section 396-8(d), HRS, which provides: "(a) Employee compliance. Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued under this chapter which are applicable to the employee's own actions and conduct." Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by a HIOSH standard, to refuse to purchase PPE (except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work. See §12-57-7(b)(1),

HAR. To be a protected activity, a refusal to work must meet the criteria set forth in §12-51-7(b)(2), HAR, as explained above.

An employee has the right to participate in an HIOSH/OSHA inspection. (§396-8(c), HRS). He or she has the right to communicate with a HIOSH compliance officer, orally or in writing (§12-51-10, HAR). Subject to §12-51-8, HAR, an authorized representative of employees has a right to accompany the HIOSH compliance officer during the walkaround inspection. He or she must not suffer retaliation because of the exercise of this right. An employee representative has the right to participate in an informal conference, subject to HIOSH's discretion, as specified in §12-51-21, HAR.

An employee has a right to request information from HIOSH. Although not explicitly stated in HIOSH Law or rules, it is reasonable to conclude that access to information is a right afforded all citizens of the state and for employees, a necessary part of participation in occupational safety and health matters.

IX. Functional Responsibilities

A. Administrator. The Administrator has overall responsibility for all discrimination investigation and outreach activities, as well as for ensuring all HIOSH personnel, especially compliance safety and health officers (CSHOs), have a basic understanding of the rights afforded to employees under the discrimination (whistleblower) section of the Law and are trained to take discrimination (whistleblower) complaints via intake form(s). The Administrator is authorized to issue determinations and approve settlement of complaints filed under the Law. In addition, the Administrator performs the following functions:

1. Developing policies and procedures for the Whistleblower (Discrimination) program.

2. Developing and conducting outreach programs and activities to promote awareness of discrimination provisions among employers and employees and their representatives.

B. Supervisory Investigatory (SI). Under the guidance and direction of the Administrator, the Supervisory Investigator (SI) is responsible for implementation of policies and procedures for the effective supervision of whistleblower investigations and their resolution, including the following functions:

1. Receiving and reviewing whistleblower complaints to determine whether the allegations warrant field investigation. The Intake Officer must be familiar with other statutes covered by the federal whistleblower program and refer cases to OSHA if he/she determines that the case alleges protected activity under another statute. For a complete listing of federal whistleblower statutes go to http://www.whistleblowers.gov/statutes_page.html.

2. Ensuring that safety, health, or other regulatory ramifications are identified during complaint intake, and when necessary, making referrals to the appropriate office or agency.

3. Drafting the Determination Notice and Order where the *prima facie* elements for discrimination have NOT been met by the complainant.

4. Initiating the discrimination complaint case file and entering initial information into the HIOSH statistical database for case tracking purposes.

5. Assigning investigative cases to individual investigators.

6. As needed, investigating or conducting settlement negotiations for cases that are unusual or of a difficult nature.

7. Providing guidance, assistance, supervision, and direction to investigators during the conduct of investigations and settlement negotiations.

8. Reviewing Reports of Investigation (ROI) and Discrimination Notices of Determination (DNO) for comprehensiveness, technical accuracy, grammatical correctness, and conformance with Division policies and procedures, and presenting recommendations to the Administrator.

9. Providing training (formal and field) for investigators.

10. Developing outreach programs and activities.

11. Processing appeals that will be heard in front of the Hawaii Labor Relations Board to the Hawaii Labor Relations Board (HLRB).

12. Distributing significant legal developments to field staff.

13. Maintaining a statistical database on discrimination investigations.

14. Assisting in developing legislation on discrimination matters.

C. **Administration and Technical Support Branch (ATS) Manager**. The ATS Manager, or designee, has the following functions:

1. Scheduling and coordinating discrimination investigation training for management and staff.

2. Conducting audits of case files to ensure conformance with policies and procedures as well as State law.

3. Investigating Complaints About State Program Administration (CASPA) that arise in discrimination cases.

D. **Investigator**. The investigator carries out responsibilities under the direct guidance and supervision of the SI which include, but are not limited to, the following functions:

1. Reviewing investigative and/or enforcement case files for background information concerning any other proceedings which relate to a specific complaint. As used in this manual, an “enforcement case” refers to an inspection or investigation conducted by a HIOSH Compliance Safety and Health Officer (CSHO or HIOSH OSHCO and HIOSH EHS) or such

inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.

2. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.

3. Following up on leads resulting from interviews and statements.

4. Interviewing and obtaining statements from respondents' officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.

5. Applying knowledge of the legal elements and evaluating the evidence revealed, analyzing the evidence, and recommending appropriate action to the SI.

6. Writing the Report of Investigation (ROI) and submitting to SI for review and approval.

7. Maintaining awareness of the need to conduct investigations in a timely manner in order to obtain the best possible outcomes for the complainant as well as remaining employees of the respondent. §396-8(e)(7), HRS, requires that the department issue its findings and determinations within 90 days of receipt of the complaint.

8. Negotiating with the parties to obtain a settlement agreement that provides prompt resolution and satisfactory remedy and negotiating with the parties when they are interested in early resolution of ay case in which the investigator has not yet recommended a determination.

9. Monitoring implementation of settlement agreements, HLRB orders, court orders, as assigned, determining specific actions necessary and the sufficiency of action taken or proposed by the respondent. If necessary, recommending further legal proceedings to obtain compliance.

10. Composing a draft Determination Notice and Order (DNO) for review by the SI and Administrator.

11. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.

12. Responsible for maintaining a general knowledge of protections under Section §396-8(e), HRS, and informs employers and employees of their responsibilities and rights under the Law.

13. Maintaining case files that include some or all of these elements.

14. Assisting the SI in whistleblower matters with other agencies and with the general public to perform outreach activities.

E. **HIOSH Staff**. The HIOSH staff includes OSHCOs, EHSs and Consultants. Each staff member is responsible for maintaining a basic understanding of the employee protection provisions of the Law, in order to advise employers and

employees of their responsibilities and rights. Each staff member must accurately record information about potential complaints on an HIOSH-87 form or the HIOSH equivalent and immediately forward to the Supervisory Investigator (SI). In every instance, the date of initial contact must be recorded.

F. **Deputy Attorney General (DAG)**. The DAG represents the Director before the HLRB, and any subsequent court proceedings under the Law. The DAG may also be asked to provide legal advice in certain situations.

CHAPTER 2
INTAKE AND EVALUATION OF COMPLAINTS

I. Scope

This chapter explains the general process for receipt of discrimination (whistleblower) complaints under §396-8(e), HRS, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in OSHA's Integrated Management Information System (IMIS).

II. Receipt of Complaint

Any employee, former employee, or his or her authorized representative is permitted to file a discrimination complaint with HIOSH. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, HIOSH will accept the complaint in any language. HIOSH will be accepting electronically-filed complaints on its website, via HIOSH webmail dlir.hiosh.complaints@hawaii.gov or referral thru the OSHA area office, or referral thru the Office of the Whistleblower Protection Program (OWPP). Although §396-8(e), HRS, states that complaints must be filed "in writing," that requirement is satisfied by HIOSH's practice of reducing all orally-filed complaints to writing[1]. Potential complaints received by HIOSH should be logged or in some manner tracked to ensure delivery and receipt by the SI. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or FedEx tracking information, emails, and fax cover sheets.

A. For orally filed complaints, when a potential complaint is received at HIOSH, the receiving officer must accurately record the pertinent information on an HIOSH-87 form and the appropriate intake worksheet and immediately forward it to the SI. In every instance, the date of the initial contact must be recorded. Complaints where the initial contact is in writing do not require the completion of an HIOSH-87 form, as the written filing will constitute the complaint.

B. Complaints received at a District Office or through other governmental units normally are forwarded to the SI for intake evaluation as soon as possible.

C. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the name, address, and phone number of the respondent or respondents; date of filing; date of adverse action; a brief summary of the alleged retaliation addressing the *prima facie*

[1] See, *e.g.*, *Roberts v. Rivas Environmental Consultants, Inc.*, 96-CER-1, 1997 WL 578330 at *3 n. 6 (Admin Review Bd. Sept 17, 1997)(complainant's oral statement to OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the "in-writing" requirement of CERCLA, 42 U.S.C. §9610(b), and the Department's accompanying regulations in 29 C.F.R. Part 24); *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, 1983 WL 189787, at *3 n. 1 (Sec'y of Labor Apr. 25, 1983)(adopting administrative law judge's findings that complainant's filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency's memorandum of the complaint satisfied the "in writing" requirement of the ERA and the Department's accompanying regulations in 29 C.F.R. part 24)

elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus); and, if known, whether a safety, health, or other statutorily protected complaint has also been filed with HIOSH or another enforcement agency.

III. Intake and Docketing of Complaints

A. Intake of Complaints

As soon as possible upon receipt of the potential complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation. This usually requires preliminary contact with the complainant to obtain additional information.

1. Whenever possible, the evaluation of a potential complaint should be completed by the investigator that the SI anticipates will be assigned the case, and the evaluation should cover as many details as possible. When practical and possible, the investigator will conduct fact-to-face interviews with complainants. When the investigator has tried and failed to reach a complainant at various times during normal work hours and in the evening, he or she must send a letter to the complainant stating that attempts to reach the complainant have been unsuccessful, and stating that if the complainant is interested in pursuing investigation, the complainant should make contact within 7 days of receipt of the letter, or HIOSH will assume that the individual does not wish to pursue a complaint, and no further action will be taken. This letter must be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of delivery must be preserved in the file with a copy of the letter to maintain accountability.

2. As a part of the intake process, the SI will verify that applicable coverage requirements have been met and that the *prima facie* elements of the allegation have been properly identified. Complaints which pass this initial screening will be docketed for investigation. The term “docket” means to formally notify both parties in writing of HIOSH’s receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the IMIS (the IMIS automatically assigns the local case number).

3. Complaints which do not allege a *prima facie* allegation, or are not filed within the 60-day statutory time limit for §396-8(e), HRS, may be closed administratively -- that is, not docketed – provided the complainant accepts this outcome. When a complaint is thus “screened out,” the Intake Officer must appropriately enter the administrative closure in the IMIS. Additionally the SI must send a letter to the complainant explaining the reason(s) the complaint is not going to be investigated. A copy of the letter, along with any related documents must be preserved for five years, as are whistleblower case files, per ADM 12-0.5A.

4. However, if the complainant refuses to accept this determination, the case must be docketed and a Determination Notice and Order (DNO) that itemizes the

reasons why the complaint is being dismissed in terms of timely filing and/or *prima facie* elements not met must be drafted for the SI concurrence. The DNO will include information about the right to appeal.

5. HIOSH must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact the respondent soon after the intake interview has been conducted and docketed if he or she believes an early resolution may be possible.

B. Docketing

The term "to docket" mean to record the case in the Integrated Management Information System (IMIS), which automatically assigns the local case number, and to formally notify both parties in writing of HIOSH's receipt of the complaint and intent to investigate. The appropriate way to docket a case file by title is: Respondent/Complainant/Local Case Number.

1. Cases that are assigned for investigation must be given a local case number, which uniquely identifies the case. The IMIS automatically designates the case number when a new complaint is entered into the system. All case numbers follow the format 11-222, where each series of numbers is represented as follows:

   a. The fiscal year

   b. The serial number of the complaint for the fiscal year

2. Cases involving multiple complainants and/or multiple respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.

3. As part of the docketing procedures, when a case is opened for investigation, the SI must send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an investigator. The name, address, and telephone number of the investigator will be included in the docketing letter. A Designation of Representative Form (see sample at the end of this chapter) will be attached to this letter to allow the complainant the option of designating an attorney or another official representative. The complainant notification may either be sent by certified U.S. mail, return receipt requested or via a third-party commercial carrier that provides delivery confirmation, with the tracking number included on the first page of the notification letter, or may be hand-delivered to the complainant.

4. Also at the time of docketing, or as soon as appropriate, the SI must prepare a letter notifying the respondent that a complaint alleging retaliation (discrimination) has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward

the respondent letter could adversely impact the respondent's due process rights and the timely completion of the investigation.

a. A copy of the whistleblower complaint should be sent to the respondent along with the notification letter.

b. A Designation of Representative Form will be attached to this letter to allow the respondent the option of designating an attorney or another official representative.

c. The respondent notification may either be sent by certified U.S. mail, return receipt requested, with the tracking number included on the first page of the notification letter, or may be personally served on the respondent. Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

d. Prior to sending the notification letter, the SI must first attempt to determine if an enforcement is pending. If it appears from the complainant and/or the initial contact with the complainant that such an inspection may be pending, then the SI must contact the appropriate branch to inquire about the status of the inspection. If a short delay is requested, then the notification letter must not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.

IV. Timeliness of Filing

A. Timeliness

Discrimination (whistleblower) complaints must be filed within 60 calendar days of the adverse action. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant. Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at a Department of Labor and Industrial Relations or OSHA office will be considered the date of filing. If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a state holiday, or if HIOSH offices are closed, then the next business day will count as the final day.

B. Dismissal of Untimely Complaints

Complaints filed after the deadline will normally be closed without further investigation, provided the complainant agrees to withdraw his/her complaint for untimeliness. However, there are certain extenuating circumstances which could justify tolling these statutory filing periods for equitable principles – see C. below. If the complainant does not withdraw or agree that the complaint was untimely, a Determination Notice and Order must be issued if the complaint was untimely and there was no valid extenuating circumstance. The general policy is outlined below, but each case must be considered individually. Additionally, when it

appears that equitable tolling may be applicable, it is advisable for the investigator to seek concurrence from the SI before beginning the investigation.

C. Equitable Tolling

The following are reasons that may justify the tolling of a deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. However, these circumstances are not to be considered all-inclusive, and the reader should refer to §12-57-8(d)(2), HAR and current case law for further information.

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

2. The employee is unable to file within the statutory time period due to debilitating illness or injury.

3. The employee is unable to file within the required period due to a natural or man-made disaster such as a major storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.

4. The employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the complainant (e.g., HIOSH discrimination complaint is filed with the Hawaii Civil Rights Commission).

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

D. Conditions Which Will Not Justify Extension of the Filing Period

1. Ignorance of the statutory filing period.

2. Filing of unemployment compensation claims.

3. Filing a workers' compensation claim.

4. Filing a private lawsuit.

5. Filing a grievance or arbitration action.

6. Filing a retaliation complaint with another state plan state or another agency that has the authority to grant the requested relief.

V. Scheduling the Investigation

A. The SI must assign the case for investigation. Ordinarily, the case will be assigned to an investigator, taking into consideration such factors as the investigator's current caseload, work schedule, and statutory time frames. The assignment will be documented by means of an assignment memorandum to the investigator. In cases involving complex issues or unusual circumstances, the SI may conduct the investigation or assign a team of investigators.

B. As part of the case assignment process, the SI will transmit the complaint materials, including the case file prepared by the Intake Officer with the original complaint and other evidentiary materials supplied by the complainant.

C. The investigator should generally schedule discrimination investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the SI. Investigators may perform enforcement inspections or other assignments as long as they do not interfere with the timely investigation and resolution of the discrimination case.

VI. Case Transfer

A. Careful planning must be exercised in the docketing of cases to avoid the need to transfer case responsibility from one investigator to another. However, if caseload or case priority considerations warrant the transfer of a case, the parties should be promptly provided with the name and telephone number of the newly assigned investigator. Any such transfer must be documented in the case file and IMIS.

B. Only the Enforcement Branch Managers are authorized to transfer cases among investigators under their supervision. The transfer of cases between investigators under separate supervisors must be accomplished through the Administrator's office.

VII. Investigative Assistance

When assistance from another island, OSHA, or other state is needed to interview witnesses or obtain evidence, the investigator requiring assistance must contact the SI, who must coordinate with the other offices/agencies through the Administrator.

Appendix to Chapter 2

Intake and Evaluation Forms and Letters

HIOSH Discrimination Case Activity Worksheet – HIOSH-87

Note: a separate worksheet must be completed for each complainant.

Select One: Letter from Complainant with Original Signature / Oral / E-mail / OSHA Referral / Other _____

Complainant Information		
Last Click here to enter text.	First Click here to enter text.	Middle Click here to enter text.
Address Click here to enter text.		
City Click here to enter text.	State Click here to enter text.	Zip Click here to enter text.
Phone 1 Click here to enter text.	E-mail Click here to enter text.	
Phone 2 Click here to enter text.	Phone 3 Click here to enter text.	

Respondent Information		
Name Click here to enter text.	☐ Company ☐ Individual	
Address Click here to enter text.		
City Click here to enter text.	State Click here to enter text.	Zip Click here to enter text.
Phone 1 Click here to enter text.	E-mail Click here to enter text.	
Phone 2 Click here to enter text.	Phone 3 Click here to enter text.	
# of employees Click here to enter text.	Unionized? ☐ Yes ☐ No	
Summary of alleged retaliation (protected activity, respondent knowledge, adverse action, nexus) Click here to enter text.		
I certify that the complaint was filed with me on :		Click here to enter a date.
Timely ☐	Untimely ☐	
Print Name:	Click here to enter text.	
Signature:	Title: Click here to enter text.	Date: Click here to enter a date.
Informed complainant of dual filing rights ☐		
HIOSH Jurisdiction Y N Referral Action Click here to enter text.		
Comments: Click here to enter text.		

HIOSH Discrimination/Whistleblower Complaint Intake Analysis

Intake Reviewer: _____

COMPLAINANT(CP)	
CP Mailing Address:	
Form of Complaint: Oral / E-mail / Telephoned / Letter / Other _____ ☐ Received a letter from CP with original signature YES / NO ☐ Informed dual filing rights	
RESPONDENT	
ALLEGATION	

TIMELINESS		
Date Complaint Filed:		
Date of Last Adverse Action		
Any Equitable Tolling? (describe)		
COMPLAINT IS TIMELY:	Yes : ☐	No: ☐
JURISDICTION ISSUES? (describe)		
PROTECTED ACTIVITY (PA):		
Describe PA		
EMPLOYER KNOWLEDGE OF PA:		
How CP knows ER knew *Or* If person with knowledge of PA took part in AA decision.		
ADVERSE ACTION (AA)		
Describe AA		
NEXUS:		
Timing, animosity (describe)		
PRETEXT		
Was CP given pretextual reason for AA? If yes, describe:		
Any disparate treatment?		

Based on the above, I recommend that (check one):

☐ The case be assigned for investigation

☐ The complainant be advised that there is insufficient evidence to proceed with an investigation and ask him/her to withdraw the complaint.

☐The complaint is untimely, and a DNO be issued for untimeliness.

Signature of Reviewer Date

Follow-Up Information:

Assigned for Investigation:	
Investigator Assigned:	
Date Assigned:	
Complainant Notification re Insufficient Evidence or Untimeliness/Asked to Withdraw	
Date of Call/Interview/Etc	
Date of Withdrawal	
In Writing ☐ Oral ☐	
Complainant does not Wish to Withdraw	
☐Assigned to Investigator for Further Information	
☐Sufficient Evidence for DNO-No Discrimination Letter,	
☐Other Action Taken (describe)	

Sample Inability to Contact Letter to Complainant

[HIOSH Letterhead]

[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: Your complaint of retaliation against [Company]

Dear [Mr./Ms. Complainant]:

The Hawaii Occupational Safety and Health Division (HIOSH) received your complaint of retaliation by [Company] on [date]. We need further information to determine whether we can proceed with the investigation. Repeated attempts were made to contact you to obtain this information on [date], [date], and [date].

Please contact me by telephone, email, or fax within 7 days of receiving this letter, so that I may obtain further information or clarification about your complaint. If I do not receive a response from you within those 7 days, then I will assume that you are no longer interested in pursuing this matter and will recommend that your complaint be dismissed.

I look forward to hearing from you soon.

Sincerely,

[Name]
SI or Investigator
Hawaii Occupational Safety and Health

Certified Mail #[1234 5678 9123 4567 8912]

Complainant Notification Letter

[HIOSH Letterhead]

[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant Name/Case No. _____

Dear Mr. Complainant:

This letter acknowledges receipt of your complaint of discrimination under §396-8(e), Hawaii Revised Statutes (HRS), which you filed on Click here to enter a date. Please save any evidence bearing on your complaint, such as notes, minutes, letters, or check stubs, etc., and have them ready when the investigator named below meets with you. It will be helpful for you to write down a brief factual account of what happened and to prepare a list of the names, addresses (including email), and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know. The investigator will be contacting you in the near future.

