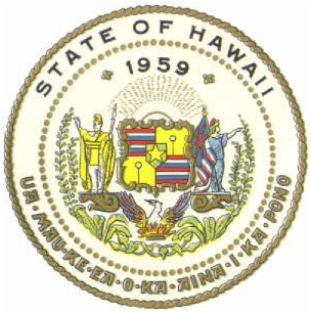
HIOSH Whistleblower Investigation Manual



State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
October 01, 2025

HIOSH INSTRUCTION

DIRECTIVE NO: CPL 02-03-011	**EFFECTIVE DATE:** October 01, 2025
SUBJECT: DISCRIMINATION (WHISTLEBLOWER) INVESTIGATION MANUAL	

ABSTRACT

Purpose: This Instruction implements the HIOSH Discrimination (Whistleblower) Investigation Manual and supersedes the December 1, 2018, Instruction. These 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: Hawaii Occupational Safety and Health - Statewide.

References: §396-8(e), HRS

Chapter 51, Hawaii Administrative Rules (HAR): Inspections, Citations, and Proposed Penalties. Subchapter 12: Inspection of Investigation not warranted; informal review.

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 December 1, 2018.

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.

Approval: By and Under the Authority of HIOSH Administrator

Executive Summary

This instruction cancels and replaces the prior [2018] version of the HIOSH Discrimination (Whistleblower) Investigation Manual. This instruction constitutes HIOSH's general guidance regarding internal operations for Discrimination (Whistleblower) Investigations for the use by the compliance branches and support staff.

Significant Changes

- All letter/document templates were removed to avoid any confusion as templates are periodically updated.
- A section on Definitions, Acronyms, and Terminology has been added to encompass the general terms used in whistleblower investigations.
- In alignment with federal OSHA standards, HIOSH has implemented the legal principle of "reasonable cause" to guide the investigative process.
- The previously designated chapters for Settlement and Remedies have been separated into two distinct chapters: Chapter 6: Remedies and Chapter 7: Settlements.
- Integration of Electronic Case Files (ECF) is implemented to enhance case management and accessibility.
- Agency review and hearing procedures are established for cases of administrative closures that are contested by the Complainant.
- Clarification is provided regarding injury reporting as a protected activity.
- A section addressing prospective employers has been added.
- 89-day disposition letters are issued to facilitate the resolution and completion of investigations.
- Clarification regarding the inclusion of employer-employee settlement agreements in the file is provided, specifically addressing confidentiality concerns.
- The manual as a whole has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were introduced throughout the manual.
- All references to the Administrator include the Administrator's designee, except as otherwise noted. The Administrator's responsibilities may be delegated to a Branch Manager, except as otherwise noted.
- Bilateral agreements will no longer be recognized by HIOSH.
- HIOSH will no longer impose punitive damages in consistent with the Hawaii Labor Relations Board (HLRB) decisions and interpretations of law.

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 HIOH 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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PRELIMINARY MATTERS

I. Purpose

This version of the Hawaii Occupational Safety and Health Division (HIOSH) Whistleblower Investigations Manual (WIM) supersedes the December 1, 2018, version. This manual outline legal concepts, procedures, and other information related to the handling of retaliation complaints under Hawaii Revised Statutes (HRS) § 396-8(e), for which responsibility was delegated to HIOSH and may be used as a ready reference.

II. Scope

The WIM shall apply to all whistleblower investigations conducted under the jurisdiction of HIOSH. Complainants who fall outside of HIOSH jurisdiction will be referred to the appropriate agencies. This program directive is applicable HIOSH-wide, specifically in the Whistleblower Unit. Furthermore, it delineates the roles and responsibilities of the different branches within HIOSH and provides guidance to facilitate the HIOSH Whistleblower Protection Program (WPP) and its related activities.

III. References

A. Hawaii Revised Statutes[1]

Hawaii Revised Statute §396-8(e)

Hawaii Revised Statute §396-11(a)

Hawaii Revised Statute §396-11(e)

Hawaii Revised Statute §396-11(h)

Hawaii Revised Statute §396-11(i)

Hawaii Revised Statute §396-11(j)

Hawaii Revised Statute §396-12

B. Hawaii Administrative Rules

[1] Common ancillary statutes that interface with the enforcement of HRS § 396 include HRS § 386, which pertains to Workers' Compensation law and grants sole authority to administer workers' compensation claims; and HRS § 378, which addresses unlawful termination in relation to dismissals solely for filing a workers' compensation claim. Additionally, HRS § 92F, known as the Uniform Information Practices Act, governs public access to information and is analogous to the Freedom of Information Act.

Hawaii Administrative Rules Chapter 51

Hawaii Administrative Rules Chapter 57

Hawaii Administrative Rules Chapter 91

C. **HIOSH Directives**

OSHA Instruction CPL 02-03-003, *Whistleblower Investigations Manual*, effective November 30, 2018; Revised March1, 2021.

HIOSH Field Operations Manual, CPL 02-00-160, effective August 2, 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.

D. **HIOSH Interoffice Memos**

Interoffice Memo 2021-1 Delegation of Administrator authority for whistleblower signatures.

Interoffice Memo 2021-2 Utilization of Disposition Letters for whistleblower investigations**.**

E. **Federal Statutes**

Occupational Safety and Health Act (Section 11(c), 29 USC 660§(c)

F. **Federal Regulations**

29 CFR Part 1977 - Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970

G. **Federal OSHA Instruction**

CPL 02-03-011 Whistleblower Investigations Manual – April 29, 2022 Memorandum

29 CFR 1954.20 - Complaints About State Program Administration.
OSHA Instruction CPL 02-03-009, Electronic Case File System Procedures for the Whistleblower Protection Program, June 18, 2020.

OSHA Instruction CSP 01-00-005, State Plan Policies and Procedures Manual, May 6, 2020.

OSHA Instruction CPL 02-00-164, OSHA Field Operations Manual (f), April 14, 2020.

OSHA Instruction CSP 01-00-005, State Plan Policies and Procedures Manual, May 6, 2020, or subsequent guidance.

OSHA Instruction CPL 02-02-072, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, August 22, 2007.

OSHA Instruction ADM 03-01-005, OSHA Compliance Records, August 3, 1998.

Memorandum *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35(b)(1)(iv)*, October 11, 2018.

Memorandum *Expanded Administrative Closure Guidance: Updated Procedures to Close Administrative Law Judge (ALJ) Cases that OSHA Lacks Authority to Investigate*, September 28, 2017.

Memorandum *Interim Investigation Procedures for Section 29 CFR 1904.35(b)(1)(iv)*, November 10, 2016.

Memorandum *Interpretation of 1904.35(b)(1)(i) and (iv)*, October 19, 2016.

Memorandum *New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases*, August 23, 2016.

Memorandum *Clarification of the Express Promise of Confidentiality Prior to Confidential Witness Interviews*, July 15, 2016.

Memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, May 11, 2016.

Memorandum *Procedures for Significant Whistleblower Cases*, September 27, 2023.

Memorandum *Tolling of Limitation Periods Under OSHA Whistleblower Laws by Private Agreements and for Other Reasons*, January 28, 2016.

Memorandum *Clarification of the Work Refusal Standard Under 29 CFR 1977.12(b)(2)*, January 11, 2016.

Memorandum *Taxability of Settlements Chart*, October 1, 2015.

Memorandum *Clarification of the Investigative Standard for OSHA Whistleblower Investigations*, April 20, 2015.

Memorandum *Employer Safety Incentive and Disincentive Policies and Practices*, March 12, 2012.

H. **Federal Desk Aid**

Occupational Safety and Health Act (OSH Act), Section 11(c) Desk Aid

IV. Cancellations

HIOSH Instruction DIS 0-0.9, *Discrimination Investigation Manual dated*, September 1, 2018; CPL 02-03-002 Whistleblower Investigations Manual and any other previous versions of the Discrimination (Whistleblower) Investigation Manual.

V. Action Information

A. **Responsible Office**

Hawaii Occupational Safety & Health Division (HIOSH)

B. **Action Offices**

Compliance Branches and Administrative Technical Support Branch

C. **Information and Evaluation Offices**

San Francisco Region, State Plans, OSHA Training Institute

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 are at least as effective as federal OSHA 11(c) policies. This manual supersedes the December 1, 2018 instruction.

B. **Appeal Process**

This manual has procedures for review of an initial retaliation case determination.[2] Complainants are afforded the opportunity for reconsideration of an initial dismissal determination within the state. Complainants will be required to exhaust this remedy before federal OSHA will accept a "request for federal review" of a dually filed

complaint or a Complaint About State Program Administration (CASPA) regarding a retaliation case filed only with the state.

C. **Dual Filing**

The Hawaii State Plan outlines the procedures for informing private-sector Complainants of their right to file a complaint concurrently under section 11(c) with federal OSHA within 30 days of the alleged retaliatory action. This information is succinctly included in the state's Job Safety and Health Poster, which informs private sector workers of their right to file with federal OSHA. Additionally, complaints submitted electronically via the federal website will, by default, constitute dual filing. Dual filing preserves Complainant's right to seek a federal remedy should the state not grant appropriate relief.

D. **Reopening Cases**

HIOSH does not have the authority to reopen investigations, as determinations and orders become final if not contested within 20 calendar days. In instances where a determination is contested, the Hawaii Labor Relations Board (HLRB) will conduct a de novo hearing, allowing for the introduction of new facts or circumstances. Following a ruling from the HLRB, parties may appeal such decisions to the Intermediate Court of Appeals (ICA). Additionally, complaints that have been administratively closed may be subject to review by the Administrator if the Complainant does not agree with closure (refer to Chapter 2). The Administrator shall determine whether an investigation is warranted in accordance with Hawaii Administrative Rules (HAR) §12-57.1.

E. **Coordination on OSHA Whistleblower Provisions Other Than HIOSH's HRS § 396-8(e) Statute**

In addition to section 11(c) of the OSH Act, federal OSHA administers, at the time of this publication, over 20 other whistleblower statutes. Although these statutes are administered solely by federal OSHA, HIOSH personnel are expected to be familiar with these statutes so that investigators are able to recognize allegations which may implicate these laws and inform Complainants of their rights to file with federal OSHA. This manual includes whistleblower complaint coordination procedures to reflect federal OSHA's administration of these laws.

F. **Action**

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

VII. Significant Changes

A. **General**

1. All letter/document templates were removed from their individual chapters.

2. Although Chapter 8 deals specifically with section 11(c), it only discusses the interface with HIOSH.

3. The manual as a whole has been restructured such that Chapter 2 now collects and explains the legal concepts and principles that guide whistleblower investigations. Previously, these concepts were introduced throughout the manual.

4. In alignment with federal OSHA standards, HIOSH has implemented the legal principle of "reasonable cause" to guide the investigative process.

5. Policies initiated by previously-issued memoranda were incorporated into this Instruction. This instruction supersedes all prior memoranda. This incorporation affected all chapters. Please refer to the memorandum itself if you wish to learn the background of a specific policy.

6. Formal investigative correspondence, including notifications and determinations, may now be sent by email, delivery receipt required. While use of email for formal investigative correspondence is now allowed, care should be taken to ensure it is a method regularly used by Complainant and/or Respondent, or else a party's responses may not be timely.

7. HIOSH must now consult with DAG on all merit cases and on all deferrals.

8. All references to the Administrator include the Administrator's designee, except as otherwise noted. The Administrator's responsibilities may be delegated to a Branch Manager, except as otherwise noted.

9. The previously designated chapters for Settlement and Remedies have been separated into two distinct chapters: Chapter 6: Remedies and Chapter 7: Settlements.

10. A section on Definitions, Acronyms, and Terminology has been added to encompass the general terms used in whistleblower investigations.

11. Agency review and hearing procedures are established for cases of administrative closures that are contested by the Complainant.

12. Clarification is provided regarding injury reporting as a protected activity.

13. A section addressing prospective employers has been added.

14. 89-day disposition letters are issued to facilitate the resolution and completion of investigations.

15. Clarification regarding the inclusion of employer-employee settlement agreements in the file is provided, specifically addressing confidentiality concerns.

16. Bilateral agreements will no longer be recognized by HIOSH.

17. HIOSH will cease to impose punitive damages consistent with the decisions and interpretations of law established by the Hawaii Labor Relations Board (HLRB), the quasi-judicial adjudicatory body for HIOSH.

B. **Chapter 1: Preliminary Matters**

1. Introduced the terms 'Whistleblower Unit' and HIOSH's 'Whistleblower Protection Program (WPP).' These terms were not used in previous instructions.

2. Added "Coordination on OSHA Whistleblower Provisions Other Than HIOSH's HRS § 396-8(e) section. See Chapter 1.VI.E

3. Deleted the "Referrals" section (Chapter 1.VI.E in previous instruction) as this content is addressed in the section above.

4. A glossary of common terms and acronyms used in the WIM has been added. See Chapter 1.IX "Definitions, Acronyms, and Terminology."

5. Chapter 1.XI. "Functional Responsibilities" now specifies responsibilities related to the OH Branch Manager and HIOSH's WPP. The functional responsibilities of the SI have been summarized, rather than presented as an exhaustive list of the specific duties in the position description as described in previous instructions.

6. Added Languages section in Chapter 1.XII. Previously, no such section addressing languages existed.

C. **Chapter 2: Legal Concepts**

1. Chapter 2 is new. It consolidates discussion of the legal concepts relevant to whistleblower investigations that were previously introduced throughout the manual.

2. In alignment with federal OSHA standards, HIOSH has implemented the legal principle of "reasonable cause" to guide the investigative process. It is noted that the standard of "preponderance of evidence" will continue to apply in hearings before the Hawaii Labor Relations Board (HLRB). Refer to Chapter 2.IV.

3. Reporting a work-related injury or illness clarifies the process for complaints that intersect with Worker's Compensation claims. This section provides a specific

discussion on which agency has the authority to provide whole-remedies and outlines the procedure for deferral until it is determined which entity possesses make-whole authority. See Chapter 2.V.A.2.

4. Work refusal is governed by the requirements outlined in HAR §12-57-7(b). See Chapter 2.V.A.7.

5. Cat's paw theory is introduced in Section V.B.

6. Causation standards, including "but for" and "contributing factor," along with references to HLRB decisions, are discussed in Section VI.

7. Section VII includes a federal section on addressing policies and practices that discourage injury reporting.

D. **Chapter 3: Intake and Evaluation of Complaints**

1. The entire chapter has been restructured and reorganized providing a more detailed process for handling complaints under this chapter.

2. The section on "Receipt of Complaints" has been reorganized under "Incoming Complaints," which outlines procedures for filing, including who may file, how to file, acceptance of written and oral complaints, the process for receiving complaints, complaints forwarded by other agencies, and requirements for such complaints. See Chapter 3.II.

3. The section on "Intake and Docketing of Complaints" has been restructured and incorporated into "Screening Interviews and Complaints," which now provides an overview of complaint/case assignment, initial contact, screening interviews, evaluation of whether a prima facie allegation exists, and tolling procedures. Refer to Chapter 3.III.

4. The section on "Timeliness of Filing" has been removed and is now addressed within Chapter 3.III.

5. A new section titled "Initial Complaint Results" has been added, discussing the procedures for administratively closed complaints, informal reviews of administrative closed complaints, and the handling of unresponsive or uncooperative complaints during the screening. Refer to Chapter 3.IV.

6. A new section titled "Named Respondents" has been incorporated. Refer to Chapter 3.VI.

7. A new section titled "Notification Letters" has been added. Refer to Chapter 3.VII.

8. A new section titled “Early Resolution” has been added. Refer to Chapter 3.VIII.

9. The section titled “Scheduling the Investigation” has been removed.

10. The Appendix to Chapter 3: Investigation Forms and Letters has been removed.

E. **Chapter 4: Conduct of the Investigation**

1. This chapter was previously titled “Case Disposition.” It is now titled “Conduct of Investigation” and the entire chapter has been restructured.

2. A new section titled “General Principles” has been added, introducing the legal principle “reasonable cause.” Refer to Chapter 4.II. This section was previously titled “Preparation” and the subject is discussed in Chapter 5.

3. The adoption of electronic case files and the elimination of paper to the fullest extent possible have been implemented. See Chapter 4.III.A.1.

4. The section “Report of Investigation” has been deleted. This content has been moved and is now discussed in Chapter 5.

5. A new section “Documenting the Evidence” has been added. See Chapter 4.III.B.

6. A new titled “Case Activity Log” has been introduced. See Chapter 4.III.C.

7. A new section titled “Investigative Correspondence” has been added. See Chapter 4.III.D.

8. A new section “Investigative Research” has been added. See Chapter 4.III.E.

9. A new section “Referrals and Notifications” has been added. See Chapter 4.IV.

10. The section “Case Review and Approval by the Supervisory Investigator has been deleted. This subject has been moved and is now discussed in Chapter 5.

11. A new section titled “Amended Complaint” has been added. See Chapter 4.V.

12. The section “Administrator’s Determination” has been deleted. However, this subject has been moved and is discussed in Chapter 5.

13. A new section titled “Lack of Cooperation/Unresponsiveness” has been added. See Chapter 4.VI.

14. The section “Contest Rights” was deleted. This subject has been moved and is discussed in Chapter 5.

15. A new section titled “On-site Investigation, Telephonic and Recorded Interviews” has been added. Chapter 4.VII.

16. A new section titled “Confidentiality” has been included. See Chapter 4.VIII.

17. A new section titled “Complainant Interview and Contact” has been introduced. See Chapter 4.IX.

18. A new section titled “Contact with Respondent” has been introduced. See Chapter 4.X.

19. A new section titled “Unresponsive/Uncooperative Respondent” has been added. See Chapter 4.XI.

20. A new section titled “Subpoenas, Document and Interview Requests” has been introduced. See Chapter 4.XII.

21. A new section titled “Party Representation at Witness Interviews has been added. See Chapter 4.XIII.

22. A new section titled “Records Collection” has been introduced. See Chapter 4.XIV.

23. A new section titled “Resolve Discrepancies” has been added. See Chapter 4.XV.

24. A new section titled “Analysis” has been introduced. See Chapter 4.XVI.

25. A new section titled “Closing Conference has been added. See Chapter 4.XVII.

26. A new section titled “Document Handling and Requests” has been added. See Chapter 4.XVIII.

F. **Chapter 5: Case Disposition**

1. This chapter was previously titled “Documentation and Determination Notice and Order (DNO).” It is now titled “Case Disposition” and outlines the policies and procedures for determining the merits and non-merits of a case. The entire chapter has been comprehensively restructured.

2. The section on “Screened Complaints” has been removed, and new sections titled, “Review of Investigative File” and “Consultation Between the Investigator and Supervisor” have been added. Refer to Chapter 5.II.

3. The section on “Case File Organization” has been deleted and replaced with “Report of Investigation.” See Chapter 5.III.

4. The section titled "Documenting the Investigation" has been removed and replaced with "Case Review and Approval by the Supervisor." See Chapter V.IV.

5. A new section on "Case Closing Alternatives" has been added. See Chapter 5.V.

6. The section on "Determination Notice and Order (DNO)" has been revised. See Chapter 5.VII.

7. A new section outlining the procedures for issuing merit and non-merit findings, along with examples of legal phrases and language that HIOSH should include, has been added. See Chapter 5.VI.

8. A new section on "Multi-Respondent Mixed Determinations" has been included. See Chapter 5.VI.D.

9. A new section on "Dismissal for Lack of Cooperation/Unresponsiveness" has been added. See Chapter 5.VIII.

10. A new section on "Withdrawal" has been introduced. See Chapter 5.IX.

11. Appendix to Chapter 5: Notice and Order Forms and Letters were removed.

G. **Chapter 6: Remedies**

1. This chapter was previously titled "Remedies and Settlement Agreements," but it has now been divided into two separated into two chapters: one focusing solely on Remedies and the other on Settlements. Consequently, this entire chapter has been restructured to reflect that change.

2. A new section on General Principles has been added. See Chapter 6.II for details.

3. The section on Emotional Distress, Mental Anguish, and Pain and Suffering has been removed.

4. The prior content regarding punitive damages has been eliminated. However, the section on Punitive Damages has been clarified. Under HIOSH Law, punitive damages are not provided for. Previously, attempts by HIOSH to award punitive damages were met with interpretations by the HLRB stating that such damages are not expressly stipulated in HRS §396-8(e). See Chapter 6.VI for clarification.

5. Although comprising a small percentage of the state's population, Hawaii does have undocumented workers, as indicated by data from the U.S. Department of Homeland Security and the DLIR. Therefore, a new section on Undocumented Workers has been added.

H. **Chapter 7: Settlements**

1. This chapter was previously titled "OSHA's Role in HIOSH Discrimination Cases." The discussion of settlement agreements, which was previously combined with remedies in Chapter 6, has now been separated and is addressed as a standalone topic in Chapter 7.

2. All forms pertaining to settlements have been removed.

3. An 89-day disposition letter has been incorporated into the settlement policy. Refer to Chapter 7.II for details.

4. The prior provision indicating that the settlement agreement need not be signed by the Complainant—on the basis that HIOSH acts on their behalf—has been deleted. It is now specified that every settlement agreement must be signed by the Complainant. See Chapter 7.III.A.

5. In the section on Settlement Procedures, under Other Remedies, training for managers and employees has been added regarding the employees' right to report potential violations of the law without fear of retaliation. Refer to Chapter 7.III.B.III.d.

6. A new section titled "Consistent with the Public Interest" has been added. See Chapter 7.III.C.

7. A section addressing the Tax Treatment of Amounts Received in Settlement has been included. See Chapter 7.III.D.

8. A section on the Use of the Disposition Letter (89-Day Letter) has been added. Refer to Chapter 7.III.E.

9. Clauses concerning Training, Confidentiality, and Non-Waiver of Rights have been included as provisions under the HIOSH standard agreement. See Chapter 7.IV.D.

10. Throughout this chapter, all subheadings and references to private settlements have been renamed to "Employer-Employee Settlement Agreements." See Chapters 7.IV.E and 7.V.

11. Bilateral agreements are no longer recognized by HIOSH. For a legal explanation, refer to Chapter 7.VI.

I. Chapter 8: OSHA's Role in HIOSH Discrimination Cases

1. Chapter 8, previously titled "Information Disclosure," is now designated as "OSHA's Role in HIOSH Whistleblower Cases." This chapter emphasizes the

coordination between federal OSHA and HIOSH, incorporating content that was formerly included in Chapter 7.

2. A new section entitled "Federal Review Procedures" has been introduced in Section III. This section delineates the procedures established by federal OSHA for Complainants seeking review of the outcomes of HIOSH cases.

J. **Chapter 9: Information Disclosure**

1. This chapter delineates the policies and procedures governing the disclosure of information pertaining to whistleblower cases under the Uniformed Information Protection Act (UIPA), including applicable costs and fees associated with such disclosures.

2. The entire chapter has been streamlined to simplify the instructions internally for HIOSH whistleblower investigators.

3. The chapter refers all UIPA related issues to the Administrative and Technical Support Branch.

4. The Administrative and Technical Support Branch are trained and authorized to handle all requests, questions or concerns related to public and private disclosure(s).

VIII. Background

The Hawaii Occupational Safety and Health Law, Chapter 396, Hawaii Revised Statutes (HRS), ("Law") is a state statute of general application 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.

The Law provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, record keeping requirements, the issuance of citations and notifications of proposed penalties, review proceedings before an independent quasi-judicial agency (the Hawaii Labor Relations Board), and judicial review.

Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Law. 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.

HRS § 396-8(e), provides, in general, that no person shall discharge, suspend or in any manner discriminate (retaliate) against any employee because the employee has exercised their rights under the Law. The Administrator has overall responsibility for the investigation of retaliation complaints under Section 396-8(e). The Administrator has authority to order the employer to provide all appropriate relief to the Complainant in merit cases, dismiss non-meritorious complaints, approve acceptable withdrawals, and negotiate voluntary settlement of complaints.

IX. Definitions, Acronyms, and Terminology

- **Administrator:** The head of HIOSH. The Administrator has overall responsibility for the HIOSH program, including the enforcement and outreach activities related to HRS 396-8(e).[3] The Administrator's responsibilities related to whistleblower activities may only be delegated to the OH Branch Manager or to the ATS Branch Manager (see definitions for both below).

