Alaska Occupational Safety & Health-*AKOSH*

Whistleblower Investigation Manual

PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER ALASKA STATUTE 18.60.089

ALASKA DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

DIVISION OF LABOR STANDARDS & SAFETY

Revised July 2013

Disclaimer

This manual is intended to provide instruction regarding some of the internal operations of the Alaska Occupational Safety and Health Program (AKOSH AKOSH), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Alaska Department of Labor & Workforce Development or the State of Alaska. Statements which reflect current Administrative Review Board or court precedents do not necessarily indicate acquiescence with those precedents.

Chapter 1
Introduction

I. Purpose

This directive sets forth and implements policy, procedures and other information on the handling of discrimination complaints by the AKOSH discrimination investigator. Specifically it deals with the rights of employees under Alaska Statue 18.60.089. The Alaska Statute provides protections similar to those of section 11(c) of the Federal Occupational Safety and Health Act which prohibits reprisals in any form, against employees who exercise rights under the federal Act.

II. Scope

This Program Directive applies AKOSH wide and specifically to the AKOSH discrimination investigator.

III. References

The whistleblower provisions of the following statutes AS 18.60.089, Prohibition against retribution and the Occupational Safety and Health Act (OSHA 11(c)), 29 CFR Part 1977 - Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act; 29 CFR Part 1978 - Interim Final Rule, AKOSH Field Operations Manual PD 12-03 Revised

IV. Cancellations

A. Alaska Program Directive PD 06-02 which adopted AKOSH Instruction DIS 0-0.9, Whistleblower Investigations Manual, August 22, 2003.

V. Functional Responsibilities

A. Responsibilities.

1. **Director of Labor Standards & Safety, Alaska Department of Labor & Workforce Development** The Director has overall responsibility for all whistleblower investigation and outreach activities, as well as for ensuring that all AKOSH personnel,

especially compliance safety and health officers (CSHOs), have a basic understanding of the rights afforded to employees under all of the whistleblower statutes enforced by AKOSH and are trained to recognize and refer whistleblower complaints to the whistleblower investigator. The Director is authorized to issue determinations and approve settlement of complaints filed under A.S 18.60.089. This authority may be re-delegated, but not lower than the Chief of Enforcement.

2. **Chief of Enforcement.** Has responsibility for supervising the work of the discrimination investigator. Under the guidance and direction of the Director of Labor Standards & Safety (LS&S), the Chief of Enforcement is responsible for implementation of policies and procedures and for the effective supervision of field whistleblower investigations, including the following functions:

   a. Receiving whistleblower complaints and promptly transmitting them to the discrimination investigator.

      The Chief of Enforcement may receive whistleblower complaints directly from complainants or from the National, Regional, and Area Offices, investigators, CSHOs, or other persons.

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

   c. Assigning whistleblower cases to individual investigators.

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

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

   f. Performing necessary and appropriate administrative and personnel actions such as performance evaluations.

   g. Reviewing final investigative reports for comprehensiveness and technical accuracy and revising closure letters to the complainant and respondent and presenting them for signature by the Director or his or her designee.

   h. At the direction of the Director, coordinating and maintaining liaison with the Alaska Department of Law, Office of the Attorney General and other governmental agencies regarding whistleblower-program-related matters within the state.

   i. Recommending to the Director changes in policies and procedures in order to better accomplish agency objectives.

3. **Investigator.** Under the direct guidance and ongoing supervision of the Chief of Enforcement, the investigator assumes the following responsibilities:

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

   b. Reviewing investigative and/or enforcement case files for background information concerning any other proceedings that relate to a specific complaint. As used in this manual, an "enforcement case" refers to an inspection or investigation conducted by an AKOSH Compliance Safety and Health Officer (CSHO) or such inspections or investigations being conducted by another agency, as distinguished from a whistleblower case.

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

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

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

   f. Applying knowledge of the legal elements and evaluating the evidence revealed, analyzing the evidence, and recommending appropriate action to the Chief of Enforcement.

   g. Composing draft closing letters to the complainant and respondent for review by the, Chief of Enforcement

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

   i. Monitoring implementation of settlement agreements and court orders, as assigned, determining specific actions necessary and the sufficiency of action taken or proposed by the respondent. If necessary, recommending that legal advice be sought on whether further legal proceedings are appropriate to seek enforcement of such settlement agreements or orders.

   j. Assisting and acting on behalf of the Director and Chief of Enforcement in whistleblower matters with other agencies or AKOSH area offices, and with the general public to perform outreach activities.

   k. Assisting in the litigation process, including preparation for

trials and hearings and testifying in proceedings.

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

4. **Office of the Commissioner of Labor & Workforce Development** Under the direction of the Governor for the State of Alaska, the Office of the Commissioner of Labor and Workforce Development performs the following functions, in addition to others that may not be listed:

   a. Developing policies and procedures for the Alaska Whistleblower Protection Program.

   b. Processing, hearing, and evaluating appeals that are to be presented to the Commissioner of Labor & Workforce Development under 8 AAC 61.530(b).

   c. Assisting in commenting on legislation on whistleblower matters.

   d. Acting as liaison between the Alaska Whistleblower Protection Program and the Federal Whistleblower Protection Program.

   e. Providing statistical information on whistleblower complaints to the public, both in response to informal requests and by publishing statistics on the Web.

   f. Processing and review of significant whistleblower cases.

5. **Compliance Safety and Health Officer (CSHO).** Each CSHO is responsible for maintaining a basic understanding of the employee protections under Alaska Statute 18.60.089 in order to advise employers and employees of their responsibilities and rights under these laws. Each CSHO must immediately notify the discrimination investigator about potential discrimination complaints and the date of initial contact by the complainant.

6. **Alaska Department of Law, Office of the Attorney General**. **(AG)** The AG provides assistance to the Director of LS&S and the Chief of Enforcement regarding cases forwarded to their office for review of their legal merits. The AG's office provides advice to the discrimination investigator, makes decisions regarding the merits of each case forwarded, and litigates those cases deemed meritorious as appropriate.

VI. Investigative Records

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

The disclosure of information in investigative records is governed by Alaska Statute 18.60.087(b), and the Alaska Public Records Statute AS 40.25.110- AS 40.25.350 (APRA), which enable public access to government records and protect personal information and other confidential data. The guidelines below are intended to ensure that the Whistleblower Protection Program meets its obligations under both of these statutes.

A. Non-public Disclosure.

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

1. During an investigation, disclosure must be made to the respondent (or the respondent's legal counsel if respondent is represented by counsel) of the complaint and any additional information provided by the complainant that is pertinent to the resolution of the complaint. If the complaint or information provided by the complainant contains personal, identifiable information about individuals other than the complainant, such information, where appropriate, should be redacted (without listing the specific exemptions that would be used if it were released under APRA) before disclosure to the respondent
2. Throughout the investigation, AKOSH will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of the respondent's submissions to AKOSH that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, AKOSH will redact them, if necessary, in

accordance with the Alaska Public Records Statute AS 40.25.120-AS 40.25.350, and other applicable confidentiality laws.

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

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

5. Appropriate, relevant, necessary and compatible investigative records may be disclosed to other state agencies responsible for investigating, prosecuting, enforcing, or implementing the general provisions of the statutes whose whistleblower provisions are enforced by AKOSH, if AKOSH deems such disclosure to be compatible with the purpose for which the records were collected.