We are also notifying the party named in the complaint about the filing of the complaint and that we are conducting an investigation into your allegations. We are providing the named party with a copy of your complaint and information concerning the Hawaii Occupational Safety and Health Division's (HIOSH) responsibilities under the law. You may obtain a copy of the Discrimination section of the law, §396-8(e), HRS and Chapter 57, Hawaii Administrative Rules at http://labor.hawaii.gov/hiosh. Upon request, a printed copy of these materials will be mailed to you.

HIOSH will provide to you (or to your legal counsel if you are represented by counsel, or to your authorized representative) a copy of all of the respondent's submissions to HIOSH that are responsive to your whistleblower complaint. In addition, HIOSH will disclose to the parties in this case any other information relevant to the resolution of the case, because evidence submitted by the parties must be tested and the opposing party provided the opportunity to fully respond. If information provided contains personal, identifiable information about individuals other than you, such information, where appropriate, will be redacted before disclosure.

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed.

Investigator Assigned: Click here to enter text.
Hawaii Division of Occupational Safety and Health
830 Punchbowl Street, Room 423
Honolulu, HI 96813
Telephone: Click here to enter text.
Fax: 808-586-9104
E-mail: Click here to enter text.

Sincerely,

Name
Supervisory Investigator

Enclosure: Designation of Representative

Certified Mail # []

Respondent Notification Letter

[HIOSH Letterhead]
[date]

ABC Company
Street Address
City, State ZIP

Re: ABC Company/Complainant Name/Case No. _____

Dear Sir or Madam:

We hereby serve you notice that a complaint has been filed with this office by [Mr./Ms.] [Complainant's name], alleging retaliatory employment practices in violation of the discrimination/whistleblower provisions of §396-8(e), Hawaii Revised Statutes (HRS). A copy of the complaint is enclosed. You may obtain a copy of the Discrimination section of the law, §396-8(e), HRS, and Chapter 57, Hawaii Administrative Rules at http://labor.hawaii.gov/hiosh. Upon request, a printed copy of these materials will be mailed to you.

We would appreciate receiving from you within 14 calendar days a written account of the facts and a statement of your position with respect to the allegation that you have retaliated against [Mr./Ms.] [Complainant's last name] in violation of the Law. Please note that a full and complete initial response supported by appropriate documentation, may help to achieve early resolution of this matter. Voluntary adjustment of complaints can be effected by way of a settlement agreement at any time.

Please note that HIOSH will disclose to the parties in this case any information relevant to the resolution of the case, because evidence submitted by the parties must be tested and the opposing party provided the opportunity to fully respond. If information provided contains personal, identifiable information about individuals other than Complainant, such information, where appropriate, will be redacted before disclosure.

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly. All communications and submissions should be made to the investigator assigned below. Your cooperation with this office is invited so that all facts of the case may be considered.

Investigator Assigned: Click here to enter text.
Hawaii Division of Occupational Safety and Health
830 Punchbowl Street, Room 423
Honolulu, HI 96813
Telephone: Click here to enter text.
Fax: 808-586-9104
E-mail: Click here to enter text.

Sincerely,

Name
Supervisory Investigator

Enclosure: Copy of Complaint
Designation of Representative

Certified Mail # [ ]

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

DESIGNATION OF REPRESENTATIVE

[*Complainant*] vs *[Respondent]*	Case Number:

TO: [Investigator]
830 Punchbowl Street, Room 423
Honolulu, HI 96813
Phone: (808) 586-9090

The undersigned hereby enters his appearance as representative of

_____

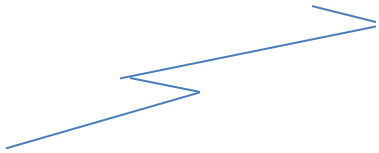
In the above captioned matter:

_____ Signature of Representative _____ Type or Print Name _____ Title _____ Date	Representative's Address and ZIP Code _____ Area Code Telephone Number _____ E-Mail Address

Sample Non-Confidential Interview Statement

I, James Kealoha, reside at 1777 Aloha Avenue, Pearl City, Hawaii 96786. My telephone number is (808) 123-4567. I have been employed by Kama`aina Drywall, Inc., located at 98-7654 Kamehameha Hwy, Aiea, Hawaii 96701, office telephone (808) 987-6544. My job classification is foreman.

I started work for Kama`aina Drywall in 1990 as a drywall hanger. In 2001, the owner, Mr. Horace Good made me one of several job foremen that he has working for him. As foreman, I am responsible for all aspects of the job I am assigned. In late September 2012, Mr. Good sent me on a hotel renovation job in Honolulu. Normally, I take my own crew on all jobs, but at this time I only had two of my regular journeymen available to work on this job, so I hired four additional journeymen and two apprentices from the local union hall. One of the apprentices I hired was Evan Bonner. Bonner first started the job in about mid-October. I wasn't really supposed to hire him because….



…. Bonner's so-called safety complaints had nothing to do with the reason I let him go. As I said above, I had to lay Bonner off to comply with the local union contract.

I have read and had an opportunity to correct this statement consisting of two typed pages, and these facts are true and correct to the best of my knowledge and belief. Section 396-10(m), Hawaii Revised Statutes, make it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

_____
James Kealoha

Witnessed by:

_____
Date

_____
I.M. Investigator

_____
Date

Sample Confidential Interview Statement

I, Kevin Kameda, reside at 333 Kapiolani Boulevard, Honolulu, Hawaii 96813. My telephone number is (808) 959-8765. I have been employed by Kama`aina Drywall, Inc., located in Aiea, Hawaii, since October 2012 at the Hale Alohalani hotel renovation jobsite, located in Waikiki.

My job classification was apprentice carpenter.

I understand that this statement will be held in confidence until I give my permission for my statement to be used in a contested case hearing, at which time my statement and my identity as a witness will become a public record. ____(initial)

I started work for Kama`aina Drywall the first part of October 2012 as a carpenter apprentice. I worked with one other apprentice named Evan Boner. I knew Bonner somewhat from seeing him around the union hall and on the jobsite. I knew that….

…and so it was clear to me that Bonner was actually laid off because he had called OSHA or you guys.

I have read and had an opportunity to correct this statement consisting of two typed pages, and these facts are true and correct to the best of my knowledge and belief. Section 396-10(m), Hawaii Revised Statutes, make it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

_____
Kevin Kameda

Witnessed by:

_____
Date

_____
I.M. Investigator

_____
Date

Sample Non-Cooperation Letter to Complainant

[HIOSH Letterhead]
[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear [Mr./Ms. Complainant]:

As you were advised by letter dated [date of notification letter], I have been assigned to investigate the allegations of retaliation that you filed with this office against [name of respondent] on [date]. It is critical that I interview you as part of the investigation. To date, my efforts to reach you by telephone for purposes of scheduling an in-person interview have been unsuccessful.

Please contact me by telephone, email, mail, or fax within 7 days of receiving this letter, so that we can arrange for a convenient date, time, and location for your interview. If I do not receive a response from you within those 7 days, then I will assume that you are no longer interested in pursuing this matter and will recommend that your complaint be dismissed.

I look forward to hearing from you soon.

Sincerely,

[Name]
Investigator
Hawaii Occupational Safety and Health
Telephone:
Facsimile No:
e-mail:

Certified Mail #[1234 5678 9123 4567 8912]

Sample Non-Cooperation Letter to Respondent

[HIOSH Letterhead]

[date]

ABC Company
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Sir or Madam:

On [date], you received certified letter #[insert number] from this office, which advised you that [Complainant's name] (Complainant) had filed a retaliation complaint with the Hawaii Occupational Safety and Health Division (HIOSH) against [Respondent's name] (Respondent) on [date filed]. The complaint alleged that Respondent's employment actions taken against [him/her] were in violation of §396-8(e), Hawaii Revised Statutes, (HRS). Our letter invited you to submit promptly "a written account of the facts and a statement of your position with respect to the allegation that you have retaliated against [Mr./Ms.] [Complainant's last name] in violation of the Law."

Explain how Respondent has not cooperated, for example:

No response

More than 14 days have passed since your receipt of our letter requesting a position statement; however, I have received no response from you to the complaint allegations.

Or

Documents not submitted

More than 14 days have passed since you received my letter of [date], in which I requested [specific documentation requested]; however, I have not received any of the requested documents from you. ***Or***

Witnesses not made available

On [date], I advised you that I would need to schedule interviews in this matter with the following management officials: [insert names]. However, you subsequently informed me that you would not make said managers available to HIOSH for interviews.

Evidence gathered to date tends to corroborate complainant's allegations that [his/her] [adverse act] was in violation of §396-8(e), HRS. ***(Insert a brief summary of the complaint allegations and the evidence supporting the elements of complainant's prima facie case.)***

As noted above, to date, you have declined to respond to HIOSH's investigative requests, which have been made in accordance with Chapter 396, HRS, and its implementing regulations. Your continued failure to cooperate with this investigation may lead HIOSH to reach a determination without your input. Additionally, you are hereby advised that HIOSH may draw an adverse inference against you based on your refusal to [specify what request was not followed].

Therefore, based on the evidence thus far, it appears that complainant's allegations have merit. We are making a final request that you ***(cooperate with the investigation, for example…)*** [provide this office **within seven (7) days** a full and complete written response to HIOSH's preliminary findings, along with any documentation to support your position] ***or*** [submit the documents requested above to this office **within seven (7) days**] ***or*** [advise me **within seven (7) days** that you will make [names of management witnesses] available for interview on [requested date].

If we do not receive your response within the seven (7) days, HIOSH will make our determinations without your input.

Optional paragraph inviting settlement discussions

Alternatively, you are invited to contact me within the seven (7)-day period to discuss the possibility of resolving this matter by means of a voluntary settlement agreement. HIOSH makes every effort to accommodate an early resolution of complaints in which both parties seek it. Upon HIOSH's approval of a settlement, this matter would be closed without further investigation.

Sincerely,

[Name]
Investigator
Hawaii Occupational Safety and Health
(808) 586-9090

Certified Mail #[ ]

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH DIVISION
STATE OF HAWAII

In the Matter of Occupational Safety and Health Investigation Re: **Company/Complainant** Inspection No.: **Case No:**	SUBPOENA DUCES TECUM and AD TESTIFICANDUM EXHIBIT "A": LIST OF DOCUMENTS

SUBPOENA DUCES TECUM and AD TESTIFICANDUM

TO: **CUSTODIAN OF RECORDS**
Establishment Name
Address
City, State Zip

YOU ARE COMMANDED to appear personally before **Investigator's Name, Job Title,** of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, at the time and place indicated below to testify under penalty of perjury regarding an investigation into the retaliation of [Complainant] by [Respondent] allegedly in violation of §396-8(e), Hawaii Revised Statutes and to turn over for inspection and copying all records, papers, and documents listed in Exhibit "A" in your care, custody and/or control:

DATE: **Day & Date of Appearance**
TIME: **Time**
PLACE: **Address Include City, State Zip**

DATED: Honolulu, Hawaii, **Date of Subpoena**

_____
Administrator, Department of Labor
and Industrial Relations

EXHIBIT A

Exhibit #	Description
1.	Carpenter Union contracts in effect from October 2012 through December 2012 where Kama`aina Drywall was a signatory.
2.	Documents and/or records, including information stored electronically regarding the scope of the work at Alohalani Hotel, 845 Kuhio Avenue, Honolulu, Hawaii 96815
3.	Safety inspections or safety audit(s) records conducted for the Alohalani Hotel jobsite, including electronic and hand-written notes or records, for the period from September 2012 through March 2013, conducted either in-house or by others.
4.	Any and all hazard assessments or job hazard/task/duty analyses performed and/or used by Kama`aina Drywall applicable to the work at the Alohalani Hotel project.
5.	Any records, including e-mails, letters, documented telephone conversations among Kama`aina supervisory personnel and management regarding Evan Bonner.
6.	Job description, training, and job performance records, including information stored electronically, for Mr. Evan Bonner.

RETURN OF SERVICE

I HEREBY CERTIFY that a duplicate original subpoena was duly served on the person named above by delivering a copy to that person on ___{Insert Date}
together with a witness fee for one day's attendance and the mileage allowed by law at the following location: {Insert location}

_____
Investigator's Name
Job Title
Hawaii Occupational Safety and Health

_____
Signature (witness)

_____
Print Name

_____
Address, if different than listed

CHAPTER 3
CONDUCT OF THE INVESTIGATION

I. Scope

This chapter sets forth the policies and procedures investigators must follow during the course of an investigation. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. Investigators should consult with their SI when additional guidance is needed.

II. General Principles

The investigator should make clear to all parties that HIOSH does not represent either the complainant or respondent, and that both the complainant's allegation(s) and the respondent's proffered non-retaliatory reason(s) for the alleged adverse action must be tested. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case.

The investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by HIOSH. This applies not only to complainants and respondents but to other witnesses as well; quite often witnesses are unaware that they have knowledge that would help resolve a jurisdictional issue or establish an element. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of the complainant, respondent, and witnesses.

The standard that applies to HIOSH discrimination/whistleblower investigations is whether HIOSH is able support a finding, with a preponderance of evidence, that a violation has occurred. This standard applies to all elements of a violation.

So when consulting with OSHA whistleblower investigators or attending whistleblower investigation classes sponsored by OSHA, HIOSH discrimination/whistleblower investigators must keep in mind that unlike OSHA, for which the burden is only to determine whether there is reasonable cause to believe a violation has occurred, and if so, must refer the case to their solicitors to bring an action before the appropriate judicial body, HIOSH issues a finding and order, which may then be contested de novo at the Hawaii Labor Relations Appeals Board.

If, having interviewed the parties and relevant witnesses and examined relevant documentary evidence, the investigator is unable to establish the elements of a violation AND has not sufficiently rebutted all respondent defenses, then a finding of no discrimination must be made.

III. Case File

Upon assignment, the investigator receives or prepares a standard case file containing the HIOSH-87 form or the appropriate intake worksheet, all documents received or created during the intake and evaluation process, copies of all required opening letters, and any

original evidentiary material initially supplied by the complainant. All evidence, records, administrative material, photos, recordings and notes collected or created during an investigation must be maintained in a case file and cannot be destroyed, unless they are duplicates. Detailed guidance regarding proper case file organization may be found in Chapter 5, "Documentation, Report Writing, and Determination Notice and Order."

IV. Preliminary Investigation

A. Intake and Evaluation

It is the SI's responsibility to ensure that complaint intake and evaluation occurs. Intake may be performed directly by the SI or may be delegated to the investigator. Whenever possible, the intake and evaluation of a complaint should be completed by the investigator to whom the SI anticipates the case will be assigned. Regardless of who completes the evaluation, it should cover as many details as possible, and may take place either in person or by telephone. Whenever practical and possible, the investigator will conduct face-to-face interviews with complainants. The individual conducting the intake should ensure all elements of a *prima facie* allegation are addressed and should attempt to obtain specific information regarding current losses and employment status.

The information obtained during the intake interview must be properly documented. At a minimum, a Memorandum of Interview must be prepared. As with any record of an interview, this Memorandum of Interview must preserve the complainant's account of the facts and record facts necessary to determine whether a *prima facie* allegation exists. This memorandum can be used later to refresh the complainant's memory in the event his or her account deviates from initial information provided; this is often the key to later assessing the credibility of the complainant.

B. Early Resolution

HIOSH must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. At any point, the investigator may explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.) An early resolution is often beneficial to all parties, since potential losses are at their minimum when the complaint is first filed. Consequently, if the investigator believes that an early resolution may be possible, he or she is encouraged to contact the respondent immediately after completing the interview of the complainant. However, the investigator must first determine whether a safety and health enforcement action is pending prior to any contact with a respondent. Additionally, any resolution reached must be memorialized in a written settlement agreement that complies with the requirements set forth in Chapter 6.

C. Threshold Issues of Timeliness and Coverage

During both the complaint evaluation process and after receiving a whistleblower case file, it is important to confirm that the complaint was timely filed, that a *prima facie* allegation has been made, that the case has been properly docketed, and that all parties have been notified.

If there appears to be a disparity in the information, the SI should be contacted about whether the investigation should continue.

D. Pre-Investigative Research

If he or she has not already done so, the investigator should determine whether there are prior or current retaliation, safety and health, or other regulatory cases related to either the complainant or employer. Such information normally will be available from the IMIS or at the HIOSH office. The information can be obtained electronically, by telephone, or in person. This enables the investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand. Examples of information sought during the pre-investigation research phase are:

1. Copies of safety and health complaints filed with HIOSH or other agencies.
2. Copies of case files of any enforcement actions, including inspection reports, which were recently taken against the employer.
3. Copies of all relevant documents, including inspector's notes, from regulatory files administered by HIOSH, OSHA, or other agencies.
4. Information on any previous whistleblower complaints filed by the complainant or against the respondent.

E. Coordination with Other Agencies

If information received during the investigation indicates that the complainant has filed a concurrent retaliation/discrimination complaint or similar complaint (such as unemployment insurance or workers' compensation) with another government agency (Hawaii Civil Rights Commission, Unemployment Insurance Division, Workers' Compensation Division), the investigator may wish to contact such agency to determine the nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the discrimination complaint, however, caution should be exercised in using that agency's information as their statutes and proceedings may differ significantly.

F. Other Legal Proceedings

The investigator should also gather information concerning any other current or pending legal actions that the complainant may have initiated such as lawsuits, arbitrations, or grievances. Obtaining information related to such actions may produce evidence of conflicting testimony or could result in the case being concluded via a deferral.

V. Weighing the Evidence

The investigative standard for all HIOSH cases under §396-8(e), HRS, is *preponderance of evidence* that a violation occurred. This applies to each element of a violation.

A. Investigative Standard

Under the *preponderance of evidence* standard, HIOSH must believe, after evaluating all the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources, that a reasonable judge <u>would</u> rule by

a *preponderance of evide*nce in favor of HIOSH's findings and conclusions that retaliation for engaging in a protected activity was likely the cause of the adverse or discriminatory act.

The burden HIOSH must meet to support a finding by a *preponderance of evidence* is higher than that of OSHA's *reasonable cause*, and each element of a violation must meet that burden. The evidence, therefore, must need to establish by a *preponderance of evidence* that a violation did occur.

B. Causation Standards

Section 396-8(e)(3), HRS uses the word "because" to express the causation element. The Supreme Court has ruled that the anti-retaliation provision of Title VII, which simply uses the term "because" to express the causation element, requires the plaintiff to prove that the employer would not have taken adverse action but for the protected activity and that the plaintiff always has the burden of proof on this element. University of Texas Southwestern Medical Center v. Nassar, U.S._, 133 S. Ct. 2517 (2013). A fuller explanation of but-for causation and examples can be found in Burrage v. United States, _U.S._, 133 S. Ct. 881 (2014). The but-for causation test is more stringent than the contributing factor or the motivating factor tests, but it does not require a showing that the protected activity was the sole reason for the adverse action. Therefore, HIOSH must have a *preponderance of evidence* that the employer would not have carried out the adverse action but for the protected activity.

VI. The Field Investigation

Investigators may be assigned multiple complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

A. The Elements of a Violation

An illegal retaliation is an adverse action taken against an employee by an employer in reprisal for the employee's engagement in protected activity. An effective investigation focuses on the elements of a violation and the required standard for causation, i.e., but-for. If the investigation does not establish, by *preponderance of the evidence*, that all of the elements of a case exist, a finding of no discrimination shall be made. Therefore, the investigator should search for evidence that would help resolve each of the following elements of a violation:

1. Protected Activity

The evidence must establish that the complainant engaged in activity protected by §396-8(e), HRS. However, with the exception of certain cases involving refusals to work, it is not necessary to prove the HIOSH standards were actually violated. In order words, the complainant does not need to show that the conduct about which he/she initially complained actually took place. Rather, as long as the complainant's protected activity was made in good faith and a reasonable person could have raised the same issue, the action meets this element.