- **Administrative Closure:** A closure of a case after initial screening due to failure to meet threshold issues and/or failure to meet prima facie elements. This is not a finding, order, citation or notice to all affected parties. An administrative closure is the result of hearing the allegations from the aggrieved party and informing that party that the information provided do not warrant an investigation.

- **Administrative Hearing:** An informal review by the Administrator of a whistleblower complaint filed by a Complainant that was administratively closed and Complainant disagreed (did not provide consent) with the closure. The purpose of the review is to determine if such a complaint warrants an investigation by the Whistleblower Unit (see definitions).

- **Administrative and Technical Support Branch (ATS):** The ATS Branch is tasked with the performance of administrative duties in support of HIOSH. Such duties include, but are not limited to, the adoption of applicable standards, the execution of outreach initiatives, the oversight of training programs, and the facilitation of communication between HIOSH and federal OSHA. The ATS Branch will administer a program that is equivalent to the standards and regulations established by federal OSHA.

- **Administrative and Technical Support Branch Manager (ATS Branch Manager):** The head of the ATS Branch. The ATS Branch Manager works directly with the Administrator, the Enforcement Branch Managers (OS and OH), and the SI (as defined below) to ensure that effective criteria are met. The ATS Branch Manager serves as the primary point of contact for requests pertaining to HIOSH files in response to requests made under the UIPA (see definition).

- **Adverse Action:** An action initiated by the respondent that would dissuade a reasonable employee from engaging in a HIOSH protected activity. Other forms of adverse action

include, but is not limited to, termination, loss in pay, demotion, discipline, job transfer, harassment.

- **Appeal:** Pursuant to HRS § 396-11, a Complainant or Respondent may appeal any order, citation, or notice issued by HIOSH. These specific appeals are forwarded to the Hawaii Labor Relations Board (HLRB), who will have jurisdiction over the case that is on appeal.

- **Animus:** A party's intention or motivation to retaliate against an employee for reporting unsafe working conditions or exercising their rights under the Law. Specifically, animus involves showing that the employer had a discriminatory or hostile attitude towards the employee's protected activity.

- **But For:** A legal standard used to establish causation. It often refers to whether an adverse action would not have happened "but for" (without) a specific protected activity or factor, thereby establishing a direct link between that activity and the outcome in question.

- **Cat's Paw Theory:** The theory that an employer can be held liable for discrimination if a biased employee, who lacks ultimate decision-making authority, influences the decision-maker to take adverse action against another employee.

- **Chilling Effect**: The "chilling effect" refers to the hesitation or fear that employees might feel about reporting safety issues or illegal practices at work. This fear often arises when employees see others being punished or retaliated against for speaking up, even if it's not directly against the Law. As a result, workers may feel discouraged from raising concerns or making complaints, even when they are legally protected from retaliation.

- **Complaint:** All employees and their representatives have the right to file a complaint with HIOSH. There are two types of complaints: 1) Safety and Health Complaints, which pertain to conditions in the workplace that violate HIOSH safety and health standards or pose a danger to employees, and 2) Whistleblower Complaints, which involve an employee suffering an adverse action as a result of engaging in protected activities covered by HIOSH. This manual will address whistleblower complaints exclusively, unless a safety or health complaint is specifically mentioned.

- **Complaints About State Program Administration (CASPA):** Complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to section 11(c) Complainants.

- **Complainant:** Any person who believes that they have suffered an adverse action in violation of the HIOSH whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with HIOSH. When this manual discusses

investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.[2]

- **Confidential Business Information (CBI):** Internal, non-public information about a company. CBI refers to information that is considered sensitive and proprietary to a business, which, if disclosed, could potentially harm the competitive position of the business or reveal trade secrets.

- **Compliance Safety and Health Officer (CSHO):** This term refers to both Occupational Safety and Health Compliance Officers (OSHCOs) and Environmental Health Specialists (EHSs). See specific definitions for both below.

- **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in HIOSH's investigation of a whistleblower complaint. If a representative has been designated, HIOSH typically communicates with the Complainant or the Respondent through the designated representative, although HIOSH may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. Determination Notice and Orders (DNO) are sent to both parties and their representatives.

- **Deputy Attorney General (DAG):** The legal representative on HIOSH matters representing the agency at trial or any legal proceeding. The DAG may be called upon to provide legal advice on all matters related to the enforcement of HRS § 396-8(e).

- **Director:** The Director of the Department of Labor & Industrial Relations (DLIR) is an appointee of the Governor responsible for overseeing all activities and operations of the DLIR.

- **Department of Labor and Industrial Relations (DLIR)**: Executive Branch of the State of Hawaii tasked with labor related matters affecting all public and private employees and employers in the state.

- **Disparate Treatment:** Refers to the discriminatory practice of treating an employee differently than others because they engaged protected activities.

- **Docket:** To formally assign a whistleblower complaint a case number and enter it into the OSHA Whistleblower Investigation Tracking System (OIS-Whistleblower) database. The initial complaint has passed screening and intake procedures and will be investigated by the Whistleblower Unit (see definition). Notification letters will be issued to the affected parties.

[2] Complainant also refers to any individual who files a notice of an alleged safety or health hazard for which HIOSH has jurisdiction or a violation of the Law.

- **Determination Notice and Order (DNO) or Order:** A formal notification issued by HIOSH after investigating a whistleblower complaint under HRS § 396-8(e). This notice informs the parties involved of the findings resulting from an investigation, outlines whether the complaint is substantiated or unsubstantiated, provides the legal rationale for the determination, and may include any orders or actions necessary to address the findings. Additionally, the notice will inform the parties of their right to appeal the determination.

- **Employer-Employee Agreements:** Settlement agreements between Complainant and Respondent, subject to HIOSH's approval. See Chapter 7.

- **Enforcement Case:** Refers to an inspection or investigation conducted by a CSHO or EHS (see definition below) or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case. See below for inspection or investigation definitions.

- **Environmental Health Specialist (EHS):** A compliance officer, specifically within the Occupational Health Branch, is assigned to carry out enforcement activities for HIOSH. EHSs are responsible for investigating safety and health complaints, as well as accidents, and primarily conducts inspections. EHSs work directly with investigators (see definition below) when there are allegations that employees have experienced retaliation after reporting concerns during employee interviews.

- **Federal Review:** Complainants who have concerns about HIOSH's investigation of their dually filed section 11(c) whistleblower complaints may request a review by federal OSHA. This review provides an opportunity for reconsideration of the state's dismissal determination and, in merit cases, allows the Secretary to file suit in Federal District Court. See Chapter 8.

- **Hawaii Labor Relations Board (HLRB):** An independent quasi-judicial entity tasked with hearing the appeals filed under HRS § 396-11. This adjudicative body may hear the case de novo (from the beginning) and preserves the parties due process rights. A finding of fact and conclusion of law may be issued on the appeal by the HLRB.

- **Hawaii Occupational Safety and Health (HIOSH):** A division of the Department of Labor and Industrial Relations (DLIR). It is comprised of five branches: Administrative Technical Support, Occupational Safety, Occupational Health, Consultation and Training, and Boiler and Elevator.

- **Inspection**: Enforcement activities performed by Occupational Safety and Health branches. Inspections of worksites within the State of Hawaii designed to ensure every working man and woman are provided insofar as possible, a safe and healthful workplace. The results of inspections may lead to the filing of whistleblower claims by employees.[4]

- **Intake Interview:** An initial interview with a Complainant to determine what their whistleblower complaint allegations are. These intake interviews (screening) are conducted by the Whistleblower Unit.

- **Investigator:** A HIOSH employee assigned to investigate and prepare a ROI (see below) in a HIOSH whistleblower case.

- **Lack of Cooperation (LOC):** A Complainant's or respondent's failure to provide information necessary for a whistleblower investigation. This includes the designated representative of the Complainant or respondent.

- **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU):** An agreement between two agencies regarding the coordination of related activities.

- **Nexus:** A connection or link between the protected activity and the adverse action taken against an employee. See Chapter 2.

- **Non-Public Disclosure:** A disclosure of information from the investigative case file made to Complainant or Respondent during the investigation in order to resolve the complaint.

- **Occupational Health Branch (OH Branch):** An enforcement branch of HIOSH responsible for implementing and enforcing workplace safety and health regulations and standards within the State of Hawaii. While this branch can conduct both safety and health inspections, its focus are on health-related hazards. The Whistleblower Unit falls under the auspices of the OH Branch.

- **Occupational Health Branch Manager (OH Branch Manager):** The head of the OH Branch, who oversees the Whistleblower Unit and acts as the designee for the HIOSH Administrator when carrying out duties typically performed by the Administrator. Additionally, they collaborate with the ATS Branch Manager on training opportunities and outreach services related to the whistleblower section.

- **Occupational Safety and Health Compliance Officers (OSHCOs):** A compliance officer, specifically within the Occupational Safety Branch, is assigned to carry out enforcement activities for HIOSH. OSHCOs are responsible for investigating safety and health complaints, as well as accidents, and primarily conducts inspections. OSHCOs work directly with whistleblower investigators (see definition below) when there are allegations that employees have experienced retaliation after reporting concerns during employee interviews.

- **Occupational Safety Branch (OS Branch):** An enforcement branch of HIOSH responsible for implementing and enforcing workplace safety and health regulations and standards within the State of Hawaii. While this branch can conduct both safety and

health inspections, its focus is on safety-related hazards. The Whistleblower Unit falls under the auspices of the OH Branch.

- **Occupational Safety Branch Manager (OS Branch Manager):** The head of the OS Branch, who supervises CSHOs performing enforcement activities. The OS Branch Manager is responsible for referring complaints arising from these enforcement activities to the SI. Additionally, the OS Branch Manager collaborates with the ATS Branch Manager to develop and implement training opportunities and outreach services related to the whistleblower section.

- **Office of Information Practices (OIP):** The state agency responsible for overseeing the implementation of the Hawaii Uniform Practices Act (UIPA). See below for definition.

- **OIS-Whistleblower:** The OSHA IT Support System – Whistleblower, or subsequent whistleblower case management system. OIS - Whistleblower is the case management system used to process complaint data for OSHA's Whistleblower Protection Program, formerly known as *WebIMIS or OITSS.*

- **Personally Identifiable Information (PII):** Information about an individual which may identify the individual, such as a Social Security number or a medical record. See Chapter 9.

- **Pretext:** A false or misleading reason given in justification of an action or decision, which is not the actual reason behind it.

- **Protected Activity:** Refers to actions taken by employees concerning safety and health that are legally protected from retaliation by employers. This includes, but is not limited to, reporting violations, participating in HIOSH inspections and investigations, and refusing to engage in unsafe work practices. For a comprehensive list of covered protected activities, refer to HRS § 396-8(e) and HAR §12-57-1.

- **Rebuttal Interview:** Interview with Complainant to go over the Respondent's position and allow the Complainant the opportunity to rebut Respondent's claims.

- **Report of Investigation (ROI):** The report prepared by an Investigator in an HIOSH whistleblower case, setting forth the facts, analyzing the evidence, and making a recommendation.

- **Respondent:** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term "Respondent" also includes Respondent's designated representative.

- **Secretary of Labor (Secretary):** The Secretary is the head of federal Occupational Safety and Health Administration (OSHA), responsible for enforcing workplace safety

and health regulations, overseeing compliance with federal standards, and promoting safe working conditions across various industries under federal jurisdiction.

- **Settlement Agreement:** A legal contract or formal resolution that resolves a whistleblower claim between the Respondent and the Complainant.

- **Supervisory Investigator (SI):** A senior official within the Whistleblower Unit responsible for overseeing and managing whistleblower complaints and investigations. The SI is the immediate supervisor of the investigators.

- **Supervisor:** The Administrator, or the OH Branch Manager, ATS Branch Manager, or SI, to whom the Administrator has delegated any of the Administrator's responsibilities, such as the responsibility to oversee HIOSH whistleblower investigations, sign subpoenas (as applicable), issue findings and orders, recommend cases for litigation by DAG, and approve settlements.

- **Temporal Proximity:** The timing between an employee's protected activity and an adverse action taken against the employee.

- **Uniformed Information Practices Act (UIPA):** Hawaii's equivalent to the federal Freedom of Information Act (FOIA). The UIPA governs the public's access to government records. It promotes transparency by allowing individuals to request records from state and county agencies, ensuring citizens can access information while balancing the need for confidentiality in certain circumstances.

- **Whistleblower Unit:** The section responsible for investigating whistleblower claims that fall under HRS § 396-8(e). This unit is supervised by the SI and operates under the auspices of the OH Branch.

- **Whistleblower Complaint:** A complaint filed with HIOSH alleging unlawful retaliation for engaging in protected activity. For example, a roofing employee complains to HIOSH that she was suspended for reporting a lack of fall protection to HIOSH. The whistleblower complaint is the complaint to HIOSH regarding the suspension for reporting a safety violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to HIOSH regarding the lack of fall protection.

- **Whistleblower Investigation:** An investigation conducted after a case has been docketed and entered into the OIS -Whistleblower system. The authority of whistleblower investigations conducted by HIOSH are found in the provisions of HRS § 396-8(e).

- **Whistleblower Protection Program (WPP):** HIOSH's Whistleblower Protection Program as a whole.

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

HIOSH administers only one discrimination or whistleblower law. HRS § 396-8(e) is substantially similar to OSHA's whistleblower statute under Section 11(c). The rules governing the administration of HRS § 396-8(e) are contained in Hawaii Administrative Rules (HAR) §12-57.

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.

B. **Protected Activity**

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

1. Occupational safety or health complaints filed orally or in writing with OSHA, HIOSH, the National Institute of Occupational Safety and Health (NIOSH), or any state or local government agency that addresses occupational safety and health hazards confronting employees. This encompasses agencies that focus on public safety or health, such as fire departments, health departments, or police departments. The timing of the complaint filing in relation to the alleged retaliation and the employer's knowledge are often central considerations in investigations involving this protected activity. HRS § 396-8(e) mandates that HIOSH notify Complainants when the division determines not to pursue compliance action, specifying the reasons for such a decision and outlining the procedures for an informal review of that 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 action, and employee appeal of an HLRB 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 included 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 conducted 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. This encompasses asking questions, expressing concerns, reporting work-related injuries or illnesses, requesting safety data sheets (SDS), and requesting access to records or copies of the HIOSH Law/OSH Act, HIOSH/OSHA regulations, HIOSH/OSHA standards, or compliance plans (such as the hazard communication program or the bloodborne pathogens exposure control plan), as permitted by applicable standards and regulations. This right is grounded in the employer's obligation to comply with HIOSH/OSHA standards (HRS § 396-6 and administrative rules, Title 12, Subtitle 8), and to maintain a workplace free from recognized hazards that could cause death or serious physical harm, as well as the employee's obligation to adhere to HIOSH/OSHA standards and regulations. Such communication is essential to the implementation of these provisions. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980) (establishing the right to refuse imminently dangerous work as integral to the general duty clause). This communication further supports the objectives outlined in the Law to ensure safe and healthful working conditions, which include encouraging both employers and employees to enhance existing programs for safety and health, recognizing their respective but interdependent responsibilities and rights in achieving safe working environments, and promoting joint labor-management efforts to reduce workplace injuries and diseases. See 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 rooted in the obligations of both the employer and employee, as articulated in 29 U.S.C. § 651(b)(1), (2), and (13) referenced in the preceding paragraph. Such communication is essential to the implementation of these provisions. See Memorandum of Understanding between OSHA and NLRB, 40 FR 20083 (June 16, 1975). It is important to note that Section 11(c) rights may overlap with rights under Section 7 of the National Labor Relations Act, which protects the right 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 relation to occupational safety or health should be primarily addressed as Section 11(c) cases.

This category (exercising any right afforded by the Law/Act) also encompasses the refusal to perform a task that the employee reasonably believes poses a real and imminent danger of death or serious injury. The HIOSH administrative rule governing work refusals is set forth in HAR § 12-57-7(b). An employee has the right to refuse to perform an assigned task if the employee:

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 the 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, rules, regulations, and orders applicable to their own actions or conduct. This right is derived from HRS § 396-6, which requires employers to comply with HIOSH/OSHA standards and from § 396-8(d), 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 HAR §12-57-7(b)(1). To be a protected activity, a refusal to work must meet the criteria set forth in HAR §12-51-7(b)(2), as explained above.

An employee has the right to participate in an HIOSH/OSHA inspection (see HRS § 396-8(c)). The employee has the right to communicate with a HIOSH compliance officer, both orally or in writing (HAR §12-51-10). In accordance with HAR §12-518, an authorized representative of employees has the right to accompany the HIOSH compliance officer during the walkaround inspection. The employee must not suffer retaliation because of the exercise of this right. Furthermore, an employee representative has the right to participate in an informal conference, subject to HIOSH's discretion, as specified in HAR §12-51-21.

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.

XI. Functional Responsibilities

The following describes the functions and responsibilities of the various positions within HIOSH's Whistleblower Unit. These descriptions are intended neither to be all-inclusive nor to describe actual position description and/or job functions. Rather, the following descriptions are intended to provide a general overview of HIOSH and DLIR functions that may be different depending on the needs or staffing of the division or unit (section).

A. **Administrator**

The Administrator is responsible for overseeing the Whistleblower Protection Program and for ensuring that HIOSH's whistleblower provisions are appropriately implemented. This includes overseeing all whistleblower investigations and outreach activities, as well as ensuring that all HIOSH personnel, especially CSHOs, have a basic understanding of the rights afforded to employees under the discrimination (whistleblower) section of the Law and are trained to handle discrimination (whistleblower) complaints using intake forms. The Administrator is also authorized to issue determinations and approve settlement of complaints filed under the Law.

B. **Occupational Health (OH) Branch Manager**

The OH Branch Manager is responsible for the overall implementation of approved policies and procedures for all whistleblower investigations, ensuring quality investigations and customer service, collaboration with the DAG, communication with federal OSHA, and coordination of all outreach activities. Additionally, the OH Branch Manager is responsible for ensuring the tracking of investigations and administrative closures.

C. **Supervisory Investigatory (SI)**

The SI is responsible for implementing and supervising the day-to-day whistleblower protection operations of the investigators and other personnel in the Whistleblower Unit. The SI is responsible for ensuring that all complaints are received and processed in accordance with HIOSH policy and procedures and that investigators receive proper guidance in order to adequately investigate retaliation complaints. Additionally, the SI organizes training (formal and field) for investigators, helps develop outreach programs and activities, and keeps field staff informed about significant legal developments. The role also includes maintaining and presenting statistical database on investigations and contributing to the development of legislation related to discrimination matters. The SI may conduct investigations of whistleblower cases as needed.

D. **Investigator**

Under the direct guidance and ongoing supervision of the SI, the investigator conducts investigations, which include responsibilities such as:

1. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.

2. Reviewing investigative and/or enforcement case files for background information concerning any other proceedings which relate to a specific complaint.

3. Interviewing Complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.

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

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

6. Applying knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzing the evidence, drafting an investigative report, and recommending appropriate action to the supervisor.

7. Composing draft DNO for supervisory review.

8. Negotiating with the parties to obtain a written settlement agreement that provides prompt resolution and satisfactory remedies to Complainant where appropriate.

9. Assisting and acting on behalf of the Administrator or SI in whistleblower matters involving other agencies or federal OSHA offices as assigned, and interacting with the general public to perform outreach activities as assigned.

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

11. Organizing and maintaining whistleblower investigation case files.

E. HIOSH Whistleblower Protection Program (WPP)

HIOSH's WPP is composed of the Administrator, the ATS Branch Manager, the OH Branch Manager, and the Whistleblower Unit, who together develops policies and procedures, provides assistance to the field on both the program and the statute it enforces, promulgates procedural and interpretive rules to implement the HIOSH Law, performs audits of investigations (conducted mainly by the ATS Branch), maintains statistical information on the state-wide program, and performs outreach.

F. Compliance Safety and Health Officer (CSHO)

Each CSHO maintains a basic understanding of the whistleblower protection provisions administered by HIOSH, in order to advise employers and employees of their responsibilities and rights under the Law. Each CSHO must accurately record information about potential whistleblower complaints on an HIOSH-87 form or the

appropriate intake worksheet and immediately forward it to the SI. In every instance, the date of the initial contact must be recorded. Additionally, as noted in the HIOSH Field Operations Manual (FOM), CSHOs should instruct employers and employees about HRS § 396-8(e) rights during opening and closing conferences.

G. **Deputy Attorney General (DAG)**

The DAG provides legal assistance to HIOSH. DAG reviews HIOSH whistleblower cases submitted by the SI and/or the OH Branch Manager to assess their legal merits. The DAG represents the Director before the HLRB and in any subsequent court proceedings under the Law. Additionally, the DAG may be called upon to review private settlement agreements to ensure they align with HIOSH's objectives.

XII. Languages

HIOSH is encouraged to communicate with Complainants, Respondents, and witnesses in the language in which they understand, both orally or in writing. Online translators may be used. If any communication, including DNOs, is written in a language other than English, an English-language version must also be written. Oral and written communication in any language must be grammatically correct. HIOSH may refer to DLIR's Language Access Plan, which outlines the provision of language services for individuals with limited English proficiency to ensure equity and inclusion.

Chapter 2

LEGAL PRINCIPLES

I. Scope

This Chapter explains the legal principles applicable to investigations under the whistleblower protection law that HIOSH enforces, including:

- the requirement to determine whether there is reasonable cause to believe that unlawful retaliation occurred.
- the prima facie elements of a violation of the whistleblower protection law.
- the standards of causation relevant to HRS § 396-8(e).
- the types of evidence that may be relevant to determine causation and to detect pretext (a.k.a. "pretext testing") in whistleblower retaliation cases.
- the consideration and integration of recent Hawaii Labor Relations Board (HLRB) decisions; and
- other applicable legal principles.

II. Introduction

The HIOSH-enforced whistleblower protection law prohibits a covered entity or person from retaliating against an employee for the employee's engaging in activity protected by HRS § 396-8(e). In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of HRS § 396-8(e) has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., but-for, contributing factor, or inference from circumstantial evidence).[3]

III. Gatekeeping

Upon receipt, an incoming whistleblower complaint is screened to determine whether the prima facie elements of unlawful retaliation (a "prima facie allegation") and other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and – as appropriate – the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of HRS § 396-8(e). The elements of a retaliation claim are described below and the procedures for screening whistleblower complaints are described in detail in Chapter 3.

IV. Reasonable Cause

If the case proceeds beyond the screening phase, HIOSH investigates the case by gathering evidence to determine whether there is reasonable cause to believe that retaliation in violation of

[3] *Skellington v. City and County of Honolulu,* Case No. OSAB 97-015 (Labor and Industrial Relations Appeals Board, August 29, 2001) (Skellington).

HRS § 396-8(e) occurred. Reasonable cause means that the evidence gathered in the investigation would lead HIOSH to believe that unlawful retaliation occurred – i.e. that there could be success in proving a violation at an HLRB hearing based on the elements described in more detail below. HIOSH continues to use the standards delineated in the Hawaii Administrative Rules (HAR) §12-57-3(a) and (b) and used by the HLRB.[4]

A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent but does not generally require as much evidence as would be required at trial. Although HIOSH will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, HIOSH does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred.[5] Because HIOSH makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a hearing.

If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, HIOSH will issue merit findings under HRS § 396-8(e) or consult with DAG to ensure that the investigation captures as much relevant information as possible so that the DAG can evaluate whether the case is appropriate for litigation. If the investigation does not establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed.

Procedures for conducting the investigation, requirements for issuing merit and non-merit (dismissal) findings in whistleblower cases, the requirement to consult with DAG in cases that HIOSH believes are potentially meritorious, and the standards for determining appropriate remedies in potentially meritorious whistleblower cases are discussed in Chapters 4 through 6.

V. Elements of a Violation

An investigation focuses on the elements of a violation and the employer's defenses. The four basic elements of a whistleblower claim are that: (1) Complainant engaged in protected activity; (2) Respondent knew or suspected that Complainant engaged in the protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (a.k.a. nexus).