B. Trade Secrets and Confidential Business Information (CBI)

1. A trade secret, as referenced in Alaska Statute18.60.099, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. As

such, trade secrets would rarely be at issue in whistleblower cases. However, if, during the course of an investigation, a respondent has clearly labeled and explained in writing why a document or some portion of a document submitted constitutes a trade secret, the investigator should place the document under a separate tab clearly labeled "Trade Secret." If requested, assurance may be made in writing that the information will be held in confidence to the extent allowed by law. Under AS 18.60.099, all information reported to or obtained by AKOSH in connection with any whistleblower investigation, enforcement inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other AKOSH officials.

Under AS 18.60.099, Information is considered confidential business information if it might reveal a trade secret referred to in 18 U.S.C. 1905.

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

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

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

2. In the context of whistleblower investigations, most confidential business information is obtained voluntarily (subparagraph i., above); thus, if, during the course of an investigation, a respondent has clearly labeled and explained in writing why a document submitted is confidential commercial or financial information, the investigator should place it under a separate tab prominently labeled "Confidential Business Information," or "CBI." This tab is

separate from any "Trade Secrets" tab. If the information was obtained under subpoena, it should be under a separate tab with the subpoena under which it was obtained. If requested, assurance may be made in writing that the information will be held in confidence to the extent allowed by law.

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

C. Attorney-client-privileged Information.

1. Attorney-complainants filing whistleblower complaints under A.S 18.60.089 administered by AKOSH may use privileged information to the extent necessary to prove their claims, regardless of their employer's claims of attorney-client or work-product privilege. Thus, an employer who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.

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

3. The guidance above applies only when there is an attorney-complainant and does not apply to other cases in which respondents assert attorney-client privilege. In such cases where the complainant is not an attorney for the respondent, AKOSH will not accept blanket claims of privilege. Rather, the respondent will be required to make specific, per-document claims, which AKOSH will assess and handle accordingly. If these claims are found to be reasonable, and if the respondent so requests, assurance may be made in writing that the information will be held in confidence to

the extent allowed by law.

D. Public Disclosure.

APRA requests from non-party requesters must be directed to the appropriate Records Custodian. . Upon receipt of an APRA request relating to a closed case, the Records Custodian must process the request in compliance with Alaska Public Records Statute AS 40.25.110-AS 40.25.350. See Division of Labor Standards & Safety Records Custodian Desk Reference for Whistleblower Public Records requests.
The following definitions should be used in determining whether a case is considered open or closed:

1. **Open Cases.** If a case is open, information contained in the case file may generally not be disclosed to the public. (Note: appropriate non-public disclosures are made to the parties while the case is open, as described above.) In the event that the matter has become public knowledge because the complainant has released information to the media, limited disclosure may be made to an equivalent extent, if circumstances warrant doing so. Consultation with the Alaska Department of Law or with the Federal Whistleblower Program is advisable before disclosure, especially in high-profile cases.
2. **Closed Cases.** Generally, cases under A.S 18.60.089 should be considered closed when a final determination has been made as to whether litigation will be pursued.

E. AKOSH -Initiated Disclosure.

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

Chapter 2

INTAKE AND EVALUATION OF COMPLAINTS

I. Scope

This chapter explains the general process for receipt of whistleblower complaints, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in Integrated Management Information System (IMIS).

II. Receipt of Complaint

Any applicant for employment, employee, former employee, or their authorized representative is permitted to file a whistleblower complaint under Alaska Statute 18.60.089 with AKOSH. The complaint must be in writing and must be filed with the department within 30 days after the discriminatory action per 8 AAC 61.500 *Filing discrimination complaints.* If the complainant is unable to file the complaint in English, AKOSH will accept the complaint in any language. Potential complaints received by any AKOSH office should be logged or in some manner tracked to ensure delivery and receipt by the AKOSH whistleblower investigator. . Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or FedEx tracking information, emails, and fax cover sheets. Complaints are usually received at the Commissioner's Office for Alaska Department of Labor and Workforce Development.

A. **When a complaint is received at any AKOSH office, basic information about the complaint and accurate contact information must be obtained by the receiving person and forwarded to the Whistleblower Investigator or back-up Whistleblower Investigator immediately.**. In every instance, the date of the initial contact must be recorded.

B. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the name, address, and phone number of the respondent or respondents; date of filing; date of adverse action; a brief summary of the alleged retaliation addressing the *prima facie* elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus), the statute(s) involved; and, if known, whether a safety, health, or other statutorily protected complaint has also been filed with

AKOSH or another enforcement agency.

III. Screening and Docketing of Complaints

A. Intake of Complaints.

As soon as possible upon receipt of the potential complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation. This usually requires preliminary contact with the complainant to obtain additional information or to explain to the complainant why the case cannot proceed to investigation. Complaints which pass this initial screening will be docketed for investigation. The term "docket" means to formally notify both parties in writing of AKOSH's receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the IMIS system.

1. Complaints which do not allege a prima facie allegation, or are not filed within statutory time limits will not be docketed if the complainant indicates concurrence with the decision to close the case administratively. When a complaint is thus "screened out," the investigator must document the screening interview and record the interview information in IMIS to document the reason for the 'screen out." However, if the complainant refuses to accept this determination, the case must be docketed and dismissed with appeal rights. A letter will be sent to the complainant explaining the appeal process.

2. AKOSH must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact the respondent soon after completing the intake interview and docketing the complaint if he or she believes an early resolution may be possible. However, the investigator must first determine whether an enforcement action is pending with AKOSH prior to any contact with a respondent.

B. Docketing.

The term "to docket" means to record the case in the Integrated Management Information System (IMIS). To docket the complaint, youmust enter the local case number and complaint information in IMIS and formally notify both parties in writing of AKOSH's receipt of the complaint and intent to investigate.

1. First, enter the 'local case number' by the Federal fiscal year

(October 1st thru September 30th) the complaint was filed, followed by the subsequent investigation number. For example, a complaint filed on October 1st, 2011, with the previous case investigated numbered as #11-614 would then be #12-615.

2. Cases involving multiple complainants with differing protected activities will be docketed separately and each given their own case number. The investigative evidence for one case may apply to the other and can be shared within the case files. For example, an AKOSH enforcement inspection file would be copied and placed in both case files. In addition, when interviewing witnesses, the investigator may ask a subset of questions that apply to the first complainant and a second subset of questions that might apply to the second complainant to the same witness in one interview.

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

4. Also at the time of docketing, or as soon as appropriate, the Chief of Enforcement must prepare a letter notifying the respondent that a complaint alleging retaliation has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the respondent's due process rights and the timely completion of the investigation.

   a. A copy of the whistleblower complaint should be sent to the respondent along with the notification letter. Names of non-management officials should be redacted from the complaint.

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

   c. The respondent notification may either be sent by certified U.S.

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

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

IV. Timeliness of Filing

A. Timeliness.

Whistleblower complaints must be filed in writing within 30 days of the adverse employment action. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant. The date AKOSH receives the written complaint by mail, fax, email, or in person delivery 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 relevant AKOSH Office is closed, then the next business day will count as the final day.

B. Dismissal of Untimely Complaints.

Complaints filed after the 30 day deadline will normally be closed without further investigation. However, there are certain extenuating circumstances that could justify tolling the statutory filing deadline under equitable principles. The general policy is outlined below, but each case must be considered individually. Additionally, when it appears that equitable tolling may be applicable, it is advisable for the investigator to seek concurrence from the Chief of Enforcement before beginning the investigation.

C. Equitable Tolling.

An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following reasons. However, these

circumstances are not to be considered all-inclusive, and the reader should refer to appropriate regulations and current case law for further information.