Protected activity generally falls into four broad categories:

a. Providing information to a government agency (including, but not limited to HIOSH, OSHA, NIOSH or a State or county government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department, health department, or police department, the employer including a supervisor or management representative of the employer, a union, a legislative body or the executive head of a government (Mayor, Governor, President).

b. Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to HIOSH or OSHA, as well as filing an occupational safety and health grievance under a collective bargaining agreement.

c. Testifying in proceedings such as trials, hearings before the Hawaii Labor Relations Board on HIOSH cases, or legislative hearings. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a complainant of a decision not to conduct enforcement action or of a HIOSH determination not to issue a citation, employee contests of abatement dates, employee initiation of proceedings for the promulgation of OSHA or HIOSH standards, employee application for modification or revocation of a variance, employee judicial challenge to an OSHA standard, and employee petition for judicial review of an order of the Hawaii Labor Relations Board. Communicating with the media about an unsafe or unhealthful workplace condition is also in this category, *Donovan v. R.D. Anderson Construction Company, Inc.* 552 F. Supp. 249 (D. Kansas, 1982).

d. Refusal to perform an assigned task. Section 396-8(e), HRs specifically protects employees from retaliation for refusing to engage in an unlawful work practice. Generally, a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful, and he or she does not receive an adequate explanation from a responsible official that the conditions are safe.

   As an example, HIOSH's refusal to work provision at §12-57-7(b), HAR provides an employee the right to refuse an assigned task if the employee:

   i. Has a reasonable apprehension of death or serious injury, *and*

   ii. Refuses in good faith, *and*

   iii. Has no reasonable alternative, *and*

   iv. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e. contacting HIOSH, *and*

   v. The employee, where possible, sought from his or her employer, and was unable to obtain, a correction of the dangerous condition.

2. Employer Knowledge

The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in

protected activity. *E.E.O.C v. Abercrombie and Fitch Stores, Inc*., _U.S.-, 133 S. Ct. 2028, 2033 (2015) (Title VII) (motive can be based on suspicion); Reich v. Hoy Shoe, Inc., 32 F.3d 361, 368 (8th Cir. 1994) (OSHA section 11(c)) (same). For example, one of the respondent's managers need not have specific knowledge that the complainant contacted HIOSH or a related regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant. Also, the investigation need now show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity.

If the respondent does not have actual knowledge, but could reasonably deduce that the complainant filed a complaint, it is referred to as *inferred knowledge*. Examples of *inferred knowledge* include, but are not limited to:

a. An HIOSH complaint is about the only lathe in a plant, and the complainant is the only lathe operator.

b. A complaint is about unguarded machinery and the complainant was recently injured on an unguarded machine.

c. A union grievance is filed over a lack of fall protection and the complainant had recently insisted that his foreman provide him with a safety harness.

d. Under the *small plant doctrine*, in a small company or small work group where everyone knows each other, knowledge can also be attributed to the employer.

3. Adverse Action

The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer. An adverse action may occur at work; or, in certain circumstances, outside of work. Some examples of adverse actions may include, but are not limited to:

- Discharge.
- Demotion.
- Reprimand.
- Harassment – unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- Hostile work environment – separate adverse actions that occur over a period of time, may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A

complaint need only be filed within the 60 calendar days required by HIOSH Law of any act that is part of the hostile work environment, which may be ongoing.

- Lay-off.
- Failure to hire.
- Failure to promote.
- Blacklisting.
- Failure to recall.
- Transfer to different job.
- Change in duties or responsibilities.
- Denial of overtime.
- Reduction in pay.
- Denial of benefits.
- Making a threat.
- Intimidation.
- Constructive discharge – the employer *deliberately* created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.

It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as "adverse," in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action "materially adverse." Specifically, the evidence must show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation.[2] The investigator can test for material adversity by interviewing coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

4. Nexus

A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence. That causal link will be that the adverse action would not have occurred *but for* the protected activity. Nexus can be demonstrated by direct or circumstantial evidence such as timing (proximity in time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees (or in comparison to how the complainant was treated prior

[2] *Burlington Northern & Santa Fe R. R. Co. v. White*, 548 U.S. 53, 68 (2006).

to engaging in protected activity), and/or animus (ill will towards the complainant).

Questions that will assist the investigator in testing the respondent's position include:

- Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did the complainant's productivity, attitude, or actions change after the protected activity?
- Did the respondent discipline other employees for the same infraction and to the same degree?

B. Contact with Complainant

The investigator's initial contact with the complainant should be made during the complaint intake and evaluation process, where possible. The assigned investigator must contact the complainant as soon as possible after receipt of the case assignment. Contact must be made even if the investigator's caseload is such that the actual field investigation may be delayed.

1. Activity/Telephone Log

All telephone calls made, messages received, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. (A sample of the activity/telephone log is included at the end of this chapter.) If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the investigator should document the substance of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the activity/telephone log may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

2. Amended Complaints

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

a. **Form of Amendment.** No particular form of amendment is required. A complaint may be amended orally or in writing. Oral amendments will be reduced to writing by HIOSH. If the complainant is unable to file the amendment in English, HIOSH will accept the amendment in any language.

b. **Amendments Filed Within Statute of Limitations.** At any time prior to the expiration of the statutory filing period for the original complaint (60 days), a complainant may amend the complaint to add additional allegations and/or additional respondents.

c. **Amendments Filed After Statute of Limitations Has Expired.** For amendments received after the statute of limitations for the original complaint has run, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment, provided that the investigation remains open. 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.

d. **Processing of Amended Complaints.** Any amended complaint must be processed in the same manner as any original complaint. This means that all parties must be provided with a copy of the amended complaint, that this notification must be documented in the case file, and that the respondent(s) must be afforded an opportunity to respond. Investigators must review every amendment to ensure that a *prima facie* allegation is present. The investigator must ensure that all parties have been notified of the amendment.

3. Amended Complaints Distinguished from New Complaints

The mere fact that the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean that new allegations should be considered an amendment. If the alleged retaliation involves a new or separate adverse action that is unrelated to the active investigation, then the complaint may be docketed with its own unique case number and processed as a new case.

4. Early Dismissal

If the investigator determines that the allegations are not appropriate for investigation under §396-8(e), HRS, but may fall under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance. If the complaint fails to meet any of the elements of a prima facie allegation, the complaint may be closed with the complainant's concurrence, i.e., the complainant withdraws his/her complaint. If the complainant refuses to withdraw his/her complaint, a Determination Notice and Order (DNO) that itemizes the reasons why the complaint is being closed in terms of timely filing and/or *prima facie* elements not met must be issued along with information about the parties' appeal rights.

5. Inability to Locate Complainant

In situations where an investigator is having difficulty locating the complainant to continue the investigation, the following steps must be taken:

a. Telephone the complainant at various times during normal work hours and in the evening.

b. Mail a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation) to the complainant's last known address, stating that the investigator must be contacted within 7 days of the receipt of the letter or the case will be dismissed. If no response is received within 7 days, management may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the letter must be preserved in the file along with the copy of the letter to maintain accountability.

C. On-site Investigation

Personal interviews and collection of documentary evidence must be conducted on-site whenever practicable. Investigations should be planned in such a manner as to personally interview all appropriate witnesses during a single site visit. The respondent's designated representative has the right to be present for all interviews with currently-employed managers, but interviews of non-management employees are to be conducted in private. The witness may, of course, request that an attorney or other personal representative be present at any time. In limited circumstances, witness statements and evidence may be obtained by telephone, mail, or electronically.

If an interview is recorded electronically, the investigator must be a party to the conversation, and it is HIOSH's policy to have the witness acknowledge at the beginning of the recording that they understand that the interview is being recorded. This does not apply to other audio or video recordings supplied by the complainant or witnesses. At the Supervisory Investigator's discretion, in consultation with the DAG, it may be necessary to transcribe electronic recordings used as evidence in HLRB hearing. All recordings are government records and need to be included in the case file.

Prior to electronically recording an interview, investigators should familiarize themselves with the guidance set forth in OSHA Instruction CPL 02-00-198, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993, adopted by HIOSH on December 20, 1993.

D. Complainant Interview

The investigator must attempt to interview the complainant in all cases. The investigator must arrange to meet with the complainant as soon as possible to conduct an interview regarding the complainant's allegations. When practical and possible, the investigator will conduct face-to-face interviews with complainants. It is highly desirable to obtain a signed interview statement from the complainant during the interview. A signed interview statement is useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in the complainant's account of the acts, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "designation of representative" form.

1. The investigator must attempt to obtain from the complainant all documentation in his or her possession that is relevant to the case. Relevant records may include but are not limited to:
    a. Copies of any termination notices, reprimands, warnings, or personnel actions.
    b. Performance appraisals.
    c. Earnings and benefit statements.
    d. Grievances.
    e. Unemployment benefits, claims and determinations.
    f. Job position descriptions.
    g. Company employee and policy handbooks.
    h. Copies of any charges or claims filed with other agencies.
    i. Collective bargaining agreements.
    j. Arbitration agreements.
    k. Medical records. Because medical records require special handling, investigators should familiarize themselves with the requirements of HIOSH Instruction CPL 02-02-072, Rules of agency practice and procedure concerning OSHA access to employee medical records, August 22, 2007, adopted by HIOSH on December 19, 2007.
2. The restitution sought by the complainant should be ascertained during the interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the complainant might be entitled in the event of settlement, issuance of a discrimination determination and order, or litigation. The complainant should be advised that the respondent's back pay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, job seeking costs, etc.
3. If the complainant is not personally interviewed and his or her statement is taken by telephone, a detailed Memo to File will be prepared relating the complainant's testimony, OR if agreeable to the complainant, a written statement in the first person of the complainant should be prepared, and sent via certified mail, return receipt requested requesting a signature of true and correct other means of acknowledging that the statement was read and understood by the complainant.
4. The complainant should also be informed of the investigation process and their right to simultaneously pursue a cause of action in the courts. He or she should also be informed that HIOSH investigation records may not be used in any civil action in accordance with §396-14, HRS.

E. Contact with Respondent

1. Often, after receiving the notification letter that a complaint has been filed, the respondent or respondent's attorney calls the investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the activity/telephone log, and, if pertinent information is conveyed during this conversation, the investigator must document it in the activity/telephone log or in a Memo to File.
2. In many cases, following receipt of HIOSH's notification letter, the respondent forwards a written position statement, which may or may not include supporting documentation. Assertions made in the respondent's position statement do not constitute evidence, and generally, the investigator must still contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense. At a minimum, copies of relevant documents and records should be subpoenaed, including disciplinary records if the complaint involves a disciplinary action.
3. If the respondent requests time to consult legal counsel, the investigator must advise him or her that future contact in the matter will be through such representative. A Designation of Representative form should be completed by the respondent's representative to document his or her involvement.
4. In the absence of a signed Designation of Representative, the investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the investigator's initial contact should be the person who signed the letter.
5. The investigator should interview all company officials who had direct involvement in the alleged protected activity or retaliation and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality. Witnesses must be advised of their rights regarding protection under the HIOSH discrimination statute, and advised that they may contact HIOSH if they have been subjected to retaliation because they participated in a HIOSH investigation.
6. The investigator must also obtain evidence about disparate treatment, i.e., how respondent treated other employees who engaged in conduct similar to the conduct of the complainant which respondent claims is the legitimate non-discriminatory reason for the adverse action. A review of personnel files would be appropriate to obtain this information.
7. If the respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.
8. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the

company, such as where the official has information helpful to the complainant and does not wish the company to know he or she is speaking with the investigator. In that event, an interview should ordinarily be scheduled away from the premises.

Respondent's attorney generally does not, however, have the right to be present, and should not be permitted to be present, during interviews of non-management or non-supervisory employees. Any witness may, of course, have a personal representative or attorney present at any time. If the non-management or non-supervisory employee witness requests that respondent's attorney be present, the investigator should ask respondent's attorney on the record who he/she represents and specifically ask respondent's attorney if he/she represents the non-management witness in the matter. It must be made clear to the witness that:

a. Respondent's attorney represents respondent and not the witness; and

b. The witness has the right be interviewed privately.

Once these facts are clear to the witness, if the witness still requests that respondent's attorney be present, the interview may proceed. If respondent's attorney indicates that he/she represents the non-management witness, a signed Designation of Representative form should be completed by respondent's attorney memorializing that he/she represents the non-management witness.

9. While at the respondent's establishment, the investigator should make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which respondent offers and which the investigator construes as being relevant to the case.

10. If a telephone conversation with the respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the activity/telephone log may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

11. If at any time during the initial (or subsequent) meeting(s) with respondent officials or counsel, respondent suggests the possibility of an early resolution to the matter, the investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.)

F. Uncooperative Respondent

1. When conducting an investigation under §396-8(e), HRS, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by HIOSH. HIOSH has two types of subpoenas for use in these cases: A Subpoena *Ad Testificandum* is used to obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to obtain documentary evidence. They can be served on the same party at the same time, and HIOSH can require the named party to appear at a

designated office for production, at division costs. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a video or digital recorder will be used). When drafting subpoenas, the party should be given a short timeframe in which to comply, using broad language like "any and all documents" or "including but not limited to," and making the investigator responsible for delivery and completion of the service form. If the respondent decides to cooperate, the SI can choose to lift the subpoena requirements, but only if he/she believes the respondent will not contest any final determination and order.

2. If the respondent fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the SI regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The other option is to consult with the DAG about enforcing the subpoena.

3. When dealing with a nonresponsive or uncooperative respondent it will frequently be appropriate for the investigator, in consultation with the SI and/or Administrator, to draft a letter informing the respondent of the possible consequences of failing to provide the requested information in a timely manner (see example at the end of this chapter). Specifically, the respondent may be advised that its continued failure to cooperate with the investigation may lead HIOSH to reach a determination without the respondent's input. Additionally, the respondent may be advised that HIOSH may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

G. Early Involvement of the Deputy Attorney General (DAG)

In general, HIOSH should consult with the DAG as early as possible in the investigative process for all instances where HIOSH believes the final determination may be contested, or where a case presents a novel question of protected activity or other elements of a violation. Investigator must consult with the SI prior to contacting the DAG,

H. Further Interviews and Documentation

It is the investigator's responsibility to pursue all appropriate investigative leads deemed pertinent to the investigation, with respect to the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources.

1. The investigator must attempt to interview each relevant witness. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has <u>no</u> right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names

and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative present at any time.

2. The investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but not be limited to, safety and health inspections, or records of inspections conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during HLRB proceedings.
3. In cases where the complainant is covered by a collective bargaining agreement, the investigator should interview relevant union officials and obtain copies of grievance proceedings or arbitration decisions specifically related to the retaliation case in question.
4. When interviewing potential witnesses (other than officials representing the respondent), the investigator should specifically ask if they request confidentiality. In each case, a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.
5. The investigator must document all telephone conversations with witnesses or party representatives in the case file.

I. Resolve Discrepancies

After obtaining the respondent's version of the facts, the investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or proffered non-retaliatory reasons for the alleged retaliation.

J. Analysis

After having gather all available relevant evidence, the investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above.

K. Conclusion of Investigations with Findings of No Violation

Upon completion of the field investigation and after discussion of the case with the SI, the investigator must contact the complainant in order to provide him or her with the opportunity to present any additional evidence deemed relevant. This closing conference may be conducted with the complainant in person or by

telephone.

1. During the closing conference, the investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
2. It is unnecessary and improper to reveal the identity of witnesses interviewed. The complainant should be advised that HIOSH does not reveal the identity of witnesses who request confidentiality. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair determination, this should be explained to the complainant along with the explanation why additional investigation does not appear warranted.
3. During the closing conference, the investigator must inform the complainant of his or her rights to appeal the determination, as well as the time limitation for filing the appeal.
4. The investigator should also advise the complainant that the decision at this stage is a recommendation subject to review and approval by higher management.
5. The closing conference with the complainant must be documented in the case file.
6. Where the complainant cannot be reached in order to conduct a closing conference, the investigator will send a letter to the complainant explaining that a finding of no discrimination/discrimination is being recommended, but that the decision at this stage is a recommendation subject to review and approval by higher management. This letter will invite the complainant to contact the assigned investigator if he or she wishes to discuss the preliminary investigative findings.

L. Documenting the Investigation

1. With respect to any and all activities associated with the investigation of a case, investigators must continually bear in mind the importance of documenting the file to support their findings. Time spent carefully taking notes and writing memoranda to file is considered productive time and can save hours, days, and dollars later when memories fade and issues lose their immediacy. To aid clarity, documentation should be arranged chronologically where feasible.
2. The ROI must be signed by the investigator and reviewed and approved in writing by the SI.

Appendix to Chapter 3
Investigation Forms and Letters

Sample Investigation Activity Log

DISCRIMINATION CASE FILE ACTIVITY DIARY

Pg _____ of _____ .

Complainant Name: **Phone :**	**Respondent / Company Name:** **Phone:**	**Case File Number:**

DATE:	**TIME:**	**ACTION:**	**INITIALS:**

HIOSHL- 40

Sample Statement Form

Department of Labor and Industrial Relations

Hawaii Occupational Safety and Health Division

WITNESS STATEMENT

Name: _____
(Print Full Name)

Home Address: _____
(Address) (City) (State) (Zip)

Telephone Numbers: _____ _____ _____
(Home) (Work) (Cell)

I have been employed by _____
(Employer's Name)

from _____ to _____
(Start Date) (End Date or "Current" if Still Working)

Position: _____

Union Affiliation: _____

I freely and voluntarily offer this written statement, which is true and accurate to the best of my knowledge:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

☐ Mark box if Witness Statement includes additional pages.

I have read and had a chance to correct this entire statement, which is true and accurate to the best of my knowledge. I have been informed and fully understand that Chapter 396, Hawaii Revised Statures, makes it a criminal offense to knowingly make false statements or representations in this statement.

SIGNED, this _____ day of _____, _____.
(Day no.) (Month) (Year)

_____ _____
(Print name) (Signature)

CHAPTER 4
CASE DISPOSITION

I. Scope

This chapter sets forth the policies and procedures for arriving at a determination on a discrimination/whistleblower case; policies regarding withdrawal, settlement dismissal, postponement, deferrals, appeals, and litigation; adequacy of remedies; and division tracking procedures for timely completion of cases.

II. Preparation

A. Investigator Reviews the File

Throughout the investigation, the investigator will keep the SI apprised of the progress of the case, as well as any novel issues encountered. During the investigation, the investigator must thoroughly review the file and its contents to ensure all pertinent data is organized consistent with the requirements set forth in Chapter 5 of this Manual.

B. Investigator and SI Discuss the Case

The SI and the investigator will discuss the facts and merits of the case throughout the investigation. The SI will advise the investigator regarding any unresolved issues and assist in making a determination or deciding if additional investigation is necessary.

III. Report of Investigation

The investigator must report the results of the investigation by means of a Report of Investigation (ROI), following the policies and format described in detail in Chapter 5 of this Manual. Once the ROI is approved, the investigator will write the draft Determination Notice and Order for the SI review and review and signature by the Administrator or his or her designee.

IV. Case Review and Approval by the Supervisory Investigator

A. Review

The investigator will provide the completed case file and draft determination letters to the SI. Upon receipt of the completed case file, the SI will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, completeness of the findings, and consistency with legal precedents and policy impact. Such review will be completed as soon as practicable after receipt of the file.

B. Approval

If the SI concurs with the analysis and recommendation of the investigator, he or she will sign on the signature block on the last page of the ROI and record the date the review was completed. The SI's signature on the ROI serves as approval of the recommended determination. Therefore, a thorough review of the case file is essential prior to issuing any determination letters. The Determination Notice and

Order (DNO) must be issued to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

1. Withdrawal

A complainant may withdraw his or her complaint at any time during HIOSH's processing of the complaint. However, it should be made clear to the complainant that by entering a withdrawal on a case, he or she is forfeiting all rights to appeal or object, and the case will not be reopened. Withdrawals may be requested either orally or in writing. It is advisable, however, to obtain a signed withdrawal whenever possible. (See sample complaint withdrawal request form at the end of this chapter.) In cases where the withdrawal request is made orally, the investigator must send the complainant a letter outlining the above information and confirming the oral request to withdraw the complaint. Once the SI reviews and approves the request to withdraw the complaint, a second letter must be sent to the complainant, clearly indicating that the case is being closed based on the complainant's oral request for withdrawal. Both letters must be sent via certified U.S. mail, return receipt requested, or via any third-party commercial carrier that provides delivery confirmation. Proof of delivery of both letters must be preserved in the file with copies of the letters to maintain accountability. (See sample letters at the end of this chapter.)

