



State of Alaska
Department of Labor and Workforce Development
Division of Labor Standards and Safety

AKOSH Program Directive No. 18-07

Date: July 10, 2018
To: All AKOSH Staff
From: Deborah Kelly, Director ^{DK}
Subject: AKOSH Whistleblower Investigation Manual

Purpose:

This Program Directive, PD 18-07, is adopted as the Whistleblower Investigation Manual of the Alaska Occupational Safety and Health Section.

This instruction establishes procedures for handling retaliation complaints under Alaska Statute 18.60.089.

This instruction is effective immediately and cancels AKOSH PD 13-04 dated July 26, 2013.

Please make sure all AKOSH staff has been provided a copy of this directive.

Attachment: AKOSH Whistleblower Investigation Manual

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Alaska Occupational Safety & Health

AKOSH

**Whistleblower
Investigation Manual**



PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER ALASKA
STATUTE 18.60.089

ALASKA DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF LABOR STANDARDS & SAFETY

Disclaimer

This manual is intended to provide instruction regarding some of the internal operations of the Alaska Occupational Safety and Health Program (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 and Workforce Development or the State of Alaska. Statements which reflect current Occupational Safety and Health Review Board or court precedents do not necessarily indicate acquiescence with those precedents.

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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 AS 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 and regulations: AS 18.60.089, Prohibition against retribution, 8 AAC 61.470 – 8 AAC 61.600, 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 18-06.

IV. Cancellations

A. Alaska Program Directive PD 13-04 which adopted Revised Whistleblower Investigations Manual.

V. Functional Responsibilities

A. Responsibilities.

1. Director of Labor Standards & Safety, Alaska Department of Labor and 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 AS 18.60.089. This authority may be re-delegated, but not lower than the Assistant Chief of Enforcement.

2. The Chief of AKOSH under the guidance and direction of the Director of Labor Standards & Safety (LS&S), the Chief of AKOSH is responsible for implementation of policies and procedures as well as the following functions:

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

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

- b. As needed, investigating or conducting settlement negotiations for cases that are unusual or of a difficult nature.
 - c. Reviewing final investigative reports for comprehensiveness and technical accuracy and revising closure letters to the complainant and respondent.
 - d. 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.
 - e. Recommending to the Director changes in policies and procedures in order to better accomplish agency objectives.
3. Assistant Chief of Enforcement. Under the guidance and direction of the Chief of AKOSH, the Assistant Chief of Enforcement has the responsibility for supervising the work of the discrimination investigator 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.
 - b. The Assistant Chief of Enforcement may receive whistleblower complaints directly from complainants or from the National, Regional, and Area Offices, investigators, CSHOs, or other persons.
 - c. Ensuring that safety, health or other regulatory ramifications are identified during complaint intake and, when necessary, making referrals to the appropriate office or agency.
 - d. Assigning whistleblower cases to individual investigators.
 - 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.
 - h. Recommending to the Chief of AKOSH changes in policies and procedures in order to better accomplish agency objectives.
4. Investigator. Under the direct guidance and ongoing supervision of the Assistant 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 Director, the Chief of AKOSH, and the Assistant Chief of Enforcement.
 - g. Composing draft closing letters to the complainant and respondent for review by the Assistant 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, Chief of AKOSH, and the Assistant 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.
5. Office of the Commissioner of Labor and 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 and 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.
6. 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.
7. Alaska Department of Law, Office of the Attorney General. (AG). The AG provides assistance to the Director of LS&S, Chief of AKOSH, and Assistant 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.

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 OSHA's 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 AS 18.60.089 with AKOSH. The complaint may be filed orally or in writing and must be filed with the department within 30 days after the discriminatory action per 8 AAC 61.500 *Filing discrimination complaints*. AKOSH will reduce oral complaints to writing. 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.

- A. When an orally filed 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.

1. Complaints which do not meet the minimum elements of a prima facie allegation, or are not filed within statutory time limits may be closed administratively- that is, not docketed, if the complainant indicates concurrence with the decision to close the case administratively. When a complaint is thus “screened out,” the investigator must appropriately enter the administrative closure in the WebIMIS. Additionally, the investigator must draft a letter to the complainant explaining the reason(s) the complaint is not going to be investigated, have the letter approved by the Assistant Chief of Enforcement, and sent to the complainant. A copy of the letter, along with any related documents, must be preserved for five years, as are whistleblower case files. 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 “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 WebIMIS system. To docket the complaint, you must enter the local case number and complaint information in WebIMIS 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 1, 2011, with the previous case investigated numbered as #11-614 would then be #12-615.
2. Cases involving multiple complainants and/or multiple respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.
3. As part of the docketing procedures, when a case is opened for investigation, the Assistant Chief of Enforcement or Investigator 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), or may be hand-delivered to the complainant.

4. Also at the time of docketing, or as soon as appropriate, the Investigator 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, 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 Assistant Chief of Enforcement or Investigator 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 AKOSH, then the Assistant Chief of Enforcement must determine if a short delay is necessary, 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.

Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party

commercial carrier, or in-person filing at a Department of Labor office will be considered the date of filing.

If the postmark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a state or federal holiday, or if the 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 tolling 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 Assistant 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 Assistant Chief of Enforcement.

Complainant Notification Letter

Letterhead

[Date]

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

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

Mr./Ms. Complainant,

This is to inform you that your complaint was found to have prima facie evidence of a possible violation of Alaska Statute 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. If a violation cannot be supported, your complaint will be dismissed, and you will be informed of the reason.

After receipt and review of the employer's (i.e, Respondent) written response to your allegations, I will contact you regarding any further investigation as warranted to include the taking of witness statements. Please save any evidence that supports your complaint, such as notes, letters, emails, etc., to provide a copy to our office.

Please be advised that you have dual filing rights with Federal OSHA under the provisions of Section 11(c) of the U.S. Department of Labor, Occupational Safety and Health Act (OSHA). If you wish to also file a complaint with Federal OSHA, you will need to contact them within thirty (30) days from the date of the adverse action.