1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action in such a way as to prevent the complainant from knowing or discovering the requisite elements of a *prima facie* case, such as presenting the complainant with forged documents purporting to negate any basis for supposing that the adverse action was relating to protected activity. Mere misrepresentation about the reason for the adverse action is insufficient for tolling.
2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
3. The employee is unable to file within the required period due to a major natural or man-made disaster such as a major snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
4. The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by AKOSH with another agency that does not have the authority to grant relief
5. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to exercise rights. For example, when an employer repeatedly assured the complainant that he would be reinstated so that the complainant reasonably believed that he would be restored to his former position tolling may be appropriate. However, the mere fact that settlement negotiations were ongoing between the complainant and the respondent is not sufficient. *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010).

D. Conditions which will not justify extension of the filing period include:

1. Ignorance of the statutory filing period
2. Filing of unemployment compensation claims
3. Filing a workers' compensation claim
4. Filing a private lawsuit
5. Filing a grievance or arbitration action
6. Filing a retaliation complaint with federal OSHA or another agency that has the authority to grant the requested relief.

V. Scheduling the Investigation.

A. The Investigator will prepare the case file containing the original complaint and other evidentiary materials supplied by the complainant.

B. The investigator should generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the Chief of Enforcement.

Complainant Prima Facie Screening Letter

Sean Parnell, Governor

3301 Eagle Street

Suite 305

Anchorage, AK 99503

Department of Labor & Workforce Development
Labor Standards and Safety Division

Occupational Safety and Health Section

May 10th, 2012

Complainant
P.O Box 123
Anchorage, AK 99501

Re: AKOSH discrimination complaint filing inquiry to Anchorage, AKOSH on May 9th, 2012

Dear Mr. Complainant,

Enclosed are the AKOSH discrimination investigation forms necessary to review and screen your complaint for evidence of a prima facie discrimination under AS 18.60.089.

It is necessary that you complete these forms as best you can at this time in order that a prima facie review and screening can be initiated. It is necessary that a prima facie allegation be established prior to any full field investigation of your allegation/s.

The DOSH 126 is required in order to access your employment records and also contains a consent to release" for the department to use the information you have provided. The DOSH 15 is for writing a detailed narrative of events leading to your allegation of OSHA discrimination. You must consent to the release of your statement on the AS 18.60.087(b) statute acknowledgement otherwise the complaint will be administratively discharged. The DOSH 14 is the basic complaint form necessary to file a formal OSHA discrimination complaint. The AS 18.60.095 statute is an affirmation of truthfulness, please read and sign the acknowledgement form. A self-addressed stamped envelope is included for the return of these forms to my office.

It is necessary that you return these forms **within 30 days of your adverse employment action. Failure to return these forms in 30 days may be cause for administrative dismissal of your complaint.** If you have any questions please call me.

Sincerely,

Investigator

Enclosures: AKOSH 15,AKOSH- 126,AKOSH 14

Complainant Notification Letter

Sean Parnell, Governor

3301 Eagle Street

Suite 305

Anchorage, AK 99503

Department of Labor & Workforce Development
Labor Standards and Safety Division

Occupational Safety and Health Section

May 10, 2012

Mr. Complainant
P.O Box 123
Anchorage, AK 99501

RE: AKOSH Discrimination Complaint #12-XXX Complainant vs. Respondent

Dear Mr. Complainant,

This is to inform you that your complaint was found to have prima facie evidence of a possible violation of Alaska Statue 18.60.089(a). Your complaint has been sent to the employer, along with a charge letter, please see enclosed.

I would like to take this opportunity to thank you for your cooperation in this matter. It is, however, important for you to understand that a prima facie allegation does not necessarily mean that your complaint will ultimately be proven meritorious. At the conclusion of the investigation, a determination will be made on the merits of your case. If your complaint is found meritorious, an attempt will be made to resolve the complaint with a voluntary settlement agreement. If we are unable to resolve the complaint voluntarily, AS 18.60.089(b) provides that the Commissioner shall bring the case to court.

After receipt and review of the employer's (i.e., Respondent) formal position statement, I will contact you regarding any further investigation as warranted to include the taking of witness statements.

Please advise me promptly of any change of mailing address or telephone number.

Sincerely,

Whistleblower Investigator

Respondent Notification Letter

Sean Parnell, Governor

Department of Labor & Workforce Development
Labor Standards and Safety Division
Occupational Safety and Health Section

3301 Eagle Street
Suite 305
Anchorage, AK 99503

December 1, 2011

Respondent Name

Attn: Mr. Respondent

1234 Street Name

Anchorage, AK 99501

Contact: Investigator
e-mail
907-269-4942

Dear Mr. Respondent,

This is to inform you that on November 29th, 2011, Mr. Complainant filed a formal Occupational Safety and Health whistleblower complaint against [Respondent Name] alleging retaliatory employment practices in violation of Alaska Statute 18.60.089. Mr. Complainant alleges that he was terminated on November 28th, 2011 in retaliation for repeatedly bringing up safety and health concerns to his foreman, Mr. Smith, such as, requesting to be fit tested for a full face respirator, requesting new cartridges for his half face respirator, and pointing out that the safety shower is blocked. A copy of the complaint is enclosed.

We are presenting Mr. Complainant's complaint allegation and advising you of your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative, please have your representative complete the "Entry of Appearance" form attached hereto and forward it promptly.

Additionally, we want to inform you of Alaska Statute 18.60.095[f], which states in part, that monetary penalty and/or civil legal actions may be brought against a person who knowingly makes a false statement in this matter.

The Chief of Enforcement will act upon the recommendations of this division and, in order to reach an impartial decision. A **statement of position,** with respect to the allegation that you have retaliated against Mr. Complainant in violation of the Act, would be desirable from Respondent **no later than 10 days after receipt of this complaint notice.** Please note that a full a complete initial response, supported by documentation, may serve to help achieve early resolution of this matter. In lieu of an investigation, voluntary settlement of this matter can be affected through an early resolution agreement at any time to close the case. All

communications and submissions should be made to the investigator assigned above. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Chief of Enforcement, AKOSH

Enclosures: Copy of Complaint
Designation of Representative

Chapter 3

CONDUCT OF THE INVESTIGATION

I. Scope

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

II. General Principles

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

The investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by AKOSH. This applies not only to complainants and respondents but to other witnesses as well; quite often witnesses are unaware that they have knowledge that would help resolve a jurisdictional issue or establish an element. This is solely the responsibility of the investigator, although it assumes the cooperation of the complainant. If, having interviewed the parties and relevant witnesses and examined relevant documentary evidence, the complainant is unable to establish the elements of a *prima facie* allegation, then the case should be dismissed

III. Case File

The investigator must prepare a standard case file containing the screening documents & notes, the AKOSH 14, AKOSH 15, and AKOSH 126 complaint forms, copies of all notification letters to the complainant and respondent, and any original evidentiary material initially supplied by the complainant. All evidence, records, administrative material, photos, recordings and notes collected or created during an investigation must be maintained in a case file and cannot be destroyed, unless they are duplicates

IV. Preliminary Investigation

A Early Resolution.

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

B. Coverage & Commerce.

The investigator must ensure that the complainant and the respondent(s) are covered under AKOSH jurisdiction. It will often be necessary for the investigator to consult with the Chief of Enforcement in order to identify and resolve issues pertaining to coverage.

C. Pre-Investigative Research.

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

1. Copies of complaints filed with AKOSH or other agencies.
2. Copies of the result of any enforcement actions, including inspection reports, which were recently taken against the employer.
3. Copies of all relevant documents, including inspector's notes and employee interviews, from regulatory files administered by AKOSH or other agencies.