2. Findings of No Discrimination

For recommendations of no discrimination, the Administrator or his or her designee must issue a determination letter (Determination Notice and Order) to the complainant, with a copy to the respondent. The letter must include the rationale for the decision and the necessary information regarding the parties' rights to appeal the findings.

3. Settlement

Voluntary resolution of disputes is desirable in many discrimination cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached solely through the utilization of HIOSH's standard settlement agreement. The language of this agreement generally should not be altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation. The investigator should use his/her judgment as to when to involve the SI in settlement discussions. The investigator will obtain approval by the SI of the settlement agreement language prior to the parties signing the agreement. For recommendations to approve settlement, the SI's approval will be indicated by signature on both the settlement agreement and the ROI. The Administrator or his or her designee will issue appropriate letters to the parties forwarding copies of the signed settlement agreement, posters, the Notice to Employees, the back pay check, or any other relevant documents, including tax-related documents. (Settlement procedures and settlement negotiations are discussed in detail in Chapter 6.)

Once an employee has filed a complaint and if the case is currently open, any settlement of the underlying claims reached between the parties must be reviewed by HIOSH to ensure that the settlement is just, reasonable, and in the public interest. At the investigation stage, this requirement is fulfilled through HIOSH's review of the agreement. A copy of the reviewed agreement must be retained in the case file. If HIOSH is unable to obtain a copy of the settlement agreement, then HIOSH must reach a determination on the merits of the complaint, based on the evidence obtained. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand our involvement in any resolution reached after a complaint has been initiated.

Approved settlements may be enforced through language in the settlement agreement. If a determination notice and order had been issued prior to the settlement, enforcement may include that the notice has become a final order.

4. Postponement

The division may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement or another law. The rights asserted in the other proceeding must be substantially the same as the rights under §396-8(e), HRS, and those proceedings must not likely violate rights under §396-8(e). The factual issues to be addressed by such proceedings must be substantially the same as those raised by the complaint. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective state whistleblower statute, but not when the proceeding is under an unemployment compensation statute, which typically does not deal with retaliation for whistleblowing. To postpone the HIOSH case, the parties must be notified that the investigation is being postponed in deference to the other proceeding and the division must be notified of the results of that proceeding immediately upon its conclusion. (See sample postponement letter at the end of this Chapter).

The case must remain open during the postponement, and the "postponed" status should be entered in IMIS, under the "Additional Information" tab. The IMIS user should enter "investigation postponed" in the "Tracking Text" field, and the date upon which the parties were formally notified of HIOSH's decision to postpone the investigation in deference to another proceeding should be entered in the "Tracking Date" field.

When HIOSH is notified of the outcome of the proceeding, "Results of [grievance hearing] received" should be entered in a new "Tracking Text" field, and the date upon which the results are received should be recorded in the "Tracking Date" field. The case should be closed following normal procedures, when the Administrator's Findings or other closing letters are issued.

5. Deferral

Voluntary resolution of disputes is desirable in many whistleblower cases. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints under the HIOSH discrimination law. The investigator and SI must review the results of any proceeding to ensure all relevant issues were addressed, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the HIOSH discrimination statute. Repugnancy deals not only with the violation, but also the completeness of the remedies. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. If the determination is accepted, the division may defer to the decision as outlined above.

In cases where the investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration or other appropriate action, the Supervisory Investigator will issue letters of deferral to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in IMIS as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in Chapter 6. HIOSH may defer to the determination of another agency or tribunal in accordance with §12-51-11(c), HAR. (See sample deferral letter at the end of this Chapter.)

6. Findings of Discrimination

Where a finding of discrimination has been made, the Determination Notice and Order (DNO) must be issued to the respondent with a copy sent to the complainant. The Notice must detail the relevant facts in terms of the *prima facie* elements for discrimination, as well as what the respondent is ordered to do as appropriate relief under §12-57-1(d), HAR. In addition, a civil penalty of not more than $9,054 may be assessed. The SI must finalize the Determination Notice and Order issued to the respondent, with a copy sent to the complainant, for the Administrator's signature.

7. Further Investigation Warranted

If, for any reason, the SI does not concur with the investigator's analysis and recommendation or finds that additional investigation is warranted, the file must be returned for follow-up work.

C. Legal Requirements

The SI should confer with the DAG for any necessary advice or consultation during the conduct of the investigation to ensure that legal requirements are met. This is particularly important if the case is unusually complex.

V. Administrator's Determination

Once the SI has reviewed the file and concurs with the recommendation, he or she will obtain the Administrator's or his or her designee's signature on the Determination Notice and Order. All Determination Notices and Orders must be sent to the parties via certified

U.S. mail, return receipt requested. Proof of receipt must be preserved in the file with copies of the Determination Notice and Order to maintain accountability.

VI. Contest Rights.

Either party may file a written notice of contest objecting to the Determination Notice and Order, in accordance with §396-11, HRS, and §12-51-19, HAR.

A. Any party objecting to the Determination Notice and Order may, within 20 calendar days, file a written notice of contest. The procedures for processing a contested case is identical to that of enforcement cases (See Field Operations Manual, Chapter 15, Legal Issues).

Appendix to Chapter 4

Case Disposition Letters

Sample Complainant Withdrawal Request

DISCRIMINATION COMPLAINT WITHDRAWAL REQUEST

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a withdrawal may be registered with the Hawaii Occupational Safety and Health Division.

The undersigned complainant wishes to withdraw the discrimination complaint, filed under Section 8(e) of the Hawaii Occupational Safety and Health Law, against [Respondent Name], Case Number _____

This withdrawal request is submitted voluntarily by the undersigned.

I understand that I have the right to a determination by the Hawaii Occupational Safety and Health Division, subject to appeal, and I have waived that right.

(Complainant's Signature) _____

_____
(Typed or Printed Name}

_____
(Date)

Withdrawal Request Received By:		Withdrawal Request Approved By:	
Investigator	Date	SI	Date

Sample Oral Withdrawal Confirmation Letter

A confirmation letter of this type must be sent to a complainant who has orally requested to withdraw a complaint.

[HIOSH Letterhead]

[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Mr. Complainant:

This confirms our conversation on [date], in which you advised me that you wished to withdraw your complaint in the above-referenced matter. As we discussed, by withdrawing your complaint, you are waiving your right to appeal HIOSH's determination.

I will be submitting your file to my supervisor with a recommendation that your withdrawal request be approved and that this matter be closed. Should you have any questions, feel free to contact me.

Sincerely,

[Name]
Investigator
Hawaii Occupational Safety and Health
830 Punchbowl Street, Room 423
Honolulu, Hawaii 96813
(808) 123-4567

Certified Mail #[ ]

Sample Withdrawal Approval Letter (for either oral or written withdrawals)

A letter of this type must be sent to the complainant approving the oral or written withdrawal of a complaint.

[HIOSH Letterhead]

[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Mr./Ms. Complainant:

Your request to withdraw your complaint in the above-captioned matter has been approved. With this withdrawal, the case in this matter is closed.

If at any time in the future you have any questions or require any information regarding employee rights and employer responsibilities under the Hawaii Occupational Safety and Health Law, please feel free to contact this office.

Sincerely,

[Name]
Supervisory Investigator

c: Respondent or Respondent's representative

Certified Mail #[1234 5678 9012 3456 7890]

Sample Postponement Letter to Respondent

[HIOSH Letterhead]

[date]

ABC Company
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Sir or Madam:

The Hawaii Occupational Safety and Health Division (HIOSH) will agree to postpone its investigation of this matter pending private arbitration on condition that ABC Company (Respondent) (1) agrees to abide by all terms discussed in this letter and (2) promptly signs and returns a signed copy of this letter to HIOSH within seven (7) calendar days of receiving this letter.

Respondent agrees that Complainant will be afforded a meaningful role in the selection of a neutral arbitrator, and that the arbitrator will have the authority and discretion to allow both Complainant and Respondent to conduct meaningful discovery. Respondent additionally agrees that Complainant may be represented by the attorney of his choosing throughout the arbitration process.

Respondent agrees that the arbitrator will be permitted to award the following remedies that would be available under §396-8(e), Hawaii Revised Statutes (HRS), including reinstatement should the arbitrator find reasonable cause to believe that Respondent has violated the provisions of §396-8(e), HRS, and reasonable attorneys' fees should Complainant prevail.

Regarding the other costs and expenses of arbitration, Respondent agrees that it will bear the fees and costs associated with arbitration. Therefore, we believe that deferral to arbitration in this matter will not prove financially inaccessible to Complainant.

Finally, our agreement to defer to arbitration depends on Respondent's waiver of any argument that arbitration would be untimely and our understanding that Respondent will promptly forward a copy of the arbitrator's final written decision, including all findings of fact, to HIOSH at the conclusion of the arbitration. At that time, HIOSH will review the decision and findings of fact to determine whether the arbitrator's award should be given deference.

By signing below, Respondent agrees to abide by all terms discussed in this letter.

_____ _____

Respondent Date

Sincerely,

Administrator

Certified Mail #[ ]

Sample Deferral Letter to Complainant

Letters of this type must be mailed to the parties when deferring to an arbitration decision that did not result in a settlement. If the arbitration did result in a settlement, an approval letter must be mailed to the parties following settlement review and approval. See Chapter 6 for settlement approval procedures and a sample approval letter.

[HIOSH Letterhead]

[date]

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Mr./Ms. Complainant:

On [date], the Hawaii Occupational Safety and Health Division (HIOSH) received a copy of the arbitration decision reached regarding your complaint of retaliation filed on [date] against [Respondent's Name] (Respondent). We have reviewed the arbitrator's written decision, which explained not only the outcome, but also the essential findings of fact and conclusions of law on which it was based. We find that the arbitration proceedings dealt adequately with all factual issues raised in the above-referenced complaint, and that the proceedings were fair, regular, and free of procedural infirmities. The outcome of the proceedings was neither palpably wrong nor repugnant to the purpose and policy of the HIOSH Law. Accordingly, we hereby defer to the arbitrator's decision. Consequently, this complaint is dismissed.

This case will be closed unless you file an objection by sending a letter to the HIOSH Administrator at the above address within **20 calendar days** of receipt of this letter, after which the Hawaii Labor Relations Board (HLRB) will review the case

In addition, please be advised that the Hawaii Division of Occupational Safety and Health does not represent any party in the HLRB hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before the Board in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The Board will then issue a decision based on the evidence, arguments, and testimony presented by the parties.

Sincerely,

Administrator

Cc: Respondent/Respondent's attorney

. Certified Mail #[ ]

CHAPTER 5

DOCUMENTATION AND DETERMINATION NOTICE and ORDER (DNO)

I. Scope

This chapter sets forth the policies, procedures, and format for documenting the investigation and for properly organizing the investigative case file.

II. Screened Complaints

Complaints that initially do not present a *prima facie* allegation may be "screened out" and closed administratively, without docketing, provided the complainant accepts the initial determination by agreeing to withdraw the complaint. See Chapter 2, Section III.

For such cases, which are not docketed after the initial screening, the file arrangement of materials as outlined below need not be followed. All administratively closed cases must be appropriately entered into the IMIS system. Additionally, a letter to the complainant, documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation will be sent by the SI. A copy of the letter, along with any related documents, must be preserved for five years, as must whistleblower case files, per Instruction ADM 12-0.5A.

III. Case File Organization

A. Upon receipt of a new complaint, the SI will forward an original HIOSH-87 form and originals of any accompanying documents within a standard discrimination case file to the investigator as part of the case docketing process. The SI should also maintain copies of the HIOSH-87 and accompanying documents as backup to the originals.

B. Upon assignment, the investigator receives a standard case file containing the HIOSH-87, screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.

1. Evidentiary material normally is arranged as follows (from the bottom up):
    a. Original complaint, HIOSH-87 form or similar intake worksheet.
    b. Relevant documents from HIOSH enforcement files.
    c. OSHA-7 or Complainant's signed statement, if additional information was obtained.
    d. Remaining evidence (statements, records, etc., in logical sequence).
    e. Investigator's rough notes.

f. Case Activity/Telephone Log.

g. Report of Investigation.

h. Table of Contents (Exhibit Log).

2. **Separation of Materials**. Administrative and evidentiary materials will be separated by means of blank paper dividers with numbered index tabs at the right or bottom.

   a. Administrative documents will be arranged in chronological order, with the newest being on top.

   b. Evidentiary material tabs (right side of file) will be numbered consecutively using Arabic numerals with the highest number at the top of the stack.

   c. A Table of Contents ("Contents of Case File" sheet) identifying all the material by exhibit must be placed on top of the last exhibit on the right side. Nothing should be place on top of the Contents of Case File sheet.

3. Table V-1 depicts a typical case file.

Table V-1: Case File Organization (Sample)		
Left Side	**Right Side**	
Administrative Materials	**Tab No.**	**Evidentiary Materials**
Assignment Memorandum	1	Complaint/Intake Form
Complainant Notification	2	OSHA-7
Respondent Notification	3	Complainant's Statement
Designation(s) of Representative(s)	4	CSHO Statement
Correspondence, organized chronologically	5	Witness Statement
Determination Notice and Order	6	Witness Statement
Final Case Summary Worksheet	7	RP Position Statement
(Any post-determination documents such as appeals, HLRB decisions, proof of compliance with order, etc. filed on top, left side)	8	Attendance Records
	9	Investigator's Memo to File
	10	Investigator's Rough Notes
	11	Case Activity/Telephone Log
	14	Report of Investigation
	15	Table of Contents/Exhibit Log

4. **Requests to Return Documents upon Completion of the Cases.** All documents received by the State from the parties during the course of an investigation become part of the case file and may not be returned. The Investigator should make this clear prior to requesting any documents, and where possible, copies should be obtained. When such a request is made, the Investigator should send a letter to the party that made the request, explaining that his or her request cannot be granted.

5. **Confidentiality Requests for Documents Submitted.** Parties in a case frequently request that documents be kept "confidential" and not disclosed to third parties. Sometimes they will even request that documents not be shared with the other parties in the case.

   a. **Requests that Documents not be Shared with the Other Parties.** HIOSH must disclose to the parties any information relevant to the resolution of the case, because evidence submitted by the parties must be tested and the opposing party provided an opportunity to fully respond.

   b. **Requests that Documents not be Disclosed to Third Parties.** If this request is made by Respondent (as a business submitter) Investigators should respond to such a request by sending an acknowledgement letter to Respondent.

   c. **Confidentiality Granted to a Document Submitted by a Business.** When confidentiality is granted to a document submitted by a business, the Investigator should make sure that these exhibits are clearly marked by means of a cover sheet to the exhibit stating "CBI" or "Confidential Business Information."

   d. **Confidentiality Requests for Witness or Informants.** When a witness or informant has requested confidentiality, the witness statement should by clearly marked by means of a cover sheet to the exhibit stating "Confidential Witness Statement."

IV. Documenting the Investigation

Any investigative determination must, at a minimum, be supported by the following documentation.

A. Case Activity/Telephone Log

List the date, time and activity of telephone calls, interviews, onsite visits, etc.

B. Report of Investigation (ROI) (Formerly Called Final Investigation Report or FIR)

The Report of Investigation (ROI) is HIOSH's internal summary of the investigation; and as such, while it contains similar information to the Determination Notice and Order (DNO), it is written as a memo from the Investigator to the SI. The ROI must contain the information below, but may also include, as needed, a chronology of events, a witness log, and any other information required by the Administrator. The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate

supervisory review of the case file. In many cases, significant portions of the narrative from the ROI may be merged into the DNO, taking care that the identities of any confidential witnesses listed in the ROI are not included in the DNO. The first page of the ROI must list the parties' and their attorneys' names, addresses, phone numbers, fax numbers, and e-mail addresses, but nothing else. See the appendix to this chapter for a sample format for the ROI.

1. **Timeliness.** Indicate the actual date that the complaint was filed and whether or not the filing was timely.
2. **Coverage.** A brief statement of the basis for coverage such as whether respondent is alleging that complainant was an independent contractor and a brief summary of the investigator's conclusions. Also if complaint may fall under another whistleblower statute other than OSHA 11(c), that the complainant was advised to file with OSHA.
3. **The Elements of a Violation.** Evaluate the facts presented in the DNO as they relate to the four elements of a violation, following Chapter 3, Section IV. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented.
   a. Protected Activity
   b. Respondent Knowledge
   c. Adverse Action
   d. Nexus
4. **Defense.** Give a brief account of the respondent's defense; e.g., "Respondent claims that Complainant was discharged for excessive absenteeism." If the respondent claims that complainant's misconduct or poor performance was the reason for the adverse action, discuss whether complainant engaged in that misconduct or performed poorly and, if so, how the employer's rules deal with this and how other employees engaged in similar misconduct or with similar performances were treated.
5. **Recommended Determination.** This is a concise statement of the Investigator's recommendation for violation of §396-8(e), HRS or no violation and whether any penalties are proposed.
6. **Recommended Relief or Remedy.** In findings of discrimination, this section should describe all appropriate relief due the complainant, as determined using Chapter 6. Any cost that will continue to accrue until payment, such as back wages, insurance premiums, and the like should be stated as formulas – that is, amounts per unit of time, so that the proper amount to be paid to the complainant is calculable as of the date of the payment. For example, "Back wages in the amount of $13.90 per hour, for 40 hours per week, from January 2, 2016 through the date of payment, less the customary deductions, shall be paid by Respondent." In findings of no discrimination, this section should simply be left blank.
7. **Other Relevant Information.** Any novel legal or other unusual issues, related complaints, Investigator's assessment of a proposed settlement agreement, or

any other relevant consideration in the case may be addressed here.

8. **Incomplete Record.** For cases that are determined to be untimely, not within HIOSH jurisdiction, where an early settlement has been reached, or where complainant's lack of cooperation resulted in insufficient information for a discrimination determination, it is generally sufficient to include information only on aspects of the investigation completed up through the date of withdrawal, settlement, or determination of untimeliness or insufficiency of information. Notation would be made of the reasons for the termination of the investigation, "Other Relevant Info for SI's Consideration," or its equivalent. However, in all cases in which there is a finding of discrimination, all of the information must be provided.

C. Closing Conference

The closing conference will be documented in the case file either by an entry in the activity/telephone log or a separate Memo to File.

V. Determination Notice and Order (DNO)

A. Purpose

The Determination Notice and Order (DNO) is required by §396-8(e)(6) and (7), HRS, and by §12-57-9, HAR, for the purpose of informing the parties of the outcome of HIOSH's investigation, succinctly documenting the factual findings as well as HIOSH's analysis of the elements of a violation, and conveying any order. The DNO also formally advises the parties of their right to appeal any determination and order, along with procedures for how to do so.

B. When Required

1. Whenever an investigation results in a determination of either discrimination or no discrimination.
2. Whenever a complaint is filed and the complainant does not agree to withdraw the complaint based on preliminary findings that the complaint is either not timely, or has not met the prima facie elements of a violation.
3. When HIOSH agrees after a careful scrutiny of all available information that it is appropriate to defer to the outcome of another proceeding because it was found that the proceeding dealt adequately with all factual issues, that the proceeding was fair, regular, and free of procedural infirmities, and that the outcome of the proceeding was not repugnant to the purpose and policy of section 396-8(e), HRS. (See §12-57-11, HAR).

C. [Reserved]

D. Format of the DNO

As shown in the sample, DNOs are written in the form of a letter, rather than a report, in the following format.

1. **Introduction.** In the opening paragraph, identify the parties, the statute under which the complaint was filed, and include a one sentence summary of the allegation(s) made in the complaint. The second paragraph will be the standard

paragraph: "Following an investigation by a duly authorized investigator, the Director of the Hawaii Department of Labor and Industrial Relations, acting through his/her designee, the Administrator for the Hawaii Occupational Safety and Health Division (HIOSH), pursuant to §396-8(e), HRS, finds that the evidence establishes that (choose one)

a. "Respondent discriminated against the Complainant in violation of §396-8(e), HRS, and issues the following findings and orders"; *or*

b. "Respondent did not discriminate against the Complainant in violation of §396-8(e), HRS, and the complaint is closed"; *or*

c. "The complaint filed on [date] was not timely filed in accordance with §396-8(e)(4), HRS, which sets 60 days from the date of the adverse action or retaliation to file a complaint"; *or*

d. "The proceeding of [name of agency, or arbitration proceeding] was found to have dealt adequately with all factual issues raised in the above-referenced complaint; were fair, regular and free of procedural infirmities; and was neither palpably wrong nor repugnant to the purpose and policy of the Hawaii Occupational Safety and Health Law. Accordingly, we hereby defer to the [arbitrator's, agency name] decision. And the complaint is closed."