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

Sincerely,

Investigator, AKOSH

Respondent Notification Letter

Letterhead

[Date]

Respondent Name
1234 Street Name
Anchorage, AK 99501

Contact:

Investigator
e-mail
907-269-4942

Mr. Respondent,

This is to inform you that on [Date, 2016], [Mr./Mrs.] [Complainant's name] filed an Occupational Safety and Health whistleblower complaint against [Respondent Name] alleging retaliatory employment practices in violation of Alaska Statute 18.60.089. This statute prohibits retaliation against employees who exercise their rights under AS 18.60.089 and include activities such as contacting or filing a complaint with the Alaska OSH program, bringing unsafe or unhealthful job conditions to management or other official's attention, refusing to perform a dangerous task, etc. [Mr. Complainant] alleges that he was terminated on [Date, 2016] in retaliation for repeatedly bringing up safety and health concerns to his foreman, [name], 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.

This is not a decision by this office that a violation has occurred. We are acting as neutral fact finders and are required to investigate the allegation. Your cooperation with this office will help ensure that all relevant facts may be considered to produce an impartial, well supported recommendation.

In lieu of an investigation, voluntary settlement of this matter can be resolved through an early resolution agreement at any time to close the case. For more information regarding early resolution opportunities, please contact me. If a full investigation is completed and it is determined that AS 18.60.089 has been violated, we would seek a remedy consistent to that provided in the enclosed sample Settlement Agreement. If the investigation revealed reasonable cause to believe that the code has been violated and we are unable to resolve the complaint with a voluntary settlement, AS 18.60.089(b) provides that the Commissioner shall request the attorney general to bring an action in the superior court against the violator. On the other hand, if a full investigation revealed insufficient proof of a violation of AS 18.60.089, the complaint will be dismissed by this office. Please be advised that even though we dismiss the complaint, 8AAC 61.530(b) gives an employee the right to appeal this determination to the office of the Commissioner of Labor and Workforce Development.

If you are not interested in a no-fault resolution without an investigation, please provide a written response or statement of position regarding the enclosed allegations in violation of AS 18.60.089 within 10 business days of your receipt of this notice. Please note that a full and complete initial response, supported by documentation, may serve to help achieve early resolution in this matter.

[Mr. Complainant's] complaint allegations are enclosed for your review. You are advised of your right 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. You should be aware that the AS 18.60.095 (f) provides criminal sanctions for a person who knowingly makes a false statement, representation, or certification. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Assistant Chief of Enforcement, AKOSH

Enclosures: Copy of Complaint
Entry of Appearance Form

Sample Non-cooperation Letter to Complainant

Letterhead

[Date]

Complainant

Street Address

City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

[Mr./Ms. Complainant]:

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

Please contact me by telephone, email, mail, or fax within 10 days of receiving this letter, so that we can arrange for a convenient date, time, and location for your interview. If I do not receive a response from you within those 10 days, then I will assume that you are no longer interested in pursuing this matter and will recommend that your complaint be dismissed.

I look forward to hearing from you soon.

Sincerely,

[Name]

Investigator, AKOSH

Sample Non-cooperation Letter to Respondent

Letterhead

[Date]

ABC Company
Street Address
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Sir or Madam:

On [date], you received certified letter #[insert number] from this office, which advised you that [Complainant's name] (Complainant) had filed a retaliation complaint with Alaska Occupational Safety and Health (AKOSH) against [Respondent's name] (Respondent) on [date filed]. The complaint alleged that Respondent's employment actions taken against [him/her] were in violation of Alaska Statute 18.60.089(a). Our letter invited you to submit promptly "a written account of the facts and a statement of your position with respect to the allegation that you have retaliated against [Mr./Ms.] [Complainant's last name] in violation of Alaska Statute 18.60.089(a)."

Explain how Respondent has not cooperated, for example:

No response

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

Or

Documents not submitted

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

Or

Witnesses not made available

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

Evidence gathered to date tends to corroborate Complainant's allegations that [his/her] discharge was in violation of Alaska Statute 18.60.089(a). *(Insert a brief summary of the*

complaint allegations and the evidence supporting the elements of Complainant's prima facie case.)

As noted above, to date, you have declined to respond to AKSOH's investigative requests, which have been made in accordance with Alaska Statute 18.60.089(a) and its implementing regulations.

Your continued failure to cooperate with this investigation may lead AKOSH to reach a determination without your input. Additionally, you are hereby advised that AKOSH may draw an adverse inference against you based on your refusal to [specify what request was not followed].

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

If we do not receive your response within the ten days, AKOSH's preliminary findings will become undisputed, which will lead us to refer this matter to the Alaska Department of Law for appropriate legal action.

Sincerely,

[Name]
Assistant Chief of Enforcement, AKOSH

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 the Assistant 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.

The standard that applies to AKOSH whistleblower investigations is whether AKOSH has reasonable cause to believe a violation occurred. This standard applies to all elements of a violation. For AS 18.60.089, when AKOSH finds that there may be reasonable cause to believe that a violation occurred, AKOSH should consult informally with the State Department of Law (DOL), if it has not already done so, to ensure that the investigation captures as much relevant information as possible so that DOL can evaluate whether it is likely to prevail at trial.

III. Case File

The investigator must prepare a standard case file containing the screening documents and 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. Intake and Evaluation.

It is the Assistant Chief of Enforcement's responsibility to ensure that complaint intake and evaluation occurs. Intake may be performed directly by the Assistant Chief or may be delegated to the investigator. Whenever possible, the intake and evaluation of a complaint should be completed by the investigator to whom the Assistant Chief of Enforcement anticipates the case will be assigned.

Regardless of who completes the evaluation, it should cover as many details as possible, and may take place either in person or by telephone. Whenever practical and possible, the investigator will conduct face-to-face interviews with complainants. When the investigator has tried and failed to reach a complainant at various times during normal work hours and in the evening, he or she must send a letter to the complainant stating that attempts to reach the complainant have been unsuccessful, and stating that if the complainant is interested in filing a complaint under any of the statutes enforced by AKOSH, the complainant should make contact within 10 business days of receipt of the letter, or AKOSH will assume that the individual does not wish to pursue a complaint, and no further action will be taken. This letter must be sent by certified U.S. mail, return receipt requested. Proof of delivery must be preserved in the file with a copy of the letter to maintain accountability.

The individual conducting the intake should ensure all elements of a *prima facie* allegation are addressed and should attempt to obtain specific information regarding current losses and employment status.