A. Protected Activity

The evidence must establish that Complainant engaged in activity protected under HRS § 396-8(e). Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities. Specific information on the protected

[4] (a) The protected activity must constitute a substantial reason for the discharge or other adverse action, or (b) The discharge or other adverse action would not have taken place "but for" engagement in the protected activity by the employee. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

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

activities under a specific statute can be found in the desk aid for the specific statute. If there is any inconsistency between this general information and the information in the desk aid, follow the more specific information in the desk aid.

1. **Reporting potential violations or hazards to management –** Reporting a complaint to a supervisor or someone with the authority to take corrective action.

2. **Reporting a work-related injury or illness –** Reporting a work-related injury or illness to management personnel. In some instances, these injury-reporting cases may be covered through HIOSH enforcement under 29 CFR 1904.35(b)(1)(iv). For additional information, refer to the memorandum *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35(b)(1)(iv),* October 11, 2018, and related memoranda. See also Chapter 2.VII, Policies and Practices Discouraging Injury Reporting for related information. Cases that interface with worker's compensation shall be screened and discussed with the Supervisory Investigator (SI) for application. Worker's compensation is a form of insurance or legal compensation provided to employees who suffer work-related injuries or illness. It is designed to provide financial and medical benefits to workers who are injured on the job or who develop work-related health conditions. In general, a case that has already been filed with the Wage Standards Division (WSD), a division within DLIR that handles complaints related to wrongful termination against an employee for reporting a workers' compensation claim, will normally remain with WSD, provided the division has the authority to grant the relief sought by the Complainant. Cases involving the employer delaying or failing to file an appropriate injury claim on behalf of the Complainant must be screened for all the pertinent facts. Complaints alleging reprisal solely for filing a workers' compensation claim shall be referred to WSD. HIOSH may address such claims if unresolved issues persist between the agencies. A possible deferral may be considered if it is determined that WSD has the authority to provide necessary relief.

3. **Providing information to a government agency –** Providing information to a government entity such as HIOSH, OSHA, EPA, DOE, NIOSH or any state or county government agency that addresses hazards affecting employees, is covered under this provision. This includes agencies involved with public safety or health, such as the health department, police department, or fire department. It also includes communications with the employer, including supervisors or management representatives, a union, a legislative body or the executive head of a government, such as a mayor, governor, or president.

4. **Filing a complaint –** Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to HIOSH under HAR §12-51-7.

5. **Instituting or causing to be instituted any proceeding under or related to HRS § 396-8(e) –** Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue (or other

issue covered by HIOSH-enforced whistleblower protection law), and communicating with the media about an unsafe or unhealthful workplace condition[6]. Communicating such complaints through social media may also be considered protected activity, in which case, HIOSH should consult with DAG.

6. **Assisting, participating, or testifying in proceedings –** Testifying in proceedings such as hearings before the HLRB and the HIOSH Administrator Review on administratively closed complaints, or legislative hearings.[7] Assisting or participating in inspections or investigations by agencies such as HIOSH or OSHA.

7. **Work Refusal --** HRS § 396-8(e), specifically protects employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected). If the work refusal is determined to be invalid, the investigator must still investigate any other protected activities alleged in the complaint. See memorandum Clarification of the Work Refusal Standard under 29 CFR 1977.12(b)(2), January 11, 2016, and the relevant desk aid for statute specific considerations. If the protected work refusal includes ambiguous action by Complainant that Respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, Complainant's subsequent lack of employment may constitute a discharge. If it is ambiguous whether Complainant quit or was discharged, consultation with DAG may be appropriate.

   Generally, Complainant only needs a good faith, reasonable belief that the conduct about which Complainant initially complained violated or would have violated the substantive (i.e. non-whistleblower) provisions of HRS § 396-8(e). As long as Complainant had reasonable belief that there was a violation or hazard, this element has been satisfied.

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

   - Has a reasonable apprehension of death or serious injury,
   - Refuses in good faith,
   - Has no reasonable alternative,

[6] *Donovan v. R.D. Andersen Construction Company, Inc*., 552 F.Supp. 249 (D. Kansas, 1982).
[7] Examples of such proceedings include but are not limited to: workplace inspections; a Complainant's review of a decision not to enforce or of a HIOSH determination not to issue a citation; employee challenges to abatement dates; employee-initiated proceedings for the creation of OSHA or HIOSH standards; employee applications to modify or revoke a variance; employee judicial challenges to an OSHA standard; and employee petitions for judicial review of HLRB orders.

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

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

The investigator should also review Complainant's complaint and interview statement for protected activity beyond the particular protected activity identified by Complainant. For example, while Complainant may note in the complaint only the protected activity of reporting a workplace injury, Complainant might also mention in passing during the screening interview that they had complained to the employer about the unsafe condition or had refused to work before the injury occurred. That hazard complaint/work refusal should be included in the list of Complainant's protected activities.

B. **Employer Knowledge**

The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that Complainant or someone closely associated with Complainant, such as a spouse or coworker, engaged in protected activity[8]. For example, one of Respondent's managers need not know that Complainant contacted a regulatory agency if their previous internal complaints would cause Respondent to suspect Complainant initiated a regulatory action.

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

- A HIOSH complaint is about the only lathe in a plant, and Complainant is the only lathe operator.

- A complaint is about unguarded machinery and Complainant was recently injured on an unguarded machine.

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

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

If Respondent's decision-maker takes action based on the recommendation of a lower-level supervisor who knew of and was motivated by the protected activity to recommend

[8] *Reich v. Hoy Shoe, Inc.,* 32 F.3d 361, 368 (8th Cir. 1994) (section 11(c)) (an employer's mere suspicion or belief that an employee had engaged in protected activity was sufficient to sustain an action alleging a violation of the OSH Act's anti-retaliation provision) ; see also rules under the administrative statutes, for example 29 CFR 1978.104(e) (STAA), 29 CFR 1980.104(e)(SOX), 29 CFR 1982.104(e)(FRSA).

action against Complainant, employer knowledge and motive are imputed to the decision-maker. This concept is known as the **cat's paw theory.**

The HLRB does not specifically require employer knowledge as an element to establish a prima facie case of discrimination. Instead, a Complainant can establish causation by presenting circumstantial evidence that shows the decisionmaker was aware of the Complainant's engagement in protected activity and that there is a close temporal proximity between the protected activity and the adverse action taken.

C. **Adverse Action**

An adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the employee. The evidence must demonstrate that Complainant suffered some form of adverse action. An adverse action typically must relate to employment. Under the statutory provisions of HRS § 396-8(e), for retaliation to be actionable, the adverse action must affect the employee's employment in a way that alters the terms, conditions, or privileges of their job. This ensures that the retaliation is not just a minor inconvenience but something that significantly impacts the employee's work life.

It may not always be clear whether Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the action at issue might have dissuaded a reasonable employee from engaging in protected activity. The investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

Some examples of adverse action are:

1. Discharge – Discharges include not only straightforward firings, but also situations in which the words or conduct of a supervisor would lead a reasonable employee to believe that they had been terminated (e.g., a supervisor's demand that the employee clear out their desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge. If it is ambiguous whether the action was a quit or a discharge, consultation with DAG may be appropriate.

2. Demotion

3. Suspension

4. Reprimand or other discipline

5. Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when the employer participates in the harassment or

knowingly or recklessly allows the harassment to occur and the harassment is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive such that it would dissuade a reasonable person from engaging in protected activity.

6. 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. A hostile work environment typically involves ongoing severe and pervasive conduct, 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 statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.

7. Lay-off

8. Failure to hire

9. Failure to promote

10. Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.

11. Failure to recall

12. Transfer to different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and should be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, and reduced opportunities for promotion and training. In such cases, it is important to gather evidence indicating what positions Respondent(s) had available at the time of the transfer and whether any of Complainant's similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments. See Memorandum Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers issued May 11, 2016, for further information.

13. Change in duties or responsibilities

14. Denial of overtime

15. Reduction in pay or hours

16. Denial of benefits

17. Making a threat

18. Intimidation

19. Constructive discharge – The employee quitting after the employer has deliberately, in response to protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.

20. Application of workplace policies, such as incentive programs, **t**hat may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.

21. Reporting or threatening to report an employee to the police or immigration authorities.

D. **Nexus**

There must be reasonable cause to believe that the protected activity was a substantial reason for the adverse action at least in part (i.e., that a nexus exists). As explained below, the protected activity must have been a "but-for-cause" in the decision to take adverse action.

Regardless of which causation standard applies, nexus can be demonstrated by direct or circumstantial evidence. Direct evidence is evidence that directly proves the fact without any need for inference or presumption. For example, if the manager who fired the employee wrote in the termination letter that the employee was fired for engaging in the protected activity, there would be direct evidence of nexus.

Circumstantial evidence is indirect evidence of the circumstances surrounding the adverse action that allow the investigator to infer that protected activity played a role in the decision to take the adverse action. Examples of circumstantial evidence that may support nexus include, but are not limited to:

- **Temporal Proximity**– A short time between the protected activity (or when the employer became aware of the protected activity or the agency action related to the protected activity, such as the issuance of a HIOSH citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action;

- **Animus –** Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager's attitude towards

Complainant following the protected activity, can be important circumstantial evidence of nexus;

- **Disparate Treatment—** Evidence of inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity can support a finding of nexus;

- **Pretext** –Shifting explanations for the employer's actions, disparate treatment of the employee as described above, evidence that Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer's explanation for taking adverse action against the employee is pretext and that the employer's true motive for taking the adverse action was to retaliate against the employee for the protected activity.

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on HIOSH's evaluation of the facts and the strength of the evidence supporting both the employer and the employee through "pretext testing" described below (See Chapter 2.VI, Testing Respondent's Defense).

VI. Causation Standards

The causation standard is the type of causal link (a.k.a. nexus), required by statute, between the protected activity and the adverse action. That causal link will be either: (1) that the adverse action would not have occurred ***but for*** the protected activity; (2) that the protected activity was a ***contributing factor*** in the adverse action;[9] or (3) that the protected activity was a ***motivating factor***[10] in the adverse action.

A. Cases under HRS 396-8(e)

HRS § 396-8(e), simply uses the word "because" to express the causation element. The Supreme Court has found that similar language requires the plaintiff to show that the employer would not have taken the adverse action but for the protected activity. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Thus, causation exists in a HRS 396-8(e) case only if the evidence shows that Respondent would not have taken the adverse action but for the protected activity. A good explanation of but-for causation is found in *Bostock v. Clay County, Georgia*, U.S. , 140 S. Ct. 1731 (2020). As the Supreme Court ruled, but-for causation analysis directs the courts to

[9] *Stone v. Hawaii Air Ambulance (Hawaii Life Flight) and DLIR*, Case No. OSH 2011-10, Decision No. 28 at *27 (June 18, 2015) (Stone).

[10] Under the six environmental statutes, federal OSHA uses a motivating factor standard of causation. *See DeKalb County v. U.S. Dep't of Labor, 812 F.3d 1015, 1021 (11th Cir. 2016)*. A motivating factor is a substantial factor in causing an adverse action. It is a higher standard of causation than the contributing factor standard of causation, but a lower standard of causation than the "but for" standard.

change one thing at a time and see if the outcome changes; if it does, there is but-for causation. This test does not require that the illegal motive (in whistleblower cases, the protected activity) be the sole reason for the adverse action. It also does not require that illegal motive (protected activity) be the primary reason for the adverse action. Id. at 1739. The but-for causation test is more stringent than the contributing factor or the motivating factor tests. Even so, it does not require a showing that the protected activity was the sole reason for the adverse action, only that it was independently sufficient. Id. See 29 CFR § 1977.6(b) (but-for causation test for section 11(c))

B. HLRB, Burden Shifting, Contributing Factor, and Preponderance of Evidence

The HLRB has applied the contributing factor burden of proof when determining the burden-shifting responsibilities of the respondent. A contributing factor is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." See *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks omitted). Thus, the protected activity, alone or in connection with other factors, must have affected in some way the outcome of the employer's decision.

Even if an employer or "person" has permissive non-retaliatory or non-discriminatory reasons for their actions, HLRB requires an analysis under HRS § 396-8(e) to determine whether the protected activity was a contributing factor to the employer's decision to take the adverse employment action. See *Stone v. Hawaii Air Ambulance (Hawaii Life Flight) v. DLIR*, Case No. OSH 2011-10, Decision No. 28 at *27 (June 18, 2015) (Stone).

In an HLRB hearing involving HIOSH whistleblower cases, whether they are non-merit or merit cases, the party initiating the proceeding has the burden of proof. This includes both the burden of producing evidence as well as the burden of persuasion by a *preponderance of the evidence*.[11] The party with the burden of proof need only offer enough evidence to tip the scale slightly in the party's favor, while the party without the burden can succeed by keeping the scale evenly balanced. See *Kekona v. Abastillas*, 113 Hawai'i 174, 180, 150 P.3d 823, 829 (2006). Upon establishing a prima facie case of retaliation and presenting the legitimate non-retaliatory reason for the adverse action, the HLRB will assess whether the stated reasons are a pretext. Pretext can be shown if the retaliatory motive appears to be the actual reason for the adverse action or if the respondent's explanations are deemed not credible. At this stage, the respondent is not required to persuade the HLRB but must provide legally sufficient explanations of its legitimate reasons that are clear and reasonably specific. HIOSH will use the reasonable cause standard during the investigative phase, aiming to match the effectiveness as federal OSHA while recognizing that the HRLB utilizes various standards (i.e., preponderance of evidence, but-for causation, and contributing factor) throughout its analytical process.

VII. Testing Respondent's Defense (a.k.a Pretext Testing)

[11] HRS § 91-10(5). Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1; am L 2003, c 76, §3]

Testing the evidence supporting and refuting Respondent's defense is a critical part of a whistleblower investigation. HIOSH refers to this testing loosely as "pretext testing" although a showing that the employer's explanation for the adverse action was pretextual is not, strictly speaking, required under HRS § 396-8(e). Investigators are required to conduct pretext testing of Respondent's defense.

- A **pretextual position** or argument is a statement that is put forward to conceal a true purpose for an adverse action.

- Thus, **pretext testing** evaluates whether the employer took the adverse action against the employee for the legitimate business reason that the employer asserts or whether the action against the employee was in fact retaliation for Complainant's engaging in protected activity.

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

- An employer's shifting explanations for its actions;

- The falsity of an employer's explanation for the adverse action taken;

- Temporal proximity between the protected activity and the adverse action;

- Inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity;

- A change in the employer's behavior toward Complainant after they engaged (or were suspected of engaging) in protected activity; and

- Other evidence of antagonism or hostility toward protected activity.

For example, if Respondent has claimed Complainant's misconduct or poor performance was the reason for the adverse action, the investigator should evaluate whether Complainant engaged in that misconduct or performed unsatisfactorily and, if so, how the employer's rules deal with this and how other employees engaged in similar misconduct or with similar performance were treated.

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

- Did Complainant actually engage in the misconduct or unsatisfactory performance that Respondent cites as its reason for taking adverse action? If Complainant did not engage in the misconduct or unsatisfactory performance, does the evidence suggest that

Respondent's actions were based on its actual but mistaken belief that there was misconduct or unsatisfactory performance?

- What discipline was issued by Respondent at the time it learned of the Complainant's misconduct or poor performance? Did Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?

- Did Complainant's productivity, attitude, or actions change after the protected activity?

- Did Respondent's behavior toward Complainant change after the protected activity?

- Did Respondent discipline other employees for the same infraction and to the same degree?

In circumstances in which witnesses or relevant documents are not available, the investigator should consult with the supervisor. Consultation with DAG may also be appropriate in order to determine how to resolve the complaint. In cases decided based on the nexus element of the prima facie case, a description of the investigator's pretext testing (or reason(s) it was not performed) must be included in the ROI.

VIII. Policies and Practices Discouraging Injury[12] Reporting

There are several types of workplace policies and practices that could discourage injury reporting and thus violate HRS § 396-8(e). Some of these policies and practices may also violate OSHA's recordkeeping regulations at 29 CFR 1904.35 where there is coverage under the OSH Act. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

A. Injury-Based Incentive Programs and Drug/Alcohol Testing

For guidance on evaluating injury-based incentive programs and drug/alcohol testing after an accident under analogous whistleblower statutes, investigators should refer to the following memorandum: Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under CFR Section 1904.35(b)(1)(iv), October 11, 2018. Testing only the injured employees involved in an incident, and not the uninjured ones as well, is a discriminatory policy.

B. Employer Policy of Disciplining Employees Who are Injured on the Job, Regardless of the Circumstances Surrounding the Injury.

Reporting an injury is a protected activity. This includes filing a report of injury under a worker's compensation statute. Disciplining all employees who are injured, regardless of

[12] For the purposes of this section the word "injury" also includes "illness."

fault, is a discriminatory policy. Discipline imposed under such a policy against an employee for reporting an injury is therefore a direct violation of HRS 396-8(e). In addition, such a policy is inconsistent with the employer's obligations under 29 CFR 1904.35(b), and where it is encountered in an OSH Act case, a referral for a recordkeeping investigation will be made.

C. **Discipline for Violating Employer Rule on Time and Manner for Reporting Injuries.**

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, most especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating HRS § 396-8(e). HIOSH recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statutes, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

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

D. **Discipline for Violating Safety Rule**

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

Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer's treatment of similarly situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of section HRS § 396-8(e).

Chapter 3

INTAKE AND INITIAL PROCESSING OF COMPLAINTS

I. Scope

This Chapter explains the general process for receipt of discrimination (whistleblower) complaints under HRS § 396-8(e), screening and docketing of complaints, initial notification to Complainants and respondents, and recording the case data in OSHA's OIS-Whistleblower. The procedures outlined in this chapter are designed to ensure that cases are efficiently evaluated to determine whether an investigation is appropriate; that HIOSH achieves a reasonable balance between accuracy in screening decisions and timeliness of screening; and to determine when it is appropriate to investigate complaints in which unlawful retaliation may have occurred.

II. Incoming Complaints

A. Flexible Filing Options

1. Who may file

Any employee, former employee, or their authorized representative is permitted to file a whistleblower complaint with HIOSH. This applies to individuals seeking employment who have reason to believe that they have been subjected to blacklisting or discriminatory practices by their former employer, union, or any person with the capacity to engage in discriminatory conduct. Any allegations asserting that a prospective employer is engaging in discriminatory practices in contravention of HRS § 396-8(e) will be assessed on an individual basis. Such evaluations may involve consultation with the DAG.

2. How to File

No particular form of complaint is required.

HIOSH will accept the complaint in any language.

A complaint may be filed orally or in writing**.**

a. Written Complaints

HIOSH accepts electronically-filed complaints on federal OSHA's website at https://www.osha.gov/whistleblower/WBComplaint.html. HIOSH also accepts written complaints delivered by other means, such as through HIOSH's email dlir.hiosh.complaints@hawaii.gov or dlir.hiosh.discrimination@hawaii.gov, or through U.S. mail.

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. **Oral Complaints**

For oral complaints, when a complaint is received, the receiving officer must accurately record the pertinent information on an HIOSH-87 form or another appropriate intake worksheet and immediately forward it to the supervisor. Whenever possible, the minimum complaint information on the HIOSH-87 form or other appropriate intake worksheet should include for each Complainant and respondent: full name, mailing address, email address, and phone number; date of filing; and date of adverse action. In every instance, the date of the initial contact must be recorded. Although HRS § 396-8(e) states that complaints must be filed "in writing," that requirement is satisfied by HIOSH's practice of reducing all orally filed complaints to writing.

B. Receiving Complaints

All complaints received by the Whistleblower Unit must be logged in OIS-Whistleblower to ensure delivery and receipt by the investigative unit. Even those complaints that on their face are untimely or have been wrongly filed with HIOSH (e.g., a complaint alleging racial discrimination) must be logged. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets. Per government recordkeeping rules, electronically scanned copies of these documents are acceptable. Complaints are usually received at the field office level but may be referred by federal OSHA or other State of Hawaii government offices.
Upon receipt of a complaint, a diary sheet (which will become the Case Activity Log should the complaint be docketed) documenting all contact with Complainant must be initiated and maintained.

C. Complaints Forwarded by Other Agencies

When HIOSH receives a complaint alleging retaliation in violation of HRS § 396-8(e) that an employee originally filed with another agency (i.e., the other agency has sent HIOSH a referral rather than a courtesy notification), HIOSH must contact the employee to verify whether the employee wishes to pursue a retaliation complaint with HIOSH. In determining whether such a complaint is timely, HIOSH will first evaluate whether the other agency or HIOSH has received the complaint within the applicable filing period, which is 60 days from the adverse action for HRS § 396-8(e)[13].

[13] HAR § 12-57-8(d)(3) states that filing with another agency is a circumstance that "do[es] not justify tolling the 60-day period." Nowhere in HAR § 12-57-8(d)(3), or any other subsection of HAR § 12-57-8, is HIOSH prohibited from tolling the 60-day deadline if it deems it justified. See *Henkels & McCoy, Inc. v. DLIR and W. Olive*, Case No. OSH 2019-05, Decision No. 40 (DLIR).

If the other agency received the complaint within the applicable filing period but HIOSH did not (i.e., the complaint would be untimely based on the date HIOSH received it), HIOSH will consider whether the other agency that originally received the complaint has authority to provide personal remedies to the employee for the retaliation.

1. **If the other agency cannot award personal remedies** for the retaliation alleged in the complaint, HIOSH will regard the complaint as mistakenly filed in the wrong forum and, under equitable tolling principles, may regard the date of filing with the other agency as the date of filing.

2. **If the other agency can award personal remedies** to the employee for the retaliation alleged in the complaint, HIOSH will regard the complaint as untimely (unless there is some other basis for equitable tolling). HCRC and WSD are examples of agencies that in some circumstances may be able to provide personal remedies for unlawful retaliation alleged in a whistleblower complaint.

D. Complaint Requirements

The complaint, supplemented as appropriate with information obtained in the screening interview (described below) and any additional information, should ultimately contain the following:

1. Complainant's name and contact information, and if applicable, name and contact information of Complainant's representative. If represented, HIOSH should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.

2. Respondents' name(s) and contact information (if multiple Respondents, then all contact information should be present).

3. Worksite address (if different from employer address).

4. The current or final job Complainant performed for Respondent(s).

5. An allegation of retaliation for having engaged in activity that is at least potentially protected by the HIOSH whistleblower protection statute (i.e., a **prima facie allegation**). That is, the complaint, supplemented as appropriate by the screening interview and any additional information, should contain an allegation of:

    a. Some details that could constitute a protected activity or activities under the HIOSH whistleblower statute;

    b. Some details indicating that the employer knew or suspected that Complainant engaged in the protected activity or activities;

c. Some details indicating that an adverse action occurred and the date of the action; and

d. Some details indicating that the adverse action was taken at least in part because of the protected activity or activities.

If any of the above information is missing after the screening interview (or after reasonable attempts (see Chapter 3.IV.A.2 below for guidance on reasonable attempts) to contact Complainant for a screening interview), HIOSH will preserve the filing date for timeliness purposes and inform Complainant that he/she/they needs to provide the missing information (HIOSH should be specific as to what is missing).

- If Complainant provides the missing information, HIOSH will either docket the complaint or administratively close the complaint if the Complainant agrees.

- If Complainant does not provide the missing information within a reasonable amount of time (usually 10 days)[14], HIOSH may administratively close the complaint. See Chapter 3.IV.A.2 below for the requirements to administratively close a complaint in these conditions.

- If Complainant resumes communication with HIOSH after a complaint has been administratively closed and indicates a desire to pursue the complaint, see Chapter 3.IV.A.2.c for instructions on how to proceed.

III. Screening Interviews and Docketing Complaints

A. Overview

HIOSH is responsible for properly determining whether a complaint is appropriate for investigation. All complaints must be evaluated ("screened") before they can be docketed.

Complaints will be docketed for investigation if the complaint (as supplemented by the screening interview and any additional information) complies with statutory time limits (including time limits as modified by equitable tolling), meets coverage requirements, and sufficiently sets forth all four elements of a prima facie allegation.

Complaints that are not filed within statutory time limits (including time limits as modified by equitable tolling), fail to meet coverage requirements, and/or do not adequately contain all four elements of a prima facie allegation will be administratively closed if Complainant agrees. If Complainant does not agree to administrative closure, the complaint closing letter will have notification of the right to object or request review. See Chapter 3.IV.A, Administrative Closures, below for more information.