2. **Timeliness.** Explain whether the whistleblower complaint was filed within the statute of limitations (60 days); and if not, whether the late filing can be excused for any of the reasons set forth in chapter 2.

3. **Coverage.** Only if coverage is a potential issue.

4. **Background.** Briefly describe the respondent's business and the complainant's employment. If complainant was not an employee of the respondent, describe how the complainant's employment was affected by respondent.

5. **Succinct Analysis of the *Prima Facie* Elements.** Within the framework of the elements of a violation, succinctly narrate and analyze the facts as to whether the evidence supports each *prima facie* element. Beginning with protected activity, summarize the facts that support that the complainant engaged in protected activity, addressing disputed facts only if they are critical to the determination. Only unresolved discrepancies should be presented as assertions. The findings generally should not state that a witness saw or heard or testified or stated to the investigator such and such or that a document stated such and such. However, in some circumstances, such fuller description may be necessary or desirable. The dates for the protected activity and the adverse action should be stated to the extent possible. All four elements of a violation should be addressed in order, even if one or more elements was not met. Care should be taken not reveal or identify confidential witnesses or detailed witness information in the DNO.

For findings of no discrimination: All *prima facie* elements must still be discussed as a complete determination, appealable to the Hawaii Labor Relations Board.

6. **Respondents Defense.** Discuss the respondent's purported non-discriminatory reason for the adverse action including the legal aspects for the finding of discrimination or no discrimination, e.g., "but for".
7. **Punitive Damages.** The rationale for ordering any punitive damages should be concisely stated here. See p. 6-6, for a discussion of when punitive damages may be appropriate.
8. **Order.** In findings of discrimination only, list all relief being awarded**.** The order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather than wording should be stated in terms of earnings per hour (or other appropriate wage unit) covering the number of hours missed.
9. **Contest Rights.** The right to contest the DNO must be provided.
10. **Signature.** The Administrator is authorized to sign the DNO. This authority may be delegated to the Supervisory Investigator.

E. Procedures for Issuing the DNO

For all determinations and orders under §396-8(e), HRS, the parties must be notified of the results of the investigation by issuance of the Determination Notice and Order (see subparagraph D. above and sample DNO at the end of this chapter): contest rights must be noted. The DNO will be prepared for appropriate signature, as set for the above. The Investigator will assure that the DNO is sent to the parties via certified U.S. Mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of the receipt will be preserved in the file with copies of the DNO to maintain accountability.

VI. Contest Process

A. Right to Contest. §396-11, HRS, provides both the complainant and respondent the right to contest the Determination Notice and Order. Investigators shall ensure that both parties are informed of, and understand, their right to contest within 20 calendar days of receipt of the order.

B. Contest Procedures. Normally, complainants contest no discrimination determinations and respondents contest determinations finding discrimination and that result in an order for appropriate relief. The contest policies and procedures for both complainant and respondent are identical.

C. Timeliness. Any notice of contest must be filed in writing to the Director within 20 calendar days following the receipt of the determination notification to the complainant or respondent. The principles of equitable tolling will also be accepted in determining timeliness of filing.

1. The 20 calendar day period begins with the first day after the receipt date noted on the certified mail return receipt form provided by the U.S. Postal Service.

2. Contests filed beyond the 20 calendar day filing period will be forwarded to the HLRB for determination of timeliness.

D. Informal Conference.

1. Both respondent and complainant have the opportunity to request an informal conference similar to other enforcement proceedings.

2. If there is still time before the 20 calendar day final order deadline, and either party has not yet contested or agrees to withdraw their contest pending the outcome of the informal conference, an informal conference with the Administrator, manager, or designee shall be held if requested.

3. Normal informal conference procedures per the FOM apply.

4. All parties shall either be given an opportunity to attend the informal conference and offer rebuttal comments, or shall be contacted separately for comments and/or rebuttal.

5. The outcome of the informal conference may be:

a. No settlement agreement is reached – parties shall be reminded that they may still file a notice of contest within the statutory 20 calendar days.

b. Settlement Agreement

i. HIOSH may reach a settlement agreement if all parties agree to the settlement terms and conditions. An ISA, which includes provisions to forego the right to contest the ISA and for failure to carry out the terms of the agreement shall then be prepared for the Respondent's, Claimant's, and manager's signatures.

ii. HIOSH may also settle the case per Chapter 6, without the complainant's consent, provided the settlement meets the intent of the Law. A Bilateral Agreement, which includes provisions to forego the right to contest the Bilateral Agreement and for failure to carry out the terms of the agreement shall be prepared for the Administrator's and Respondent's signatures.

iii. The ISA or Bilateral Agreement will serve as the final order.

E. Transmittal to Hawaii Labor Relations Board (HLRB). Notices of contest filed (regardless of timeliness) by either complainant or respondent will be forwarded to the Hawaii Labor Relations Board (HLRB), and the DAG via transmittal memo. The DAG also receives a redacted copy of the case file.

In addition, the parties will receive a letter confirming receipt of the contest letter and notifying all that the HLRB now has jurisdiction over the proceeding and will hear the case de novo – only on evidence presented during the hearing.

VII. Documenting Key Dates in IMIS

A. Timely and Accurate Entry. Entry of information in IMIS, as detailed in OSHA Directive IRT 01-00-016, is critically important. In particular, key dates must be accurately recorded in order to measure program performance.

1. **Date Complaint Filed**

   The date a complaint is filed is the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at a HIOSH office.

2. **ROI (Formerly FIR) Date**

   The date upon which the ROI was approved by the SI is the ROI date.

3. **Determination Date**

   The date upon which the DNO is postmarked is the determination date.

4. **Date Appeal Filed**

   The date the contest is filed is the date of the postmark, delivery to a third-party commercial carrier, or in-person filing at a HIOSH office. (See §12-51-19, HAR – contest letters must be an original and mailed if not delivered.)

Appendix to Chapter 5

Notice and Order Forms and Letters

Sample Report of Investigation (ROI)

State of Hawaii
Department of Labor and Industrial Relations
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
(HIOSH)

INTER-OFFICE MEMORANDUM

[date]

TO: ABBOTT A. COSTELLO
Supervisory Investigator

FROM: CHARLES E. TODD
Investigator

SUBJECT: Good Stuff Drywall/Aloha/Case No. _____

STATUTE: §396-8(e), HRS

COMPLAINANT:	John K. Aloha 1234 Kamaaina Ave Honolulu, HI 96822 Telephone: (808) 123-4567 jkaloha@gmail.com	Represented By: None.
RESPONDENT:	Good Stuff Drywall 9876 Waiwai Street Honolulu, HI 96819 Telephone: (808) 789-1234 drywall4u@aol.com	Represented By: Marie Wrong, Esq. 516 Richards St., Suite 500 Honolulu, HI 96813 Telephone: (808) 798-1236 corplawyers@comcast.net

	Analysis	**Exhibit #(s)**
Timeliness	Complainant, John K. Aloha, was laid off on October 25, 2013. On that same day, Complainant filed a complaint with HIOSH alleging that Respondent retaliated against him in violation of §396-8(e), HRS. As this complaint was filed within 60 days of the alleged adverse action, it is deemed timely.	1
Coverage	Respondent, Good Stuff Drywall, is an employer within the meaning of §396-3, HRS. Respondent is a Nevada corporation, primarily engaged in the installation of wallboard and insulation. Complainant is an employee of Good Stuff Drywall and within the meaning of §396-2, HRS.	2, 5
Protected Activity	On several occasions between October 19 and 24, 2013, Complainant engaged in protected activity by complaining to his superintendent, Harry S. Briggs, about his need for safety glasses and a respirator. Complainant also engaged in protected activity when he called the HIOSH office on October 24 and filed a safety and health complaint.	3, 4
Knowledge	Although Respondent initially disputed in its position statement that it had knowledge of Complainant's October 24 call to HIOSH, two of Respondent's managers acknowledged in their interviews with Investigator that they knew Complainant was the one who called HIOSH. Respondent knowledge of the internal safety/health complaints was also confirmed through interviews. Respondent knowledge has been established.	6, 7
Adverse Action	Complainant experienced an adverse action when Respondent laid him off on October 25, 2013.	3, 6, 7

	Analysis	Exhibit #(s)
Nexus	A close temporal proximity exists between the protected activity and adverse action, as Complainant was laid off within an hour of Briggs learning that he had called HIOSH. Additionally, animus toward the protected activity is demonstrated by Briggs' comments that "nobody calls OSHA on me," to Aloha and Nelson at the time of Parker's termination and to Business Agent Abner the next day. The evidence indicated that Briggs had expressed frustration around the workplace regarding Complainant's repeated complaints about safety and health matters. A nexus has been established between the protected activity and adverse action.	6, 7, 8
Defense	Respondent claimed that Complainant was laid off to confirm with the Collective Bargaining Agreement (CBA) provision that required seven journeymen on the job before hiring a second apprentice. However, the investigation revealed that this provision in the CBA was routinely disregarded and that second apprentices had been hired on several occasions in recent years, even with less than seven journeymen present. Therefore, Respondent's defense is not believable and is a pretext for retaliation.	3, 6, 7
Recommended Determination	A violation of Discrimination be found with a proposed penalty of $9,054.	
Recommended Relief Ordered		
Reinstatement	It is recommended that reinstatement be ordered, as Complainant was laid off and remains unemployed.	
Back Wages	See attached Damages Calculations	
Interest	See attached Damages Calculations	
Other Compensatory Damages	$375.00: Job search expenses	
OPTIONAL: Punitive damages	It is recommended that, due to the callous indifference toward Complainant's rights demonstrated by multiple Respondent management officials, that punitive damages be awarded in the amount of $XXXX.00	
Expungement	Yes	

	Analysis	**Exhibit #(s)**
Posting	Yes	
Attorney's Fees	n/a	
Other Relevant Information for SI's Consideration	Numerous attempts to settle this matter short of litigation were attempted, but Respondent's "final" settlement offer (25% of Complainant's back wages with no reinstatement) was unacceptable to both Complainant and HIOSH	
	Respondent has previously been issued six serious, and ten other-than-serious, citations in the past two years, demonstrating recalcitrance to provide a safe and healthful workplace for its employees. Respondent was also subject to a prior396-8(e) complaint in November 2012, which our office settled for three days of back wages, as that complainant found other employment quickly and was not interested in returning to work. Respondent's past history with HIOSH may be relevant to the issue of punitive damages.	

Submitted by:

_____
Name
Investigator, HIOSH

I have reviewed this investigative file and I concur with the recommendation above.

_____
Name
Supervisory Investigator, HIOSH

COMPLAINANT CLOSING CONFERENCE

Date: _____ time: _____

☐ In person

☐ By phone

☐ Complainant representative present

☐ Notified Complainant of findings

- ☐ Employer settlement if any yes / no

☐ Informed Complainant of his/her rights

- ☐ Appeal within 20 days of receiving the determination letter
- ☐ _____

☐ Other actions _____

Comments/notes:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

RESPONDENT CLOSING CONFERENCE

Date: _____ time: _____

- ☐ In person (If discrimination found, closing must be in person)
- ☐ By phone (only if no discrimination found)
- ☐ Respondent representative (attorney) present
- ☐ Notified Respondent of findings
  - ☐ Discussed possibility of settlement
- ☐ Informed Respondent of his/her rights
  - ☐ Appeal within 20 days of receiving the determination letter
  - ☐ _____
- ☐ Other actions _____

Comments/notes:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Sample Discrimination Notice and Order to Respondent

[HIOSH Letterhead]

[Date]

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. U R Respondent
Address
City, State ZIP

Dear Respondent:

Re: Respondent/Complainant/Case No._____

On [Date filed], [Complainant Name], Complainant, an employee of [Employer], Respondent filed a discrimination/whistleblower complaint under §396-8(e), Hawaii Revised Statutes (HRS), because he/she was [adverse action] in retaliation for [protected activity]. The Respondent's position is that Complainant was [adverse action] because. . .Following an investigation by a duly authorized investigator, the Hawaii Occupational Safety and Health Division (HIOSH) finds that the evidence establishes that Respondent discriminated against the Complainant in violation of §396-8(e), HRS, and issues the following findings and orders.

FINDINGS OF THE INVESTIGATION

Timeliness of Complaint

Complainant was [adverse action] on or about [date]. On [date filed], Complainant filed a complaint with HIOSH alleging that Respondent retaliated against [him/her] in violation of §396-8(e), HRS. As this complaint was filed within 60 days of the alleged adverse action, it is deemed timely.

Protected Activity

Complainant engaged in protected activity under §396-8(e), HRS, when . . .

Respondent Knowledge

Respondent knew of [or suspected] Complainant's protected activity . . .

Adverse Action

Complainant experienced an adverse action when. . . [also specify the date of adverse action]

Nexus

Complainant's protective activity constituted a substantial reason for the [adverse action] in that. .

Respondent's Defense

Discuss briefly why respondent's defense was rejected, e.g., pretext, "but for", etc.

ORDER

Upon receipt of this Determination Notice and Order, Respondent is ordered to provide relief to <Complainant> as follows:

1. Respondent shall immediately reinstate Complainant to [his/her] former position at a rate of $[insert amount] per [insert appropriate time unit]. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had [he/she] never been discharged.
2. Respondent shall pay Complainant back pay, minus interim earnings, at the rate of [$amount per week/month], for the period [Date] until Respondent makes Complainant a bona fide offer of reinstatement.
3. Respondent shall pay Complainant $[insert amount] as bonus for [year].
4. Respondent shall pay interest on the back wages and bonus in accordance with 26 U.S.C. §6621.
5. Respondent shall reinstate Complainant's right to exercise stock options on [x] shares, pursuant to Respondent's equity plan. Complainant's enrollment shall be deemed to have been continuous for purposes of vesting requirements.
6. Respondent shall pay Complainant for additional out-of-pocket expenses as a result of the [adverse action], for the following:
    a. Out-of-pocket medical expenses in the amount of $[insert amount]. (This would be for medical costs that would not have occurred had the retaliation not occurred, e.g. doctor bills for stress]
    b. Medical insurance premiums in the amount of $[insert amount].
    c. Job hunting expenses in the amount of $[insert amount].
    d. Pain and suffering, including mental distress $[insert amount]

    When punitive damages are awarded, the rationale for doing so must be set forth in the body of the findings.
7. Respondent shall pay Complainant punitive damages in the amount of $[insert amount].
8. Respondent shall expunge Complainant's employment records of any adverse materials/references related to the complainant's exercise of his/her rights under the Hawaii Occupational Safety and Health Law.
9. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to HIOSH Law, Chapter 396, Hawaii Revised Statutes.

10. Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices are customarily posted including Respondent's internal Web site for employees or e-mails, if respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least sixty (60) consecutive days from the date of the posting, the attached notice to employees, to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon.

CITATION AND PENALTY

Based on the above findings, Respondent violated §396-8(e), HRS, when he/she discriminated against Complainant for [protected activity] by [adverse action]. In accordance with section 396-10(h), HRS, a penalty of $9,054 is hereby assessed.

Payment of the penalty is due within twenty (20) calendar days from receipt of this order, unless contested (see below). Please make your check or money order for the $9,054.00 penalty payable to, "Director of Budget and Finance." All checks should be mailed to the Hawaii Occupational Safety and Health Division, 830 Punchbowl Street, Room 423, Honolulu, Hawaii96813.

CONTEST AND RECONSIDERATION RIGHTS

You may appeal this Determination Notice and Order and/or the penalty by notifying the Administrator in writing within twenty (20) calendar days after receiving this order. You must file the notice of contest with:

Administrator
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 Punchbowl Street, Room 423
Honolulu, Hawaii 96813

The adjudicatory body is the Hawaii Labor Relations Board (HLRB) who will hear the case based on all evidence and arguments presented before them at a formal hearing. They will determine whether the Complainant has met the burden of establishing a violation of §396-8(e), HRS.

<u>If this Determination Notice and Order is not contested, it becomes a final order (not contestable) after twenty (20) calendar days.</u>

INFORMAL CONFERENCE

In addition, Pursuant to 12-51-21of the Hawaii Administrative Rules, you or your designated representative may request and attain an informal conference by contacting the Administrator of the Hawaii Occupational Safety and Health Division (see the address in the "Contest and Reconsideration Rights" section above) after receiving this Determination and Notice of Order

(DNO). The purpose of the informal conference may be for discussion of any citation, proposed penalty, notice of intention to contest and a discussion of settlement. Parties can enter into a settlement during the informal conference to settle the case. **However, the informal conference or request for informal conference shall not stop the 20 (twenty) calendar day period for filing an appeal, as discussed in the "Contest and Reconsideration Rights" section above. In other words, if you wish to request an informal conference and also preserve your appeal rights, you must still follow the instructions on how to file an appeal above**.

Sincerely,

Administrator

Enclosure: Employee Notice

CC: Complainant

Certified #: [ ]

Sample No Discrimination Determination Notice and Order to Complainant
Complaint was timely filed

[HIOSH Letterhead]

[date]

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. U.R. Complainant
Street Address
City, State ZIP

Dear Mr. Complainant:

Re: Respondent/Complainant/Case No. _____

On [Date filed], you filed a discrimination/whistleblower complaint under §396-8(e), Hawaii Revised Statutes (HRS) because you were [adverse action] in retaliation for [protected activity]. Following an investigation by a duly authorized investigator, the Hawaii Occupational Safety and Health Division (HIOSH) finds that the evidence establishes that [Name of Employer Company], Respondent did not discriminate against you in violation of §396-8(e), HRS, and issues the following findings and orders.

FINDINGS OF THE INVESTIGATION

Timeliness of Complaint

Complainant was [adverse action] on or about [date]. On [date filed], Complainant filed a complaint with HIOSH alleging that Respondent retaliated against [him/her] in violation of §396-8(e), HRS. As this complaint was filed within 60 days of the alleged adverse action, it is deemed timely.

[Except for Timeliness Issue, discuss ALL elements even if only one unmet element establishes no discrimination – Reason – if go to contest, HLRB will consider all elements.]

Protected Activity

Complainant engaged in protected activity under §396-8(e), HRS, when . . .

or

Complainant did not engage in protected activity under §396-8(e), HRS in that [activity] is not a protected activity.

Respondent Knowledge

Respondent knew of [or suspected] Complainant's protected activity . . .

or

Respondent did not know of or suspect Complainant's protected activity

Adverse Action

Complainant experienced an adverse action when. . . [also specify the date of adverse action]

Nexus

Complainant's protective activity did not constitute a substantial reason for the [adverse action] in that . . [discuss respondent's defense]

or

Complainant's protected activity was a consideration in the adverse action However, Respondent would have taken the same adverse action in the absence of Complainant's protected activity.

ORDER

As a preponderance of the evidence shows that all requisite elements for a finding of discrimination could not be established, it is determined that there is no violation of section §396-8(e), HRS. The case is hereby closed unless you appeal this Non-merit Determination Notice and Order (see "Contest and Reconsideration Rights" section below).

CONTEST AND RECONSIDERATION RIGHTS

You may appeal this Determination Notice and Order and/or the penalty by notifying the Administrator in writing within twenty (20) calendar days after receiving this order. You must file the notice of contest with:

Administrator
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 Punchbowl Street, Room 423
Honolulu, Hawaii 96813

The adjudicatory body is the Hawaii Labor Relations Board (HLRB) who will hear the case based on all evidence and arguments presented before them at a formal hearing. They will determine whether you have met the burden of establishing a violation of §396-8(e), HRS. Please note that where HIOSH finds no discrimination, the state Deputy Attorney General does not represent either Respondent or Claimant in the hearing; rather, each party presents his or her own case.

If this Determination Notice and Order is not contested, it becomes a final order (not contestable) after twenty (20) calendar days.