The information obtained during the intake interview must be properly documented. At a minimum, an AKOSH 14 must be written to preserve the complainant's account of the facts and record facts necessary to determine whether a *prima facie* allegation exists. This document can be used later to refresh the complainant's memory in the event his or her account deviates from the initial information provided; this is often the key to later assessing the credibility of the complainant.

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 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 did not occurred, then the investigation should be closed with appeal rights to the complainant. This would indicate the *prima facie* has not been met.

For AKOSH to consider a complaint, it must be received in writing according to the requirements of 8 AAC 61.500.

B. 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.

C. Coverage.

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 Assistant Chief of Enforcement in order to identify and resolve issues pertaining to coverage.

D. Pre-Investigative Research.

If he or she has not already done so, the investigator should determine whether there are prior or current retaliation, safety and health, or other regulatory cases related to either the complainant or employer. Such information normally will be available from the IMIS, OIS, or the AKOSH office. 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.

E. 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.

F. Other Legal Proceedings.

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

V. **Weighing the Evidence.**

For AS 18.60.089, the investigative standard is *whether there is reasonable cause to believe that a violation occurred*. This standard applies to each element of a violation.

A. Investigative Standard.

Under the reasonable cause standard, AKOSH must believe, after evaluating all of the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources, that a reasonable judge could rule in favor of the complainant. The threshold AKOSH must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the evidence provided by both sides or otherwise gathered during the investigation, but does not generally require as much evidence as would be required at trial. Because AKOSH makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing. Accordingly, AKOSH's investigation must reach an objective conclusion – after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur.

AKOSH's responsibility to determine whether there is reasonable cause to believe a violation occurred is greater than the complainant's initial burden to demonstrate a prima facie allegation that is enough to trigger the investigation. However, a reasonable cause finding does not necessarily require as much evidence as would be required at trial to establish unlawful retaliation by a preponderance of the evidence. Although AKOSH will need to make some credibility determinations to evaluate whether a reasonable judge could find in

the complainant's favor, AKOSH does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred. Rather, when AKOSH believes, after considering all of the evidence gathered during the investigation, that the complainant could succeed in proving a violation, it is appropriate to issue a merit finding.

VI. The Field Investigation

A. The Elements of a Violation.

An illegal retaliation is an adverse action taken against an employee by a covered entity or individual in reprisal for the employee's engagement in protected activity. An effective investigation focuses on the elements of a violation and the required standard for causation (i.e., but-for, motivating factor, or contributing factor). If the investigation does not establish that there is reasonable cause to believe that all of the elements of a case exist, the case should be dismissed. Therefore, the investigator should search for evidence that would help resolve each of the following elements of a violation:

i. Protected Activity.

The evidence must establish 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 or 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. As well as, 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:

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

ii. 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.

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

iv. Nexus.

The causal link between the protected activity and the adverse action must be established. That causal link will be either: (1) that the adverse action would not have occurred *but for* the protected activity; (2) that the protected activity was a *contributing factor* in the adverse action; or (3) that the protected activity was a *motivating factor* in the adverse action. 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.

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

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

B. Contact with Complainant.

The investigator's initial contact with the complainant should be made during the complaint intake and evaluation process. 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.

i. 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 right middle 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.

ii. 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 orally or in writing. If a complaint is amended orally, the investigator will reduce the amendment to 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.

- iii. 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.

- iv. 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.

- v. 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. It is AKOSH policy to have the witness acknowledge at the beginning of the recording that they understand that the interview is being recorded. This does not apply to other audio or video recordings supplied by the complainant or witnesses. At the 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 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.
7. If the respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.
8. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to the complainant and does not wish the company to know he or she is speaking with the investigator. In that event, an interview should ordinarily be scheduled away from the premises.

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

- a. Respondent's attorney represents Respondent and not the witness; and
- b. The witness has the right 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.

9. While at the respondent's establishment, the investigator should make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which respondent offers and which the investigator construes as being relevant to the case.
10. If a telephone conversation with the respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the activity/telephone log may simply indicate the nature and date of the contact and the comment "See Memo/Document - Exhibit #."
11. If at any time during the initial (or subsequent) meeting(s) with respondent officials or counsel, respondent suggests the possibility of an early resolution to the matter, the investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.)

F. Uncooperative Respondent.

1. When conducting an investigation under AS 18.60.089, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the Commissioner of Labor and Workforce Development. 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 Assistant 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 Assistant Chief of Enforcement and seek the final recommendation from the Chief of OSH. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The Chief of OSH also has the option to request that a superior court judge enforce the subpoena.

3. When dealing with a nonresponsive or uncooperative respondent, it will frequently be appropriate for the investigator, in consultation with the Assistant Chief of Enforcement, the Chief of AKOSH, 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.

In general, AKOSH should consult the Department of Law (DOL) as early as possible in the investigative process for all instances where AKOSH believes there is a potential for meritorious findings or where DOL may otherwise be of assistance, such as where settlement discussions reach an impasse, or where a case presents a novel question of statutory coverage or protected activity. When AKOSH believes that there may be reasonable cause to believe that a violation occurred, AKOSH should consult informally with DOL, if it has not already done so. Consulting early with DOL helps to ensure that the investigation captures as much relevant information as possible. Early involvement of DOL also helps ensure that DOL can evaluate whether it is likely to prevail in a superior court action. In cases that DOL litigates in superior court, greater fact finding by AKOSH and DOL may be necessary to determine whether a case is suitable for litigation. The ultimate responsibility for determining whether a case is suitable for litigation rests with DOL.

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 State or 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 AS and AAC.

K. Conclusion of Investigations of Non-Merit Complaints.

Upon completion of the field investigation and after discussion of the case with the Assistant 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 review or objection under 8 AAC 61.530, 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, where necessary, 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 review 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 Assistant Chief of Enforcement and the Chief of AKOSH.

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 Assistant 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 Assistant Chief of Enforcement Discuss the Case.

The Assistant Chief of Enforcement and the investigator will discuss the facts and merits of the case throughout the investigation. The Assistant 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

A. Review.

The investigator will provide the completed case file to the Assistant Chief of Enforcement. Upon receipt of the completed case file, the Assistant Chief of Enforcement 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 AKOSH will review the recommendation for consistency with legal precedents and policy impact before forwarding to the director for approval. Such review will be completed as soon as practicable after receipt of the file.