[14] In some circumstances, a reasonable period of time may be more than 10 days; for instance, if medical issues prevented Complainant from responding to HIOSH's inquiry within 10 days

Complainant need not explicitly state the statute(s) implicated by the complaint. HIOSH is responsible for properly determining the statute(s) under which a complaint is filed and make appropriate referrals to federal OSHA.

B. **Complaint/Case Assignment**

It is the supervisor's responsibility to ensure that the complaint is timely, that HIOSH has coverage, and that the complaint is evaluated to determine whether all elements of a prima facie allegation are addressed.

The supervisor will approve the case for docketing and assign for investigation based on the needs of the division. It is recommended that one investigator handle the case from screening interview to closing conference. While the case assignment may happen before or after the screening interview, the case must be assigned to an investigator no later than the completion of the screening.

C. **Initial Contact/Screening Interviews**

As soon as possible upon receipt of the potential complaint, the available information should be reviewed for timeliness of filing, appropriate coverage requirements, and the presence of a prima facie allegation. HIOSH must contact Complainant to confirm the information stated in the complaint and, if needed, to conduct a screening interview to obtain additional information. Screening interviews will typically be conducted by phone, video conference, such as Microsoft Teams, or in person. Whenever possible, the evaluation of a complaint should be completed by the investigator whom the supervisor assigns, or anticipates assigning, to the case. If the investigator determines before or during the screening interview that the complaint is likely to be docketed, the investigator may conduct the more detailed Complainant interview at that time. See Chapter 4.IX, Complainant Interview and Contact, for more information.

The screening interview must be properly documented by either a memorandum of interview, a signed statement, a screening worksheet, or a recording. Recorded interviews must be documented in the file (e.g., noted in the phone/chronology log, or in a memo to file). If the screening interview is recorded, HIOSH personnel will advise Complainant that the interview is being recorded and document Complainant's acknowledgement that the interview is being recorded.

D. **Evaluating Whether a Prima Facie Allegation Exists and Other Threshold Issues**

As noted above, the primary purpose of the screening interview is to ensure that (a) the complaint is timely, (b) the coverage requirements have been met, and (c) a prima facie allegation of unlawful retaliation exists. During the complaint screening process, it is important to confirm that the complaint was timely filed and that a prima facie allegation has been made under HRS § 396-8(e). Other threshold issues may also need to be verified depending on the circumstances. The following is a list of the threshold issues that most commonly arise when evaluating the sufficiency of a whistleblower complaint.

1. **Coverage by HRS § 396-8(e)**

The investigator must ensure that Complainant and Respondent(s) are covered under HRS § 396-8(e). It may be necessary for the investigator to consult with the supervisor in order to identify and resolve issues pertaining to coverage. Occasionally, HIOSH needs further information from Respondent to verify coverage under HRS § 396-8(e). In these circumstances, HIOSH may docket a complaint based on Complainant's allegation of coverage in order to obtain further information from Respondent.

2. **Employment**

   HRS § 396-8(e) requires that the entity employing Complainant be engaged in any trade, business, occupation, or work, including excavation, demolition, and construction work, or any process or operation in any way related, in which any person is engaged to work for hire except domestic services in or about a private home.

3. **Timeliness of Filing**

   Whistleblower complaints must be filed within the statutory timeframe of 60 days, which generally begins when the adverse action takes place. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to Complainant. Generally, the date of the postmark, facsimile transmittal, email communication, online complaint, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the HIOSH 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 or federal holiday, or if the HIOSH office is closed, then the next business day will count as the final day.

4. **Tolling (Extending) the Complaint Filing Deadline**

   The following is a non-exclusive list of reasons that may justify the tolling (extending) of the complaint filing deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. Tolling suspends the running of the filing period and allows days during which Complainant was unable to file a complaint to be added to the regular filing period. If in doubt, the investigator should consult with the SI, OH Branch Manager, or the Administrator. Refer to HAR §12-57-8(d)(2) for circumstances which would justify tolling.

   a. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action. Examples of concealed adverse actions would be:

      - After the employee engaged in protected activity, the employer placed a note in the personnel file that will negate the employee's eligibility for promotion but never informed the employee of the notation; and

- The employer purports to lay off a group of employees, but immediately rehires all of the employees who did not engage in protected activity.

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

b. The employee is unable to file due to a debilitating illness or injury which occurred within the filing period.

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

d. The employee mistakenly filed a timely retaliation complaint with another agency that does not have the authority to grant individual relief (e.g., filing a HIOSH retaliation complaint with the Department of Health).

e. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate their rights. For example, tolling may be appropriate when an employer repeatedly assured the Complainant that they would be reinstated so that the Complainant reasonably believed they would be restored to their former position. 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).

f. HIOSH will recognize private agreements between the employer and employee that expressly toll (extend) the filing deadline. The agreement must be (a) in writing, (b) operate to actually extend the deadline to file a whistleblower complaint, and (c) reflect the mutual assent of both parties. The agreement will only toll the limitations period with respect to the parties that are actually covered by the agreement.

g. Conditions which do not justify extension of the filing period include:

i. Ignorance of the statutory filing period.

ii. Filing of unemployment compensation claims.

iii. Filing a workers' compensation claim.

iv. Filing a private lawsuit.

v. Filing a grievance or arbitration action.

vi. Filing a retaliation complaint with another agency that has the authority to grant the requested relief

IV. Initial Complaint Results

Following the screening interview (or reasonable attempts to conduct one), complaints that do not meet threshold requirements (i.e., do not contain a prima facie allegation or fail for some other threshold reason such as untimeliness or lack of coverage) will be either administratively closed (if the Complainant agrees) or docketed and dismissed. Other potential results after initial intake and screening are also discussed further below.

A. Administrative Closures (AC)

1. Administrative Closures with Complainant's Agreement

Complaints that do not meet the threshold requirements following a screening interview will be administratively closed provided that Complainant agrees. The supervisor must also agree, and that agreement must be documented in the case file. If a supervisor has conducted the screening, no further supervisory review is necessary. When a complaint is administratively closed in these circumstances, the following must be completed by the investigator:

a. Obtain Complainant's agreement: The investigator will notify Complainant, verbally or in writing, that the complaint does not meet threshold requirements for investigation and that, if Complainant agrees, HIOSH will administratively close the case. The notification can be done as part of a screening interview and should include:

i. A brief explanation of the reason(s) the complaint cannot be investigated and the opportunity for the Complainant to provide any pertinent information that might lead HIOSH to docket the case;

ii. An explanation that if the case is administratively closed, the complaint will not be forwarded to Respondent and Complainant will not have the opportunity to object to or request review of HIOSH's decision; and

iii. An explanation that if Complainant does not agree to allow HIOSH to administratively close the case, HIOSH will inform the Complainant of their rights to object or request an informal review of HIOSH's decision. Complainant will also be informed that Respondent will be notified of the complaint if it is docketed and dismissed.

b. Send Complainant confirmation of the administrative closure or dismissal of the complaint and document the administrative closure in the case file:

i. **If Complainant agrees,** HIOSH will send (email or mail, delivery confirmation required) an administrative closure letter to Complainant, stating that Complainant has agreed to the administrative closure.

ii. **If Complainant disagrees** with the administrative closure, HIOSH will proceed with its informal review process described below.

iii. **If Complainant changes their mind after initially agreeing** to the administrative closure of the case and contacts HIOSH within a reasonable amount of time (usually 10 days), HIOSH should reopen the case and forward the complaint to the Administrator for an informal review unless Complainant provides information that would allow HIOSH to docket the case for investigation.

c. Administratively closed complaints will not be forwarded to the named respondent.

B. **Informal Review**

If the Complainant objects to HIOSH's determination to administratively close the whistleblower complaint, the case may be referred to the Administrator for an informal review in accordance with HAR §12-51-12. The Complainant may request such a review by submitting a written statement of position to the Administrator. Upon the Complainant's request, the Administrator may convene a redetermination hearing or meeting, during which the Complainant may present their views orally. After evaluating all written and oral submissions, the Administrator will decide whether to affirm or reverse the initial determination not to proceed with an investigation and will notify the Complainant of the decision and the reasons therefor.

Should the Administrator conclude that an investigation is warranted, the case will be formally docketed and investigated. Conversely, if the Administrator determines that an investigation is not appropriate and the Complainant continues to contest this decision, the case will be docketed and subsequently dismissed.

Notification letters will be sent to the Respondent, informing them that a determination has been made not to conduct an investigation. The letter will also notify the Respondent that the Complainant intends to appeal this determination to the HLRB.

The authority for such a review is provided under HAR §12-51-11.

"The complaining party may obtain review of the determination by submitting a written statement of position with the Director. Upon the request of the complaining party, the Director may hold a redetermining hearing in which the complaining party may orally present his views. After considering all written and oral views presented, the Director shall affirm or reverse the prior determination not to conduct an inspection or investigation and inform the complaining party of the decision and reasons."

C. **Unavailable/Unresponsive Complainant**

If Complainant does not respond to HIOSH's reasonable attempts to conduct a screening interview or obtain information needed to docket the complaint, HIOSH may administratively close the complaint.

1. **Reasonable Attempts to Contact Complainant**

   HIOSH will attempt to contact Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information and allowing Complainant 48 hours to respond. In the case of phone calls, at least two attempts should be made at different hours of the day during allowed work-band hours. HIOSH's attempts to contact Complainant must be documented in the case file.

2. **Notification to Complainant After HIOSH attempts**

   HIOSH will inform the Complainant that it has administratively closed the complaint and that if Complainant wishes to pursue the complaint, Complainant should contact HIOSH within 10 days or before the filing period ends, whichever is later. Where possible, this notification should be done in writing and sent by methods that allow HIOSH to confirm delivery. The notification will specify direct contact information for the HIOSH Office or the investigator including: mailing address, telephone number, and email.

3. **Response From Complainant**

   If Complainant contacts HIOSH and indicates a desire to pursue the complaint, HIOSH will reopen the case, complete the screening interview, and either docket the case or seek Complainant's concurrence with administratively closing the case if it does not meet the necessary threshold requirements.

   a. If Complainant contacts the investigator within 10 days, the original filing date will normally be used.

   b. If Complainant contacts the investigator after 10 days, but still within the statutory filing period, the date of Complainant's new response may be used as the filing date.

   c. If Complainant contacts the investigator after 10 days and the statutory filing period has ended, the investigator will, in the screening interview, determine if (1) Complainant received the letter, and (2) if circumstances exist that could excuse the Complainant's failure to pursue their case in a timely manner. The investigator shall then consult with the SI, the OH Branch Manager, and DAG, as appropriate, to determine whether the complaint should be reopened or if the complaint should remain closed due to Complainant's failure to pursue their case in a timely manner. This determination is fact-specific to each complaint. The original filing date must be used.

D. **Documenting Administrative Closures in OIS-Whistleblower**

As noted above, the decision to administratively close a complaint and communications with Complainant related to administratively closing a complaint must be appropriately documented on the case activity log. The investigator must:

1. Appropriately enter the administrative closure in OIS-Whistleblower.

2. Preserve, in the same manner as investigation case files and in accordance with the current agency records retention schedule, a copy of the administrative closure letter and the complaint, along with any other related documents such as emails and interview statements/recordings. Typical documents to be included in the screening file record are:

   a. The complaint;

   b. Complaint assignment memo or email;

   c. All internal and external emails and other correspondence;

   d. Documentation of contacts/attempted contacts with Complainant (e.g., case activity log) and supervisor's approval of actions taken;

   e. Complainant interview (e.g., recording, statement, or memo to file);

   f. Administrative closure letter to Complainant; and

   g. OIS -Whistleblower Summary page.

E. **Withdrawal Before Docketing or before Notification Letters are Issued**

When Complainant elects not to pursue their complaint before docketing or before HIOSH issues notification letters, the investigator will document Complainant's withdrawal request in the case file and administratively close the complaint. Follow administrative closure procedures beginning at Chapter 3.IV.A.1.a above. The administrative closure letter will indicate Complainant did not wish to pursue the case.

V. Docketing

The term "to docket" means to open a case for an investigation, document the case as an open investigation in OIS Whistleblower, assign a local case number, and formally notify both parties in writing of HIOSH's receipt of the complaint and intent to investigate.

The appropriate case file identification format for electronic case files is "Local Case Number[space]Respondent[space]-[space]Complainant."[15] The appropriate case identification in correspondence is "Respondent/Complainant/Local Case Number."

[15] See OSHA Instruction CPL 02-03-009, Electronic Case File System Procedures for the Whistleblower Protection Program, June 18, 2020, for more information.

OIS -Whistleblower automatically designates the case number when a new complaint is entered into the system. However, cases that are docketed and assigned for investigation must be given a local case number, which uniquely identifies the case. Local case numbers shall follow the format 11-222, where each series of numbers designates the following:

- The fiscal year and
- The serial number of the complaint for the fiscal year

Cases involving multiple Complainants will be docketed under separate case numbers.

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

VI. Named Respondents

All relevant employers should be named as Respondents in all docketed cases unless Complainant refuses. This includes contractors, subcontractors, host employers, and relevant staffing agencies, as well as individual company officials as discussed below. Failing to name a Respondent may create confusion regarding whether Complainant has properly exhausted administrative remedies which could impede future settlement of the case, impede relevant interviews, or unnecessarily delay or prevent Complainant from obtaining reinstatement and other remedies. For more information on temporary workers and host employers, see Memorandum, Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers, issued May 11, 2016 and OSHA's Protecting Temporary Workers webpage for further information.

An individual company official who carries out the retaliatory adverse action may be liable if they have the authority to hire, transfer, promote, reprimand, or discharge Complainant. Anderson v. Timex Logistics, 2014 WL 1758319 (ARB 2014).

VII. Notification Letters

A. Complainant

As part of the requisite docketing procedures when a case is opened for investigation, a notification letter will be sent to inform the Complainant of the case number and the assigned investigator. The contact information of the investigator will be included in the docketing letter. The letter will also request that the parties provide each other with a copy of all submissions they make to HIOSH related to the complaint. The letter packet will include at minimum:

- A copy of the whistleblower complaint supplemented as appropriate by a summary of allegations added during the screening interview.
- A Designation of Representative Form to allow the Complainant the option of designating an attorney or other official representative.

B. Respondent

At the time of docketing, or as soon as appropriate if an inspection is pending, a notification letter will be sent notifying the Respondent(s) that a complaint alleging unlawful retaliation (discrimination) has been filed by Complainant and requesting that 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

The letter will notify the Respondent(s) to retain and maintain all records, documents, email, correspondence, memoranda, reports, notes, video, and all other evidence relating to the case.

The letter will also request that the parties provide each other with a copy of all submissions they make to HIOSH related to the complaint. The letter packet will include at minimum:

- A copy of the whistleblower complaint redacted as appropriate and supplemented as appropriate by a summary of allegations added during the screening interview.

- A Designation of Representative Form to allow the Respondent the option of designating an attorney or other official representative.

Respondent will be notified using a method that permits HIOSH to confirm receipt. This includes but is not limited to: email or certified U.S. mail, delivery confirmation required, or hand delivery. Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

Prior to sending the notification letter, the supervisor should determine whether it appears from the complaint and/or the initial contact with Complainant that an inspection may be pending with the OH or OS Branches. If it appears that an inspection may be pending, the supervisor or investigator should contact the appropriate branch to inquire about the status of the inspection. If a delay is requested, then the notification letter should not be issued until such inspection has commenced in order to avoid giving advance notice of a potential inspection.

VIII. Early Resolution

HIOSH will work 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 Respondent soon after completing the intake interview and docketing the complaint if they believe an early resolution may be possible. However, the investigator must first determine whether a safety/health inspection is pending. The investigator must wait until the commencement of the safety and health inspection before contacting Respondent.

IX. Case Transfer

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, any such transfer must be documented in the case file and OIS -Whistleblower.

The SI may consult with the OH Branch Manager when it is necessary to reassign cases among investigators under their supervision due to staffing issues.

CHAPTER 4

CONDUCT OF INVESTIGATION

I. Scope

This chapter sets forth the policies and procedures investigators must follow during the course of an investigation. The policies and procedures are designed to ensure that complaints are efficiently investigated, and that the investigation is well documented. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. If there is a conflict between HRS § 396-8(e) or regulations and the procedures set out in this chapter, the statutory and/or regulatory provisions take precedence. Investigators should consult with their SI when additional guidance is needed.

II. General Principles

A. Reasonable Balance

The investigative procedures described in this chapter are designed to ensure that a reasonable balance is achieved between the quality and timeliness of investigations. The procedures outlined in this chapter will help investigators complete investigations as expeditiously as possible while ensuring that each investigation meets HIOSH's quality standards. **Reasonable balance** is achieved when further evidence is not likely to change the outcome. These procedures reflect the best practices developed across all OSHA regions.

B. Investigator as a Neutral Party

The investigator should make clear to all parties that DLIR does not represent either Complainant or Respondent. Rather, the investigator acts as a neutral party in order to ensure that both the Complainant's allegation(s) and the Respondent's positions are adequately investigated. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination in the case.

C. Investigator's Expertise

The investigator, not Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation of the statute administered by HIOSH. The investigator will review all relevant documents and interview relevant witnesses in order to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of Complainant, Respondent, and witnesses.

D. Reasonable Cause to Believe a Violation Occurred

For HRS § 396-8(e) cases, after consulting with DAG, HIOSH will issue merit findings when there is reasonable cause to believe that a violation has occurred. Investigators must be aware of HLRB precedent and the requisite legal standards that apply to both merit and non-merit cases established by the HLRB. Investigators should engage in informal consultations with the DAG to ensure that the investigation gathers comprehensive relevant information necessary for the DAG to assess cases suitability for litigation. See Chapter 2.IV, *Reasonable Cause*, for more information.

E. **Supervisory Review is Required**

Supervisory review and approval are required before docketed case files can be closed.

If a supervisor has conducted the investigation, the Administrator or his/her designee (another manager) must agree that closure is appropriate, and the manager's agreement should be documented in the case file.

III. Case File

Upon assignment, the investigator will begin preparing the investigation's case file. A standard case file contains the complaint and/or the HIOSH-87 form or the appropriate intake worksheet, all documents received or created during the intake and evaluation process (including screening notes and assignment memorandum), copies of all required opening letters, and any original evidentiary material initially supplied by Complainant or Respondent. All evidence, records, administrative material, photos, recordings, and notes collected or created during an investigation must be organized and maintained in the case file.

A. **File Format**

1. **Electronic Case Files**

All Regions are transitioning to electronic case files per the Office of Management and Budget (OMB) directive, dated August 24, 2012, requiring the use of electronic recordkeeping and eliminating paper to the fullest extent possible. See Instruction CPL 02-03-009, *Electronic Case File System Procedures for the Whistleblower Protection Program*, dated June 18, 2020.

2. **Paper Case Files**

As noted above, OSHA regions are transitioning to keeping electronic case files as a general rule. As noted in the *Electronic Case File System Procedures* cited above, Regions should encourage both Complainants and Respondents to submit materials in electronic format. Parties are not however, required, to submit materials in electronic format.

When a party submits evidence in paper format, HIOSH should scan and save the document as a PDF. Once the paper document has been converted to a PDF, the

PDF becomes the official government record, although HIOSH should retain the paper submissions until the case is closed at the HIOSH level.

To the extent a paper file is kept, 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. The retention period for both paper and electronic case files shall follow the DLIR Approved Retention and Disposition Schedules (Forms SA-1) Policy, revised 12/2022, which states that discrimination case files must be retained for 5 years after the end of the federal fiscal year in which the case was closed

B. **Documenting the Investigation**

With respect to all activities associated with the investigation of a case, investigators must fully document the case file to support their findings. A well-documented case file assists reviewers of the file. Documentation should be arranged chronologically by date of receipt where feasible.

C. **Case Activity Log**

All telephone calls made, and voice mails received during the course of an investigation, other than those with HIOSH personnel, must be accurately documented and notation of calls and voice mails must be typed in the case activity log. If a telephone conversation with one of the parties or witnesses 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 addition to telephone calls, the case activity log must, at a minimum, note the key steps taken during the investigation. For example, investigative research and interviews conducted, notifications sent, and documents received from the parties should be noted in the activity log.

D. **Investigative Correspondence**

Templates for complaint notifications, administrative closure letters, Determination Notice and Order (equivalent to OSHA's Secretary's Findings), and 10-day contact letters are available in the HIOSH M drive. The templates will be used to the extent possible. Future interface with the OIS-Whistleblower page for such templates will be considered. Correspondence must be sent (either by mail, third party carrier, or electronic means) in a way that provides delivery confirmation. Delivery receipts will be preserved in the case file. Findings in all cases may be sent by electronic means.

Correspondence by Email. Subject lines of emails delivering formal investigative correspondence should be appropriately descriptive (e.g., "Respondent/Complainant/Case Number" or "Respondent/Complainant/Case Number – Notification"). The formal correspondences are sent as letters attached to the emails. These emails should also be new emails, not sent as responses to other emails. Formal investigative correspondence emails must provide delivery confirmation. The original email of any email sent with the

delivery confirmation option engaged must be placed in the relevant correspondence folder separately from the delivery confirmation (i.e., do not place in the folder just the delivery confirmation email with the original email attached; any attachments to the original email are lost this way).

E. **Investigative Research**

It is important that investigators adequately plan for each investigation. The investigator should research whether there are prior or current retaliation and/or safety and health cases related to either Complainant or Respondent. Such information normally will be available from the OITTS-Whistleblower, OIS, and the HIOSH office. Examples of information sought during this investigation may include copies of safety and health complaints filed with HIOSH, inspection reports, and citations. -Research results must be documented in the case file. When research reveals no relevant results, the investigator must still note in the case activity log the pre-investigation research that was performed (for example, by listing the searches that the investigator did in OIS-Whistleblower) and that no relevant results were found.

IV. Referrals and Notifications

Allegations of safety and health hazards, or other regulatory violations, will be referred promptly to the appropriate office or agency through established channels. This includes new allegations that arise during witness interviews. Allegations of occupational safety and health hazards covered by the Law, for example, will be referred to the appropriate enforcement branch as soon as possible.

A. **Other Agencies**

Informational copies of all incoming complaints, determinations, and orders, as well as notification of all other case closure actions, will be sent to federal OSHA or other relevant agency(s) promptly.

B. **Coordination with Other Agencies**

If information received during the investigation indicates that the Complainant has filed a concurrent retaliation/discrimination complaint, safety and health complaint, or any other complaint with another government agency (i.e. Unemployment Insurance Division or Workers' Compensation Division), the investigator should consider whether to request from Complainant any other agency investigative documents or information regarding contact persons and should consider contacting such agency to determine the nature, status, and results of that complaint. This coordination may result in the discovery of valuable information pertinent to the whistleblower complaint, and may, in certain cases, preclude unnecessary duplication of government investigative efforts. However, caution should be exercised when using information from that agency as their statutes and procedures may differ significantly.

C. **Other Legal Proceedings**

The investigator should also gather information concerning any other current or pending legal actions that the Complainant may have initiated against Respondent(s) related to the protected activity, the adverse action and/or other aspects of Complainant's employment

with Respondent, such as lawsuits, arbitrations, and grievances. Obtaining information related to such actions may produce evidence of conflicting testimony or could result in the postponement of the investigation or deferral to the outcome of the other proceedings.

V. Amended Complaint

After filing a retaliation complaint with HIOSH, 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. HIOSH will reduce oral amendments to writing. If Complainant is unable to file the amendment in English, HIOSH will accept the amendment in any language.

B. Amendments Filed within Statutory Filing Period

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 the Statutory Filing Has Expired

If amendments are received after the limitations period for the original complaint has expired, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment unless the exception noted in the last sentence of paragraph "E" below applies. 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

Whenever a complaint is amended, regardless of the nature of the amendment, the Respondent(s) must be notified in writing of the amendment by a method that allows HIOSH to confirm delivery and be given an opportunity to respond to the new allegations contained in the amendment. The amendment and notification to Respondent of the amendment must be documented in the case file.

E. Amended Complaints Distinguished from New Complaints (i.e., what "reasonably relates")

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. A new allegation should also be docketed as a new complaint when an amendment to the original complaint would unduly delay a determination of the original complaint.