4. Information on any previous whistleblower complaints filed by the complainant or against the respondent.

5. Interviews and/or signed statement of the inspector.

6. Information from the company website.

D. Coordination with Other Agencies.

If information received during the investigation indicates that the complainant has filed a concurrent retaliation complaint, safety and health complaint, or any other complaint with another government agency (such as OSHA, DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the investigator should contact such agency to determine the nature, status, or results of that complaint. This coordination may result in the discovery of valuable information pertinent to the whistleblower complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

E. Other Legal Proceedings.

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

V. Weighing the Evidence.

A. Burden of Proof. The complainant has the initial burden of establishing a prima facie case showing. After the complainant has met the burden of establishing a prima facie case, the burden shifts to the employer to produce evidence of a legitimate and nondiscriminatory reason for its actions against the complainant. The complainant then must show employers, proffered reasons are pretextual or the employer is dually motivated. If there is insufficient evidence to establish that any of the elements occurred, then the investigation should be closed with appeal rights to the complainant.

B. The Elements of a Violation.

1. **Protected Activity**: It must be established that the complainant engaged in activity protected by the statute under which the complaint was filed. The complainant does not need to show that the hazard exists nor is it required that AKOSH have standards that specifically address their safety/health concern. Rather, as long as the complainant's protected activity was made in good faith and a

reasonable person could have raised the same issue, the action meets this requirement.

Protected activity generally falls into the following categories:

a. Providing information to a government agency, such as AKOSH, Federal OSHA, a supervisor (employer), a union representative, health department, fire department, or Congress. An employee has the right to participate in an AKOSH or OSHA inspection. He or she has the right to communicate with an AKOSH or OSHA compliance officer, orally or in writing.

b. Filing a complaint or instituting a proceeding provided by law, such as filing an AKOSH complaint.

c. Testifying in proceedings such as trials, hearings before the OSH Review Board, or Congressional hearings. Participating in inspections or investigations by agencies including but not limited to AKOSH.

d. Refusal to perform an assigned task. Generally a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthy, and he or she does not receive an adequate explanation from a responsible official that the conditions are safe. In order for an employee to refuse to perform a job, the following conditions must be met:

i) Has a reasonable apprehension of death or serious injury, and
ii) Refuses in good faith, and
iii) Has no reasonable alternative work task, and
iv) There is insufficient time to eliminate the condition through regular statutory enforcement channels, and
v) The employee, where possible, sought correction from his employer, and was unable to obtain, a correction of the dangerous condition.

2. **Employer knowledge**: The respondent must be shown to have been aware, or suspect, that the complainant engaged in protected activity. For example, supervisor need not have specific knowledge that the complainant contacted a regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant. Also, the investigation need not show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity.

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

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

b. The complaint item is specific to a piece of machinery that the complainant was recently injured on.

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

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

3. **Adverse Action:** The evidence must demonstrate that the complainant suffered some form of adverse action, including but not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire, failure to promote, reduction in work hours, transfer to different job or job location, or change in duties or responsibilities.

4. **Nexus:** The causal link between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited animosity) toward the protected activity or safety and health concern; proximity in time between the protected activity and the adverse action (timing); disparate treatment of the complainant compared to other similarly situated employees; false testimony or manufactured evidence; the employer did not follow its own progressive discipline policy or employee handbook related to disciplinary procedures; and pretextual defenses by the respondent, etc.

5. **Employer Defense:** After the prima facie case is established, the respondent must in order to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason e.g., poor work performance, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, AKOSH or the complainant must show by a preponderance of evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pretextual e.g., the non-safety related misconduct did not occur; other employees who engaged in similar misconduct known to management were not similarly punished; “but for” the protected activity the adverse action would not have occurred; the

misconduct was minor in nature.

6. **Dual Motive**: If it is determined that a respondent's adverse treatment of a complainant was motivated by illegal and legitimate reasons, then the dual motive test becomes applicable. The dual motive analysis may be based on either direct or circumstantial evidence of a link between an improper motive and the challenged employment decision. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of evidence that it would have reached the same decision despite the protected activity.

A. "Motivating Factor" Statutes.

The Occupational Safety and Health Act of 1970 (hereinafter 11(c)), requires a higher standard of causation – "motivating factor" - and apply the traditional burdens of proof.

1. Under this standard, the investigation must disclose facts sufficient to raise the inference that the protected activity was a motivating factor in the adverse action. AKOSH may consider on the standards derived from discrimination case law as set forth in *Mt. Healthy City School Board v. Doyle*, 429 U.S. 274 (1977) (mixed- motive analysis); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (pretext analysis); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (pretext analysis).

2. The possible outcomes of an investigation of a complaint under a motivating-factor statute are (1) a preponderance of the evidence indicates that the employer's reason for the retaliation was a pretext, and the complaint is meritorious; (2) a preponderance of the evidence indicates that the employer acted for both prohibited and legitimate reasons (that is, "mixed motives"), and—absent a preponderance of the evidence indicating that the respondent would have reached the same decision even if the complainant hadn't engaged in protected activity, the complaint is meritorious; (3) a preponderance of the evidence indicates that the employer acted for both prohibited and legitimate reasons, but a preponderance of the evidence indicates the respondent would have reached the same decision even in the absence of protected activity, and the complaint must be dismissed; or (4) a preponderance of the evidence indicates that the employer was not motivated in whole or in part by protected activity and the complaint must be dismissed. In mixed-motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated.

B. Contact with Complainant.

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

1. Activity/Telephone Log.

All telephone calls made, messages received, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the case file. This correspondence is documented on the left side of the case file under "AKOSH/CP Correspondence". The activity/telephone log tracks communications between the investigator and anyone related to the discrimination case. Not only will this be a helpful chronology and reference for the investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. (A sample of the activity/telephone log is included at the end of this chapter.) If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the investigator should document the substance of this contact and place it under the "AKOSH/CP Correspondence" tab and reference its location in the telephone log.

2. Amended Complaints.

After filing a retaliation complaint with AKOSH, a complainant may wish to amend the complaint to add additional allegations and/or additional respondents. It is AKOSH'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.** A complaint must be amended in writing. If the complainant is unable to file the amendment in English, AKOSH will accept the amendment in any language.

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

c. **Amendments Filed After Statute of Limitations Has Expired.** For amendments received after the statute of limitations for the original complaint has run, the investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional

respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment, provided that the investigation remains open. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with the implicated statute.

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

3. **Amended Complaints Distinguished from New Complaints.**

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

4. **Early Dismissal.**

If the investigator determines that the allegations are not appropriate for investigation under the covered statutes but may fall under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance. If the complaint fails to meet any of the elements of a *prima facie* allegation, the complaint must be dismissed, unless it is withdrawn.

5. **Inability to Locate Complainant.**

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

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

b. Mail a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery

confirmation) to the complainant's last known address, stating that the investigator must be contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, management may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the letter must be preserved in the file along with a copy of the letter to maintain accountability.

C. On-site Investigation.

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

If an interview is recorded electronically, the investigator must be a party to the conversation. At the Director's discretion, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and need to be included in the case file.

D. Complainant Interview.

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

1. The investigator must attempt to obtain from the complainant all documentation in his or her possession that is relevant to the case. Relevant records may include, but are not limited to:

    a. Copies of any termination notices, reprimands, warnings or

personnel actions

b. Performance appraisals

c. Earnings and benefits statements

d. Grievances

e. Unemployment benefits, claims and determinations

f. Job position descriptions

g. Company employee and policy handbooks

h. Copies of any charges or claims filed with other agencies

i. Collective bargaining agreements

j. Arbitration agreements

k. Medical records.