B. Approval.

If the Assistant Chief of Enforcement concurs with the analysis and recommendation of the investigator, the Assistant Chief of Enforcement will sign on the signature block on the last page of the ROI and record the date the review was completed. The Assistant Chief of Enforcement'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.

i. 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 a review or objections, 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 Assistant 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.)

ii. Dismissal.

For recommendations to dismiss, the Investigator will draft letters of dismissal to both parties, to be sent by the director. The letter will include a brief summarization of the items discussed in the closing conference as well as the complainant's right to a review of the decision by the Commissioner of Labor.

iii. 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 Assistant Chief of Enforcement in settlement discussions. The investigator will obtain approval, by the Assistant Chief of Enforcement, of the settlement agreement language prior to the parties signing the agreement. For recommendations to approve settlement, the Assistant 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.

iv. 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 Assistant 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 Assistant 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.

v. Merit Finding.

All Reports of Investigation issuing merit determinations must be signed by the 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).

vi. Further Investigation Warranted.

If, for any reason, the Assistant Chief of Enforcement, Chief of AKOSH, or the LS&S 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.

V. Agency Determination.

Once the Assistant Chief of Enforcement has reviewed the file and concurs with the recommendation, he or she will obtain the Chief’s and the Director’s signatures on the findings, and in a merit case, the preliminary order. All findings and preliminary orders must be sent to the parties via certified U.S. mail, return receipt requested. Proof of receipt must be preserved in the file with copies of the findings and preliminary orders to maintain accountability.

VI. Reviews and Objections.

If the complainant disagrees with the determination, they have the right to request a review of the determination per 8 AAC 61.530(b) by submitting a written request within 10 days of their receipt of the closing letter from the Chief of AKOSH. They will address their review request letter to the Commissioner of the Department of Labor & Workforce Development, PO Box 111149, Juneau, AK 99811. 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 AG’s office for review. If the AG’s office determines that additional investigation is required, the Assistant Chief of Enforcement 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 a 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.
 1. Evidentiary material is normally arranged as follows:
 - a. Copy of the complaint and WebIMIS printout
 - b. Documents from AKOSH or other agency enforcement files
 - c. Complainant's signed statement
 - d. Remaining evidence (statements, records, etc., in logical sequence)
 - e. Investigator's rough notes
 - f. Case Activity/Telephone log
 - g. Report of Investigation
 - h. Table of Contents (Exhibit Log)
 2. Separation of Materials. Administrative and evidentiary materials will be separated by means of blank paper dividers with numbered index tabs at the right or bottom.

| | | | |
|---|---|--|--|
| H | DOSH 126 (Release of Records and Confidentiality) | | |
| I | DOSH 15 (CP Complaint - Interview Form) | | |
| J | Entry of Appearance | | |
| | | | |
| | Divider 1 Case File Tracking | | |
| | Divider 2 CD's/Electronic Data | | |
| | Divider 3 Respondent Correspondence | | |
| | Divider 4 Complainant Correspondence | | |

IV. Documenting the Investigation.

A Commissioner's Findings (including an Order or Preliminary Order, if applicable) must, at a minimum, be supported by the following documentation.

- A. Case activity/telephone log.
List the date, time, and activity of telephone calls, interviews, onsite visits, etc.
- B. Report of Investigation (Formerly called Final Investigation Report or FIR).

The ROI is AKOSH's internal summary of the investigation. It is written as a memo from the Investigator to the Assistant Chief of Enforcement, Chief of AKOSH, 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 references 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 alleges 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 only, 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 be excluded.
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.

C. Closing Conference.

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

V. **Commissioner's Findings.**

A. Purpose.

Commissioner's Findings, which are issued at the conclusion of the investigation, inform the parties of the outcome of AKOSH's investigation, succinctly documenting the factual findings as well as AKOSH's analysis of the elements of a violation and conveying any order or preliminary order. Commissioner's Findings also formally advise the parties of the right to appeal or object to the determination and the procedures for doing so.

B. When Required.

Although not specifically required by statute or regulation, it is AKOSH policy to issue Commissioner's Findings in *dismissals* of Whistleblower cases. In merit cases, the sending of the superior court complaint by the Office of the AG to the complainant fulfills the Commissioner's obligation under these statutes to notify the complainant of the determination. If the AG does not do this, the director must do so. The director must consult with the AG as to its practice to make sure that the superior court complaints are provided to the complainant.

C. Format of the Commissioner's Findings.

As shown in the sample at the end of this chapter, the Commissioner's Findings are written in the form of a letter, rather than a report, in the following format:

1. **Introduction.** In the opening paragraph, identify the parties, the statute under which the complaint was filed, and include a one sentence summary of the allegation(s) made in the complaint. The second paragraph will be the standard paragraph: "Following an investigation by a duly authorized investigator, the Commissioner of the Department of Labor and Workforce Development, acting through [his] [her] agent, the Director of Labor Standards and Safety for Alaska Occupational Safety and Health pursuant to AS 18.60.089, finds that there is reasonable cause to believe that Respondent [violated/did not violate] AS 18.60.089 and issues the following findings."
2. **Timeliness.** Explain whether the whistleblower complaint was filed within the applicable statute of limitations; and if not, whether the late filing can be excused for any of the reasons set forth in Chapter 2.
3. **Coverage.** Explain why the complainant and each respondent are, or are not, covered by the statute(s) under which the complaint was filed.
4. **Background.** Briefly describe the respondent's business and the complainant's employment with the respondent.