F. **Deceased Complainant**

If Complainant passes away during the HIOSH investigation, HIOSH should consult Complainant's designated representative or a family member to determine whether Complainant's estate will continue to pursue the retaliation claim. In such circumstances, Complainant's estate will be automatically substituted for Complainant. HIOSH should consult with the DAG regarding potential remedies and other pertinent issues as needed in these circumstances.

VI. Complainant Interview and Contact

The investigator must attempt to interview the Complainant in all docketed cases. - This interview may be conducted as part of the screening process. If a full Complainant interview is not conducted as part of the complaint screening process, HIOSH will endeavor to interview Complainant within 30 days of receiving Respondent's position statement or two months of the docketing of the complaint, whichever is sooner. It is highly desirable to record the Complainant interview (if Complainant agrees) or obtain a signed interview statement from Complainant during the interview. - Complainant may have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "Designation of Representative" form.

The investigator must attempt to obtain from Complainant all documentation legally in their possession that is relevant to the case. Relevant records may include:

- Copies of any termination notices, reprimands, warnings, or personnel actions
- Performance appraisals.
- Earnings and benefit statements.
- Grievances
- Unemployment or worker's compensation benefits, claims and determinations.
- Job position descriptions
- Company employee policy handbooks.
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Emails, voice mails, phone records, texts, and other relevant correspondence related to Complainant's employment, as well as relevant social media posts.

- Medical records. Most often medical records should not be obtained until it is determined that those records are needed to proceed with the investigation. Because medical records require special handling, investigators must familiarize themselves with the requirements of HIOSH Instruction CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning HIOSH Access to Employee Medical records,* August 22, 2007, adopted by HIOSH on December 19, 2007.

The relief sought by Complainant should be determined during the interview. If discharged or laid off by Respondent, Complainant should be advised of their obligation to seek other employment (a.k.a. "mitigate," see Chapter 6.IV.D, Mitigation Considerations), 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 Complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. Complainant should be advised that Respondent's back pay liability ordinarily ceases only when Complainant refuses a bona fide, unconditional offer of reinstatement. See Chapter 6.IV.A, Lost Wages.

The Investigator must also inform Complainant that Complainant must preserve all records that relate to the whistleblower complaint, such as documents, emails, texts (including preserving texts, photographs, and other documentation from a prior cell phone if Complainant replaces it), photographs, social media posts, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies Complainant seeks. Thus, for instance, Complainant should retain documentation supporting Complainant's compensation with Respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting from the adverse action, such as medical bills, pension plan losses and fees, repossessed property, moving or job search expenses, etc.

After obtaining Respondent's position statement, the investigator will contact Complainant to conduct a rebuttal interview to resolve any discrepancies between Complainant's allegations and Respondent's defenses. In cases where the investigator has already conducted the complainant interview, the Complainant may decide to submit a written rebuttal in lieu of the rebuttal interview.

Complainant must be informed about the investigation process and their right to simultaneously pursue legal action in the courts. Additionally, Complainant should be advised that, in accordance with HRS § 396-14, Records from the HIOSH investigation cannot be used in any civil action.

VII. Complainant Lack of Cooperation/Unresponsiveness

Complaints may be dismissed for Lack of Cooperation (LOC) on the part of Complainant. These circumstances may include, but are not limited to, Complainant's:

- Failure to be reasonably available for an interview.

- Failure to respond to repeated correspondence or telephone calls from HIOSH

- Failure to attend scheduled meetings; and

- Other conduct making it impossible for HIOSH to continue the investigation, such as excessive requests for extending deadlines.

- **Harassment, inappropriate behavior, or threats of violence** may also justify dismissal for LOC and lead to other actions/referrals provided under law pursuant to HRS 396-10(n).

- When Complainant fails to provide requested documents in Complainant's possession or a reasonable explanation for not providing such documents, HIOSH may draw an adverse inference against Complainant based on this failure unless the documents may be acquired from Respondent. If the documents cannot be acquired from Respondent, then Complainant's failure to provide requested documents or a reasonable explanation for not doing so may be included as a consideration with the factors listed above when considering whether a case should be dismissed for LOC.

A. **Dismissal Procedures for Lack of Cooperation/Unresponsiveness**

In situations where an investigator is having difficulty locating Complainant following the docketing of the complaint to initiate or continue the investigation, the following steps must be taken:

1. Telephone Complainant during normal work hours and contact Complainant by email. Notify Complainant that they are expected to respond within 48 hours of receiving this phone message or email.

2. If Complainant fails to contact the investigator within 48 hours, HIOSH will notify Complainant in writing that it has unsuccessfully attempted to contact Complainant to obtain information needed for the investigation and that Complainant must contact the investigator within 10 days of delivery of the correspondence. Complainant will be notified using a method that permits HIOSH to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. The notification will specify direct contact information for the HIOSH Office or the investigator including: mailing address, telephone number, and email address. If no response is received within 10 days, the SI may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the communication must be preserved in the file.

3. Complainant has an obligation to provide HIOSH with all available methods of contact, including a working telephone number, email address, or mailing address of record. Complainant also has an obligation to update HIOSH when contact information changes. HIOSH may dismiss a complaint for lack of cooperation if HIOSH is unable to contact Complainant due to the absence of up-to-date contact information.

4. Consistent with the applicable regulations, when HIOSH dismisses a case for lack of cooperation, an abbreviated letter, with an explanation of the right to request an informal hearing with the Administrator will be provided to the Complainant. HIOSH has discretion to reopen the investigation within 30 days of delivery of the dismissal letter to Complainant if Complainant contacts HIOSH, indicates a desire to pursue the case, and provides a reasonable explanation for the failure to maintain contact with HIOSH.

VIII. Contact with Respondent

A. In many cases, following receipt of HIOSH's notification letter, Respondent forwards a written position statement, which may or may not include supporting documentation. The investigator should not rely on assertions in Respondent's position statement unless they are supported by evidence or are undisputed. Even if the position statement is accompanied by supporting documentation, the investigator should still contact Respondent to interview witnesses, review records and obtain additional documentary evidence to test Respondent's stated defense(s). See Chapter 2.VII, Testing Respondent's Defense (a.k.a. Pretext Testing), for example, for information on pretext testing.

   In all circumstances, at a minimum, copies of relevant documents and records should be requested, including disciplinary records if the complaint involves a disciplinary action or the relevant policy where Respondent claims Complainant was terminated or disciplined for violating a policy.

B. If Respondent requests time to consult legal counsel, the investigator must advise Respondent that future contact in the matter will be through such representative and that this does not alter the 14-day time to respond to the complaint. A reasonable extension to the deadline may be granted, but the investigator must be mindful that for any leeway given to Respondent, substantially equivalent leeway should also be granted to Complainant for the rebuttal if needed. A Designation of Representative form should be completed by Respondent's representative to document Respondent's representative's involvement.

   If 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. All document requests and any other attempts at communication with the Respondent shall, as a general rule, be directed through the Respondent's attorney

C. In the absence of a signed Designation of Representative, the investigator is not bound or limited to making contacts with Respondent through any one individual or other designated representative (e.g., safety director). If a position statement was received from Respondent, the investigator's initial contact should be the person who signed the letter unless otherwise specified in the letter.

D. The investigator should, in accordance with the reasonable balance standard, interview all relevant Respondent witnesses who can provide information relevant to the case. The investigator should attempt to identify other witnesses at the Respondent's facility that may have relevant knowledge. . 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 whistleblower statute and advised that they may contact HIOSH if they have been subjected to retaliation because they participated in a HIOSH investigation.

   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 Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the procedures for handling confidential witness interviews must be followed. See Chapter 4.VIII, *Confidentiality.*

   Section 396-4(b)(5) of the HIOSH Law authorizes whistleblower investigators to question **any employee privately** during regular working hours or at other reasonable times. The purpose of such interviews is to obtain whatever information whistleblower investigators deem necessary or useful in carrying out investigations effectively. Thus, under the HIOSH Law, HIOSH has a statutory right to interview non-management, non-supervisory employees in private.

   Additionally, the HIOSH Law provides that investigations be conducted in a manner that preserves the confidentiality of any person who provides information on a confidential basis, other than the Complainant.

   Thus, Respondent's attorney does not have the right to be present, and should not be permitted to be present, during interviews of non-management or non-supervisory employees. If Respondent's attorney insists on being present during interviews of non-management or non-supervisory employees, HIOSH should consult with DAG.

E. 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 believes is relevant to the case.

F. If a telephone conversation with 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 case diary may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

   If at any time during the initial (or subsequent) meeting(s) with Respondent's 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.)

IX. Unresponsive/Uncooperative Respondent

Below is a non-exclusive list of examples of unresponsive or uncooperative Respondents and related procedures.

A. Respondent Bankruptcy

When investigating a Respondent that has filed for bankruptcy, the investigator should promptly consult with their Administrator, SI, and DAG. Otherwise, Complainants and DLIR may lose their rights to obtain any remedies.

B. Respondent Out-of-Business

When investigating a Respondent that has gone out of business, the investigator should consult with the Administrator, SI, and DAG, as appropriate. HIOSH should determine whether there are legal grounds to continue the investigation against successors in interest of the original Respondent.

C. Uncooperative Respondent

When conducting an investigation under HRS § 396-8(e), subpoenas may be obtained for witness interviews or records. See Chapter 4.XII.A below for procedures for obtaining subpoenas.

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

D. Uncooperative Respondent Representative

When a Respondent is cooperating with an investigation, but their representative is not, the investigator should send a letter or email to both Respondent and the representative requesting them to affirm the designation of representation in the case file. If the designation of representation is not affirmed within **10** business days, the investigator may treat Respondent as unrepresented. HIOSH should not decline to accept written information received directly from a represented Respondent.

X. Subpoenas, Document and Interview Requests

A. **Subpoenas**

When conducting an investigation under HRS § 396-8(e), subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the Administrator. 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 *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. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present).

An administrative subpoena can be signed by either the Administrator or whom the Administrator in writing has delegated authority to sign subpoenas.

The subpoena must contain language mandating a reasonable timeframe for the witness to comply, identify the statutory provision(s) under which the subpoena is issued, use broad language for requests, and identify the investigator responsible for delivery and completion of the service form. Before issuing a subpoena, HIOSH should consult with DAG regarding the appropriate timeframes and language. If the witness decides to cooperate, the SI can choose to lift the subpoena requirements.

A designated representative may accept service of the subpoena. If the designated representative has not accepted service of the subpoena, the subpoena will be served to the party named by personal service. Leaving a copy at a place of business or residence is not personal service. In exceptional circumstances, service may be by certified mail with return receipt requested. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

HIOSH shall pay witnesses the same fees and mileage that are paid witnesses in Hawaii courts. The witness fees and mileage to which these provisions refer are set forth in 28 U.S.C. § 1821. HIOSH should consult with DAG as needed on the calculation of witness fees.

If the witness fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the supervisor 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 request that DAG enforce the subpoena in state district court.

B. **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 believes that there is a potential that the case will be referred for litigation, that HIOSH will issue merit findings, or that DAG

may otherwise be of assistance. -- For example, DAG may be of assistance in cases where settlement discussions reach an impasse, where assistance is needed to determine the appropriate remedy (see Chapter 6, *Remedies*), or where a case presents a novel question of statutory coverage or protected activity. When HIOSH has reasonable cause to believe that a violation occurred, HIOSH should consult informally with DAG, if it has not already done so. Consulting early with DAG is particularly important in cases that HIOSH anticipates referring to DAG for litigation as early consultation helps to ensure that the investigation captures as much relevant information as possible so that DAG can evaluate whether the case is suitable for litigation.

C. **Further Interviews and Documentation**

It is the investigator's responsibility, in consultation with the SI, to determine and pursue all appropriate investigative leads deemed pertinent to the investigation, with respect to Complainant's and Respondent's positions. Contact must be made whenever possible with relevant witnesses, and reasonable attempts must be made to gather pertinent data and materials from available sources.

The investigator must document all telephone conversations with witnesses or party representatives in the case activity log and, if the conversation is substantive, in a Memo to File. (See Chapter 9 on handling requests for disclosure of case activity logs and Memos to File.)

XI. Resolve Discrepancies

After obtaining Respondent's position statement, the investigator will contact Complainant to conduct a rebuttal interview and will contact other witnesses as necessary to resolve any relevant discrepancies between Complainant's allegations and Respondent's defenses.

XII. On-site Investigation, Telephonic and Recorded Interviews

At the beginning of all interviews, the investigator will inform the interviewee in a tactful and professional manner that HRS § 396-10(m) makes it a criminal offense to knowingly make a false statement or misrepresentation to a government representative during the course of the investigation. If the interview is recorded electronically, this notification and the interviewee's acknowledgement must be on the recording.

Respondent's designated representative generally 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.[16] The witness may request that an attorney or other personal representative be present at any time and, if the witness does so, the investigator should obtain a signed "Designation of Representative" form and include it in the case file. Refer to XIII.D. in instances where the Respondent's designated representative asserts that they also represent the non-

[16] HIOSH's statute provides that investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the Complainant. See HRS § 396-8(f).

management witness. 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 the witness understands that the interview is being recorded. At the SI's discretion, in consultation with the DAG, it may be necessary to transcribe electronic recordings used as evidence in HLRB hearings. 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 HIOSH Instruction *CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993,* adopted by HIOSH on December 20, 1993.

XIII. Confidentiality

The informer privilege allows the government to withhold the identity of individuals who provide information about violations of laws, including retaliation in violation of HIOSH's whistleblower statute. The informer privilege also protects the contents of witness statements to the extent that disclosure would reveal the witness's identity.

When interviewing a witness (other than Complainant and current management officials representing Respondent), the investigator should inform the witness that their identity will remain confidential to the extent permitted by law. This pledge of confidentiality should be clearly noted in any interview statement, memo to file, or other documentation of the interview and should be included in any audio recording of the interview. The investigator also should explain to the witness that the witness's identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the existence and content of the interview may need to be disclosed. Indeed, a court or HLRB may require the disclosure of the names of witnesses at or near trial. Furthermore, the witness should be advised that their identity might be disclosed to another federal agency, under a pledge of confidentiality from that agency.

Under HIOSH's whistleblower statute, any witness (other than the Complainant) may provide information to HIOSH confidentially. There may be circumstances where there is reason to interview current 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 Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the above procedures for handling confidential witness interviews should be followed.

XIV. Party Representation at Witness Interviews

Respondent and Complainant do not generally have the right to have a representative present during the interview of a non-managerial employee. Where either party is attempting to interfere with the rights of witnesses to request confidentiality, investigators should coordinate with their SI, Administrator, and DAG and insist on private interviews of non-management witnesses. If

witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and personal telephone numbers and contact these witnesses later, outside of the workplace.

XV. Records Collection

The investigator must attempt to obtain copies of appropriate records, including pertinent documentary materials as required. Such records may include 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 produced later during proceedings. Refer to XVIII of this chapter for the procedures regarding the handling of documents and requests by the Complainant and Respondent.

XVI. Analysis

After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions to support a recommended outcome based on the evidence and the law using the guidance given in Chapter 2 and in accordance with the requirements of HRS § 396-8(e).

XVII. Closing Conference

Upon completion of the field investigation and after discussion of the case with the SI, the investigator will conduct a closing conference with Complainant (in cases in which HIOSH anticipates issuing non-merit findings) or Respondent (in cases in which HIOSH anticipates issuing merit findings). This closing conference may be conducted in person, by telephone, or via videoconference, depending on the circumstances of the case. In addition, depending on the case's investigative stage, the closing conference may be conducted in conjunction with the rebuttal interview, if warranted.

A. During the closing conference, the investigator will provide a brief verbal summary of the recommendation and basis for the recommendation.

B. It is unnecessary and improper to reveal the identity of witnesses interviewed. Complainant should be advised that HIOSH does not normally reveal the identity of witnesses, especially if they requested confidentiality.

C. Although HIOSH anticipates that in most cases no new evidence or argument will be raised in the closing conference, if Complainant (or Respondent) attempts to offer any new evidence, argument, or witnesses, this information should be discussed as appropriate to ascertain whether it is relevant; might change the recommended determination; and, if so, what further investigation might be necessary prior to the issuance of findings.

D. During the closing conference, the investigator must inform Complainant/Respondent of his/her rights to object and request a hearing before the HLRB, as well as the time limitation for filing the appeal.

E. The investigator should also advise Complainant (or Respondent) that the decision at this stage is a recommendation subject to review and approval by higher management.

F. Where HIOSH anticipates issuing merit findings, the closing conference may be used to explore the possibility of settlement with Respondent.

G. Where Complainant (or Respondent) cannot be reached despite HIOSH's reasonable attempts to conduct a closing conference, HIOSH will document its attempts to reach Complainant/Respondent in the file and proceed to issue a Determination Notice and Order. Reasonable attempts include attempting to contact Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information and allowing Complainant 48 hours to respond. In the case of phone calls, at least two attempts should be made at different hours of the day during allowed work-band hours. HIOSH's attempts to contact Complainant must be documented in the case file.

H. If Complainant becomes combative during the course of the closing conference, the investigator may end the conference. The investigator will document their attempt to hold a closing conference in the file and proceed to issue a Determination Notice and Order. Combativeness is not the simple questioning of the evidence and HIOSH's determination. Combativeness includes cursing the investigator and making threats.

XVIII. Document Handling and Requests

A. Requests to Return Documents Upon Completion of the Case

All documents received by HIOSH from the parties during the course of an investigation become part of the case file and will not be returned. At the beginning of the investigation, it is important to tell Complainants to keep originals of their documents because any documents they provide will not be returned. Encourage Complainant to only submit HIOSH-requested documents as well as those documents they believe HIOSH should consider.

B. Documents Containing Confidential Information

If Complainant or Respondent submits documents containing confidential information, such as confidential business information of Respondent or information that reveals private information about employees other than Complainant, HIOSH must mark that information appropriately in the file, take care to avoid inadvertent disclosure of the information, and follow the procedures in Chapter 9 for evaluating whether the information may be disclosed either to the other party (under HIOSH's Non-Public Disclosure policy) or in response to a UIPA request.

C. Witness Confidentiality

Confidential witness statement must be clearly marked as "Confidential Witness Statement" in the file.

D. **Medical Records – Handling and Storage of Medical Records in Whistleblower Case Files**

Ensure that medical records are handled in keeping with OSHA Instruction CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records (or its successor)*, and 29 CFR 1913.10, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records. These instructions provide guidance to HIOSH personnel when accessing personally identifiable employee medical records.

In rare instances where a case file includes medical information, the medical information must be password protected. If stored on external media, the records must be encrypted and kept in a secure manner. See OSHA Instruction CPL 02-03-009, *Electronic Case File (ECF) System Procedures for the Whistleblower Protection Program.*

Chapter 5

CASE DISPOSITION

I. Scope

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

These policies and procedures are designed to ensure that HIOSH arrives at the appropriate determination for each whistleblower complaint by achieving a **reasonable balance** between an investigation's timeliness and quality. Attention to the proper balance between quality and timeliness will ensure that each investigation receives the appropriate level of supervisory review, and that a final determination is reached as expeditiously as possible while ensuring that each investigation meets HIOSH's standards for quality and thoroughness. These procedures reflect the best practices developed by OSHA regions.

II. Review of Investigative File and Consultation Between the Investigator and Supervisor

During the investigation, the investigator must regularly review the file to ensure all pertinent information is considered. The investigator will keep the SI apprised of the progress of the case, as well as any novel or noteworthy issues encountered. The SI will advise the investigator regarding any unresolved issues and assist in reaching a recommended determination and deciding whether additional investigation is necessary.

III. Report of Investigation

Except as provided below, the investigator must report the results of the investigation in a Report of Investigation (ROI). The ROI is HIOSH's internal summary of the investigation written as a memo from the investigator to the supervisor.

The first page of the ROI must note the names and titles of the investigator and the reviewing supervisor, and HRS § 396-8(e) implicated by the complaint. It must also list the parties' and their representatives' (if any) names, addresses, phone numbers, fax numbers, and email addresses, and nothing else. The remainder of the ROI must follow the policies and format described below.

The ROI must contain the elements listed below in Chapter 5.III.B, *Elements of the ROI*, that are relevant to the case, as well as a chronology of events. It may also include, as needed, 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. The citations must note the page number of the exhibit. Using abbreviations for the citations, which should be explained, is helpful to reduce writing time. If a

witness log is included in the ROI, any witnesses who were suggested by the Complainant or Respondent but who HIOSH did not interview should be identified with contact information (if it exists) and the reason for not interviewing.

The ROI must be signed by the investigator. It must be reviewed and approved in writing by the supervisor before the findings are issued.

A. **No ROI/Limited ROI Required**

Complaints that result in a settlement, withdrawal, or dismissal for lack of cooperation/unresponsiveness will require only an entry into the OIS-Whistleblower database (or a successor database) in lieu of a Report of Investigation. The notation in the OIS - Whistleblower case comment section must contain the reasons why the case is being closed and reference any supporting documents (i.e., exhibits). Upon closing the case, the OIS -Whistleblower Case Summary will be added to the case file. The issuance of a signed determination letter in these case disposition types signifies supervisory approval.

B. **Elements of the ROI**

The ROI must include a chronology of the **relevant** events of the case and, **as applicable**,[17] analysis of the following issues, unless otherwise noted:

1. **Coverage**

Give a brief statement of the basis for coverage. This statement includes information about Respondent and Complainant relevant to HRS § 396-8(e). Delineate the information that brings the case under the applicable statute. Also explain the coverage of Complainant. If coverage was disputed, this is where HIOSH's determination on the issue should be addressed. **If it is determined that there is no coverage, then no further discussion of the elements is required in the ROI.** In addition, this section should note the location of the company and the nature of the business, if not already addressed.

2. **Timeliness**

Indicate the actual date that the complaint was filed and whether or not the filing was timely under HRS § 396-8(e), including any equitable tolling. **If it is determined that the complaint is untimely, then no further discussion of the elements is required in the ROI.**

3. **The Elements of a Violation**

[17] For example, if no protected activity is found after analysis of Complainant's alleged protected activity, the investigator may proceed to the recommended disposition and need not analyze the remaining elements of the case (knowledge, adverse action, and nexus).

Discuss and evaluate the facts as they relate to the four elements of a violation, following Chapter 2.V, *Elements of a Violation*, and 2.VI, *Causation Standards.*

a. Protected Activity

b. Respondent Knowledge/Suspicion

c. Adverse Action

d. Nexus

If there is conflicting evidence about a relevant matter, the investigator must make a determination and explain the reasoning supporting the conclusion.

4. **Employer Defense/Affirmative Defense and Pretext Testing**

Respondent must produce evidence to rebut Complainant's allegations of retaliation in order for a case to be dismissed for lack of nexus. For example, if Respondent alleges that it discharged Complainant for excessive absenteeism, misconduct, or poor performance, Respondent must provide evidence to support its defense. The investigator must analyze such evidence in the ROI and explain the reasoning supporting the investigator's conclusion.

Below is an example of a pretext evaluation (with pretext found), placed in the *Nexus* analysis section of the ROI:

> *Respondent claimed that Complainant was laid off to conform with the CBA provision that required seven journeymen on the job before hiring a second apprentice. However, interviews and Respondent's employee roster 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.*

An example where pretext is not found is:

> *Respondent claimed that Complainant was laid off to conform with the CBA provision that required seven journeymen on the job before hiring a second apprentice. Interviews and Respondent's employee roster revealed that this provision in the CBA was routinely followed. Therefore, Respondent's reason for laying off Complainant is not pretext; it laid Complainant off for this legitimate business reason.*

5. **Remedy**

In merit cases, this section should describe all appropriate relief due to Complainant, consistent with the guidance for determining and documenting

remedies in Chapter 6. Any remedy that will continue to accrue until payment, such as back wages, insurance premiums, and other remedies that continue to accrue should be stated as a formula when practical; that is, amounts per unit of time, so that the proper amount to be paid to Complainant is calculable as of the date of payment. For example, "Back wages in the amount of $13.90 per hour, for 40 hours per week, from January 2, 2007, through the date of payment, less the customary deductions, must be paid by Respondent."

6. **Recommended Disposition**

The recommended disposition is a required element of the ROI. The investigator shall provide the recommendation for the disposition of the case, along with the reasoning supporting such recommendation.