INFORMAL CONFERENCE

In addition, Pursuant to 12-51-21of the Hawaii Administrative Rules, you or your designated representative may request and attain an informal conference by contacting the Administrator of the Hawaii Occupational Safety and Health Division (see the address in the "Contest and Reconsideration Rights" section above) after receiving this Non-merit Determination and Notice of Order (DNO). The purpose of the informal conference may be for discussion of any citation, proposed penalty, notice of intention to contest and a discussion of settlement. Parties can enter

into a settlement during the informal conference to settle the case. **However, the informal conference or request for informal conference shall not stop the 20 (twenty) calendar day period for filing an appeal, as discussed in the "Contest and Reconsideration Rights" section above. In other words, if you wish to request an informal conference and also preserve your appeal rights, you must still follow the instructions on how to file an appeal above**.

DUALLY FILED COMPLAINTS

In addition, if you dually filed your case with Federal OSHA and would like to invoke your dually filed rights, you may contact Federal OSHA only after receiving a final determination in this claim—that is, a decision by the Hawaii Occupational Safety and Health Division that it lacks merits or a decision after a hearing by the HLRB, whichever comes later. The request for a review must be made in writing to the OSHA Regional Supervisory Investigator indicated below and postmarked within fifteen (15) calendar days after receipt of the final determination. If you do not request a review in writing within the fifteen (15) day period, your federal retaliation complaint will be considered to be administratively closed.

OSHA Regional Supervisory Investigator
OSHA Region IX
US Department of Labor - OSHA
Ronald Dellums Federal Building
1301 Clay Street, Suite 1080N
Oakland, CA 94612

COMPLAINT ABOUT STATE PLAN ADMINISTRATION

If you feel that the investigation was not conducted in accordance with established procedures, and you received a final determination in this claim (as discussed in the "Dually Filed Complaints" section above), you may contact Federal OSHA to file a Complaint About State Program Administration (CASPA) against the Hawaii Occupational Safety and Health Division. A CASPA can be filed orally or in writing by contacting the Area Director of Federal OSHA's Honolulu's Area Office at:

Area Director
OSHA Honolulu Area Office
Prince Jonah Kuhio Kalanianaole Federal Building
300 Ala Moana Blvd., Room 5-146
Honolulu, HI 96850
(808)541-2680
(808)541-3456 FAX

Sincerely,

Administrator

Certified #: [ ]

CC: Respondent

Sample Respondent Contest Acknowledgement Letter

[date]

[Name of Employer or Representative, Title]
[Company's Name]
[Address]

Dear Employer/Employer Representative]:

RE: NOTICE OF CONTEST
Respondent/Complainant, Case No. _____
Determination Notice and Order Date:

We are sending your contested case to the Hawaii Labor Relations Board (HLRB) for their review of the Determination Notice and Order. Please be advised that once your letter of contest is received, the contested items become the jurisdiction of the HLRB. You will be receiving notices from them regarding pre-trial and hearing dates or any information relating to your case. Please call the HLRB at 808-586-8610 for any questions pertaining to these notices.

Any questions pertaining to the contested items should be directed to the Office of the Attorney General at 808-586-1450. If you have questions that are not related to the contest, please call us at 808-586-9116.

In accordance with §12-51-16(c) and (d), Hawaii Administrative Rules (HAR), you are required to notify your employees of this contest by posting in a conspicuous place in or about your facility, including in all places where notices are customarily posted.

Sincerely,

Administrator

c: Hawaii Labor Relations Board
Department of the Attorney General

Sample Complainant Contest Acknowledgement Letter

[date]

[Name of Complainant]
[Address]

Dear [Complainant]:

RE: NOTICE OF CONTEST
Respondent/Complainant, Case No._____
Determination Notice and Order Date:

We are sending your contested case to the Hawaii Labor Relations Board (HLRB) for their review of the Determination Notice and Order. Please be advised that once your letter of contest is received, the contested items become the jurisdiction of the HLRB. You will be receiving notices from them regarding pre-trial and hearing dates or any information relating to your case. Please call the HLRB at 808-586-8610 for any questions pertaining to these notices or the hearing process.

Although the Department of the Attorney General (DAG) is being notified of your contest, in such proceedings before HLRB, the DAG does not represent either the Respondent or you in this matter. Each party must present their own case. The DAG represents the State of Hawaii and may assist the HLRB as needed.

Sincerely,

Administrator

c: Hawaii Labor Relations Board
Department of the Attorney General
Respondent

Sample Contest Notification Memo to Attorney General's Office

[HIOSH Letterhead]
[date]

TO: [Name], Supervising Deputy Attorney General
Department of the Attorney General, Labor Division

FROM: Administrator
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

SUBJECT: Notice of Contest
Discrimination Complaint
Establishment Name/Last Name of Complainant/Discrimination No.

Transmitted herewith are documents in connection with the above contested case. The Respondent/Complainant is contesting the Determination Notice and Order [and the assessed penalty].

The following addresses are provided for your information and use:

Respondent's name Address Phone, e-mail	Attorney's Name Address Phone, e-mail
Complainant's Name Address Phone, e-mail	Attorney's Name (or other representative) Address Phone, e-mail

Enclosures: Contest Letter
Determination Notice and Order
Investigative File (redacted)

Sample Contest Notification Memo to HLRB

[HIOSH Letterhead]
[date]

TO: [Name], Chairperson
Hawaii Labor Relations Board

FROM: Administrator
Hawaii Occupational Safety and Health Division

SUBJECT: Notice of Contest
Discrimination Complaint
Establishment Name/Last Name of Complainant/Discrimination No.

Transmitted herewith are documents in connection with the above contested case. The Respondent/Complainant is contesting the Determination Notice and Order [and the assessed penalty].

The following addresses are provided for your information and use:

Respondent's name Address Phone, e-mail	Attorney's Name Address Phone, e-mail
Complainant's Name Address Phone, e-mail	Attorney's Name (or other representative) Address Phone, e-mail

Enclosures: Contest Letter
Determination Notice and Order

CHAPTER 6
REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope

This Chapter provides guidance on gathering evidence and determining appropriate remedies in discrimination/whistleblower cases where a violation has been found. Damage awards should result from a fact-specific evaluation of the evidence developed in the investigation. Investigators should consult with the SI in designing the appropriate remedy. The DAG should also be involved in cases involving potential punitive damages. This Chapter also provides guidance for the effective negotiation of settlements and their documentation.

II. Remedies

Section 396-8(e), HRS, is designed to compensate complainants for the losses caused by the unlawful conduct and restore them to the terms, conditions, privileges of their employment or former employment (if the complainant was fired) as they existed prior to the employer's/respondent's adverse actions. The complainant's remedies may also include non-monetary remedies such as reinstatement to a position from which the complainant was terminated, receipt of a promotion which the complainant was denied, expungement of adverse references in the employment record, a neutral employment reference, and other remedies that would make the complainant "whole".

III. Reinstatement and Front Pay

A. Reinstatement

Reinstatement of the complainant to his or her former position is the presumptive remedy where discrimination was found involving a discharge or demotion and is a critical component of making the complainant whole. Where reinstatement is not feasible for reasons such as those described in the following paragraph, front pay in lieu of reinstatement may be awarded from the date of the award up to a reasonable amount of time for the complainant to obtain another job.

B. Front Pay

Front pay, which is described in OSHA's whistleblower rules as economic reinstatement, is a substitute remedy in rare cases where reinstatement, the presumptive remedy in termination cases, is not possible. Situations where front pay may be appropriate include those in which the respondent's retaliatory conduct has caused the complainant to be medically unable to return to work, or the complainant's former position or a comparable position no longer exists. Similarly, front pay may be appropriate where it is determined that a respondent's offer of reinstatement is not made in good faith or where returning to the workplace would result in debilitating anxiety or other risks to the complainant's mental health. Front pay also may be available in cases of extreme hostility

between the respondent and the complainant such that complainant's continued employment would be unbearable.

In cases where front pay may be a remedy, the investigator should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors like the length of time the complainant expects to be out of work and the complainant's compensation prior to the retaliation, adjusted for any income the complainant is earning. DAG should be consulted when considering an award of front pay.

IV. Back Pay

A. Lost Wages

Lost wages generally comprise the bulk of the back pay award. Investigators should compute back pay by deducting the complainant's interim earnings (described below) from gross back pay. Gross back pay is the total earnings (before taxes and other deductions) that the complainant would have earned during the period of unemployment. Generally, this gross back pay is calculated by multiplying the hourly wage by the number or hours per week that the complainant typically worked. If the complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be broken down into a daily rate and then multiplied by the number of days that the complainant typically would have worked. If the complainant has not been reinstated, the gross back pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. The back pay award should include any cost-of-living increases or raises that the complainant would have received if he or she had continued to work for the respondent. The investigator should ask the complainant for evidence of such increase or raises and keep the evidence in the case file.

A respondent's cumulative liability for back pay ceases when a complainant rejects a bona fide offer of reinstatement. The respondent's offer must afford the complainant reinstatement to a job substantially equivalent to the former position.

B. Bonuses, Overtime, and Benefits

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

C. Interim Earnings

Interim earnings obtained by the complainant will be deducted from a back pay award. Interim earnings are the total earnings (before taxes and other deductions) that the complainant earned from interim employment subsequent to his termination and before assessment of the damages award. Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job, assuming the expenses would not have been incurred at the former job. Such expenses may include special tools and equipment, necessary safety clothing, union fees, mileage at the applicable IRS rate per driving mile for any increase in commuting distance from the distance travelled to the respondent's location,

special subscriptions, mandated special training and education costs, special lodging costs, and other related expenses.

Interim earnings should be deducted from back pay using the periodic mitigation method. Under this method, the time between a complainant's unlawful termination and the complainant's reinstatement (economic or actual) is divided into periods. The period should be the smallest possible amount of time given the evidence available. Thus, the period ideally would be one day, if possible. If one day is not possible to calculate, the next smallest period would be one week, and so on. Interim earnings in each period are subtracted from the lost wages attributable to that period. This yields the amount of back pay owed for that period. If the interim earnings exceed the lost wages in a given period, the amount of backpay owed for that period would be $0.00—not a negative amount. Once completed, adding the backpay attributable to each period together will yield the total backpay award.

Unemployment insurance benefits received are not deducted from gross back pay. Worker's compensation benefits that replace lost wages during a period in which back pay is owed may be deducted from gross back pay. Complainants should be reminded that they may need to reimburse unemployment benefits received.

Investigators must support back pay awards with documentary evidence.

D. Mitigation Considerations

Complainants have 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. 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 the complainant for evidence of his or her job search and keep the evidence in the case file. A complainant's obligation to mitigate his or her damages does not normally require that the complainant go into another line of work or accept a demotion. However, complainants who are unable to secure substantially equivalent employment after a reasonable period of time must consider other available and suitable employment.

E. Social Security

Respondents will be ordered to submit appropriate documentation to the Social Security Administration, allocating the back pay award to appropriate periods.

V. Compensatory Damages

A. Pecuniary Losses

Compensatory damages are a part of the appropriate relief entitled to complainants found to have been discriminated against. Compensatory damages include, but are not limited to, pecuniary losses resulting from the respondent's adverse employment action, such as out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy as well as medical expenses for

treatment of symptoms directly related to the retaliation (e.g., post-traumatic stress, depression, etc.), vested fund or profit-sharing losses (vested fund or profit sharing losses include both company contributions and investment gains and losses), credit card interest and other property loss resulting from missed payments, and annuity losses. Complainants may also recover expenses incurred as a result of searching for interim employment. Such expenses may include, but are not limited to, mileage at the current IRS rate per driving mile, employment agencies fees, meals and lodging when traveling for interviews, bridge and highway tolls, moving expenses, and other documented expenses. Again, investigators should itemize these amounts and support them with documentary evidence.

B. Emotional Distress/Mental Anguish/Pain and Suffering

Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish resulting from the respondent's adverse employment action. Courts regularly award compensatory damages for demonstrated mental anguish or pain and suffering in winning employment retaliation and discrimination cases. While damages for emotional distress and mental anguish may be awarded, such damages are not necessarily appropriate in every case. The investigator, with guidance from the SI and DAG, will evaluate whether compensation for emotional distress is appropriate.

1. Necessary Evidence

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

A complainant's own statement may be sufficient to prove objective manifestations of distress if the complainant's statement is credible. Similarly, a complainant's statement may be corroborated by statements of family members, friends, or co-workers if credible. Although evidence form healthcare providers is not required to recover emotional distress damages, statements by healthcare professionals can strengthen a complainant's case for entitlement to such damages.

Evidence from a healthcare provider is required if a complainant seeks to prove a specific and diagnosable medical condition. Investigator should consult with the SI to explore the possibility of obtaining a written waiver from a complainant to communicate with his or her doctor to ensure compliance with HIPAA and a complainant's privacy rights. To comply with privacy laws, any medical evidence must be marked as confidential in the case file and should not be disclosed except in accordance with the State's Uniform Information Practices Law.

In addition to proof of objective manifestations of distress, evidence of a causal connection between the emotional distress and the respondent's adverse employment action is required. A respondent may be held liable where the complainant proves that the respondent's unlawful conduct aggravated a pre-existing condition, but only the additional or aggravated distress should be considered in determining damages for emotional distress.

2. Factors to Consider

Investigators should consider a number of factors when determining the amount of an award for emotional and mental distress. Investigations should seek guidance from the SI, who may seek guidance from the DAG. The factors to consider include:

a. The severity of the distress. More serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships are indicative of higher damage awards for emotional distress.

b. Degradation and humiliation. Generally, courts have held that the more inherently humiliating and degrading the respondent's action, somewhat more conclusory evidence of emotional distress is acceptable to support an award for emotional distress.

c. Length of time out of work. Often, long periods of unemployment contribute to a complainant's mental distress. Thus, higher amounts may be awarded in cases where individuals have been out of work for extended periods of time as a result of the respondent's adverse employment action and thus were unable to support themselves and their families.

d. Comparison to other cases. A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.

VI. Punitive Damages

A. General

Punitive damages, also known as exemplary damages, are an award of money over and above compensatory damages. The purpose of these damages is to punish for violations in which respondents are aware that they are violating the law or where the violations involved egregious misconduct.

Normally, because HIOSH investigations may result in a penalty up to $9,054 for violating §396-8(e), punitive damages would not be considered except for the most flagrant, most egregious conduct by the respondent in willful disregard of an employee's rights under the Hawaii Occupational Safety and Health Law where the penalty is determined to be insufficient deterrence for future such actions. In all cases, where HIOSH seeks to order payment of punitive damages, the DAG shall be consulted.

B. Determining When Punitive Damages Are Appropriate

To decide whether punitive damages are appropriate, investigators should look for (1) respondent's awareness that the act was illegal, or (2) evidence that indicates that the respondents conduct was particularly egregious.

1. The Respondent Was Aware That the Act Was Illegal

   Punitive damages may be appropriate when a management official involved in the adverse action knew the adverse action violated HIOSH Law before it occurred. Probative evidence may include prior whistleblower investigations involving the respondent, company officials witness statements, training received by respondent's staff, and corporate policies or manuals. A manager must have been acting within the scope of this or her authority for the manager's knowledge or actions to serve as the basis for assessing punitive damages

2. The Respondent's Conduct Was Egregious

   Examples of egregious conduct include, but are not limited to:

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

   b. A complainant has been discharged because of his or her association with a whistleblower.

   c. A group of whistleblowers has been discharged.

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

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

   f. A manager commits violence against the complainant.

   g. The adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.

   h. The retaliation is accompanied by extensive or serious violations of HIOSH Law or standards.

C. Respondent's Good Faith Defense

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

D. Calculating the Punitive Damages Award

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

1. Statutory Caps

   Although neither §396-8(e), HRS, nor §12-57 contain provisions for setting caps on punitive damages, an argument can be made that since the purpose of punitive awards is to deter future violations, which is the same for HIOSH penalties under §396-10, HRS, the maximum intended for egregiously violating §396-8(e), HRS is the same as for willful or repeated violations of HIOSH Laws, rules, standards or orders, currently $12,675.

2. Ratios

   Where there is no statutory cap, OSHA guidance indicates that the ratio of punitive damages to other monetary relief (back pay and compensatory damages) should not exceed 9 to 1 except in extraordinary circumstances, such as when there are nominal compensatory damages but highly egregious or reprehensible conduct. If the DAG concurs with a presumed legislative intent of $12,675 as the maximum deterrence amount (as in 1 above), then it may not be necessary to apply the ratio. If there is no other monetary relief, punitive damages may still be awarded on the basis of the factors below:

3. Relevant Factors

   A number of factors should be considered in calculating a punitive damages award, including:

   a. Degree of respondent's awareness that its conduct was illegal (see discussion above).

   b. Egregiousness of the conduct (many of the factors are discussed above).

   c. Duration and frequency of the adverse action.

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

   e. Financial condition of the respondent.

   f. Evidence that the respondent attempted to conceal or provide pretextual reasons for the adverse action.

g. Evidence that the respondent tolerated or created a workplace culture that discouraged or punished whistleblowing; in other words, whistleblowers were chilled from engaging in protected activity.

h. Deliberate nature of the retaliation or actual threats to the complainant for his/her complaints to management.

i. Whether HIOSH has found merit/discrimination in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, so as to suggest a pattern of retaliatory conduct.

j. Other mitigating or aggravating factors.

VII. Attorney's Fees

HIOSH Law does not authorize the awarding of attorney's fees.

VIII. Interest

Interest on back pay will be computed by compounding daily the IRS interest rate for the underpayment of taxes. That underpayment rate can be determined for each quarter by visiting www.irs.gov and entering "federal short-term rate" in the search expression. The press releases for the interest rate for each quarter will appear. The relevant rate is generally the Federal short-term rate plus 3 percentage points. A definite amount should be computed for the interim (the time up to the date of the award), but the findings should state that interest at the IRS underpayment rate at 26 U.S.C §6621, compounded daily, also must be paid on back pay for the period after the award until the actual payment is made. Interest is not awarded on damages for emotional distress or on any punitive damages. However, compound interest may be awarded on compensatory damages of a pecuniary nature.

IX. Evidence of Damages

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

In addition to including this evidence in the case file, the DNO should include an explanation of the basis for awarding any punitive or emotional distress damages. The basis for such damages should be something beyond the basis for finding that the respondent violated the Law.

X. Non-monetary Remedies

HIOSH may order non-monetary remedies, which may include:

A. Expungement of warnings, reprimands, and derogator references (such as references to the complainant's termination) which may have been placed in the complainant's personnel file as a result of the protected activity.

B. Providing the complainant with a neutral reference for future employers.

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

D. Posting of a notice regarding the HIOSH order.

Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact the DAG, thru the SI, for guidance on these and other non-monetary remedies.

Note: The penalty for violation of §396-8(e), HRS, is not a remedy. It is a civil penalty intended to provide deterrence against discrimination toward employees who engage in protected activity. It may, however, be used as part of a settlement package.

XI. Settlement Policy

Voluntary resolution of disputes is desirable in many discrimination cases and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is HIOSH policy to seek settlement of all cases where initial screening has determined that the *prima facie* elements for discrimination have been met, and where a Determination Notice and Order for the complainant has been issued. Furthermore, at any point prior to the completion of the investigation, HIOSH will make every effort to accommodate an early resolution of complaints in which both parties seek it. HIOSH should not enter into or approve settlements which do not provide fair and equitable relief for the complainant and are consistent with public policy, e.g., the settlement is not repugnant to the purpose and policy of HIOSH's whistleblower law, §396-8(e), HRS, and does not undermine the protection that the law provides.

Although the complainant may simultaneously pursue civil litigation, during which settlement may also occur, it is the intent of the HIOSH discrimination provision not only to provide appropriate relief to the complainant but also to assure that other employees are protected from engaging in protected activity. Therefore, if HIOSH is not given "party status" in the civil settlement, the investigation will continue and a determination will be made on the best available evidence.

XII. Settlement Procedure

A. Requirements

Requirements for all settlement agreements are:

1. The file must list contain documentation of all appropriate relief at the time the case has settled and the relief obtained.

2. The settlement must contain all of the core elements of a settlement agreement (see XII.C. below), unless it creates a barrier to achieving an early resolution.
3. Every settlement, or approval letter, in cases in which the division approves a private settlement, must be signed by the Administrator.
4. To be finalized, every settlement must be signed by the respondent(s).
5. The complainant need not sign the settlement agreement as HIOSH acts on his or her behalf.