5. **Succinct Analysis of the *Prima facie* Elements.** Within the framework of the elements of a violation, succinctly narrate the events relevant to the determination. Beginning with protected activity, tell the story in terms of the facts that have been established by the investigation, addressing disputed facts only if they are critical to the determination. Only unresolved discrepancies should be presented as assertions. The findings generally should not state that a witness saw, heard, testified, or stated to the investigator such and such or that a document stated such and such. However, in some circumstances, such fuller description may be necessary. The dates for the protected activity and the adverse action should be stated to the extent possible. The elements of a violation should be addressed in order; if one of the elements is not met, then the analysis ends with that element. Care should be taken not to reveal or identify confidential witnesses or detailed witness information in the Commissioner's Findings.
6. **Punitive Damages.** In merit cases, the rationale for ordering any punitive damages should be concisely stated here. See p. 6-7, for a discussion of when punitive damages may be appropriate.
7. **Order (or Preliminary Order).** In merit cases only, list all relief being awarded. The order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour (or other appropriate wage unit) covering the number of hours missed.
8. **Appeal Rights.** The applicable appeal or objection rights must be provided in the Commissioner's Findings. See 8 AAC 61.530(b).
9. **Special Considerations for Merit Findings.** In general, meritorious Commissioner's Findings should only include a one sentence description of the respondent's purported nondiscriminatory reason for the adverse action, with no further analysis of the defense. However, in some circumstances, a fuller description may be necessary or desirable.
10. **Signature.** The director is authorized to sign Commissioner's Findings. This authority may be sub-delegated, but not lower than to the Chief of AKOSH.

D. Procedure for Issuing Findings.

For all dismissal determinations, the parties must be notified of the results of the investigation by issuance of Commissioner's Findings (see subparagraph D above and sample Commissioner's Findings at the end of this Chapter). Appeal rights must be noted. The Commissioner's Findings will be prepared for appropriate signature, as set forth above. The director or designee will send the Commissioner's Findings 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 will be preserved in the file with copies of the

letters to maintain accountability. For merit cases the superior court complaint filed by the AG constitutes the Commissioner's Findings. The AG ordinarily will send the district court complaint to the complainant, but the director (or other appropriate official) must consult with the AG as to its practice to make sure that AKOSH sends the district court complaint to the complainant if the AG does not.

VI. Delivery of the Case File.

The case file must be hand-delivered to the Chief of AKOSH 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 director is the ROI date.

C. Determination Date.

The date upon which the director of LS&S signs the closing determination letter is postmarked is the determination date.

D. Date Request for Review Filed.

The date a request for review is filed is the date of the postmark, facsimile transmittal, e-mail communication, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the Commissioner's office. If the filing with the Commissioner's office is untimely but the copy filed with the director or with AKOSH is earlier and timely, then the date the request was filed is the earlier date. If the request is filed with AKOSH or the director's office, the date of filing will be the date the request was filed with that office. The request will be forwarded to the Commissioner's office.

Sample Commissioner's Findings (Non-Merit)

Note: Comments in bold italics are notes for the user and must be deleted from the final finding, and any section that does not pertain to the case must be deleted. In addition, [] indicates that the text inside it must be overwritten with the appropriate wording.

[Date]
[Complainant/Complainant's Attorney]
[Street Address]
[City, State ZIP]

This letter is addressed to Complainant (or Complainant's attorney) because the complaint is being dismissed. Merit findings must be addressed to Respondent (or Respondent's attorney), with a copy to Complainant.

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear [Complainant/Complainant's Attorney]:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by (Complainant) against (Respondent) on [date], under AS 18.60.089. In brief, [you/your client] alleged that Respondent [adverse action] [you/your client] in retaliation for [protected activity].

***Pick only one of the following two paragraphs, as appropriate:
Insert the following paragraph if dismissing on a "threshold" issue, such as timeliness or lack of coverage***

Following an investigation by a duly-authorized investigator, the Commissioner, acting through her agent, the director for LS&S issues the following findings:

Insert the following paragraph if dismissing on the merits

Following an investigation by a duly-authorized investigator, the Commissioner of the Department of Labor and Workforce Development, acting through her agent, the director of LS&S, finds that there is no reasonable cause to believe that Respondent violated AS 18.60.089 and issues the following findings:

Timeliness of complaint

Complainant was [adverse action] on or about [date]. On [date filed], Complainant filed a complaint with Alaska Occupational Safety and Health alleging that Respondent retaliated against [him/her] in violation of AS 18.60.089. As this complaint [was/was not] filed within 30 days of the alleged adverse action, it is deemed [timely/not timely]. [If untimely, and no grounds exist for equitable tolling, then include:

Consequently, this complaint is dismissed.]

Coverage (if no coverage, then the language must be altered accordingly)

Respondent is an person within the meaning of 8 AAC 61.470(b)
Complainant is an employee within the meaning of 8 AAC 61.470(a).

Complainant and Respondent both covered

Complainant was employed by Respondent as a [job title]. Complainant and Respondent are, therefore, covered by AS 18.60.089.

Findings of the investigation:

[A concise narrative of the facts of the case, addressing, in order, the *prima facie* elements; if one of the elements is not met, then the analysis ends with that element. Address disputed facts only if they are critical to the outcome. Whenever possible, the dates for protected activities and adverse actions should be stated.]

Select one of the following options to explain the reason for the dismissal:

Complainant and/or Respondent not covered

[Complainant and/or Respondent] [is/are] not covered under [abbreviated name of statute and general statutory cite, such as 49 U.S.C. § 31105],

No protected activity

Complainant did not engage in any activity protected by AS 18.60.089

No Respondent knowledge

Respondent lacked knowledge of and did not suspect Complainant's protected activity.

No adverse act

Complainant did not experience an adverse action.

No nexus – Complainant's protected activity was not a motivating factor in the adverse action.

Or, Nexus but mixed motive, and other factor precludes merit: Complainant's protected activity was a motivating factor in the adverse action. However, Respondent would have taken the same adverse action in the absence of Complainant's protected activity.

Conclusion

Consequently, this complaint is dismissed.

Review rights (must be included in all Commissioner's Findings):

In accordance with 8 AAC 61.530(b), you may obtain a review of this determination by submitting a written request to the Commissioner within 10 days after receiving notification of this determination to:

PO Box 111149
Juneau AK, 99811-1149
Tel: (907) 465-2700
Fax: (907) 465-2784
Email: Commissioner.Labor@alaska.gov

Sincerely,

[Chief of AKOSH]

Cc: Respondent/Respondent's Attorney

Chapter 6 - REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope

This chapter covers policy and procedures for the determination of appropriate remedies in whistleblower cases and for the effective negotiation of settlements and their processing. Damage awards should result from a fact-specific evaluation of the evidence developed in the investigation. The Investigator should consult with the Assistant Chief of Enforcement in designing the appropriate remedy. The AG's office also should be involved in determining potential remedies in any case that AKOSH anticipates referring for litigation.