7. **Other Relevant Information**

Any novel legal or other unusual issues, information about related complaints, the investigator's assessment of a proposed settlement agreement, or any other relevant consideration(s) in the case may be addressed here.

For instance, if the investigator is recommending that HIOSH defer to another proceeding, discussion of the other proceeding and why deferral is appropriate should be contained in this section of the ROI.

Elements of a ROI	
Standard first page: 1) Names & titles of investigator and reviewing supervisor 2) Implicated Act(s) 3) Parties' and their representatives' (if any) full contact information	
Chronology with citations to evidence (Fact/Assertion notation optional)	
Analysis of: (as applicable)	
	Coverage. If coverage found, then: (write-up can be same as Findings)
	Timeliness. If timely, then: (write-up can be same as Findings)
	Elements of violation, as applicable: Protected activity Respondent's knowledge Adverse action Nexus If all elements are found, then:

	Respondent's defense/pretext testing
	Remedy, only if merit has been found.
Recommended disposition	
Other relevant information, if any.	
Signatures of investigator and reviewing supervisor	

IV. Case Review and Approval by the Supervisor

A. Review

The investigator will notify the supervisor when the completed case file, including, if applicable, the ROI and draft Determination Notice and Order (DNO) or other draft case closing documents (such as approvals of withdrawal requests and settlements), is ready for review on the HIOSH M drive. The supervisor will review the file to ensure technical accuracy, the thoroughness and adequacy of the investigation, the correct application of law to the facts, and completeness of the DNO or other closure letter. Such a review will be completed as soon as practicable after receipt of the file.

B. Approval

If the supervisor determines that appropriate issues have been explored and concurs with the analysis and recommendation of the investigator, the supervisor will sign on the signature block on the last page of the ROI and record the date the review was completed. If the supervisor does not concur with the analysis and recommendation of the investigator, the supervisor will make a note on the Case Activity Log of the reason for non-concurrence and return the case file to the investigator for additional work.

The supervisor's signature on the ROI serves as initial approval of the recommended determination. Depending on the Administrator's policy and procedures, the supervisor's approval may be the final approval in most cases. The OH Branch Manager's review of the case file and final approval is required for all merit and noteworthy cases. Cases in which the OH Branch Manager is providing final approval will be reviewed by the OH Branch Manager once the supervisor approves the ROI and draft DNO or other case closing documents and notifies the OH Branch Manager that the case is ready for review.

V. Case Closing Alternatives

Docketed whistleblower cases may be resolved by a variety of means. Completed whistleblower investigations will be resolved through one of the following:

1. A referral to DAG for HLRB hearings, or

2. The issuance of a DNO in merit cases.

3. Complainants may also request to withdraw their whistleblower claims at any point in the investigation.

4. HIOSH may close a case due to a settlement.

5. HIOSH may determine that a deferral to the results of another proceeding is appropriate under the circumstances. HIOSH will issue findings noting the deferral in these circumstances.

Each case disposition option, along with the applicable procedures, is discussed below.

VI. Cases Under HRS § 396-8(e) (State Equivalent to OSHA's Section 11(c) Statute)

A. Merit Cases

Where HIOSH believes that a case is meritorious under HRS § 396-8(e), the case must be forwarded to DAG for review. The Administrator (or designee) and other HIOSH staff will work with DAG prior to and after the referral, so that the case may be fully reviewed for legal sufficiency. If DAG determines that additional investigation is required prior to approving a case for a merit finding, the supervisor normally will assign such further investigation to the original investigator. If DAG determines that the case is not suitable for a merit finding, a DNO will be issued dismissing the case and Complainant will be notified of the right to appeal.

A DNO with a merit finding must be signed by Administrator (or designee) and addressed to Respondent (or Respondent's counsel if applicable, with a copy to Respondent), with a copy to Complainant (and Complainant's counsel if applicable). The DNO must adhere to the format described below and must advise the parties of the right to object to the DNO and request a hearing before the HLRB. See Chapter 5.VIII.A. The DNO must be sent to the parties by a method that can be tracked. This includes, but is not limited to: email; U.S. Mail, return receipt requested; a third-party commercial carrier that provides delivery confirmation; or hand delivery. Proof of delivery will be preserved in the file with copies of the DNO to maintain accountability.

HIOSH must consult with DAG prior to issuing merit findings. If a hearing is requested, DAG represents HIOSH (referred to as the Director in the applicable regulations).

B. Dismissals (Non-Merit Cases)

1. Issuance of Non-Merit DNO

For non-merit determinations or dismissals, the parties must be notified of the results of the investigation by the issuance of a DNO addressed to Complainant (or Complainant's counsel if applicable, with a copy to Complainant), and copied to Respondent (and Respondent's counsel if applicable).

The DNO must advise Complainant of the right to contest the determination and order pursuant to HRS § 396-11(e). The DNO must be sent to the parties by a method that can be tracked. This includes, but is not limited to email, certified mail, or hand delivery. Proof of delivery will be preserved in the file with copies of the DNO to maintain accountability.

C. **Notice of Contest or Appeal**

Should a whistleblower complaint be dismissed pursuant to a non-merit determination and order, the Complainant shall have the right to contest such dismissal and request a review by the HLRB. Similarly, if a whistleblower complaint is determined to be valid and a merit determination and order is issued, the Respondent shall have the right to contest the determination and seek a review by the HLRB.[18]

The notice of contest must be made in writing to HIOSH within **20** calendar days of Complainant's or Respondent's receipt of the DNO (unless equitable tolling applies; see Chapter 3.III.D.4, *Tolling (Extending) the Complaint Filing Deadline*), with a copy to the Administrator. The request may be mailed, faxed, or emailed (dlir.hiosh@hawaii.gov). Verbal requests for appeals are not accepted.

The first day of the request period is the day after Complainant's or Respondent's receipt of the DNO. Generally, the request date is the date of the postmark, facsimile transmittal, or email communication. If the postmark is absent or illegible, the request date is three days prior to the date the notice of contest is received. If the last day of the request period falls on a weekend or a state holiday, or if the HIOSH Office is closed, then the next business day will count as the final day.

Upon HIOSH's receipt of a notice of contest under HRS § 396-8(e), the SI must promptly make available a copy of the case file and any additional comments regarding the notice of contest to DAG for review. The notice of contest must be preserved in the file.

HLRB reviews the case de novo for proper application of the law to the facts:

- If the decision is supported by the evidence and is consistent with the law, HLRB will uphold or affirm the HIOSH determination.

- If not, the decision may be reversed. Pursuant to HRS § 396-11(i), the HLRB is authorized to modify an order, or to continue the matter upon terms and conditions as may be deemed necessary, or to direct other relief as it considers appropriate. Thus, the HLRB may determine that a Respondent violated HRS § 396-8(e) and issue their own restitution and penalties as may be required to make

[18] The appeal procedures described in this manual reflect the provisions of HRS § 396-11 in effect at the time of publication. Any future amendments to the statute may modify or supersede these procedures, including the process for contesting dismissals of complaints or orders issued by the Director, the HIOSH Administrator, or their designee. The most current version of HRS § 396-11 should be consulted to determine the applicable rights and procedures.

Complainant whole, in accordance with the provisions set forth in HRS §§ 396-8(e)(6) and 396-10(h).

- In certain instances, the HLRB may remand the case back to HIOSH for further investigation. This may occur in cases where equitable tolling provisions were not adequately addressed. Upon remand, HIOSH is required to investigate the issues specified in the HLRB order, render a final determination, and submit a copy of this determination as evidence to the HLRB. Any party adversely affected by the final determination has the right to appeal, following the standard procedural steps for such appeals.

D. Multi-Respondent Mixed Determinations

In some cases, Complainant alleges retaliation by multiple respondents and HIOSH finds that one Respondent violated HRS § 396-8(e) but another Respondent did not. In those cases, HIOSH will address both Respondents in a single DNO. HIOSH will issue merit findings against the Respondent found to have violated the law and, in the same set of findings, indicate that it has determined that the allegations against the other Respondent(s) are not meritorious.

The DNO in such cases should be addressed to the Complainant and all Respondents. The DNO must be sent to all of the parties by a method that can be tracked. This includes, but is not limited to email, delivery receipt required; U.S. Mail, return receipt requested; a third-party commercial carrier that provides delivery confirmation; or hand delivery. Proof of delivery to each party should be preserved in the file with copies of the DNO to maintain accountability.

In addition to containing a full explanation of the DNO's basis for finding retaliation with respect to at least one Respondent, the DNO must include a brief description of the rationale for the decision to dismiss the case with respect to the Respondent(s) that HIOSH concludes did not violate the law.

VII. Determination Notice and Order (DNO)

The DNO is written in the form of a letter, rather than a report, and generally must follow the format described below.

A. Format of the DNO

A DNO should contain the following elements, as applicable:

1. Introduction

In the opening paragraph, identify the parties, the statute under which the complaint was filed, and include a brief sentence summary of the allegation(s) made in the complaint.

The second paragraph will contain standard language such as:

Following an investigation by a duly authorized investigator, the Director of Labor & Industrial Relations, acting through [his/her] agent, the Administrator of the Hawaii Occupational Safety and Health Administration, pursuant to [insert statute], finds that there is [not] reasonable cause to believe that Respondent [violated/did not violate] HRS § 396-8(e) and issues the following findings.

The findings generally need not recount the details of the investigation, such as listing the witnesses interviewed or documents requested.

2. **Coverage**

   Explain whether Complainant and each Respondent are covered by the statute and if so, why. If there is no coverage, no further findings are required.

3. **Timeliness**

   Explain whether the whistleblower complaint was filed within the applicable statute of limitations. If the complaint was not timely filed but the late filing is being tolled for any of the reasons set forth in Chapter 3.III.D.4, *Tolling (Extending) the Complaint Filing Deadline*, the reasons must be stated. If the complaint was not timely filed and Complainant's request for tolling was denied despite Complainant's explicit request for tolling, the denial should be explained. If the complaint was untimely, no further findings are required.

4. **Narrative**

   Findings should contain a brief description of Complainant's allegation, a brief description of Respondent's defense, and a brief explanation of the events relevant to the determination.

   Tell the story in terms of the facts that have been established by the investigation, addressing disputed facts only if they are critical to the determination. Often, recounting the events in chronological order is clearest to the reader. Only unresolved discrepancies should be presented as assertions. The findings generally should not state that a witness saw, heard, testified, or stated to the investigator, or that a document showed something. **In other words, the findings must not be summaries of each witness's testimony.** For example, a finding might be: "Complainant complained to the dispatcher that the brakes on the truck were defective." An improper finding would be: "Complainant told the investigator that he had complained to the dispatcher about defective brakes on the truck." The dates for the protected activity and the adverse action should be stated to the extent possible. Care should be taken not to reveal or identify confidential witnesses or detailed witness information in the DNO.

In cases where the protected activity relates to a potential violation of a regulation, the findings generally should cite the relevant regulation whenever possible. This reference must be made even if Complainant did not refer to the specific regulation in the course of engaging in the protected activity or in providing information to HIOSH.

In cases in which compensatory damages are ordered, the narrative should include relevant facts in support of the type and amount of damages (see Chapter 6 for discussion of the facts and factors relevant to ordering compensatory and/or punitive damages).

5. **Analysis and Conclusion About Violation**

Following the narrative, the DNO should contain a brief summary of HIOSH's analysis on each prima facie element or issue relevant to the determination and HIOSH's conclusion regarding whether there has been a violation of HRS § 396-8(e). If compensatory damages are ordered, the findings should contain a brief summary of HIOSH's basis for awarding such damages.

For instance, non-merit findings would contain analysis and a conclusion similar to one of the following options:

Based on the foregoing, HIOSH dismisses this complaint because [choose one]:

- *Complainant or Respondent [or both] is not covered by [insert acronym for statute and reason that there is no coverage];*

- *Complainant did not file the complaint within the [insert days] allowed by [insert acronym for statute] and there is no basis for tolling the filing period;*

- *HIOSH has no reasonable cause to believe that Complainant engaged in protected activity under [HRS § 396-8(e) and reason that there is no protected activity]*

- *HIOSH has no reasonable cause to believe that Complainant suffered an adverse action; [insert reason for HIOSH's conclusion]; or*

- *HIOSH has no reasonable cause to believe that but for Complainant's protected activity the adverse action would not have been taken against Complainant. [Insert brief explanation for HIOSH's conclusion that there is no nexus between the protected activity and the adverse action].*

6. **Non-Pecuniary Damages**

In merit cases, the rationale, the rationale for ordering any punitive damages or any non-pecuniary compensatory damages (such as damages for emotional distress, mental anguish, loss of reputation) should be concisely stated here. See Chapter 6.VI.B, *Determining When Compensatory Damages are Appropriate*, for a discussion of when punitive non-pecuniary compensatory damages may be appropriate.

7. **Order**

In merit cases only, list all relief being awarded. The reinstatement order will generally state: *"Respondent shall immediately reinstate Complainant to their former position with all the terms, conditions, and benefits of that position."* Relief should be determined and documented in the case consistent with the guidance in Chapter 6, *Remedies*. When back pay is awarded, it should be stated in terms of earnings per hour (or other appropriate wage unit) covering the time missed minus interim earnings. This allows for the possibility that damages may continue to accrue after the Order. The exact amount of compensatory damages (pecuniary and non-pecuniary) must be stated. The interest on back pay and pecuniary damages will be stated in terms of the interest rate described in Chapter 6.VIII, *Interest*. The order will also set forth non-monetary remedies, as appropriate (see Chapter 6.X, *Non-Monetary Remedies*). In addition, a civil penalty of not more than $9,054 may be assessed. The SI must finalize the DNO issued to Respondent, with a copy sent to Complainant, for the Administrator's signature.

8. **The Right to File an Appeal**

In both merit and non-merit findings, the DNO must advise Complainant or Respondent of the right to appeal the determination pursuant to HRS § 396-11.

9. **Signature**

The Administrator (or designee) must sign the DNO.

B. **Abbreviated DNO**

When a case is dismissed due to deferral, lack of cooperation/unresponsiveness, or without an investigation (e.g., complaint is untimely, contains no prima facie allegation, or there is no coverage), the DNO may be abbreviated. The abbreviated DNO must state why the case is being closed (e.g., that Complainant has not cooperated with the investigation; the complaint was untimely). Where the complaint was untimely, the date of the adverse action and the date of the filing of the complaint must be included in the findings. Where a complaint is dismissed for lack of cooperation/unresponsiveness, HIOSH's attempts to contact Complainant should be documented in the DNO. The abbreviated DNO must inform the parties of the right to object to the DNO and appeal before the HLRB.

VIII. Dismissals for Lack of Cooperation/Unresponsiveness - Complainant

See Chapter 4.VI, *Lack of Cooperation/Unresponsiveness,* for the requirements and procedures for dismissing complaints for LOC.

IX. Withdrawal

Complainant, with HIOSH's approval, may withdraw the complaint at any time during HIOSH's processing of the complaint.[19] However, it must be made clear to Complainant that by entering a withdrawal, they are forfeiting all rights to seek review or appeal, and the case will not be reopened.

Withdrawals may be requested either orally or in writing. It is advisable, however, for the investigator to obtain a signed withdrawal request whenever possible. In cases where the withdrawal request is made orally, the investigator will either record the withdrawal conversation or confirm in writing the Complainant's desire to withdraw. As part of the request, Complainant must also indicate whether the withdrawal is due to a settlement. If Complainant is seeking to withdraw a complaint due to settlement, HIOSH must inform Complainant of the requirement to submit the settlement for HIOSH's approval. More information regarding HIOSH's review and approval of settlement agreements is available in Chapter 7.

Once the supervisor reviews and approves the request to withdraw the complaint, a letter will be sent to Complainant, clearly indicating that the case is being closed based on Complainant's request for withdrawal and that Complainant has forfeited all rights to seek review or appeal. The withdrawal approval letter will be sent using a method that permits HIOSH to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. Proof of delivery must be preserved in the file with copies of the letters.

Although Complainant's request to withdraw is usually granted, there may be situations in which approval of the withdrawal is not warranted. See, e.g. HAR §12-57-10. Situations in which approval for withdrawal may be denied include, but are not limited to, a withdrawal made under duress, the existence of similarly situated complainants other than Complainant requesting withdrawal, adverse effects on employees in the workplace other than Complainant if the case is not pursued, and the existence of a discriminatory policy or practice. If HIOSH does not approve the request for withdrawal, HIOSH will document the denial and proceed with the continuation of the investigation.

When Complainant elects not to pursue their complaint before docketing, the complaint will be administratively closed.

X. Settlement

Voluntary resolution of disputes is desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is HIOSH policy to seek settlement of

[19] Exception: HIOSH will not accept a withdrawal when the parties have reached a private settlement until HIOSH has obtained and reviewed the settlement.

all cases determined to be meritorious prior to referring the case to DAG. 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. Settlement requirements and procedures, including the requirement to submit the settlement agreement for HIOSH's review and approval, are discussed in detail in Chapter 7.

XI. Postponement/Deferral

Due regard should be paid to the determination of other forums established to resolve disputes which may also be related to complaints under the HIOSH whistleblower statute. Thus, postponement and/or deferral may be advised when there is a proceeding that meets the criteria below. This policy on postponement and deferral is based on HAR §12-57-11, which governs section 396-8(e) cases, and on case law articulating analogous standards for postponement and deferral in cases under other OSHA whistleblower statutes.

A. Postponement

HIOSH 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 HRS § 396-8(e) and those proceedings must not likely violate the rights of Complainant under HRS § 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 address retaliation. The investigator must consult with DAG to make these determinations. To postpone the HIOSH case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that HIOSH must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement.

B. Deferral

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

1. All relevant issues were addressed;

2. The proceedings were fair, regular, and free of procedural infirmities; and

3. The outcome of the proceedings was not repugnant to the purpose and policy of HIOSH whistleblower statute.

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

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

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

If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. However, if a settlement was approved or entered into by another government agency, such as the NLRB, or another third-party entity such as a labor union, deferral could be appropriate if the criteria for deferral above are met. Employer-employee settlements that release a HIOSH whistleblower claim must be approved by HIOSH in accordance with Chapter 7.

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

XII. Documenting Key Dates in OIS-Whistleblower

For purposes of documenting case disposition, key dates must be accurately recorded in OIS - Whistleblower in order to maintain data integrity and measure program performance.

A. Date Complaint Filed

The date a complaint is filed is the date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the HIOSH office. If tolling applies, the basis for tolling should be explained in the OIS -Whistleblower case comments. See Chapter 3.III.D.3, *Timeliness of Filing,* and 3.III.D.4*, Tolling (Extending) the Complaint Filing Deadline*.

B. ROI Dates

The date upon which the investigator submitted the ROI to the supervisor for review and the date upon which the supervisor approved the ROI must be recorded in OIS-Whistleblower.

C. Determination Date

The date upon which the DNO or closing letter is dated is the determination date.

D. **Date Request for Review or Appeal Filed**

The date a request for review or appeal/notice of contest is filed is the date of the postmark, facsimile transmittal, email communication, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the HIOSH office. The investigator or supervisor will enter the filing date into OIS-Whistleblower.

E. **Date of Key Post-HIOSH Events**

Any party may appeal a HIOSH determination and request a hearing before HLRB, petition for review of an HLRB decision by the Hawaii Intermediate Court of Appeals (ICA) and petition the Supreme Court for review of an ICA decision. The key dates for these actions and decisions must be documented in OIS-Whistleblower. HIOSH must document the date a party objects to an HIOSH determination and requests a hearing before HLRB, the date of the HLRB decision, the date a party petitions for review of the HLRB decision by the ICA or the Supreme Court, along with the dates of the subsequent HLRB/ICA (and, rarely, Supreme Court) decisions.

Table 5-1. Required Documents for Disposition

Disposition	OIS-Whistleblower	ROI	DNO	Parties Receive
Administratively Closed (e.g. prior to docketing, complaint determined to be untimely or contains no *prima facie* allegation)	Entry of complaint information	N/A	N/A	Complainant receives written explanation and confirmation of the screen-out with appeal rights
Settled (HIOSH approved)	Summary in Case Comments field	None	None Required	Copy of signed settlement
Settled – Other (HIOSH approved)	Summary in Case Comments field	None	None Required	Settlement approval letter
Dismissal: Lack of Cooperation (LOC)/Unresponsiveness	Summary in Case Comments field	None	Abbreviated	Abbreviated DNO with appeal rights
Dismissed After Agency Review		Required	Abbreviated	Abbreviated DNO with appeal rights
Deferral		Required	Abbreviated	Abbreviated DNO with appeal rights
Non-Merit		Required	Required	DNO with appeal rights
Merit		Required	Required	DNO with appeal rights

CHAPTER 6

REMEDIES

I. Scope

This Chapter provides guidance on gathering evidence and determining appropriate remedies in whistleblower cases where a violation has been found. Investigators should consult with their supervisor in designing the appropriate remedies. The DAG should also be consulted on determining potential remedies in any case that HIOSH anticipates issuing merit findings.

II. General Principles

HRS § 396-8(e) is designed to compensate Complainants for the losses caused by the unlawful retaliation and to restore to Complainants the terms, conditions, privileges of their employment as they existed prior to Respondent's adverse actions. The remedies available under the HIOSH whistleblower statute are also designed to mitigate the deterrent or "chilling" effect that retaliation has on employees other than the Complainant, who may be unwilling to report violations or hazards if they believe the employer will retaliate against whistleblowers.

HIOSH's whistleblower statute provides for reinstatement, back pay, and compensatory damages for pecuniary losses[20] and non-pecuniary damages.[21] Where appropriate, Complainant's remedies also include other remedies designed to make Complainant whole, such as receipt of a promotion that Complainant was denied, expungement of adverse references in the employment record, or a neutral employment reference. The statute does not permit punitive damages and recovery of attorney fees.

III. Reinstatement and Front Pay

A. Reinstatement

Reinstatement of Complainant to their former position is the presumptive remedy in merit whistleblower cases involving a discharge, demotion, or an adverse transfer and is a critical component of making 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 findings up to a reasonable amount of time for Complainant to obtain another comparable job.

B. Front Pay

[20] These are damages that are readily quantified-- for example, job search expenses, medical bills that Complainant would not have incurred absent the unlawful retaliation, and health insurance premiums.
[21] These damages are not readily quantifiable and include, for example, pain and suffering, emotional distress, and loss of quality of life.

Front pay, which HIOSH considers to be economic reinstatement,is a substitute for actual reinstatement in rare cases where actual reinstatement, the presumptive remedy in cases of discharge, demotion, or adverse transfer, is not possible. - Situations where front pay may be appropriate include those in which Respondent's retaliatory conduct has caused Complainant to be medically unable to return to work, or 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 Complainant's mental health. Front pay also may be available in the rare cases where such extreme hostility exists between Respondent and Complainant 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 such as the length of time that Complainant expects to be out of work and Complainant's compensation prior to the retaliation. Front pay should be adjusted to account for any difference in pay between Complainant's old job and the new job. DAG should be consulted when considering an awardof front pay.

IV. Back Pay

Back pay is available under HRS § 396-8(e).

A. Lost Wages

Lost wages generally comprise the bulk of the back pay award. Investigators should compute back pay by deducting Complainant's interim earnings (described below) from gross back pay. Investigators should support back pay awards with documentary evidence in the case file, including evidence of pay and bonuses at Complainant's prior job and evidence of interim earnings. Relevant documentary evidence includes documents such as pay stubs, W-2 forms, and statements of benefits.

Gross back pay is defined as the total earnings (before taxes and other deductions) that Complainant would have earned during the period of unemployment. Generally, this gross back pay is calculated by multiplying the hourly wage by the number of hours per week that Complainant typically worked. If Complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be converted into a daily rate and then multiplied by the number of days that a Complainant typically would have worked. Depending on the circumstances, other methods for calculating back pay may be appropriate and DAG should be consulted as needed for assistance in determining the method for calculating back pay.

The formula that HIOSH proposes using to compute back pay should be provided to DAG.

Back pay should include any cost-of- living increases or raises that Complainant would have received if they had continued towork for Respondent. The investigator should ask Complainant for evidence of such increases or raises and keep the evidence in the case file. If Complainant requests a tax gross up and supports the request with appropriate evidence, HIOSH's back pay calculation may include it. A "tax gross up" is an adjustment to back pay to compensate for the increased tax burden on Complainant of a lump sum award of back pay.