B. Adequacy of Settlements

1. **Full Restitution.** Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass and is not necessarily limited to any or all of the following:

   a. Reinstatement to the same or equivalent job, including restoration of accumulated seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement), in lieu of reinstatement. See III.A., above.

   b. "Front pay" in the context of settlement is a term referring to future wage losses, calculated from the time of discharge, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties wishes to avoid reinstatement and the other agrees. See III.B., above.

   c. Wages lost due to the adverse action, offset by interim earnings, i.e., any wages earned in the complainant's attempt to mitigate his or her losses, which are subtracted from the full back wages (NOTE: Unemployment insurance benefits may never be considered as an offset to back pay). See IV.D., above.

   d. Respondent's submission of appropriate documentation to the Social Security Administration allocating back pay to the appropriate periods.

2. **Other Remedies.** Other remedies include, but are not limited to:

   a. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file or other records.

   b. The respondent's agreement to provide a neutral reference (e.g., title, dates of employment and pay rate) to potential employers of the complainant.

   c. Posting of a notice to employees and/or a fact sheet stating that the respondent agreed to comply with the HIOSH discrimination statute (§396-

8(e), HRS). Postings should be readily available to all employees, e.g. posted on a bulletin board or distributed electronically.

d. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit sharing losses, or property loss resulting from missed payments, compensation for mental distress caused by the adverse action, and out-of-pocket expenses for treatment by a mental health professional and medication related to that distress. See V, above.

e. An agreed-upon lump sum payment to be made at the time of the signing of the settlement agreement.

f. Punitive damages should not be considered for settlement conditions, however, the penalty for violation of §396-8(e), HRS may be considered to negotiate more favorable concessions in the other categories.

g. Other possible alternatives may be considered, including flexible work schedules and management training.

3. **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 discrimination/whistleblower settlement are done in accordance with the Internal Revenue Code, case law, and IRS guidance[3], as well as with the equivalent State of Hawaii tax codes.

C. The Standard HIOSH Settlement Agreement

1. **General Principles.** Whenever possible, the parties should be encouraged to use HIOSH's standard settlement agreement containing all of the core elements outlined below. (See sample HIOSH settlement agreement at the end of this chapter.) This will ensure that all issues within HIOSH's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

a. It must be in writing.

b. It must stipulate that the employer agrees to comply with HIOSH Law, standards and rules.

c. It must specify the relief obtained.

d. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, where the respondent communicates with its employees electronically) or an equivalent notice. If a posting or notice is not required, the case file must

[3] For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to IRS Counsel Memorandum, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at http://www.irs.gov/pub/lanoa/pmta2009-035.pdf. However, OSHA notes that this guidance is not precedential and may change in the future.

contain an explanation of why the posting is considered unnecessary.

2. **Specific Requirements.** The investigator should try to obtain an early settlement which may also provide complaint with all appropriate relieve in a single payment and should make every efforts to address the chilling effect.

   a. Adherence to these core elements should not create a barrier to achieving an early resolution and adequate relief for the complainant, and depending on the circumstances, concessions sometimes may be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the SI. All pre-settlement discussions with the SI must be documented in the case file.

   b. All appropriate relief to which the complainant is entitled, and its justification, must be documented in the file. In HIOSH discrimination cases, the complainant's concurrence is not required.

   c. In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Posting of a settlement agreement or notice to employees, while an important remedy, also may be an impediment to a settlement. Other efforts to address the chilling effect, such as employer-provided training, may be available and should be explored.

   d. The investigator should try as much as possible to obtain a single payment of all monetary relief. The settlement should require that payment(s) be made by certified or cashier's check, and be made out to the complainant but provided to HIOSH. HIOSH will promptly note receipt of any check, copy the check for inclusion in the case file and mail the check to the complainant.

3. **Provisions of the Agreement.** In general, much of the language of the standard agreement should not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Sections that may be optional are:

   a. POSTING OF NOTICE. A provision stating that the respondent will post a Notice to Employees that it has agreed to abide by the requirement of the HIOSH discrimination/whistleblower law pursuant to a settlement agreement.

   b. COMPLIANCE WITH NOTICE. A provision stating that the respondent will comply with all of the terms and provisions of the Notice.

   c. POSTING OF THE HIOSH LAW. A provision requiring the respondent to post the HIOSH Poster that summarized the rights and responsibilities under the HIOSH discrimination/whistleblower law.

   d. NON-ADMISSION. A provision stating that, by signing the agreement, the respondent does not admit to violating any law, standard, or regulation

administered by HIOSH.

e. REINSTATEMENT (*this section may be omitted if the parties agree to a monetary settlement in lieu of reinstatement*.)

i. The Respondent has offered the complainant reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the alleged retaliation, which he has declined or accepted.

ii. Reinstatement is not an issue in the case. The Respondent is not offering reinstatement and the complainant is not seeking it.

f. The Respondent agrees to make complainant whole by payment of back pay less normal payroll deductions, the Respondent will provide appropriate documentation to the Social Security Administration allocating the back pay award to the appropriate periods. Checks will be made out to the complainant but provided to HIOSH.

g. The Respondent agrees to pay the complainant a lump sum of money. The Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check(s) will be made out to the complainant but provided to HIOSH.

4. Settlement as Final Order. The settlement must include provisions for enforcement of the settlement agreement by HIOSH. It must state that the Settlement Agreement will become a final order upon the Administrator's approval and signature, and the respondent's violation of any terms of the settlement may prompt the filing of a civil action by the director in an appropriate Hawaii state court.

5. Entry into IMIS. All agreements utilizing HIOSH's standard settlement agreement must be recorded in the IMIS as "Settled."

6. Settlement Agreement Language. In general, HIOSH settlements should not be altered beyond the options outlined above. Any changes to the standard HIOSH settlement agreement language, beyond the few options noted above, must be approved in a pre-settlement discussion with the SI. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the respondent belongs. Settlement agreements must not contain provisions that prohibit HIOSH or the department's release of the agreement to the general public, except as provided in this manual.

D. Settlements to Which HIOSH Is Not a Party

1. Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, even in cases in which HIOSH does not take an active role in the settlement negotiations. Because voluntary resolution of disputes is desirable, HIOSH's policy is to defer to adequate privately-negotiated settlements. Settlements reached between the parties must be reviewed and approved by the Administrator to ensure that the terms of the settlement are fair, adequate, reasonable, consistent with the purpose and intent

of the HIOSH discrimination law, and in the public interest (See E. below). Approval of the settlement demonstrates HIOSH's consent and achieves the consent of all three parties. HIOSH's authority over settlement agreements is limited to the Law within its authority. Therefore, HIOSH's approval only relates to the terms of the agreement pertaining to complaints filed under §396-8(e), HRS. As such, HIOSH is unable to give approval to those terms of the settlement agreement that encompasses issues unrelated to the protections afforded under the HIOSH Law. Investigators should make every effort to explain this process to the parties early in the investigation to ensure that they understand HIOSH's involvement in any resolution reached after a complaint has been initiated.

2. In most circumstances, a HIOSH settlement agreement is optimal, and if the parties are amenable to signing one, the HIOSH settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the HIOSH agreement. This is achieved by inserting the following paragraph in the HIOSH agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the Hawaii Division of Occupational Safety and Health's (HIOSH's) authority. HIOSH's authority over that agreement is limited to Chapter 396, Hawaii Revised Statutes. Therefore, HIOSH approves and incorporates in this agreement only the terms of the other agreement pertaining to the §396-8(e), HRS, under which the complaint was filed." It may be necessary to modify the last sentence to identify the specific sections or paragraph numbers of the agreement that are under HIOSH's authority. These cases must be recorded in the IMIS as "Settled."

3. If HIOSH approves a settlement agreement, it constitutes the final order of the Director and may be enforced in an appropriate State of Hawaii circuit court in accordance with §396-4(d)(7), HRS.

4. The approval letter must include the following statement: "The Hawaii Occupational Safety and Health Division's authority over this agreement is limited to the statutes it enforces. Therefore, the Hawaii Occupational Safety and Health Division approves only the terms of the agreement pertaining to §396-8(e), HRS." This last sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under HIOSH's authority. These cases must be recorded in the IMIS as "Settled – Other."

A copy of the reviewed agreement must be retained in the case file and the parties should be notified that HIOSH will disclose settlement agreements in accordance with the Hawaii Uniform Information Practices Act, unless one of the UIPA exemptions applies.

5. If the parties do not submit their agreement to HIOSH or if HIOSH does not approve the agreement signed, HIOSH may:

a. Dismiss the complaint if the investigation has not yet determined whether a *prima facie* allegation exists. The dismissal shall state that the parties settled the case independently, but that the settlement agreement was not submitted to HIOSH, or that the settlement agreement did not meet

HIOSH's criteria for approval, as the case may be. The dismissal will not include factual findings.

OR

b. Inform the parties that the investigation will proceed, and issue a Determination Notice and Order on the findings of the investigation. The findings must include the statement that the parties reached a settlement that was either not submitted for review by HIOSH or not approved by HIOSH.

E. Criteria for Reviewing Private Settlements

To ensure that settlements are fair, adequate, reasonable, and in the public interest, the Investigator must carefully review un-redacted settlement agreements in light of the particular circumstances of the case. The criteria below provide example of the types of terms that HIOSH will not approve in a private settlement agreement.

1. HIOSH will not approve a provision that states or implies that HIOSH or the Hawaii Department of Labor and Industrial Relations (DLIR) is party to a confidentiality agreement.
2. HIOSH will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. This includes a complainant's right to file a future complaint related to an occupational injury or exposure of which he or she was unaware at the time of entering into the settlement agreement. HIOSH will not recognize agreements in which a complainant waives the right to file a complaint based on a respondent's past or future conduct. When such a provision is encountered, the parties should be asked to remove it or replace it with the following: "Nothing in this Agreement is intended to prevent or interfere with Complainant's non-waivable right to engage in any future activities protected under Section 396-8(e), Hawaii Revised Statutes."
3. HIOSH will not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to prevent, impede or interfere with complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency." HIOSH must ensure that the complainant's decision to settle is knowing and voluntary.
4. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file.
   a. **The breadth of the waiver.** Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether the complainant's skills are readily transferable to other employers or industries. Waivers that narrowly restrict future employment may be less

problematic than broader waivers. Thus, an agreement limiting a complainant's future employment to a single employer, its parent, or its subsidiaries, is less problematic than a waiver that would prohibit a complainant from working for any companies with which the respondent does business.

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

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

c. **The strength of the complainant's case.** How strong is the complainant's retaliation case, and what are the corresponding risks of litigation before the Hawaii Labor Relations Board if the respondent should contest? The stronger the case and the more likely a finding of discrimination, the less acceptable a waiver is, unless very well remunerated. Consultation with DAG may be advisable.

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

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

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

XIII. Bilateral Agreements (Formerly Called Unilateral Agreements)

A. A *bilateral settlement* is one between the Hawaii Occupational Safety and Health Division (HIOSH), signed by the Administrator, and a respondent—*without the*

complainant's consent—to resolve a complaint filed under §396-8(e), HRS. It is an acceptable remedy to be used only under the following conditions:

1. The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. In other words, as the likelihood of prevailing in litigation increases, the percentage of make-whole relief offered should also increase. Although the desired goal is obtaining reinstatement and all back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief. See XIII.E.5. for information regarding a complainant who refuses a check.

2. The complainant refuses to accept the settlement offer. The case file should fully set out the complainant's objections in the discussion of the settlement to ensure that the information is available when the case is revised by the SI.

3. If the complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses), attempts to resolve these demands fail, and the final offer from the respondent is reasonable to HIOSH.

B. When presenting the proposed agreement to the complainant, the investigator should explain that there are significant delays and potential risks associated with final resolution and that HIOSH may settle the case without the complainant's participation. This is also the time to explain that, once settled, the case cannot be appealed, as the settlement resolves the case.

C. All potential bilateral settlement agreements must be reviewed and approved in writing by the Administrator. The bilateral settlement is then signed by both the respondent and the Administrator. Once settled, the case is entered in IMIS as "settled."

D. [Reserved].

E. Documentation and implementation

1. Although each agreement will be unique in its details, in settlements negotiated by HIOSH, the general format and wording of the standard HIOSH agreement should be used.

2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.

3. Back pay computations must be included in the case file, with explanations of calculating methods and relevant circumstances, as necessary.

4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

5. Any check from the employer must be sent to the complainant even if he or she did not agree with the settlement. If the complainant returns the check to HIOSH, the office shall record this fact and return it to the respondent.

XIV. Enforcement of Settlements.

If a respondent fails to fully comply with a settlement agreement, a letter must be sent to the respondent informing him or her that the settlement became a final order of the Director upon the Administrator's approval of the agreement and that the terms of the agreement will be enforced in the applicable state circuit court. The case shall then be referred to the DAG for litigation and the complainant shall be so informed.

Appendix to Chapter 6

Settlement Forms

Sample Standard HIOSH Settlement Agreement

In the matter of: [Name], Complainant v. [Name], Respondent

Case No. _____

SETTLEMENT AGREEMENT

The undersigned Respondent and undersigned Complainant, in settlement of the above-captioned matter and subject to the approval of the Hawaii Occupational Safety and Health Division, HEREBY AGREE AS FOLLOWS:

Compliance with Law. Respondent will not discharge or in any other manner discriminate against Complainant or any other employee because of activity protected by §396-8(e), Hawaii Revised Statutes.

Posting of Notice. Respondent will post in conspicuous places in and about its facility, including all places where notices to employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice to Employees attached hereto and made a part hereof, said Notice to Employees to be signed by a responsible official of Respondent organization and the date of actual posting to be shown thereon. [For employers who communicate with their employees electronically] Respondent shall e-mail this notice to all employees at [insert establishment] [or post this notice on its intranet].

Compliance with Notice. The Respondent will comply with all of the terms and provisions of said Notice to Employees.

General Posting. Respondent will permanently post in a conspicuous place in or about its premises, including all places where posters for employees are customarily posted, including electronic posting, where the employer communicates with its employees electronically the HIOSH Poster informing employees of their rights and obligations under HIOSH Law.

Reinstatement. Respondent has offered [or shall offer as soon as possible] reinstatement to the same or equivalent job, including restoration of seniority and benefits that Complainant would have earned but for the alleged retaliation, which he has declined/accepted. [OR Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.

Monies. Respondent agrees to make the Complainant whole by payment of $___ (less normal payroll deductions). [OR Respondent agrees to pay Complainant a lump sum of $____. Complainant agrees to comply with applicable tax laws requiring the reporting of income.] [Any check shall be made payable to the complainant and mailed to HIOSH at 830 Punchbowl Street, Room 423, Honolulu, HI 96813

Personnel Record. Respondent shall expunge any adverse references from Complainant's personnel records relating to the adverse action and not make any negative references relating to the adverse action in any future requests for employment references.

Inquiries Concerning Complainant. Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to any third party that could be construed as damaging the name, character, or employment of Complainant.

Performance. Performance by both parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Administrator

Enforcement of settlement. This settlement constitutes HIOSH's determination and order under §396-8(e), HRS. The parties' signatures constitute a waiver of the right to contest and, therefore, the agreement becomes a final order upon its approval by the Administrator. Failure to comply with all the terms of the agreement may result in enforcement proceeding of the settlement agreement in the appropriate state court.

Non-Admission. Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation enforced by the Hawaii Occupational Safety and Health Division (HIOSH). Nothing in this Agreement may be used against either party except for the enforcement of its terms and provisions.

Notification of Compliance. Respondent agrees that within ten (10) days of receiving a fully executed approved copy of this Agreement, Respondent will notify the Administrator in writing of the steps it has taken to comply with the terms and conditions of this Agreement.

Closure of Complaint. Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against [Respondent] arising out of Complainant's complaint filed with HIOSH on [Date complaint filed],and will cause the complaint to be closed.

This Agreement has been obtained and entered into without duress and in the best interest of all parties.

RESPONDENT:	COMPLAINANT:
Signature	Signature
Title	
Date:	Date
RECOMMENDED BY:	APPROVED BY:
Signature Supervisory Investigator	Signature Administrator
Date:	Date:

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NOTICE TO EMPLOYEES

PURSUANT TO A SETTLEMENT AGREEMENT
ENTERED INTO BY THE HAWAII DEPARTMENT OF
LABOR AND INDUSTRIAL RELATIONS,
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

The employer agrees that it will not 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 the Hawaii Occupational Safety and Health Law, §396-8(e), HRS 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 Law.

The employer agrees that it will not advise employees against exercising rights guaranteed under the HIOSH Law, such as contacting, speaking with, or cooperating with Hawaii Occupational Safety and Health Division (HIOSH) officials either during the conduct of an occupational safety and health inspection of the employer's facilities or in the course of an investigation.

The employer agrees that it will not intimidate employees by suggesting or threatening that employee contact, conversation, or cooperation with HIOSH officials might result in closure of the employer’s facilities, in loss of employment for other employees, or in civil legal action being taken against the employees.

The employer’s signature on this Notice is in no way an admission of any wrongdoing or of a violation of any law or regulation enforced by the Hawaii Occupational Safety and Health Division (HIOSH).

_____ _____

[Title of Responsible Official] Date
[Respondent company]

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL.

Sample Settlement Approval Letter to Complainant

[HIOSH Letterhead]

[date]

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Mr. Complainant:

This is to advise you that pursuant to the settlement agreement between the parties, received by this office on [date], the Hawaii Occupational Safety and Health Division (HIOSH) is closing the investigation of the above-referenced complaint, which was filed with this office under section §396-8(e), Hawaii Revised Statutes. HIOSH's authority over settlement agreements is limited to the statutes which it enforces. Therefore, we hereby approve only the terms of the agreement pertaining to the above referenced discrimination law.

Thank you for your cooperation in successfully resolving this matter. If at any time you have questions or require information regarding employee rights or employer responsibilities under the whistleblower statutes administered by HIOSH, please contact this office.

Sincerely,

[Signature]
Supervisory Investigator

c: Respondent/Respondent's Attorney

Certified Mail #[1234 5678 9012 3456 7890]

Sample Complainant Settlement Letter

[HIOSH Letterhead]

[date]

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. U.R. Complainant
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Mr. Complainant:

Enclosed is your check from [Company] in the amount of ${dollars], which represents payment for back pay and compensatory damages [add additional categories as needed] incurred in accordance with the settlement. Please cash the check promptly. Also enclosed for your records is a copy of the signed Settlement Agreement.

Because of full compliance with the terms of the settlement agreement, this office considers the matter closed. Please advise this office by mail or telephone if you have any further questions or concerns regarding this complaint, please contact this office.

Sincerely,

[Signature]
Administrator

Enclosure: [Check No. xxxx]
Copy of Settlement Agreement

c: Respondent/Respondent's Attorney

Certified Mail #[1234 5678 9012 3456 7890]

Sample Respondent Settlement Letter

[HIOSH Letterhead]

[date]

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. U.R. Respondent
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. _____

Dear Sir or Madam:

This is to acknowledge receipt of [Company]'s check in the amount of $[dollars], payable to [Complainant Name] in the above- referenced complaint. The check has been sent under separate letter to the complainant. Also enclosed for your records is a copy of the signed Settlement Agreement. Because of full compliance with the terms of the settlement agreement, this office considers the case closed.

We sincerely appreciate your cooperation in resolving this matter. If at any time you need information on employee rights and employer responsibilities under the Hawaii Occupational Safety and Health Law, please feel free to contact this office by mail or telephone.

Sincerely,

[Signature]
Administrator

Enclosure: Copy of Settlement Agreement

c: Complainant/Complainant's Attorney

Certified Mail #[1234 5678 9012 3456 7890]

CHAPTER 7 [equivalent to Chapt 7.V.]

OSHA'S ROLE IN HIOSH DISCRIMINATION CASES

I. General

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §667, provides that any State, i.e., States as defined by 29 U.S.C. §652(7) that desires to assume the responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a state plan under Section 18, does not affect the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any state, although 29 CFR 1977.23 and 1902.4(c)(2)(v) require that each state plan include whistleblower protections that are as effective as OSHA's Section 11(c). Therefore, in state plan states that cover the private sector, such employees may file occupational safety and health whistleblower complaints with federal OSHA, the state, or both.