II. Remedies

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

III. Reinstatement and Front Pay.

A. Reinstatement.

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 AG's office should be consulted on front pay.

B. Front Pay.

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

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

IV. Back Pay.

Back pay is available under whistleblower statutes enforced by AKOSH.

A. Lost Wages.

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

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

B. Bonuses, Overtime and Benefits.

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

C. Interim Earnings.

Interim earnings obtained by the complainant will be deducted from a back pay award. Interim earnings are the total earnings (before taxes and other deductions) that the complainant earned from interim employment subsequent to his termination and before assessment of the damages award. Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job, assuming the expenses would not have been incurred at the former

job. Such expenses may include special tools and equipment, necessary safety clothing, union fees, mileage at the applicable IRS rate per driving mile for any increase in commuting distance from the distance travelled to the respondent's location, special subscriptions, mandated special training and education costs, special lodging costs, and other related expenses.

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

Unemployment benefits received are not deducted from gross back pay. Workers' compensation benefits that replace lost wages during a period in which back pay is owed may be deducted from gross back pay. Investigators should support backpay awards with documentary evidence.

D. Mitigation Considerations.

Complainants have a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a complainant must exercise reasonable diligence in seeking alternate employment. However, complainants need not succeed in finding new employment; they are required only to make an honest, good faith effort to do so. The investigator should ask the complainant for evidence of his or her job search and keep the evidence in the case file. A complainant's obligation to mitigate his or her damages does not normally require that the complainant go into another line of work or accept a demotion. However, complainants who are unable to secure substantially equivalent employment after a reasonable period of time must consider other available and suitable employment.

After preliminary reinstatement is ordered, the complainant mitigates his or her damages simply by being available for work. Under these circumstances, the complainant does not have a duty to seek other work for at least some period of time after the preliminary reinstatement order is issued.

V. **Compensatory damages.**

A. Pecuniary Losses

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.

B. Emotional Distress/Mental Anguish/Pain and Suffering

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

i. Necessary Evidence.

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

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

Evidence from a healthcare provider is required if a complainant seeks to prove a specific and diagnosable medical condition. Investigators should contact the AG to explore the possibility of obtaining a written waiver from a complainant to communicate with his or her doctor to ensure compliance with HIPAA and a complainant's privacy rights. To comply with privacy laws, any medical evidence must be marked as confidential in the case file and should not be disclosed except in accordance with the Alaska Public Records Act.

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

ii. Factors to Consider

Investigators should consider a number of factors when determining the amount of an award for emotional and mental distress. Investigators should seek guidance from their supervisors and RSOL. The factors to consider include:

- a. The severity of the distress. More serious physical manifestations, serious effects on relationships with spouse and family, or serious impact on social relationships are indicative of higher damage awards for emotional distress.
- b. Degradation and humiliation. Generally, courts have held that the more inherently humiliating and degrading the respondent's action, somewhat more conclusory evidence of emotional distress is acceptable to support an award for emotional distress.
- c. Length of time out of work. Often, long periods of unemployment contribute to a complainant's mental distress. Thus, higher amounts may be awarded in cases where individuals have been out of work for extended periods of time as a result of the respondent's adverse employment action and thus were unable to support themselves and their families.
- d. Comparison to other cases. A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.

VI. Punitive damages.

A. General.

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

Punitive damages are not appropriate in every meritorious retaliation case. Punitive damages are awarded when the respondent's conduct is motivated by evil motive or intent or the conduct demonstrates reckless or callous indifference to the rights of others under AS 18.60.089. In determining whether

to award punitive damages, investigators should focus on the character of the respondent's conduct and consider whether it is of the sort that calls for deterrence and punishment over and above compensatory damages. The Supreme Court has held that the purpose of punitive damages is to punish a respondent for its outrageous conduct and to deter it and others like it from similar conduct in the future.

Coordination with the director of LS&S and the commissioner's office as soon as possible is imperative when considering a punitive damages award. If the commissioner agrees that such damages may be appropriate, further development of evidence should be coordinated with the AG. 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.

B. Determining When Punitive Damages are Appropriate.

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

i. The Respondent was Aware that the Act was Illegal.

Punitive damages may be appropriate when a management official involved in the adverse action knew the adverse action violated the relevant whistleblower statute before it occurred, or the official perceived there was a risk that the action was illegal but did not stop or prevent the conduct. Probative evidence may include company officials' witness statements, previous complaints regarding retaliation, training received by respondent's staff, and corporate policies or manuals. A manager must have been acting within the scope of his or her authority for the manager's knowledge or actions to serve as the basis for assessing punitive damages.

ii. The Respondent's Conduct was Egregious.

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

- a. A discharge accompanied by previous or simultaneous harassment or subsequent blacklisting.
- b. A complainant has been discharged because of his or her association with a whistleblower.
- c. A group of whistleblowers has been discharged.
- d. There has been a pattern or practice of retaliation in violation of AS 18.60.089 and the case fits the pattern.
- e. There is a policy contrary to rights protected by the statute (for example, a policy requiring safety complaints to be made to management before filing them with AKOSH or restricting employee discussions with

AKOSH compliance officers during inspections) and the retaliation relates to this policy.

- f. A manager commits violence against the complainant.
- g. The adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.
- h. The retaliation is accompanied by extensive violations of AKOSH standards.

VII. Attorney's Fees.

Attorney's fees are allowed under AS 18.60.089. The superior court has the authority to award reasonable attorney's fees, and may do so in merit cases if the complainant has been represented by an attorney and requests attorney's fees.

Attorney's fees are calculated using the "lodestar method." Under this method, the attorney's fees owed equal the product of the number of hours worked by the attorney(s) on the case and the prevailing market rates for attorneys of comparable experience in the relevant community. Thus, AKOSH will not order attorney's fees based on alternative methods of compensation, such as a contingency arrangement.

Complainant's attorney should be consulted regarding the hourly rate and the number of hours worked. The number of hours worked would include, for example, hours spent on the attorney's preparation of the complaint filed with AKOSH, the submission of information to the investigator, and time spent with the complainant preparing for and attending interviews by the investigator. However, the hours worked must involve the specific investigation in question and cannot include hours worked on related cases that are not pending before AKOSH.