2. The restitution sought by the complainant should be ascertained during the interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. The complainant should be advised that the respondent's back pay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

3. If the complainant is not personally interviewed and his or her statement is taken by telephone, a detailed Memo to File will be prepared relating the complainant's testimony.

E. Contact with Respondent.

1. Often, after receiving the notification letter that a complaint has been filed, the respondent or respondent's attorney calls the investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the activity/telephone log, and, if pertinent information is conveyed during this conversation, the investigator must document it in the activity/telephone log or in a Memo to File.

2. In many cases, following receipt of AKOSH's notification letter, the respondent forwards a written position statement, which may or may not include supporting documentation. Assertions made in the respondent's position statement do not constitute evidence, and generally, the investigator must still contact the respondent to

interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense. At a minimum, copies of relevant documents and records should be requested, including disciplinary records if the complaint involves a disciplinary action.

3. If the respondent requests time to consult legal counsel, the investigator must advise him or her that future contact in the matter will be through such representative. A Designation of Representative form should be completed by the respondent's representative to document his or her involvement.

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

5. The investigator should interview all company officials who had direct involvement in the alleged protected activity or retaliation and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality. Witnesses must be advised of their rights regarding protection under the applicable whistleblower statute(s), and advised that they may contact AKOSH if they believe that they have been subjected to retaliation because they participated in an AKOSH investigation.

6. The investigator must also obtain evidence about disparate treatment, i.e., how respondent treated other employees who engaged in conduct similar to the conduct of the complainant which respondent claims is the legitimate non-discriminatory reason for the adverse action. A review of personnel files would be appropriate to obtain this information.

6. If the respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.

7. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to the complainant and does not wish the company to know he or she is speaking with the investigator. In that event, an interview should ordinarily be scheduled away from the premises.

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

a. Respondent's attorney represents Respondent and not the witness; and
b. The witness has the right to be interviewed privately.

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

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

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

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

F. Uncooperative Respondent.

1. When conducting an investigation under A.S 18.60.089, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the

Commission of Labor and Workforce Development. A Subpoena *Duces Tecum* is used to obtain documentary evidence. When drafting subpoenas, the party should be given a short timeframe in which to comply, using broad language like "any and all documents" or "including but not limited to," and making the investigator responsible for delivery and completion of the service form (see example at the end of this chapter). If the respondent decides to cooperate, the Chief of Enforcement can choose to lift the subpoena requirements.

2. If the respondent fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the Chief of Enforcement 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 the Alaska AG enforce the subpoena.

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

G. Early Involvement of the Alaska Department of Law, Office of the Attorney General.

When needed, consult with the AG. This may be appropriate in the early stages of an investigation of cases where AKOSH may recommend that the Attorney General participate in the case, but also in cases that the investigator or Chief of Enforcement thinks are worthy, but which Attorney General believes may not be suitable for litigation.

H. Further Interviews and Documentation.

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

1. The investigator must attempt to interview each relevant witness. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality.

The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative present at any time.

2. The investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but not be limited to, safety and health inspections, or records of inspections conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceedings.

3. In cases where the complainant is covered by a collective bargaining agreement, the investigator should interview relevant union officials and obtain copies of grievance proceedings or arbitration decisions specifically related to the retaliation case in question.

4. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another Federal agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.

5. The investigator must document all telephone conversations with witnesses or party representatives in the case file.

I. Resolve Discrepancies.

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

J. Analysis.

After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above and according to the requirements of the statute(s) under which the complaint was filed.

K. Conclusion of Investigations of Non-Merit Complaints.

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

1. During the closing conference, the investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
2. It is unnecessary and improper to reveal the identity of witnesses interviewed. The complainant should be advised that AKOSH does not reveal the identity of witnesses, unless confidentiality is expressly waived by the witness. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
3. During the closing conference, the investigator must inform the complainant of his/her rights to appeal or objection under the appropriate statute (which vary, as described in following chapters), as well as the time limitation for filing the appeal or objection.
4. The investigator should also advise the complainant that the decision at this stage is a recommendation subject to review and approval by higher management and the AG.
5. The closing conference with the complainant must be documented in the case file.
6. Where the complainant cannot be reached in order to conduct a

closing conference, AKOSH will send a letter to the complainant explaining that the case is being recommended for dismissal, and they may exercise their appeal rights if they do not agree with this recommendation. This letter will be sent via certified mail.

L. Documenting the Investigation.

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

Chapter 4

CASE DISPOSITION

I. Scope

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

II. Preparation

A. Investigator Reviews the File.

Throughout the investigation, the investigator will keep the Chief of Enforcement apprised of the progress of the case, as well as any novel issues encountered. During the investigation, the investigator must thoroughly review the file and its contents to ensure all pertinent data is organized properly.

B. Investigator and Chief of Enforcement Discuss the Case.

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

III. Report of Investigation

The investigator must report the results of the investigation by means of a Report of Investigation (ROI), following the policies and format described in detail in Chapter 5 of this Manual**.**

IV. Case Review and Approval by the Chief of Enforcement

A. Review.

The investigator will provide the completed case file to the Chief of Enforcement and to the AKOSH Director. Upon receipt of the completed case file, the Chief of Enforcement and Director will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, and merits of the case. If legal action is being considered, the Chief of Enforcement and Director will review the recommendation for consistency with legal precedents and policy impact.

Such review will be completed as soon as practicable after receipt of the file.

B. Approval.

If the Chief of Enforcement and Director concur with the analysis and recommendation of the investigator, they will sign on the signature block on the last page of the ROI and record the date the review was completed. The Director's signature on the ROI serves as approval of the recommended determination. Therefore, a thorough review of the case file is essential prior to issuing any determination letters. Appropriate determination letters must be issued to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt must be preserved in the file with copies of the letters to maintain accountability.

1. Withdrawal.

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

2. Dismissal.

For recommendations to dismiss, the Investigator will draft letters of dismissal for the AKOSH Director's signature to both parties. The letter will include a brief summarization of the items discussed in the closing conference as well as the complainant's right to appeal the decision to the Commissioner of Labor.

3. Settlement.

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

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

Approved settlements may be enforced in accordance with the relevant statute and the controlling regulations.

4. Deferral.

Voluntary resolution of disputes is desirable in many whistleblower cases. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints under the AKOSH whistleblower statutes. The investigator and Chief of Enforcement must review the results of any proceeding to ensure all relevant issues were

addressed, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the relevant AKOSH whistleblower statute. Repugnancy deals not only with the violation, but also the completeness of the remedies. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. If the determination is accepted, the Agency may defer to the decision as outlined above.

In cases where the investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration or other appropriate action, the Chief of Enforcement will issue letters of deferral to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in IMIS as "Dismissed." If the other proceeding results in a settlement, it will be recorded as "Settled Other," and processed in accordance with the procedures set forth in chapter 6.

5. Merit Finding.

All Reports of Investigation issuing merit determinations must be signed by the AKOSH Director. The Director then must draft a letter to the Office of the Attorney General requesting action is filed in Superior Court pursuant to AS 18.60.089 (b).

6. Further Investigation Warranted.

If, for any reason, the Chief of Enforcement or the AKOSH Director does not concur with the investigator's analysis and recommendation or finds that additional investigation is warranted, the file will be returned for follow-up work.