A Respondent's cumulative liability for back pay ceases when a Complainant rejects (or does not accept within a reasonable amount of time) a bona fide offer of reinstatement, which must afford Complainant reinstatement to a job substantially equivalent to the former position. Whether a reinstatement offer meets this requirement sometimes requires an evaluation of the facts and circumstances of the offer as compared to the complainant's previous position, and consultation with DAG may be necessary to determine whether an offer is a bona fide offer of reinstatement. A Respondent's liability for back pay can also cease in other circumstances, such as when Respondent goes out of business, when Respondent closes the location where Complainant worked without retaining the employees who worked at the location, or when Complainant becomes totally disabled or otherwise unable to perform their former job.

NOTE: Temporary Employees. A Complainant, who is a temporary employee, may receive back pay beyond the length of the temporary assignment from which they were terminated if there is evidence indicating that Complainant would either have continued their employment beyond the seasonal work or that they would otherwise have been rehired for the next season. Thus, in cases with temporary employees, the investigator must determine whether Complainant's coworkers were offered new assignments. In addition, the investigator should ask Complainant whether Complainant applied for an alternate assignment. If Complainant reapplied and was not rehired and the complaint is still pending, Complainant may amend the complaint to include failure to rehire. See memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, issued May 11, 2016, for further information.

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.

C. Interim Earnings and Unemployment Benefits

Interim earnings obtained by Complainant will be deducted from a back pay award. Interim earnings are the total earnings (before taxes and other deductions) that Complainant earned from interim employment subsequent to Complainant's 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 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 in which back pay is owed- is divided into periods. The period should be the smallest possible amount of time given the evidence available. 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. The back pay owed for each period is added together to determine total backpay award.

Unemployment insurance benefits received are not deducted from gross back pay. The investigator should determine whether worker's compensation benefits that replace lost wages during a period in which backpay is owed may be deducted from gross back pay after consultation with DAG.

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

E. Reporting of Back Pay to the Social Security Administration

Respondents are required to submit appropriate documentation to the Social Security Administration, allocating the back pay award to the appropriate periods. The DNO

where applicable must include this requirement.

V. Compensatory Damages

A. Pecuniary or Monetary Damages

Pecuniary damages (a.k.a. monetary damages) may be awarded under HRS § 396-8(e). Pecuniary damages are Complainant's out-of-pocket losses that result from or are likely to result from unlawful retaliation. Investigators must support awards of these types of damages with documentary evidence in the case file.

Pecuniary damages can include, but are not limited to, losses such as: (1) out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy; (2) medical expenses for treatment of symptoms directly related to the unlawful retaliation (e.g., post-traumatic stress disorder, depression, etc.); (3) credit card interest paid as a result of the unlawful retaliation; (4) fees, penalties, lost-interest, or other losses related to withdrawals from savings or retirement accounts made as a result of the unlawful retaliation; or (5) moving expenses if Complainant had to move as a result of the retaliation.

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.

B. Non-Pecuniary Damages

Non-pecuniary damages include compensation for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish resulting from Respondent's adverse action. Courts regularly award compensatory damages for demonstrated mental anguish, loss of reputation, emotional distress, and pain and suffering in employment retaliation and discrimination cases. Such damages may be awarded under HRS § 396-8(e)although they are not necessarily appropriate in every case. HIOSH, with guidance from DAG, will evaluate whether compensation for these damages is appropriate.

Entitlement to non-pecuniary damages is not presumed. Generally, Complainant must demonstrate both (1) objective manifestations of harm, and (2) a causal connection between the retaliation and the harm. Objective manifestations of harm 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 medical conditions, such as sleeplessness, harm to relationships, and reduced self-esteem.

Complainant's ownstatement may be sufficient to prove objective manifestations of harm. Similarly, Complainant's statement may be corroborated by statements of family members, friends, or coworkers if credible. Although evidence from healthcare providers is not required to recover non-pecuniary damages, statements by healthcare providers can strengthen Complainant's case for entitlement to such damages.

Evidence from a healthcare provider is required if Complainant seeks to prove a specific and diagnosable medical condition. Investigators should contact DAG to explore the possibility of obtaining a written waiver from Complainant to communicate with their health care provider to ensure compliance with HIPAA and 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 HIOSH's Uniformed Information Practices Act (UIPA) policies set forth in Chapter 9 or otherwise required by law.

In addition to proof of objective manifestations of harm, there must be evidence of a causal connection between the harm and Respondent's adverse employment action. A Respondent also may be held liable where Complainant proves that Respondent's unlawful conduct aggravated a pre-existing condition, but only the additional harm should be considered in determining damages.

C. **Factors to Consider**

Investigators should consider a number of factors when determining the amount of an award for non-pecuniary damages. Investigators should seek guidance from their supervisor and DAG. The factors to consider include:

1. The severity of the distress. Serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships justify higher damage awards for emotional distress or other forms of non-pecuniarydamages.

2. Degradation and humiliation. Generally, courts have held that when Respondent's actions were inherently humiliating and degrading, somewhat moreconclusory evidence of emotional distress or other non-pecuniary harm is acceptable to support an award for damages.

3. Length of time out of work. Often, long periods of unemployment contribute to 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 Respondent's adverse employment action and thus were unable to support themselves and their families.

4. Comparison to other cases. Under HRS § 396-8(e), a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. Relevant cases can include those decided by the courts under the various OSHA whistleblower statutes and cases decided by the courts under section 11(c) and other discrimination or anti-retaliation provisions, such as the Title VII 42

U.S.C. § 2000e-3a. In section 11(c) cases, comparison with court decisions under this statute or other discrimination or anti-retaliation provisions, such as the Title VII anti-retaliation provision and 42 U.S.C. § 1983, is appropriate.

VI. Punitive Damages

HIOSH Law does not explicitly provide for punitive damages. HAR §12-57-1(d) stipulates that appropriate relief is limited to reinstatement or any other relief deemed appropriate by the Director.

VII. Attorney 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 three 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 theperiod after the award until the actual payment is made. Interest typically is not awarded on damages for emotional distress. 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) 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 non-pecuniary compensatory 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 ofthe basis for awarding any non-pecuniary compensatory damages (such as damages for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish). As discussed above, the basis for such damages should be something beyond the basis for finding that Respondent violated the statute.

X. Non-Monetary Remedies

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

1. Expungement of warnings, reprimands, and derogatory references which may have been placed in Complainant's personnel file as a result of the protected activity.

   In some instances, for example where Respondent has a legal obligation to maintain certain records, it may be appropriate to limit an expungement order. This may be done, for instance, by stating that the requirement to expunge records is fulfilled by maintaining information in a restricted manner such that physical and electronic access to it is limited, and by refraining from relying on the information in future personnel actions or referencing it to prospective employers or others.

2. Providing Complainant with at least a neutral reference for future employers

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

4. Posting of an informational poster about HIOSH Law.

5. Posting of a notice regarding the HIOSH order.

B. Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact their supervisor and the DAG for guidanceon these and other non-monetary remedies.

XI. Undocumented Workers

Undocumented workers are not entitled to reinstatement, front pay, or back pay. *Cf. Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) (under National Labor Relations Act, undocumented workers are not entitled to reinstatement or back pay). Other remedies, including compensatory damages, and conditional reinstatement[22] may be awarded, as appropriate.

[22] With conditional reinstatement the worker is given a reasonable period of time to present or acquire work authorization and, if they are able to do so, the employer must offer reinstatement.

CHAPTER 7

SETTLEMENTS

I. Scope

This chapter provides guidance on the following topics: (1) standard HIOSH settlement agreements; (2) HIOSH's approval of settlement agreements negotiated between Complainant and Respondent where applicable; (3) terms that HIOSH believes are inappropriate in whistleblower settlement agreements because they are contrary to the public interest and the policies underlying the whistleblower protection statute enforced by HIOSH; and (4) enforcement of agreements.

II. Settlement Policy

Voluntary resolution of disputes is often desirable, 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 determined to be meritorious prior to issuing a DNO. HIOSH will not enter into or approve a settlement agreement unless it determines that the settlement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement is not repugnant to HRS § 396-8(e) and does not undermine the protection that the statute provides.

As discussed below, Complainant and Respondent should be encouraged whenever possible to use the HIOSH standard settlement agreement. However, the parties may negotiate their own settlement agreement and submit it for HIOSH's approval. Such settlement agreements are referred to as employer-employee settlement agreements in this manual. In most cases, a claim may be settled only with the consent of both Complainant and Respondent.

Although Complainant may simultaneously pursue civil litigation, during which settlement may also be reached, the intent of the HIOSH whistleblower provision is to provide appropriate relief to Complainant while ensuring that other employees are protected when engaging in protected activity. Therefore, if HIOSH's statutory authority is not recognized in the civil settlement (even if complainant withdraws their complaint in the private settlement), the investigation will continue, and a determination will be made based on the best available evidence.

HIOSH settlement policies include the use of disposition letters or 89-day letters, which help track the investigation process and reminds the parties of the option to settle the case instead of receiving formal findings. Additionally, the settlement process can benefit from the near completion of the investigation, potentially leading to more balanced and informed negotiations. However, parties may choose to settle before or even after the 90-day statutory timeframe for HIOSH to complete the investigation.

III. Settlement Procedure

A. Requirements

Requirements for settlement agreements are:

1. The settlement agreement must be in writing and the settlement must be knowing and voluntary, provide appropriate relief to Complainant, and be consistent with public policy, i.e., the settlement agreement must not be repugnant to HRS § 396-8(e) and must not undermine the protection that the statute provides.

2. Every HIOSH settlement agreement must be signed by the Administrator.

3. In every employer-employee agreement, the settlement approval letter must be signed by the Administrator.

4. Every settlement agreement must be signed by Respondent(s).

5. Every settlement agreement must be signed by Complainant.

6. Employer-employee settlements must be submitted to HIOSH for review and approval.

B. **Adequacy of Settlements**

The standards outlined below are designed to ensure that settlement agreements in whistleblower cases meet HIOSH's requirements. The appropriate remedy in each case should be explored and, if possible, documented. A Complainant may accept less than full restitution to resolve the case more quickly. Concessions by both Complainant and Respondent are inevitable to accomplish a mutually acceptable and voluntary resolution of the matter.

1. **Knowing and Voluntary**

   Complainant and Respondent must enter into the settlement agreement voluntarily, with an understanding of the terms of the settlement agreement and, if desired, an opportunity to consult with counsel or other representative prior to signing the settlement agreement.

2. **Reinstatement & Monetary Remedies**

   The settlement agreement must specify the remedies for Complainant, which may include reinstatement, back pay, front pay, damages, attorney fees, or other monetary relief. Alternatively, the settlement agreement may specify payment of a lump sum amount to Complainant or the payment of separate lump sum amounts to Complainant and Complainant's counsel. It is recommended that the settlement

agreement expressly state the allocation of payment between wages and other amounts.[23]

C. **Other Remedies**

A variety of non-monetary remedies may be appropriate to include in a settlement agreement to make the employee whole and/or to remedy the chilling effect of retaliation in the workplace. Common non-monetary remedies that HIOSH may seek in a settlement include the following, although additional non-monetary remedies may be appropriate as well:

a. The expungement of any warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in Complainant's personnel file or other records, and/or requiring the employer to change a Complainant's personnel file to simply state that employment ended and to note the date employment ended rather than that Complainant was discharged;

b. The agreement of Respondent, and those acting on Respondent's behalf, to provide at least a neutral reference (e.g., title, dates of employment, and pay rate) to potential employers of Complainant, to refrain from any mention of Complainant's protected activity, and to refrain from saying or conveying to any third party anything that could be construed as damaging the name, character, or the employment prospects of Complainant.

c. Posting of a notice to employees stating that Respondent agrees to comply with HRS § 396-8(e) and/or posting of an informational poster or fact sheet about the statute. Postings should be readily available to all employees, e.g., posted on a bulletin board or distributed electronically.

d. Training of managers and employees regarding employees' right to report potential violations of the law without fear of retaliation under HRS § 396-8(e).

D. **Consistent with Public Interest**

As explained below (see Chapter 7.VI.E, *Criteria for Reviewing Employer-Employee Settlement Agreements*), HIOSH will not enter into or approve a settlement agreement that contains provisions that it believes are inconsistent with HRS § 396-8(e) or contrary to public policy.

E. **Tax Treatment of Amounts Recovered in Settlement**

Complainant and Respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with

[23] Failure to expressly identify the payments that are made for restitution or to come into compliance with the law (e.g., wages, compensatory damages) may affect the tax treatment of such payments. See 26 U.S.C. § 162(f)(2)(A)(ii).

applicable tax law.[24] HIOSH is not responsible for advising the parties on the proper tax treatment or tax reporting of payments made to resolve whistleblower cases.

1. The investigator should inform parties that HIOSH cannot provide Complainants or Respondents with individual tax advice and that the parties are responsible for compliance with applicable tax law and may need to seek advice from their own tax advisers.

2. The investigator can talk with parties generally about the potential taxability of settlement amounts, including (1) the possibility of the employer withholding applicable taxes for settlement payments made for restitution or to come into compliance with the law (e.g., wages, compensatory damages) and (2) the parties' responsibility to report and pay any applicable taxes on settlement amounts.

3. The investigator should try to ensure that the settlement agreement expressly states the allocation of payment that is made for restitution or to come into compliance with the law (e.g., wages, compensatory damages). This will help determine the taxability of settlement amounts later if it becomes an issue.

IV. HIOSH Settlement Agreement

A. General Principles

Whenever possible, the parties should be encouraged to use HIOSH's standard settlement agreement containing the elements outlined below.

B. Specific Requirements

A HIOSH settlement agreement:

1. Must be in writing.

2. Must stipulate that Respondent agrees to comply with HRS § 396-8(e).

3. Must document the agreed-upon relief.

4. Must be signed by Complainant, Respondent, and the Administrator (or designee).

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[24] 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: https://www.irs.gov/pub/lanoa/pmta2009-035.pdf. Further additional information is also available on the IRS's website: https://www.irs.gov/government-entities/tax-implications-of-settlements-andjudgments. The parties may also wish to refer to OSHA's *Taxability of Settlements Desk Aid* (Sept. 30, 2015), available at https://www.whistleblowers.gov/memo/2015-09-30. However, OSHA notes that these guidance documents may change in the future.

5. Should include whenever possible measures to address the chilling effect of the alleged retaliation in the workplace. Remedies to address the chilling effect of the alleged retaliation are particularly important in instances in which Complainant does not return to the workplace as a result of the settlement agreement. Appropriate remedial provisions to alleviate the chilling effect of retaliation in the workplace, such as postings and training of employees and managers are discussed further below (see next section, 7.IV.D). Model provisions can also be found in HIOSH's standard settlement template.

6. Should include a single payment of all monetary relief due to Complainant whenever possible. If Respondent sends the payment directly to Complainant (e.g., as a direct deposit), the investigator will obtain a confirmation of payment (e.g., a deposit slip or copy of the check) from Complainant or Respondent. If Respondent sends the payment to HIOSH, the investigator will promptly note receipt of any check, copy the check for inclusion in the case file, and mail or otherwise deliver the check to Complainant.

C. **Use of Disposition Letter (89-day letter)**

Prior to the 90-day period for completing the investigation, the investigator will contact both the Complainant and the Respondent to inquire if they are interested in exploring a settlement. This proposal is made with the understanding that both parties have submitted all relevant evidence and are open to exploring alternatives to the continuance of the investigation.

1. If both parties agree and indicate their intent to discuss settlement, the investigator will meet with each party individually to address issues such as renumeration and reinstatement for Complainant.

2. The investigator will also emphasize that the agency is a party to the settlement, making it imperative to ensure the provisions of HRS § 396-8(e) are preserved and upheld for all workers.

3. If the parties are unable to reach as settlement within a defined period (typically a month), the investigator shall document all settlement efforts, including the final numbers proposed by each side.

4. The investigator shall then inform the parties that, despite good faith efforts on both sides to reach a settlement (with any unreasonable demands documented in the file), the agency will proceed to issue its findings along with information on appeal rights.

5. Such documentation shall be included in the case file for potential use in the event of an appeal and made available for the DAG to review, if applicable.

6. The terms of the settlement shall adhere to the standard HIOSH settlement guidelines for whistleblower/discrimination cases outlined below.

D. **Provisions of the Agreement**

In general, much of the language of the HIOSH settlement agreement should not be altered, but certain sections may be altered or removed to fit the circumstances of the complaint or the stage of the investigation. The following are the typical provisions in a HIOSH settlement agreement.

1. POSTING OF NOTICE. A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirement of HRS § 396-8(e) pursuant to a settlement agreement. (Optional)

2. COMPLIANCE WITH NOTICE**.** A provision stating that the respondent will comply with all of the terms and provisions of the Notice. (Optional)

3. POSTING OF AN INFORMATIONAL POSTER. A provision requiring Respondent to post an appropriate poster, which may include the mandatory HIOSH Law poster, or any appropriate fact sheet that summarizes the rights and responsibilities under the HIOSH-enforced discrimination/whistleblower statute.[25] (Optional)

4. TRAINING. A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under HRS § 396-8(e). (Optional)

5. NON-ADMISSION. A provision stating that, by signing the agreement, Respondent does not admit or deny violating any law, standard, or regulation enforced by HIOSH. (Optional)

6. REINSTATEMENT. This section may be omitted if reinstatement is not a possible remedy in the case. Otherwise, the settlement agreement should include one of the two options below: [If accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].

    a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have had but for the alleged retaliation. Complainant has [declined/accepted] reinstatement.

    b. Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.

[25] The HIOSH Law poster, which provides information about Section 8(e) and other rights under the HIOSH Law, is mandatory. HRS § 396-6(f).

7. MONIES. This section may be omitted if monetary relief is not a part of the settlement. The parties should choose one of the options for monetary relief in the standard settlement agreement to indicate either:

   a. the payment of a specified amount of back pay;

   b. the payment of a specified lump sum amount; or

   c. a combination of a specified payment of back pay and a specified payment of a lump sum.

   In unique circumstances, with supervisory approval, it may be appropriate for the parties and HIOSH to craft alternative provisions regarding the payment of money to Complainant. The settlement agreement should expressly identify the payments that are made for restitution or to come into compliance with the law (e.g., wages). See 26 U.S.C. § 162(f)(2)(A)(ii).

8. PERSONNEL RECORD**.** The settlement should include a provision expunging Respondent's records of references to Complainant's protected activities as well as any adverse actions taken against Complainant and requiring that Respondent provide Complainant with at least a neutral reference. The precise terms of this provision may vary depending on the facts of the case.

9. ENFORCEABILITY. The settlement must state the following:

   Respondent's violation of any terms of the settlement may prompt further investigation and the filing of an action by the Director in the appropriate district court under the statute. This Agreement shall be admissible in such an action. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.

10. CONFIDENTIALITY. Settlement agreements must not contain provisions that state or imply that HIOSH is a party to a confidentiality agreement. Complainant and Respondent may agree that each of them will keep the settlement agreement confidential and may ask HIOSH to regard the agreement as potentially containing confidential business information exempt from disclosure under UIPA. In those circumstances, the agreement should contain a statement such as the following:

    Complainant and Respondent have agreed to keep the settlement confidential. The settlement agreement is part of HIOSH's records in this case and is subject to disclosure under UIPA, unless an exemption applies. Complainant and Respondent have requested that HIOSH designate the agreement as

containing potentially confidential information and request pre-disclosure notification of any UIPA request pursuant to Haw. Code R. 2-71-15

The agreement must be maintained in the case file and should be clearly marked as potentially containing business confidential information exempt from disclosure under UIPA.[26]

11. NON-WAIVER OF RIGHTS

The standard language reaffirming Complainant's right to engage in activity protected under HIOSH's whistleblower statute may be included in the agreement:

Nothing in this Agreement or in any separate agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct or engage in any future activities protected under HRS § 396-8(e) administered by HIOSH.

In some cases, it may also be appropriate to add:

Nothing in this Agreement or in any separate agreement is intended to or shall prevent, impede, or interfere with Complainant's filing of a future claim related to an exposure to a hazard, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date Complainant signed this agreement.

E. **Side Agreements**

In some instances, Complainant and Respondent in a whistleblower case may negotiate to resolve multiple claims arising from Complainant's employment, including a claim under HRS § 396-8(e). In those instances, HIOSH prefers that the parties use the HIOSH settlement agreement to resolve the whistleblower claim pending before HIOSH. If the parties' separate agreement contains terms relevant to settlement of the whistleblower case, the separate agreement must be submitted to HIOSH for approval (see Chapter 7.V., *Employer-Employee Settlement Agreements*) and the HIOSH standard settlement agreement may incorporate the relevant (approved) parts of the employer-employee agreement by reference. This is achieved by inserting the following paragraph in the HIOSH standard settlement agreement:

Respondent and Complainant have signed a separate agreement encompassing matters not within the Hawaii Occupational Safety and Health Division's (HIOSH's)

[26] HRS § 92F-13 lists exceptions to public disclosure, which may include cases where the disclosure would frustrate a legitimate government function or involve clearly unwarranted invasions of personal privacy.

authority. HIOSH's authority over that agreement is limited to the statute within its authority. Therefore, HIOSH approves and incorporates in this agreement only the terms of the other agreement pertaining to HRS § 396-8(e) 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 the Director's authority.

F. **OIS-Whistleblower Recording**

All cases utilizing HIOSH settlement agreement, including those that also contain a side agreement as explained above, must be recorded in the OIS-Whistleblower as "Settled."

V. Employer-Employee Settlement Agreements

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 employer-employee settlements.

In most circumstances, a HIOSH settlement agreement is optimal. As explained above, if the parties are amenable to signing one, the HIOSH settlement agreement may incorporate the relevant (approved) parts of an employer-employee agreement by reference. See Chapter 7.IV.E., *Side Agreements* above.

A. **Review Required**

Settlement agreements reached between the parties must be reviewed and approved by the Administrator (or designee) to ensure that the settlement agreement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement must not be repugnant to HRS § 396-8(e) and not undermine the protection that the whistleblower statute provides. 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 HRS § 396-8(e) under which the complaint was filed. 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.

If the parties do not submit their agreement to HIOSH or will not submit an agreement that HIOSH can approve, HIOSH may dismiss the complaint. The dismissal will 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. Alternatively, if HIOSH's investigation has already gathered sufficient evidence for HIOSH to conclude that a violation occurred, or in other appropriate

circumstances, such as where there is a need to protect employees other than Complainant, HIOSH may issue merit findings or continue the investigation. The findings will note the failure to submit the settlement to HIOSH or HIOSH's decision not to approve the settlement. The determination should be recorded in OIS-Whistleblower as either dismissed or merit, depending on HIOSH's determination.

B. **Required Language**

The settlement agreement must state the following:

> *Respondent's violation of any terms of the settlement may prompt further investigation and the filing of a civil action by the Director in an appropriate state court under the statute. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. This Agreement shall be admissible in such an action. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.*

The approval letter for employer-employee settlement agreements must include the following statement:

> *The Hawaii Occupational Safety and Health Division's authority over this agreement is limited to the statute it enforces. Therefore, the Hawaii Occupational Safety and Health Division approves only the terms of the agreement pertaining to HRS § 396-8(e).*

This last sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under HIOSH's authority.

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 UIPA, unless one of the UIPA exemptions applies.

C. **Complaint Withdrawal Request**

If Complainant requests to withdraw the whistleblower complaint, the investigator should inquire whether the withdrawal is due to settlement. If the withdrawal is due to settlement, the investigator must inform the parties that the settlement agreement must be submitted for approval. Upon review, HIOSH may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The investigator should also advise the parties that upon HIOSH's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed. If parties fail to submit the settlement agreement for approval, the investigator should follow the procedures in section V.A., *Review Required* (above).

D. **OIS-Whistleblower Recording for Employer-Employee Settlements**

Any case in which HIOSH approves an employer-employee settlement agreement must be recorded in OIS-Whistleblower as "Settled – Other**."**

Investigators should make every effort to obtain signatures on the HIOSH standard agreement in cases where parties have signed an employer–employee settlement agreement. If a case involves both agreements (a HIOSH settlement and an employer-employee agreement), it should be recorded in OIS as "Settled."