AKOSH may reduce the fee to reflect a reasonable number of hours worked if the hours an attorney claims to have worked on an investigation appear excessive based on the investigator's interaction with the attorney during the investigation. Similarly, AKOSH may reduce the hourly rate at which it will order compensation if the hourly rate appears excessive compared to the hourly rate of other practitioners with a similar level of experience in the same geographic area.

Attorneys should submit documentation with their request for fees to substantiate that the number of hours worked and the prevailing hourly rate are reasonable. Examples of documentation supporting an award of attorney's fees could include contracts, spreadsheets, invoices, statements of other attorneys in the same market regarding their own hourly rates, other whistleblower cases awarding attorney's fees to attorneys in the same market, and other documents. Investigators should consult with the Assistant Chief of Enforcement if there are questions regarding whether a request for attorney's fees is reasonable.

VIII. Interest.

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

IX. Evidence of Damages.

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

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

X. Non-monetary Remedies.

AKOSH may order non-monetary remedies, including:

- A. Expungement of warnings, reprimands, and derogatory references (such as references to the complainant’s termination) which may have been placed in the complainant’s personnel file as a result of the protected activity.
- B. Providing the complainant with a neutral reference for future employers.
- C. Requiring the respondent to provide employee or manager training regarding the rights afforded by AS 18.60.089. Training may be appropriate particularly where the respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation.
- D. Posting of a notice regarding the AKOSH order.

Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact the Assistant Chief of Enforcement and the AG for guidance on these and other non-monetary remedies.

XI. 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.

XII. 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 XII.C. below), unless it creates a barrier to achieving an early resolution.
3. To be finalized, every settlement, or in cases where AKOSH 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. See III.A., above.
- b. “Front pay” in the context of settlement is a term referring to future wage losses, calculated from the time of discharge, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties’ wishes to avoid reinstatement and the other agrees. See III.B., above.
- c. Wages lost due to the adverse action, offset by interim earnings. 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. See IV.C., above.
- d. Respondent’s submission of appropriate documentation to the Social Security Administration allocating back pay to the appropriate periods.

2. Other Remedies.

Other remedies include, but are not limited to:

- e. 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.
- f. The respondent’s agreement to provide a neutral reference to potential employers of the complainant.
- g. 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. A Whistleblower Fact Sheet may be posted in lieu of a posting a notice to employees.
- h. 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.

- i. Attorney's fees.
 - j. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.
 - k. Punitive damages may be considered and may be awarded under certain circumstances. See VI, above, for guidance. However, coordination with the supervisor and AG as soon as possible is imperative when considering such action. If the AG agrees that such damages may be appropriate, further development of evidence should be coordinated with the law office.
 - l. Other possible alternatives may be considered, including flexible work schedules and management training.
3. Tax Treatment of Amounts Recovered in a Settlement.

The complainant and respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with the Internal Revenue Code, case law, and IRS guidance. AKOSH is not responsible for advising the parties on the proper tax treatment and IRS reporting of payments made to resolve whistleblower cases.

C. The Standard AKOSH Settlement Agreement.

1. General Principles. 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:
 - a. It must be in writing.
 - b. It must stipulate that the respondent agrees to comply with the relevant statute(s).
 - c. It must specify the relief obtained.
 - d. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, where the 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.
2. Specific Requirements.

- a. 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 Assistant Chief of Enforcement. All pre-settlement discussions with the Assistant Chief of Enforcement must be documented in the case file.
- b. All appropriate relief and damages to which the complainant is entitled, and its justification, must be documented in the file. The complainant's concurrence must be noted, except in bilateral agreements where the complainant's concurrence is not required.
- c. In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. 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.
- d. 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.

3. Provisions of the Agreement. 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.** A provision stating that the respondent will post a Notice to Employees that it has agreed to abide by the requirement of the applicable whistleblower law pursuant to a settlement agreement. (See sample of Notice to Employees at the end of this chapter.)
 - b. **COMPLIANCE WITH NOTICE.** A provision stating that the respondent will comply with all of the terms and provisions of the Notice.

- c. GENERAL POSTING. A provision requiring the respondent to post the appropriate Whistleblower Fact Sheet that summarizes the rights and responsibilities under AS 18.60.089
 - d. NON-ADMISSION. A provision stating that, by signing the agreement, the respondent does not admit to violating any law, standard or regulation administered by AKOSH.
 - 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.
 - f. The Respondent agrees to make the complainant whole by payment of back pay less normal payroll deductions. The Respondent will provide appropriate documentation to the Social Security Administration, allocating the back pay award to the appropriate periods. Checks will be made out to the complainant but provided to AKOSH.
 - g. The Respondent agrees to pay the complainant a lump sum of money. The Complainant agrees to comply with applicable tax laws requiring the reporting of income. Checks will be made out to the complainant but provided to AKOSH.
4. All agreements utilizing AKOSH's standard settlement agreement must be recorded in the IMIS as "Settled."
 5. 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 Assistant 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.

1. 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 Assistant 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.

2. 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 Alaska Public Records Act, unless one of the APRA exemptions applies.
3. The approval letter must include the following statement: "The authority of Alaska Occupational Safety and Health over this agreement is limited to the statutes it enforces. Therefore, Alaska Occupational Safety and Health approves only the terms of the agreement pertaining to AS 18.60.089." This last sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under AKOSH 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 Alaska Public Records Act, unless one of the APRA exemptions applies.

4. If the parties do not submit their agreement to AKOSH or if AKOSH does not approve the signed agreement, AKOSH may dismiss the complaint. The dismissal shall state that the parties settled the case independently, but that the settlement agreement was not submitted to AKOSH or that the

settlement agreement did not meet AKOSH's criteria for approval, as the case may be. The dismissal will not include factual findings. Alternatively, if AKOSH's investigation has already gathered sufficient evidence for AKOSH to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than the complainant, AKOSH may issue merit findings or continue the investigation. The findings shall note the failure to submit the settlement to AKOSH or AKOSH's decision not to approve the settlement. The determination should be recorded in IMIS as either dismissed or merit, depending on AKOSH's determination.

E. Criteria by which to Review Private Settlements.

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest, the Assistant Chief of Enforcement must carefully review un-redacted 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 DOLWD 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 AS 18.60.089."
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 the AG 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.