VI. Appeals and Objections.

If the complainant disagrees with the determination, they have the right to appeal the determination per 8 AAC 61.530(b) to obtain a review of the decision by submitting a written request within 10 days of their receipt of the closing letter from the AKOSH Director. They will address their appeal letter to the Commissioner of Labor and Workforce Development at PO Box 111149 Juneau, AK 99811-1149. The complainant must provide an explanation of their reasons for disagreeing with the determination.

VII. Approval for Litigation

Cases recommending litigation will be forwarded to the Office of the Attorney General for review. If the AG's office determines that additional investigation is required, the AKOSH Director will assign further investigation to the whistleblower investigator.

Chapter 5

REPORT WRITING AND CASE FILE DOCUMENTATION

I. Scope.

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

II. Administratively Closed Complaints.

All administratively closed cases must be appropriately entered into the IMIS system and maintained as a hard copy with the memorandum to file of the complaint intake/screen out. The memorandum to file will contain the nature of the complaint and the discussion with the complaint about the reasons why the case is not appropriate for AKOSH investigation. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed with appeal rights. Initial letters will be prepared and sent to both parties and they should include an explanation for the dismissal and appeal rights.

III. Case File Organization

A. Upon receipt of a new complaint the investigator will prepare an original case file for each docketed case.

B. Upon assignment, the Investigator normally prepares a standard case file containing the AKOSH discrimination complaint forms (AKOSH 14, 15, 126) , intake/ screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.

C. Report of Investigation (Formerly called Final Investigation Report or FIR).

The Report of Investigation (ROI) is AKOSH's internal summary of the investigation. It is written as a memo from the Investigator to the Chief of Enforcement and Director rather than in the form of a letter to the parties. The ROI must contain the information below, but may also

include, as needed, a chronology of events, a witness log, and any other information required by the Commissioner of Labor and Workforce Development. The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate review of the case file.

1. **Timeliness.** Indicate the actual date that the complaint was filed and whether or not the filing was timely.

2. **Coverage.** Give a brief statement of the basis for coverage and a basic description of the company to include location of main offices, and nature of primary business.

3. **The Elements of a Violation.** Evaluate the facts as they relate to the four elements of a violation. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented.

    a. Protected Activity

    b. Respondent Knowledge

    c. Adverse Action

    d. Nexus

4. **Defense.** Give a brief account of the respondent's defense; e.g., "Respondent claims that Complainant was discharged for excessive absenteeism." If the respondent claims that complainant's misconduct or poor performance was the reason for the adverse action, discuss whether complainant engaged in that misconduct or performed poorly and, if so, how the employer's rules deal with this and how other employees engaged in similar misconduct or with similar performances were treated.

5. **Remedy.** In merit cases, this section should describe all appropriate relief due the complainant, as determined using Chapter 6, II. Any cost that will continue to accrue until payment, such as back wages, insurance premiums, and the like should be stated as formulas—that is, amounts per unit of time, so that the proper amount to be paid the 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, shall be paid by Respondent." In non-merit cases, this section should simply be left blank.

6. **Recommended Disposition.** This is a concise statement of the investigator's recommendation for disposition of the case.

7. **Other Relevant Information.** Any novel legal or other unusual issues, related complaints, investigator's assessment of a proposed

settlement agreement, or any other relevant consideration in the case may be addressed here.

8. **Incomplete Record.** For cases that are being dismissed as untimely or not covered, or for lack of cooperation, or where an early settlement has been reached, it is generally sufficient to include information only on aspects of the investigation completed up through the date of withdrawal, settlement, or dismissal on a threshold issue or lack of cooperation. Notation would be made of the reasons for the termination of the investigation in the field, "Other Relevant Info for Consideration," or its equivalent. However, in all cases in which a determination on the merits is being recommended, all of the information must be provided.

D. Closing Conference.

The closing conference will be documented in the case file by a separate Memo to File.

VI. Delivery of the Case File.

The case file must be hand-delivered to the Chief of Enforcement or sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt will be preserved by the sender to maintain accountability.

VII. Documenting Key Dates in IMIS.

The timely and accurate entry of information in IMIS is critically important. In particular, key dates must be accurately recorded in order to measure program performance.

A. Date Complaint Filed.

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

B. ROI (formerly FIR) Date.

The date upon which the ROI was approved by the Chief of Enforcement is the ROI date.

C. Determination Date.

The date upon which the Director of Labor Standards and Safety signs the closing determination letter is postmarked is the determination date

Chapter 6

REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope

This section covers policy and procedures for the determination of appropriate remedies in whistleblower cases and for the effective negotiation of settlements and their processing.

II. Remedies.

In cases where AKOSH is ordering monetary and other relief or recommending litigation, the investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation.

A. Reinstatement and Front pay

Under all whistleblower statutes enforced by AKOSH, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases and is a critical component of making the complainant whole. Where reinstatement is not feasible, such as where the employer has ceased doing business or there is so much hostility between the employer and the complainant that complainant's continued employment would be unbearable, front pay in lieu of reinstatement should be awarded from the date of discharge up to a reasonable amount of time for the complainant to obtain another job. The Office of the Attorney General should be consulted on front pay.

B. Back Pay

Back pay is available under all whistleblower statutes enforced by AKOSH. Back pay is computed by deducting net interim earnings from gross back pay. Gross back pay is the total taxable earnings complainant would have earned during the quarter if he or she had remained in the discharging employer's employment. Usually, the hourly wage is multiplied by the number of hours a week the complainant typically worked. If the complainant has not been reinstated, the gross pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. Net interim earnings are interim earnings reduced by expenses. Interim earnings are the total taxable earnings complainant earned from interim employment (other employers). Expenses are 1) those incurred in searching for interim employment, e.g., mileage at the current IRS rate per driving mile; toll and long distance telephone call;

employment agency fees, other job registration fees, meals and lodging if travel away from home; bridge and highway tolls; moving expenses, etc.; and those incurred as a condition of accepting and retaining an interim job, e.g., special tools and equipment, safety clothing, union fees, employment agency payments, mileage for any increase in commuting distance from distance traveled to the discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc. Unemployment insurance is not deducted from gross back pay. Worker's compensation is not deducted from back pay, except for the portion which compensates for lost wages.

C. Compensatory damages.

Compensatory damages include, but are not limited to, out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy, expenses incurred in searching for a new job (see paragraph B above), vested fund or profit-sharing losses, credit card interest and other property loss resulting from missed payments, annuity losses, compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health professional and medication related to that mental distress. The AG should be consulted on computing the amount of compensation for mental distress.

D. Punitive damages.

1. Under A.S 18.60.089, punitive damages are available in cases where the respondent's conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the rights of the employee under the relevant statute.

Punitive damages are appropriate:

a. when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before the adverse action occurred (unless the employer had a clear-cut, enforced policy against retaliation); or

b. when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, when there has been a pattern or practice of retaliation in violation of the statutes AKOSH enforces, when there is a policy contrary to rights protected by these statute (for example, a policy requiring safety complaints to be made to management before filing them with AKOSH or restricting employee discussions with AKOSH compliance officers during inspections) and the retaliation relates to this policy, when a management official commits violence against the complainant, or when the adverse action is accompanied by public humiliation, threats

of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.