Hawaii's equivalent of 11(c) is §396-8(e), HRS, and the equivalent regulation is Chapter 57, HAR.

II. State Plan State Coverage

The Hawaii state plan extends coverage, including occupational safety and health whistleblower protections to non-federal public employees and all private sector employees in the state.

III. Overview of the 11(c) Referral Policy

The regulation at 29 CFR1977.23 provides that OSHA may refer complaints of employees protected by state plans to the appropriate state agency. It is OSHA's long-standing policy to refer all Section 11(c) complaints to the appropriate state plan for investigation; this it is rarely the case that a complaint is investigated by both federal OSHA and a state plan. However, utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

A. Exemption to the Referral Policy

The Regional Administrator (RA) may determine, based on monitoring findings or legislative or judicial actions, that a state plan cannot adequately enforce whistleblower protections or for some reason cannot provide protection. In such situations, the RA may elect to temporarily process private sector 11(c) complaints from employees covered by the affected state in accordance with procedures in non-plan states.

B. Federal Review of a Properly Dually-Filed Complaint

If a complaint has been dually filed with federal OSHA and a state plan state, and meets specific criteria as outlined in this chapter, OSHA will review the complaint under the basic principles of its deferral criteria, set forth in 29 CFR1977.18(c)

C. Procedures for Referring Complaints to State Plans (Hawaii)

1. **Federally Filed Complaints.** In general, all federally-filed complaints alleging retaliation for occupational safety or heath activity under state plan authority, i.e., private sector and non-federal public sector, will be referred to the appropriate state plan official for investigation, a determination on the merits, and the pursuit of a remedy if appropriate. If such complaints also contain allegations of retaliation covered under the OSHA-administered whistleblower laws other than Section 11(c), such allegations will be investigated by federal OSHA under those laws.

2. **Referral of Private-Sector Complaints.** A private-sector employee may file an occupational safety and health whistleblower complaint with federal OSHA under Section 11(c) and with the state plan. When a complaint from a private-sector employee is received, OSHA will screen but not docket the complaint. OSHA will prepare a memo to the file to document the screening, the federal filing date and the fact that the complaint was dually filed, so that the complaint can be acted upon, if needed.

3. **Referral of Public Sector Complaints.** OSHA will refer to the state, without screening, any occupational safety and health whistleblower complaint from a non-federal public employee.

4. **Referral Letters.** Federal OSHA shall promptly refer Section 11(c) complaints to the state by means of a letter, fax, or e-mail to the state office. In addition, OSHA will notify the complaint of the referral by letter. The referral letter will inform the complainant that he or she may request federal review of dually filed 11(c) complaint as follows:

    a. "OSHA will not conduct a parallel investigation. The Hawaii Occupational Safety and Health Division (HIOSH) will conduct the investigation of your retaliation complaint. However, should you have any concerns regarding HIOSH's conduct of the investigation, you may request a federal review of your retaliation claim under Section 11(c) of the OSH Act. Such a request may only be made after any appeal right has been exercised and the state has issued a final administrative decision. The request for a review must be made in writing to the OSHA [Regional Office] indicated below and postmarked within 15 working days after your receipt of the State's final administrative decision. If you do not request a review in writing within the 15 working day period, your federal 11(c) complaint will be closed."

    As HIOSH issues an administrative decision which can be contested before an administrative board, the Hawaii Labor Relations Board (HLRB), the final administrative decision is the decision rendered by HLRB.

5. **Federal Statutes Other than 11(c).** Complaints filed solely under the whistleblower statutes administered by OSHA (other than 11(c)) are under the exclusive authority of federal OSHA and may not be referred to Hawaii. For a

complete listing of federal statutes go to http://www.whistleblowers.gov/statutes_page.html.

D. Referral Procedure -- Complaints Received by State Plan States (Hawaii)

1. In general, 11(c)-type complaints received by a State Plan state which are under dual federal-state authority will be investigated by the state and shall not be referred to federal OSHA.

2. Because employers in state plan states do not use the federal OSHA poster, the states must advise private-sector complainants of their right to file a federal 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to concurrent federal protection. This may be accomplished through such means as an addition to the state safety and health poster, a checklist, handout, or in the letter of acknowledgment, by the inclusion of the following paragraph:

   "If you are employed in the private sector or the United States Postal Service, you may also file a retaliation complaint under Section 11(c) of the federal Occupational Safety and Health Act. In order to do this, you must file your complaint with the U.S. Department of Labor – OSHA within thirty (30) days of the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under OSHA's Section 11(c). Although OSHA will not conduct a parallel investigation, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final administrative determination; that is, after the State's appeals process is completed. To file such a complaint, contact the OSHA Regional Office representative indicated below…"

3. At the conclusion of each whistleblower investigation conducted by a state, the state must notify complainants of the determination in writing and inform the complainant of the state's appeals process. If the complaint constituted a dually-filed complaint, the determination letter will inform the complainant as follows:

   "Should you have any concerns regarding this agency's conduct of the investigation, you may request a federal review of your retaliation claim under section 11(c) of the OSH Act. Such a request may only be made after this agency has issued a final administrative determination after exercise of all appeal opportunities. The request for a review must be made in writing to the OSHA [Regional Office] indicated below and postmarked within 15 working days after your receipt of this final administrative decision. If you do not request a review in writing within the 15 working day period, your federal retaliation complaint will be closed."

4. Complainants in Hawaii must be made aware of their rights under the whistleblower protection provision administered by the state and should also be informed of their rights under the federal whistleblower 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.

The HIOSH Intake Officer must carefully evaluate the complaint to determine if all or part of the complaint falls under exclusive federal OSHA authority. In such instances, the Intake Officer must inform the complainant to also file with OSHA. For a complete listing of federal whistleblower statutes go to http://www.whistleblowers.gov/statutes_page.html. To further preserve the complainant's rights under these other OSHA whistleblower statutes, a referral shall be made to the appropriate OSHA office as follows:

a. Mixed jurisdiction cases – parts of the complaint fall under HIOSH and parts under OSHA: Copies of the following will be enclosed with the referral memo.

    i. Original complaint with pertinent date filed attachments (envelope with postmark, information from a third-party commercial carrier that provides sending information, HIOSH date received stamp),

    ii. Form 87 or equivalent, and

    iii. Other supporting information provided by the complainant.

b. Exclusive OSHA authority whistleblower – Originals of the above documents will be enclosed with the referral memo with a copy made for HIOSH files.

IV. Complaints About State Program Administration (CASPAs)

A. OSHA state plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a state's program may file a Complaint About State Program Administration (CASPA) with the appropriate RA.

B. A CASPA is an oral of written complaint about some aspect of the operation or administration of a state plan made to OSHA by any person or group. The CASPA process provides a mechanism for employers, employees, and the public to notify federal OSHA of specific issues, systemic problems, or concerns about a state program. A CASPA may reflect a general criticism of the state program administration or it may relate to a specific investigation.

C. Because properly dually-filed 11(c) complaints under federal review under the Section 11(c) procedures, no duplicative CASPA investigation is required for such complaints. Complaints about the handling of stat whistleblower investigation from non-federal public sector employees, and from private sector employees who have not properly dually-filed their complaint will be considered under CASPA procedures.

D. Upon receipt of a CASPA complaint relating to a state's handling of a whistleblower case, OSHA at the regional level may:

1. Request copies of the investigative file so that they may review and investigate as necessary to determine if the state's investigation was adequate and the determination supported by appropriate available evidence. A review of the

state's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the Whistleblower Protection Program; or

2. Request that the state conduct an initial review and evaluation of the case as above and send copies of the state's findings and investigative case file to OSHA.

E. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future state investigations techniques, policies and procedures. A review under CASPA procedures is not an appeal and a review under CASPA procedures will not be reviewed by OSHA's Appeals Committee.

Although OSHA, in their Whistleblower Protection Program policies and procedures requires that states have the ability to "reopen" a case for corrective action, in fact HIOSH does not have a literal "reopen" process. HIOSH issues a Determination Notice and Order which may include a citation and assessed penalty for violation of its whistleblower statute, §396-8(e), HRS. This notice and order can be contested by either respondent or complainant with a de novo hearing before the Hawaii Labor Relations Board ("the Board"), an independent agency, administratively attached to the Hawaii Department of Labor and Industrial Relations. As such hearings are held de novo, any new information or additional argument by either party can be admitted into evidence.

If the result of the CASPA investigation by OSHA results in a determination that HIOSH law, regulation, or proceedings are not at least as effective as OSHA's policies and procedures, HIOSH will review OSHA's findings and take appropriate corrective action.

CHAPTER 8

INFORMATION DISCLOSURE

I. Hawaii Uniform Information Practices Act

HIOSH procedures for records disclosure adheres to the Hawaii Uniform Information Practices Act (IUPA) as set out in Chapter 92F of the Hawaii Revised Statutes. HIOSH procedures to respond to requests for access to or copies of records prepared for and obtained during a HIOSH discrimination/whistleblower investigation can be found in Chapter 16, Disclosure Under the Hawaii Uniform Information Practices Act (UIPA), of the HIOSH Field Operations Manual, HIOSH Directive CPL 02-00-159, effective April 15, 2016.

The following material adds more specific information and/or procedures related specifically to Discrimination/Whistleblower records.

II. Investigative Records

Investigative materials or records include interviews, notes, work papers, memoranda, e-mails, documents, and audio or video recordings received or prepared by an investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original materials are records that are the property of the Hawaii State Government and must be included in the case file. Under no circumstances are investigation notes and work papers to be destroyed or retained, or used by an employee of the State for any private purpose. In addition, files must be maintained and destroyed in accordance with official agency schedules for retention and destruction of records. Investigators may retain copies of final Reports of Investigation (ROI) and Determination Notice and Order (DNO) for reference.

The disclosure of information in investigative records is governed by the Privacy Act (PA), the goal of which is to protect the privacy of individuals in whose names records are kept, and the Hawaii Uniform Information Practices Act (UIPA), the goal of which is to enable public access to government records. The guidelines below are intended to ensure that the Discrimination Program meets its obligations under both of these statutes.

A. Non-public Disclosure

While a case is under investigation or appeal, information contained in the case file will be disclosed to the parties in order to resolve the complaint; we refer to these as non-public disclosures. Once a case is closed at the division level, any and all records not otherwise protected from disclosure may be disclosed to the parties, upon their request. This non-public disclosure may also occur at any level after the investigative stage, through the course of any administrative or judicial proceedings, until the final disposition of the case, either through the administrative or judicial process. The procedures for non-public disclosures are as follows:

1. During an investigation, disclosure must be made to the respondent (or the respondent's legal counsel if respondent is represented by counsel) of the

complaint and any additional information provided by the complainant that is pertinent to the resolution of the complaint. If the complaint or information provided by the complainant contains personal, identifiable information about individuals other than the complainant, such information, where appropriate, should be redacted (without listing the specific exemptions that would be used if it were released under Hawaii UIPA) before disclosure to the respondent.

2. Throughout the investigation, HIOSH will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of the respondent's submissions to HIOSH that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, HIOSH will redact them, if necessary, in accordance with disclosure procedures (See Chapter 16 of the FOM).

3. Personal, identifiable information about individuals, other than the complainant and management officials representing the respondent, that is contained in the investigative file, such as statements taken by HIOSH or information for use as comparative data, such as wages, bonuses, the substance of promotion recommendations, supervisory assessments of professional conduct and ability, or disciplinary actions, should generally be withheld when such information could violate those persons' privacy rights, cause intimidation or harassment to those persons, or impair future investigations by making it more difficult for HIOSH to collect similar information from others.

4. In taking statements from individuals other than management officials representing the respondent, the investigator must specifically ask if confidentiality is being requested, and must document the answer in the case file. Witnesses who request confidentiality will be advised that their identity and all of HIOSH's records of the interview (including interview statements, audio or video recordings, transcripts, and investigator's notes) will be kept confidential to the fullest extent allowed by law, but that if they are going to testify in a proceeding, the statement and their identity may need to be disclosed. Furthermore, they should be advised that their identity and the content of their statement may be disclosed to another government agency, under a pledge of confidentiality from that agency. In addition, all confidential interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the statement.

5. Appropriate, relevant, necessary and compatible investigative records may be disclosed to other governmental agencies where the disclosure is necessary for the performance of the requesting agency's duties and functions. See §92F-19, HRS.

6. Appropriate, relevant, necessary, and compatible investigative records may be shared with another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or

criminal law enforcement activity, if the activity is authorized by law, and if that agency or instrumentality has made a written request to HIOSH, signed by the head of the agency, specifying the particular records sought and the law enforcement activity for which the records are sought.

When such a request for records is received, the SI must immediately notify DAG of its receipt, so that the disclosure may be made in full compliance with the Hawaii UIPA, §92F, HRS.

B. Trade Secrets and Confidential Business Information (CBI)

1. A trade secret, under exemption 4 of FOIA, 5 U.S.C. §552(b)(4), is narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001), *quoting Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir 1983). As such, trade secrets would rarely be at issue in whistleblower cases. However, if, during the course of an investigation, a respondent has clearly labeled and explained why a document or some portion of a document submitted constitutes a trade secret, the investigator should place the document under a separate tab clearly labeled "Confidential - Trade Secret." Should the file be requested under the UIPA law, HIOSH policy is to redact this information since these are not government documents. Should an assertion of trade secrets arise in a discrimination case, staff should familiarize themselves with the requirements of Section 13 of the HIOSH Law, which provides: "Information obtained by the department containing or revealing a trade secret shall be held confidential and access shall be limited to authorized representatives of the director concerned with carrying out this chapter or when relevant in any proceeding under this chapter. In such proceeding the director, the appeals board, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets."

2. Information is considered confidential business information if it is commercial or financial, obtained from a person, and privileged or confidential. These terms are defined as follows:

   a. "Commercial or financial" is defined as relating to business or trade. Typically encountered examples are business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information on financial condition (unless that information is publicly available, as are filings with the SEC (Securities Exchange Commission).

   b. The criterion that the information be obtained from a person is easily met, since the definition of person in the Administrative Procedure Act at 5 U.S.C. §551(2) includes "an individual, partnership, corporation, association, or public or private organization other than an agency. Note that HIOSH Law refers to "natural person" with respect to employees.

c. The definition of "confidential" depends on how it was obtained.

i. Information that is voluntarily provided to the government is confidential if it is of a kind that would normally not be released to the public by the person from whom it was obtained. Evidence obtained in the investigation of a case is generally voluntarily provided, unless it was obtained under subpoena.

ii. Information that is required of a person is confidential if its disclosure is likely to either impair the state's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Competitive harm is limited to external harm that might result from the affirmative use of information by competitors; it should not be taken to mean simply any injury to competitive position such as might flow from customer or employee disgruntlement. Thus, unless the release of a settlement agreement would cause such harm, it is not CBI. Personally identifiable information in settlements that may be properly withheld under UIPA exemptions, such as home addresses, phone numbers, and bank account information, must be redacted.

3. In the context of whistleblower investigations, most confidential business information is obtained voluntarily (subparagraph i., above); thus, if, during the course of an investigation, a respondent has clearly labeled and explained why a document submitted is confidential commercial or financial information, the investigator should place it under a separate tab prominently labeled "Confidential Business Information," or "CBI." This tab is separate from any "Trade Secrets" tab. If the information was obtained under subpoena, it should be under a separate tab with the subpoena under which it was obtained. Should the file be requested under the UIPA law, HIOSH policy is to redact this information since these are not government documents.

   Care must be taken with information that may be CBI but was obtained from the complainant rather than directly from the respondent. If the investigator believes that information submitted by complainant is reasonably likely to be CBI, he or she should mark those exhibits accordingly.

C. Attorney-Client Privileged Information

1. Attorney-complainants filing discrimination complaints under §396-8(e), HRS, may use privileged information to the extent necessary to prove their claims, regardless of their employer's claims of attorney-client or work-product privilege. Thus, an employer who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.

2. In cases involving privileged information submitted by attorney-complainants, HIOSH will assure the parties that the evidence submitted by the attorney-complainant will receive special handling, will be shared only with

them, and will be secured from unauthorized access. Further, to the extent that this evidence falls under attorney-client privilege, it will be withheld, to the extent allowed by law, from public disclosure under UIPA, Chapter 92F, HRS. Generally, if the respondent has asserted that the information referred to in the complaint is privileged, the entire case file should be clearly labeled as containing information that is to be withheld because the complainant is an attorney bound by attorney-client privilege. If the respondent asserts that only certain information is privileged, then that information should be sealed in an envelope, labeled as above, and placed under a clearly labeled tab. If requested, assurance may be made in writing that the evidence will receive special handling and will be held permanently in confidence to the extent allowed by law.

3. The guidance above applies only when there is an attorney-complainant and does not apply to other cases in which respondents assert attorney-client privilege. In such cases where the complainant is not an attorney for the respondent, HIOSH will not accept blanket claims of privilege. Rather, the respondent will be required to make specific, per-document claims, which HIOSH will assess and handle accordingly. If these claims are found to be reasonable, and if the respondent so requests, assurance may be made in writing that the information will be held in confidence to the extent allowed by law, and that by HIOSH policy, submitters of confidential commercial or financial information will be notified in writing of a pending UIPA request for disclosure of such information and will be given an opportunity to comment on the impact of any potential disclosure before the division reaches a decision regarding its disclosure. Further, if the division dos not agree with the submitter that materials identified by the business submitter as CBI should be protected, business submitters must be notified in writing and granted reasonable time to protest the release in a court of competent jurisdiction.

D. Paragraph 92F-13(3), HRS

This exception to disclosure pertains to government records involving the prosecution or defense of any judicial or quasi-judicial action to which the State is a party, to the extent that such records would not be discoverable. Such documents include:

1. “Deliberative process privilege” includes documents that are pre-decisional and deliberative in nature. This privilege may be asserted when: (1) The information was generated prior to and in contemplation of litigation; (2) the information is not purely factual and does not concern recommendations that the department (DLIR) expressly adopted or incorporated by reference in its ultimate decision; and (3) disclosure of the privileged matter would have an inhibiting effect on the division’s decision-making processes.
2. “Attorney work-product privilege” includes documents that are prepared by an attorney (or under an attorney’s direction) in anticipation of litigation. Factual information may be protected in this context. In nearly all discrimination/whistleblower cases resulting in a DNO, it is anticipated that

the DNO will be contested and ultimately heard before the Hawaii Labor Relations Board, a quasi-judicial body.

3. "Attorney-client privilege" includes confidential communications between a client (HIOSH) and an attorney (DAG).

E. Public Disclosure

UIPA requests from non-party requesters must be directed to ATS. Upon receipt of a UIPA request relating to a closed case, ATS must process the request in accordance with the UIPA law, §396-14, HRS and Chapter 92F, HRS. The following definitions should be used in determining whether a case is considered open or closed:

1. **Open Cases**. If a case is open, i.e., no final order, all penalties have not been paid, and all violations have not been abated, information contained in the case file may generally not be disclosed to the public. (Note: appropriate non-public disclosures are made to the parties while the case is open, as described above.) In the event that the matter has become public knowledge because the complainant has released information to the media, limited disclosure may be made to an equivalent extent, if circumstances warrant doing so. Consultation with the DAG is advisable before disclosure, especially in high-profile cases.
2. **Closed Cases**. A discrimination case is considered closed when a final order on the determination is reached, any penalty has been paid, and the terms of the determination and order have been complied with by the respondent. Although a case may be closed at the administrative (HIOSH) level, records may not be released if a civil case is pending. See §396-14, HRS.
3. **Statistical Data**. Disclosure may be made to Congress, the State Legislature, the media, researchers, or other interested parties, of statistical reports containing aggregate results of program activities and outcomes. Disclosure may be in response to requests made by telephone, e-mail, fax, or letter, by a mutually convenient method.

E. HIOSH-Initiated Disclosure.

The division may decide that it is in the public interest or the division's interest to issue a press release or otherwise to disclose to the media the outcome of a complaint. A complainant's name, however, may only be disclosed with his or her consent; otherwise, the disclosure must be without personal identifiers.

X. Statistics

Statistics derived from reports containing aggregate results of program activities and outcomes may be posted by the system manager on the HIOSH webpage.