XIII. Bilateral Agreements (Formerly Called Unilateral Agreements).

- A. A bilateral settlement is one between AKOSH , signed by the director, and a respondent—without the complainant’s consent—to resolve a complaint filed under AS 18.60.089. It is an acceptable remedy to be used only under the following conditions:
- i. 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.
 - ii. 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.)
 - iii. 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 DOLWD 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 Investigator shall record this fact and return it to the respondent.

XIV. Enforcement of settlements.

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

Sample Settlement Agreement Template

In the Matter of: [Complainant] v. [Respondent]
AKOSH Case #

SETTLEMENT AGREEMENT

Whereas, Complainant, _____, has filed discrimination complaints under the employee protection provisions of Alaska Statute 18.60.089; alleging violations of said provisions, and

The undersigned Respondent, _____, without admitting any violation of said Acts, and the undersigned Complainant _____, in the settlement of the above matters and subject to the approvals of the Chief of AKOSH, State of Alaska, Occupational Safety and Health, HEREBY AGREE AS FOLLOWS:

FAIR AND EQUITABLE - The Respondent will agree to the following terms and provisions which will provide the Complainant, _____, with a fair and equitable agreement:

1. **MONETARY AMOUNT:** The Respondent will pay the Complainant a monetary amount of \$ _____, with which applicable standard withholdings (taxes, social security, worker's compensation, and unemployment insurance) will be taken. This amount constitutes gross wages of \$ _____, less interim earnings of \$ _____.
2. **PERSONNEL RECORD:** Respondent will expunge Complainant's employment records of any reference to the exercise of his rights under Alaska Statute 18.60.089, and any record of disciplinary action surrounding this matter.
3. **NEUTRAL REFERENCE:** To the extent the Complainant directs any inquiry from a third party with regard to his employment with the Respondent and/or reasons(s) for the termination of his employment, Respondent agrees to provide a neutral reference, to include dates of employment, job title, and final wage rate.

NON-RETALIATION - The Respondent agrees not to retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the aforementioned statutes.

POSTING OF OSHA WHISTLEBLOWER FACT SHEET– Upon approval of this agreement, Respondent will post immediately in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, and maintain for a period of 60 consecutive days from the date of posting.

PERFORMANCE - Performance by the Respondent with the terms and provisions of the Agreement shall commence immediately after the Agreement approval.

CONSIDERATION - Complainant agrees to accept this Agreement in full as a complete settlement of any and all claims arising out of the filing of the discrimination complaints filed with AKOSH and OSHA against the Respondent. Complainant agrees that this claim

against Respondent will be dismissed without any additional or further award of costs or attorney's fees. All costs and attorney's fees are to be borne by the individual party who incurred the expenses. Neither complainant nor the government shall be liable for any attorney's fees or costs of Respondent.

AKOSH AUTHORITY: AKOSH's authority over settlement agreements is limited to such statutes as are within its jurisdiction as defined by the applicable state statute. Therefore, we approve only the terms of the agreement pertaining to AS 18.60.089.

NONADMISSION OF LIABILITY: This Agreement in no way constitutes an admission by Respondent of wrongdoing or a violation of any Alaska Statute and nothing in this Agreement may be used against Respondent except for the enforcement of its terms and provisions.

SIGNATURES & COPIES - The parties agree that this Settlement Agreement can be signed in counterparts and that a copy can be deemed the original.

Respondent Date

Complainant Date

Approved By:

Chief of AKOSH
State of Alaska
Occupational Safety and Health

Date

Chapter 7 - AKOSH RELATIONSHIP WITH OSHA

I. Relationship with OSHA.

- A. Section 18 of the OSH Act provides that any state 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 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.

| | | |
|---|------------------------------------|---|
| Discrimination Complaint AS 18.60.089 | | Case No: |
| COMPLAINANT INFORMATION | | |
| 1. Full Name: | | Date/Time: |
| 2. Address/Telephone Number: Email: | | |
| RESPONDENT (EMPLOYER) INFORMATION | | |
| 3. (Employer) Respondent Name: | | |
| 4. Respondent Address/Telephone Number: | | |
| 5. Type of Business: | | 6. Total Number of Employees in Establishment: |
| UNION INFORMATION | | |
| 7. Union? <input type="checkbox"/> Yes <input type="checkbox"/> No | | If yes, give Union Name and Local: |
| 8. Did you file a union grievance? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> No |
| GENERAL EMPLOYMENT INFORMATION | | |
| 10. Immediate Supervisor: | | |
| 11. Final Wage Rate: | | 11a. Usual number of hours worked per week: |
| Length of employment (<i>from-to</i>): | | |
| 13. Department assigned and job title: | | |
| 14. Brief description of work duties: | | |

| | |
|--|-------|
| 14a. How were you discriminated or retaliated against? | |
| 15. Did you file any complaints with the employer? <input type="checkbox"/> Yes <input type="checkbox"/> No | |
| 15a. What were the details of the complaint? | |
| 15b. To whom did you make the complaint and when? | |
| 15e. Did anyone else complain? (<i>Who and what was the result?</i>) | |
| 16. Did you file a complaint with state or federal OSHA or any other agency? <input type="checkbox"/> State of Alaska, OSH <input type="checkbox"/> Federal OSHA <input type="checkbox"/> Other agency (<i>please specify</i>) _____ <input type="checkbox"/> No | |
| 16a. When did you file? | |
| DETAILS OF WORK REFUSAL | |
| 17. Did you ever refuse to do any work assignment? <input type="checkbox"/> Yes <input type="checkbox"/> No (<i>if No skip to 18</i>) | |
| 17a. Describe the situation where you refused a work assignment. | |
| Description and details of the adverse action | |
| 18. What remedy are you seeking? | |
| 19. Do you want your job back? <input type="checkbox"/> Yes <input type="checkbox"/> No | |
| 20. Have you worked since leaving this employment? If so, where? | |
| 20a. When did you first begin this new employment? | |
| OFFICER RECEIPT AND CERTIFICATION | |
| I certify that the complaint was filed with me on: _____ in _____, Alaska. | |
| Officer Signature | Date: |

| | |
|---|-------------------------------|
| WITNESS INFORMATION | |
| 23. Please provide names, addresses, telephone numbers of witnesses (<i>please use additional paper if needed</i>): | |
| 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? |