2. Coordination with the Director of Labor Standards and Safety and the Alaska Department of Law as soon as possible is imperative when considering a punitive damages award. If Alaska Department of Law agrees that such damages may be appropriate, further development of evidence should be coordinated with the Attorney General. When determining punitive damages, management and investigators should review ARB, ALJ, and court decisions, such as *Reich v. Skyline Terrace, Inc.*, 977 F.Supp. 1141 (N. D. Okl. 1997), for determining if punitive damages are appropriate and the appropriate amounts to award. Inflation in the time period after the issuance of the decision relied upon should be considered.

F. Interest

Interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes. See 26 U.S.C. §6621 (the Federal short–term rate plus three percentage points). 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 rates for each quarter will appear. The relevant rate is the one for underpayments (not large corporate underpayments). A definite amount should be computed for the time up to the date of calculation, but the findings should state that in addition interest at the IRS underpayment rate at 26 U.S.C. §6621, compounded daily, must be paid on monies owed after that date. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function.

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

H. Providing the complainant a neutral reference for potential employers.

III. Settlement Policy

Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is AKOSH policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, AKOSH will make every effort to accommodate an early resolution of complaints in which both parties seek it. AKOSH should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

IV. Settlement Procedure.

A. Requirements.

Requirements for settlement agreements are:

1. The file must contain documentation of all appropriate relief at the time the case has settled and the relief obtained.
2. The settlement must contain all of the core elements of a settlement agreement (see IV.C. below).
3. To be finalized, every settlement, or in cases where the Agency approves a private settlement, every approval letter must be signed by the appropriate AKOSH official.
4. To be finalized, every settlement must be signed by the respondent.
5. To be finalized, every settlement must be signed by the complainant except under a bilateral agreement between AKOSH and the employer.

B. Adequacy of Settlements.

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

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

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

c. Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant's attempt to mitigate his or her losses are subtracted from the full back wages. For settlement purposes, Unemployment compensation benefits may not

be considered as an offset to back pay.

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

e. The respondent's agreement to provide a neutral reference to potential employers of the complainant.

f. Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting. If the employer objects to this; a Whistleblower Fact Sheet may be posted in lieu of a posting a notice to employees.

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

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

i. Punitive damages may be considered and may be awarded when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his or her association with a whistleblower, when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of the statutes AKOSH enforces. However, coordination with the supervisor and AG as soon as possible is imperative when considering such action. If the Attorney General agrees that such damages may be appropriate, further development of evidence should be coordinated with the law office.

C. The Standard AKOSH Settlement Agreement.

Whenever possible, the parties should be encouraged to utilize AKOSH's standard settlement agreement containing all of the core elements outlined below. (See sample AKOSH settlement agreement at the end of this

chapter.) This will ensure that all issues within AKOSH's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

1. It must be in writing.
2. It must stipulate that the employer agrees to comply with the relevant statute(s).
3. It must address the alleged retaliation.
4. It must specify the relief obtained.
5. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, where the employer communicates with its employees electronically) or an equivalent notice. If a posting or notice is not required, the case file must contain an explanation of why the action is considered unnecessary.

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

   All appropriate relief and damages to which the complainant is entitled must be documented in the file. If the settlement does not contain a make- whole remedy, the justification must be documented and the complainant's concurrence must be noted in the case file.

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

   The investigator should try as much as possible to obtain a single payment of all monetary relief. This will ensure that complainant obtains all of the monetary relief.

   The settlement should require that a certified or cashier's check, or where installment payments are agreed to, the checks, to be made out to the complainant, but sent to AKOSH. AKOSH shall promptly note receipt of the checks, copy the check[s], and mail the check[s] to the complainant.

In addition the complainant will sign a copy of the check and return to AKOSH to acknowledge receipt of the settlement check.

6. Much of the language of the standard agreement should generally not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Those sections that can be omitted or included, with management approval include:

   a. *POSTING OF NOTICE* (See sample of Notice to Employees at the end of this chapter.)

   b. COMPLIANCE WITH NOTICE

   c. GENERAL POSTING

   d. NON-ADMISSION

   e. REINSTATEMENT *(this section may be omitted if adequate front pay is offered)*

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

      ii. Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.

7. MONIES

   a. Respondent agrees to make Complainant whole by payment of $_____ (less normal payroll deductions).

   b. Respondent agrees to pay Complainant a lump sum of $ _____ . Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check[s] shall be made out to the complainant, but mailed to AKOSH.

All agreements utilizing AKOSH's standard settlement agreement must be recorded in the IMIS as "Settled."

AKOSH settlements should generally not be altered beyond the options outlined above. Any changes to the standard AKOSH settlement agreement language, beyond the few options noted above, must be approved in a pre- settlement discussion with the Chief of Enforcement. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the employer belongs. Settlement agreements should not contain provisions which prohibit DOLWD's release of the agreement to the general public.

D. Settlements to which AKOSH is not a Party.

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without AKOSH's participation in settlement negotiations. Because voluntary resolution of disputes is desirable in many whistleblower cases, AKOSH's policy is to defer to adequate privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved by the Chief of Enforcement to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest (See E. below). Approval of the settlement demonstrates the Commissioners' consent and achieves the consent of all three parties. However, AKOSH's authority over settlement agreements is limited to the statutes within its authority. Therefore, the Agency's approval only relates to the terms of the agreement pertaining to the referenced statute[s] under which the complaint was filed. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand AKOSH's involvement in any resolution reached after a complaint has been initiated.

1. In most circumstances, issues are better addressed through an AKOSH agreement, and if the parties are amenable to signing one as well, the AKOSH settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the AKOSH agreement. This is achieved by inserting the following paragraph in the AKOSH agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration's (AKOSH's) authority. AKOSH's authority over that agreement is limited to the statutes within its authority. Therefore, AKOSH approves and incorporates in this agreement only the terms of the other agreement pertaining to the [Insert name of the statute[s] under which the complaint was filed] [You may also modify the sentence to identify the specific sections or paragraph numbers of the agreement that are under the Secretary's authority.]" These cases must be recorded in the IMIS as "Settled Other." A copy of the reviewed agreement must be retained in the case file and the parties should be notified that AKOSH will disclose settlement agreements in accordance with the Freedom of Information Act, unless one of the FOIA exemptions applies as set forth in Ch. 1VI., particularly paragraph B.

E. Criteria by which to Review Private Settlements.

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest, Chief of Enforcements must carefully review unredacted settlement agreements in light of the particular circumstances of the case.

1. AKOSH will not approve a provision that states or implies that

AKOSH or DOL is party to a confidentiality agreement.

2. AKOSH will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or shall prevent or interfere with Complainant's non-waivable right to engage in any future activities protected under the whistleblower statutes administered by AKOSH."

3. AKOSH will not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency."

4. AKOSH must ensure that the complainant's decision to settle is voluntary.

5. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file.

   a. **The breadth of the waiver.** Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether the complainant's skills are readily transferable to other employers or industries. Waivers that more narrowly restrict future employment, for example, to a single employer or its subsidiaries or parent company may generally be less problematic than broad restrictions such as any employers at the same worksite or any companies with which the respondent does business.

   The investigator must ask the complainant, "Do you feel that, by entering this agreement, your ability to work in your field is restricted?" If the answer is yes, then the follow-up question must be asked, "Do you feel that the monetary payment fairly compensates you for that?" The complainant also should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the

monetary payment, fairly compensates for the waiver of employment. The case file must document the complainant's replies and any discussion thereof.

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

c. **The strength of the complainant's case.** How strong is the complainant's retaliation case, and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver is, unless very well remunerated. Consultation with RSOL may be advisable.

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

If the complainant is represented by counsel, the investigator must ask the attorney if he or she has discussed this provision with the complainant.