E. **Criteria for Reviewing Employer-Employee Settlement Agreements**

To ensure that settlement agreements are entered into knowingly and voluntarily, provide appropriate relief to Complainant, and are consistent with public policy, HIOSH must review unredacted settlement agreements in light of the particular circumstances of the case. The criteria below provide examples rather than an all-inclusive list of the types of terms that HIOSH will not approve in a settlement agreement negotiated between Complainant and Respondent. As previously noted, HIOSH prefers that parties use the HIOSH settlement agreement whenever possible, as that agreement does not contain **terms that HIOSH cannot approve:**

1. PARTY TO A CONFIDENTIALITY AGREEMENT. HIOSH will not approve a provision that states or implies that HIOSH or the DLIR is party to a confidentiality agreement. Complainant and Respondent may agree that each of them will keep the settlement agreement confidential and may ask HIOSH to regard the agreement as potentially containing confidential business information exempt from disclosure under UIPA. In those circumstances, the settlement or HIOSH's approval letter will contain a statement such as the following:

   Complainant and Respondent have agreed to keep the settlement confidential. The parties are advised that the settlement agreement is part of HIOSH's records in this case and is subject to disclosure under UIPA unless an exemption applies. The parties have requested that HIOSH designate the agreement as containing potentially confidential information and request predisclosure notification of any UIPA request pursuant to Haw. Code R. 2-71-15.

   The approval letter should be maintained in the case file with the settlement agreement and the settlement agreement should be clearly marked as potentially containing business confidential information exempt from disclosure under UIPA.

2. GAG PROVISIONS. HIOSH will not approve a "gag" provision that prohibits, restricts, or otherwise discourages Complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. Potential "gag" provisions often arise from broad confidentiality or non-disparagement clauses, which

Complainants may interpret as restricting their ability to engage in protected activity. Other times, they are found in specific provisions, such as the following:

a. A provision that restricts Complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on Respondent's past or future conduct. For example, HIOSH will not approve a provision that restricts Complainant's right to provide information to the government related to an occupational injury or exposure.

b. A provision that requires Complainant to notify their employer before filing a complaint or communicating with the government regarding the employer's past or future conduct.

c. A provision that requires Complainant to affirm that they have not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage Complainants from engaging in protected activity.

d. A provision that requires Complainant to waive their right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. HIOSH will also not approve a provision that requires Complainant to remit any portion of such an award to Respondent. For example, HIOSH will not approve a provision that requires Complainant to transfer award funds to Respondent to offset payments made to Complainant under the settlement agreement.

When these types of provisions are encountered, or settlements have broad confidentiality and non-disparagement clauses that apply "except as provided by law," employees may not understand their rights under the settlement. Accordingly, HIOSH will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement:

Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statute administered by HIOSH, or to receive and fully retain a monetary award from a government-administered whistleblower award program (such as, but not limited to, the SEC or IRS whistleblower award programs) for providing information directly to a government agency.

In some cases, it may also be appropriate to add:

Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant's filing a future claim related to an exposure, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to Complainant on the date they signed this Agreement.

3. LIQUIDATED DAMAGES. HIOSH occasionally encounters settlement agreements that require a breaching party to pay liquidated damages. HIOSH may refuse to approve a settlement agreement where the liquidated damages are clearly disproportionate to the anticipated loss to Respondent from a breach. HIOSH may also consider whether the potential liquidated damages would exceed the relief provided to Complainant, or whether, owing to Complainant's position and/or wages, they would be unable to pay the proposed amount in the event of a breach.

4. OVERLY BROAD TERMS.

   a. CLAIMS AND PARTIES RELEASED. HIOSH will typically approve a settlement agreement that contains a general release of employment-related claims against Respondent with the understanding that OSHA's approval is limited to the settlement of the claims under the whistleblower statute that it enforces. Because a general release cannot apply to future claims, HIOSH prefers that a general release explicitly state that Complainant is releasing only employment-related claims that Complainant knew of as of the date of the settlement agreement. In addition, HIOSH occasionally encounters settlement agreements that are extremely broad as to the parties released by the agreement or the claims released by the agreement, such as settlements containing terms that would release affiliates of Respondent unconnected to either Complainant's employment with Respondent or the protected activity alleged in the complaint or claims unconnected to Complainant's employment with Respondent. In order to ensure that Complainant's consent to the settlement is knowing and voluntary, HIOSH may require that Respondent clearly list in the agreement the entities and/or individuals (e.g. the subsidiaries, affiliates, partners, directors, agents, attorneys, insurers, etc.) that are being released or provide more specific information regarding the claims that are being released.

   b. TAX ISSUES. HIOSH occasionally encounters settlement agreements that have broad language relating to tax issues, e.g., requiring Complainant to indemnify and/or hold Respondent harmless for all taxes except those for which Respondent is solely liable. In order to ensure that the settlement agreement is not so vague regarding Complainant's potential liability that

Complainant's consent cannot be regarded as knowing and voluntary, when HIOSH encounters such a term, HIOSH will request that the parties (1) omit the term from their agreement, or (2) substitute a term that states that both parties are solely responsible for their own tax obligations on monies paid under the settlement agreement and/or (3) substitute a term that states that Complainant is solely liable for Complainant's tax obligations and will hold Respondent harmless if Complainant fails to comply with any legal obligations to report and pay taxes on the amount that Complainant is receiving under the settlement agreement.

5. CHOICE OF LAW. Employer-employee settlement agreements sometimes contain a "choice of law" provision that states that the settlement is to be governed by the laws of a particular state. HIOSH may approve an agreement that contains this term as long as the choice of law provision states that it does not limit the applicability of federal law under the HIOSH whistleblower statute. Where HIOSH encounters a choice of law provision, it will request that the parties insert the following language:

   This provision does not limit the applicability of federal law under HRS § 396-8(e).

   If the parties do not revise the agreement to include the language above, HIOSH's approval letter should note that the settlement agreement contains a choice of law provision and that this provision does not limit the applicability of federal law under HRS § 396-8(e).

6. WAIVER OF FUTURE EMPLOYMENT. 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 Complainant from working in their chosen field and/or in the locality where they reside? Consideration should include whether Complainant's skills are readily transferable to other employers or industries. Waivers that narrowly restrict future employment for a limited time to a single, discrete employer may be less problematic than broader waivers. Thus, an agreement limiting Complainant's future employment to a single employer is less problematic than a waiver that would prohibit Complainant from working for any companies with which Respondent does business.

   b. **Fairness.** The investigator must ask 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?" Complainant also should be asked whether they believe that there are any other concessions made by Respondent in the settlement that, taken together with the monetary

payment, fairly compensates for the waiver of employment. The case file must document Complainant's replies and any discussion thereof.

c. **The amount of the remuneration.** Does Complainant receive adequate consideration in exchange for the waiver of future employment.

d. **The strength of the complainant's case.** How strong is Complainant's retaliation case, and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver, unless it is very well remunerated. Consultation with DAG may be advisable.

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

f. **Comprehension and acceptance of the waiver**. If Complainant is not represented, the investigator must ask Complainant they understand the waiver and if they 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, threats made to persuade Complainant to agree, or additional monies or forgiveness of debt promised as an additional incentive.

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

VI. Bilateral Agreements

A bilateral settlement is one between a government agency, such as the U.S. Department of Labor (DOL), signed by the Regional Administrator (or designee) and Respondent—without Complainant's consent—to resolve a complaint filed under a whistleblower statute. Unlike federal OSHA, HIOSH cannot enter into a bilateral settlement. Specifically, under HRS § 396-8(e)(8), this section states that a Complainant may pursue their rights through civil action in court regardless of any investigation or action taken by HIOSH. A bilateral settlement agreement between HIOSH and a Respondent, signed by the Administrator without the Complainant's consent, may be prohibited because it could undermine the Complainant's right to seek legal recourse.

Legally, HIOSH must ensure that its enforcement actions do not conflict with or impede Complainant's ability to pursue their claims in court. This protection is crucial to uphold the integrity of both administrative and judicial processes. Therefore, while HIOSH can resolve

complaints through its own mechanisms, it must do so in a manner that respects the Complainant's rights. Entering into a bilateral settlement without the Complainant's consent could be viewed as conflicting with their ability to litigate.

HIOSH's inability to enter into bilateral agreements without Complainant's consent is rooted in the legal principle of ensuring that Complainants maintain their right to a private cause of action, as provided under the statute.

VII. Enforcement of Settlements

If there is a breach of a settlement agreement that HIOSH has entered into or approved, depending on the status of HIOSH's investigation or any subsequent proceedings at the time the settlement was reached, HIOSH staff may either reopen the whistleblower investigation or refer the matter to DAG to pursue court-ordered enforcement. The additional work is a continuation of the original case. HIOSH does not open a new case to deal with the breach of a settlement agreement**.**

If there is a breach of a settlement agreement, the supervisor generally should consult with DAG. HIOSH may also inform the parties that violation of a settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court. HIOSH staff will, after appropriate consultation with DAG, evaluate the case to determine how to proceed.

1. If the case settled before the merits of the complaint could be determined, the case may be reopened and investigated.

2. If the case had already been determined to have merit before the settlement was reached, the case may be referred to DAG for review.

3. If the case was settled after the case had been determined to have merit and the settlement agreement was approved, then HIOSH generally will refer the case to DAG to obtain further relief from the court.

4. 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.

CHAPTER 8

OSHA'S ROLE IN HIOSH WHISTLEBLOWER CASES

I. Scope

The purpose of this chapter is to describe the procedures for the coordination of cases involving section 11(c) and HIOSH enforcement of HRS § 396-8(e). An explanation of the substantive and procedural provisions of section 11(c) can be found in the section 11(c) desk aid. The other chapters of this manual provide guidance on the investigation of HIOSH whistleblower cases and making determinations in those cases.

Regulations pertaining to federal OSHA's administration of section 11(c) of the OSH Act are contained in 29 CFR Part 1977. The regulations most pertinent to Federal-State coordination on occupational safety or health retaliation cases are at 29 CFR 1977.18 (arbitration or other agency proceedings) and 29 CFR 1977.23 (State Plans).

II. Relationship to OSHA

A. General

Section 18 of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §667, provides that any State[27] wishing to assume 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 a whistleblower provision as effective as OSHA's Section 11(c) ("section 11(c) analog"). Therefore, in State Plans that cover the private sector, employees may file occupational safety and health whistleblower complaints with federal OSHA, the State Plan, or both.

B. State Plan Coverage

The Hawaii State Plan covers both state and local government employees, as well as most private sector workers, with the exception of those in maritime employment and contractors working on federal property, such as Hawaii's national parks, military installations, and contractors engaged in United States Postal Service mail operations.

C. Overview of the 11(c) Referral Policy

[27] Under the OSH Act the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. 29 U.S.C. § 652(7). Pursuant to the Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Article V, section 502(a), as contained in Pub. L. 94-24, 90 Stat. 263 (Mar. 24, 1976) [citations to amendments omitted], generally applicable laws applicable to Guam apply to the Northern Marianas as they do to Guam. Therefore, the Commonwealth of the Northern Mariana Islands is also a "State" under the OSH Act.

Under 29 CFR 1977.23 OSHA may refer section 11(c) complaints to HIOSH. It is OSHA's long-standing policy to refer section 11(c) complaints to HIOSH for investigation. Thus, rarely do both federal OSHA and HIOSH investigate a complaint.

D. **Exemption to the Referral Policy**

Utilizing federal whistleblower protection enforcement authority in some unique situations is appropriate. Examples of such situations are summarized below:

1. **Multi Statute Complaint:** If federal OSHA receives a complaint that is covered by section 11(c) and another OSHA whistleblower statute, federal OSHA will not refer the case to HIOSH. However, federal OSHA should notify HIOSH that it has received the complaint and will be conducting the investigation.

   However, if the occupational safety or health retaliation portion of the complaint is untimely under section 11(c) but timely under HIOSH, OSHA will split the case and refer that portion to HIOSH. OSHA will continue its investigation under the other statute(s).

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

3. **Multi-State Contacts:** When federal OSHA encounters a section 11(c) case with multi-state contacts and one or more of the states is HIOSH, it is best to avoid the complexities HIOSH may face in attempting to cover the case. For example, if the unsafe conditions which the employee complained about are not within HIOSH jurisdiction, HIOSH may have a coverage problem. Another problem relates to the possible inability of the HIOSH to serve process on the employer because the employer is headquartered in another state; this may often happen with construction businesses. The nation-wide applicability of section 11(c) solves these problems. Federal OSHA must take such cases and should communicate with HIOSH when it does so.

4. **Inadequate Enforcement of Whistleblower Protections:** When federal OSHA receives a section 11(c) complaint concerning an employee covered by a State Plan, the Regional Administrator (RA) may determine, based on monitoring findings or legislative or judicial actions, that a State Plan does not adequately enforce whistleblower protections or fails to provide protection equivalent to that provided by federal OSHA policies, e.g., a State Plan does not protect internal

complaints. In such situations, the RA may elect to process private-sector section 11(c) complaints from employees covered by the affected State Plan in accordance with procedures in non-plan states.

E. **Referral Procedures: Complaints Received by Federal OSHA.**

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

1. **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 HIOSH. Except as otherwise provided, when such a complaint is received by federal OSHA, the complaint will be administratively closed as a federal section 11(c) complaint. The date of the filing with federal OSHA will be recorded in OIS-Whistleblower. The case will then be referred to the State Plan, generally where Complainant's workplace is located, for handling.

Complaints that on their face implicate only section 11(c) and HIOSH's section 11(c) analog (HRS § 396-8(e)) should be immediately referred to HIOSH. The requirement of a screening interview is waived with such complaints.

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

2. **Referral of Public Sector Complaints**

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

3. **Filing Periods in HIOSH**

As of the date of this publication, the period to file a whistleblower complaint with HIOSH, as established by statute is 60 days. Please refer to the other individual State Plan statutes for current filing periods and potential extensions.

F. **Procedures for Complaints Received by HIOSH**

In general, a section 11(c) analog complaint received directly from a Complainant by HIOSH will be investigated by HIOSH and will not be referred to federal OSHA, unless it falls under one of the exceptions to State Plan coverage as stated above. HIOSH may not request federal OSHA to handle a section 11(c) case after the expiration of the section 11(c) filing period if the complaint was not timely dually filed by Complainant with federal OSHA.

1. **Notifying Complainants of Right to File Federal Section 11(c) Complaint**

Because employers in HIOSH jurisdiction do not use the federal OSHA poster, HIOSH must advise private-sector Complainants of their right to file a federal section 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to federal protection. This may be accomplished through such means as the following language in the letter of acknowledgment or a handout sent or given to Complainant:

If you are or were employed in the private sector, 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 receiving notice of the retaliatory act. If you do not file a retaliation complaint with OSHA within the specified time, you will waive your rights under federal OSHA's section 11(c). Although OSHA will not conduct an investigation while HIOSH is handling the case, filing a federal complaint allows you to request a federal review of your retaliation claim if you are dissatisfied with the state's final determination. A final determination is a final decision of the investigating office or a decision of a tribunal (e.g. HLRB, the Hawaii Intermediate Court of Appeals, or the Hawaii Supreme Court), whichever comes later. As part of the federal review, OSHA may conduct further investigation. If the U.S. Labor Department (DOL) finds merit, DOL may file suit in federal district court to obtain relief. To file such a complaint, contact the OSHA Regional Office indicated below:…

2. **Notification of Federal Review Option at Conclusion of State Plan Investigation**

At the conclusion of each whistleblower investigation, HIOSH must notify Complainant of the determination in writing and inform them of the process for requesting review by the state. If a timely complaint was also filed with federal OSHA, the determination letter should inform Complainant as follows:

Should you disagree with the outcome 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 a final determination has been made by the state investigation office after exercise of the right to appeal the state's determination or a final decision of a tribunal (e.g. HLRB, the Hawaii Intermediate Court of Appeals, or the Hawaii Supreme Court) whichever comes later. The request for federal review must be made in writing to the OSHA Regional Office indicated below and postmarked within 15 calendar days after your receipt of this final decision. If you do not request a federal review in writing within the 15 calendar-day period, you will have waived your right to a federal review.

3. **Federal Whistleblower Statutes Other than Section 11(c)**

   OSHA expects that, where applicable, HIOSH will make Complainants aware of their rights under the federal whistleblower protection statutes (other than section 11(c)) enforced by federal OSHA, which protect activity dealing with other federal agencies and which remain under federal OSHA's exclusive authority. For information on Complainants' rights under other federal whistleblower statutes enforced by federal OSHA, go to https://www.whistleblowers.gov/statutes

G. **Properly Dually Filed Complaint**

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

H. **Activating Properly Dually Filed Complaints**

Complainants who have concerns about HIOSH's investigation of their whistleblower complaints may request federal review of the HIOSH investigation. Such a request may only be made after any right to appeal has been exercised through HLRB and further through the state's court system. A final decision is either one reached by the investigating office or a decision of a tribunal (e.g. HLRB, Hawaii Intermediate Court of Appeals, or Hawaii Supreme Court), whichever comes later.

The request for a federal review must be made in writing to the OSHA Regional Office and postmarked within 15 calendar days after receipt of the state's final decision. If the request for federal review is not timely filed, the federal section 11(c) case will remain administratively closed.

III. Federal Review Procedures

A **federal review** is the review by OSHA of HIOSH's case file of a dually filed complaint after Complainant has met the criteria below in section A. As part of the review, a case may be sent back to the state so that the state may attempt to correct any deficiencies. If, after the federal

review of the HIOSH case file, federal OSHA determines that the state's proceedings met the criteria listed below in section C, it may simply defer to the state's findings (see section D below). Alternatively, if federal OSHA determines that the state's investigation was inadequate or that the Complainant's rights were not protected in any other way, federal OSHA will conduct a full investigation (see section E below).

A. **Complainants Request for Federal Review**

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

1. Confirm that the complaint is, in fact, a dually filed complaint. That is: Complainant filed the complaint with federal OSHA in a timely manner. Complaints submitted through the OSHA Online Complaint form are considered filed with federal OSHA.

2. A final determination has been made by the state. A final determination is a final decision of the investigative office after a review of an initial determination or a final decision of a tribunal, such the HLRB, the Hawaii Intermediate Court of Appeals, or the Hawaii Supreme Court.

3. Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's final determination; and

4. Complaint is covered under section 11(c).

B. **Complaints Not meeting Federal Procedural Prerequisites for Review**

1. If upon request for federal review, the case does not meet the prerequisites for review, Complainant will be notified in writing that no right for review by OSHA will be available. In that notification, Complainant will be informed of the right to file a Complaint About State Program Administration (CASPA), which may initiate an investigation of HIOSH's handling of the case, but not a section 11(c) investigation and, therefore, will not afford individual relief to Complainant.

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

C. **Federal Review**

The OSHA federal review will be conducted as follows:

Under the basic principles of 29 CFR 1977.18(c), in order to defer to the results of the state's proceedings, it must be clear that:	The state proceedings "dealt adequately with all factual issues;" **and**
	The state proceedings were "fair, regular and free of procedural infirmities;" **and**
	The outcome of the proceeding was not "repugnant to the purpose and policy of the Act."

The federal review will entail a scrutiny of all available information, including HIOSH's investigative file. OSHA may not defer to the state's determination without considering the adequacy of the investigative findings, analysis, procedures, and outcome. If appropriate, as part of the review, OSHA may request that the case be reopened and the specific deficiencies be corrected by HIOSH.

D. **Deferral**

If HIOSH's proceedings meet the criteria above, federal OSHA may simply defer to the state's findings. Complainant will be notified and requests for review by the Directorate of the Whistleblower Protection Programs (DWPP) will not be available. The closing notification will use both federal OSHA's existing, administratively closed case number and HIOSH's case number in its subject heading. Federal OSHA shall copy Respondent on the closing notification. Federal OSHA will note the federal review and the deferral in the original, preexisting federal OSHA OIS-Whistleblower entry. No new case will be opened or new entry added into OIS-Whistleblower.

E. **No Deferral/New Investigation**

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

IV. State Plan Evaluation

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

A. CASPA Procedures

1. OSHA's State Plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of HIOSH's State Plan Program may file a Complaint About State Program Administration (CASPA).

2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a State Plan made to OSHA by any person or group. A CASPA about a specific case may be filed only after HIOSH has made a final determination, as defined above.

3. Because properly dually filed 11(c) complaints may undergo federal review under the section 11(c) procedures, no duplicative CASPA investigation is required for such complaints. If a private-sector retaliation complaint was not dually filed, it is not subject to federal review under section 11(c) procedures and is only entitled to a CASPA review. Complaints about the handling of HIOSH whistleblower investigations from state and local government employees will be considered under CASPA procedures only.

4. Upon receipt of a CASPA complaint relating to HIOSH's handling of a whistleblower case, federal OSHA will review HIOSH's investigative file and conduct other inquiries as necessary to determine if HIOSH's investigation was adequate and whether the handling of the case was in accordance with HRS § 396-8(e) and supported by appropriate available evidence. A review of the file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the HIOSH's Whistleblower Protection Program. The review should be completed within 60 days to allow time to finalize and send letters to HIOSH and Complainant within the required 90 days.

5. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future HIOSH investigations techniques, policies, and procedures. A CASPA will not be reviewed under the OSHA request for federal review process. If the OSHA Regional Office finds that the outcome in a HIOSH whistleblower case is not appropriate (i.e., final state action is contrary to federal practice and is less protective than a federal action would have been; does not follow state law, policies, and procedures; or state law, policies, or procedures are not at least as effective as OSHA's), HIOSH, within state statutes, will attempt to correct the outcome, and, whenever possible, make changes to prevent recurrence. However, HIOSH cannot legally reopen a case once a DNO becomes a final order by statute, unless ordered to do so by the HLRB. If there is a deficiency in the state statute, and the Regional Administrator along with the Directorate of Cooperative and State Programs has requested that HIOSH recommend legislative changes, HIOSH will take this into consideration.

Chapter 9

Information Disclosure

I. Uniform Information Practices Act (UIPA)

The Uniform Information Practices Act (UIPA), enacted in 1988 by the Hawaii State Legislature, closely mirrors the federal Freedom of Information Act (FOIA) of 1967. The intent of both laws is to promote the transparency and accountability of the government to its citizens. Pursuant to 92F, this chapter shall be applied and construed to promote its underlying purposes, which is to:

- *Promote the public interest in disclosure;*
- *Provide for accurate, relevant, timely, and complete government records;*
- *Enhance governmental accountability through a general policy of access to government records;*
- *Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and*
- *Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy. [L 1988, c 262, pt of §1]*

II. HIOSH Procedures

The Hawaii Occupational Safety and Health strictly follows the provisions of HRS § 92F including all amendments codified by the Hawaii State Legislature.

The Administrative Technical Support (ATS) Branch is designated and trained to handle all requests and inquiries concerning government and personal records, as defined in HRS § 92F-3. The Deputy Attorney General advises the ATS Branch Manger ad hoc to interpret and comply with the provisions of HRS § 92F.

Note: All HIOSH personnel are to report any requests under HRS 92F to the ATS Manager for tracking and processing.

ATTACHMENT A

List of UIPA Exemptions

Sections 13 and 14, Hawaii Revised Statutes, Chapter 92F[28]

Government records; exceptions to general rule, HRS § 92F-13 (1993)

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Significant privacy interest; examples, HRS § 92F-14 (2020)

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

[28] Attachment A is provided for reference purposes only and reflects the UIPA exemptions in effect at the time this directive was adopted. The most current version of the UIPA and related regulations should be consulted to determine applicable exemptions.

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

(i) The name of the employee;

(ii) The nature of the employment related misconduct;

(iii) The agency's summary of the allegations of misconduct;

(iv) Findings of fact and conclusions of law; and

(v) The disciplinary action taken by the agency;

when the following has occurred: the highest non judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision or, for decisions involving county police department officers, ninety days have elapsed following the issuance of the decision;

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all dispositions;

(8) Information comprising a personal recommendation or evaluation;

(9) Social security numbers; and

(10) Information that if disclosed would create a substantial and demonstrable risk of physical harm to an individual.