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

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

V. Bilateral Agreements (Formerly Called Unilateral Agreements).

A. A *bilateral settlement* is one between AKOSH), signed by the Chief of Enforcement , and a respondent—*without the complainant's consent*—to resolve a complaint filed under A.S 18.60.089.. It is an acceptable remedy to be used only under the following conditions:

1. The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the

reinstatement offered, and the merits of the case. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.

2. The complainant refuses to accept the settlement offer. (The case file should fully set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by management.)

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

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

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

D. Documentation and implementation

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

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

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

4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function.

5. Any check from the employer must be sent to the complainant

even if he or she did not agree with the settlement. If the complainant returns the check to AKOSH, the Discrimination Officer shall record this fact and return it to the employer.

VI. Enforcement of settlements.

If an employer fails to comply with a settlement in an AKOSH Whistleblower case, the Discrimination Officer shall refer the case to the Director of LS&S for litigation and the complainant shall be so informed.

Chapter 7

AKOSH relationship with OSHA

I. Relationship with OSHA.

A. Section 18 of the OSH Act provides that any sate which desires 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 relinquish the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any state. However, 29 CFR 1977.23 and 29 CFR 1902.4(c)(2)(v) require that each state plan include an anti-discrimination provision as effective as OSHA's section 11(c). Therefore, in state plans states, employees may file occupational safety and health discrimination complaints either with federal OSHA or the state or both.

B. The regulation 29 CFR 1977.23 also provides that OSHA may refer complaints of employees adequately protected by state plans to the appropriate state agency. It is OSHA's policy to refer all 11(c) complaints to the appropriate state plan where it has been determined that the state's discrimination program is operating effectively to protect employees. A state plan state's jurisdiction extends to employees of all private sector employers who are subject to the state's occupational safety and health standards enforcement program as well as to all state and local government employees. Complaints filed under the other whistleblower statutes are under exclusive federal OSHA jurisdiction and may not be referred to the states.

1. Complaints received by AKOSH which are not under state plan jurisdiction will be referred to OSHA by means of a referral letter and referral form sent certified mail, along with any intake notes or other evidentiary material. A copy of all materials mailed certified will also be emailed to OSHA.

2. The complainant will also be advised by telephone and certified letter that their complaint is being referred to OSHA's jurisdiction. All referrals will be documented on in IMIS and maintained for reference.

3. AKOSH must advise complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent federal protection. This will be accomplished in the initial letter to the complainant. If the complainant dually files a complaint and the state dismisses it, the determination letter will inform the complainant as follows:

a. Should you have any concerns regarding this agency's conduct of the investigation, you may request a federal review of your retaliation claim under 11(c) of the OSH Act. Such a request may only be made after this

agency has issued a final administrative determination after exercise of all appeal opportunities. The request for a review must be made in writing to the OSHA Seattle Office and postmarked within 15 calendar days after your receipt of this final administrative decision. If you do not request a review in writing within the 15 calendar day period, your federal retaliation complaint will be closed.

AKOSH DISCRIMINATION COMPLAINT AS 18.60.089	Case No:

COMPLAINANT INFORMATION

1. Full Name:	Date/Time:
2. Address/Telephone Number:	Email:

EMPLOYER INFORMATION

3. Employer Name:	
4. Employer Address/Telephone Number:	
5. Type of Business:	6. Total Number of Employees in Establishment:

UNION INFORMATION

7. Union? ☐ Yes ☐ No	If yes, give Union Name and Local:	
8. Did you file a union grievance? ☐ Yes ☐ No ☐ Not Applicable		
8a. If yes, when?	8b. What is the status?	8c. Name of the union representative.
9. Timeliness of AS 18.60.089 Complaint:	9a. When was adverse action taken?	9b. Within 30 days? ☐ Yes ☐ No

GENERAL EMPLOYMENT INFORMATION

10. Immediate Supervisor:	
11. Final Wage Rate:	11a. Usual number of hours worked per week:
12. Length of employment (*from-to*):	
13. Department assigned and job title:	
14. Brief description of work duties:	

14a. How were you discriminated against?
14b. Why did the employer take this action (in your opinion)?
14c. Any statements about OSHA (state or federal)? *(If yes, please explain.)* ☐ Yes ☐ No
14d. What is the employer's attitude towards job safety and health?
15. Did you file any complaints with the employer? ☐ Yes ☐ No
15a. What were the details of the complaint?
15b. To whom did you make the complaint?
15c. When?
15d. Who heard and would they give a statement to AKOSH?
15e. Did anyone else complain? *(Who and what was the result?)*
16. Did you file a complaint with state or federal OSHA or any other agency? ☐ State of Alaska, OSH ☐ Federal OSHA ☐ Other agency *(please specify)* _____ ☐ No
16a. When did you file?
16b. Did anyone else know you filed? *If so, how did they know, is there proof of that knowledge, and are there any witnesses that will testify to this?*
16c. What was the result of the agency complaint? Was there an inspection?

16d. Did anyone else file a complaint with OSHA or another agency? *If so, who, who knew of the complaint, and what was the result?*
DETAILS OF WORK REFUSAL
17. Did you ever refuse to do any work assignment? ☐ Yes ☐ No *(if N/A skip to 18a)*
17a. To whom?
17b. For what and why:
17c. When?
17d. What was the result? Did anyone hear and will they testify?
17e. Did anyone else refuse? *If so, who and what was the result?*
17f. Was the assignment you refused a normal job activity? Had you done it before? *If so, when did you do it, how often, and how was it different this time?*
17g. When were you first told to do this job assignment or that you would have to do it? *(what did you do about it, why didn't you call OSH?)*
17h. Did anyone else do the work that you refused to do? *If so, specify who, when, how was it different from when you were told to do it, and why didn't that/those person(s) refuse?*
17i. Was there any other work that you could have done at the time your refusal to perform the assigned task? If so, what, did you offer to do it, and were you given the opportunity to do it?
17j. Did you seek correction of the hazard from the employer? Did you state the reason for the work refusal to the employer?
17k. Did you fear serious injury or death from performing the task?
DESCRIPTION AND DETAILS OF THE ADVERSE ACTION
18a. What time did you report to work that day/night? / What were your normal work hours?
18b. How was the conversation initiated and by whom?
18c. Where did this take place? *Be specific.*

18d. When did this conversation take place? *Be specific.*		
18e. What was said? *Be specific, use quotes for all parties to conversation. Please attach additional sheets if needed.*		
18f. Who heard this conversation ? *(Who was present?)*		
18g. How did the conversation end?		
19. What remedy are you seeking?		
19.a Do you want your job back? ☐ Yes ☐ No		
20. Have you worked since leaving this employment? If so, where?		
20a. When did you first begin this new employment?		
20b. Where have you applied for jobs?		
21. Have you filed complaints with any other agency regarding the adverse action? ☐ Yes ☐ No		
21a. Where?	21b. When?	21c. What is the status of the complaint?
22. What may we expect the employer to tell us about you? Is this true?		

WITNESS INFORMATION	
23. Please provide names, addresses, telephone numbers of witnesses *(please use additional paper if needed)*:	
Name: Address: Phone:	What can this person tell me?
Name: Address: Phone:	What can this person tell me?
Name: Address: Phone:	What can this person tell me?
Name: Address: Phone:	What can this person tell me?
Name: Address: Phone:	What can this person tell me?
24. What was the inquirer (complainant) advised by officer taking complaint?	

OFFICER RECEIPT AND CERTIFICATION	
I certify that the complaint was filed with me on: _____ in _____, Alaska.	
Officer Signature	Date:
Officer Title:	