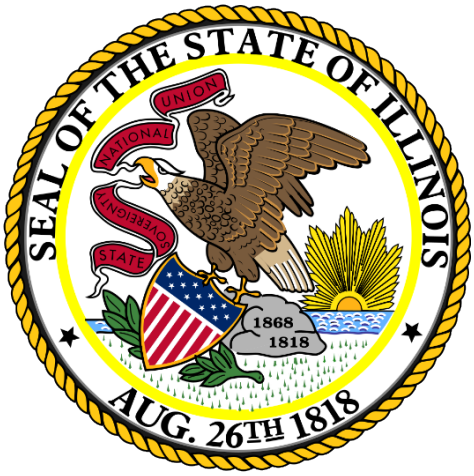
Illinois Department of Labor Whistleblower Investigations Manual



WIM Effective 2/16/23 V-1

Disclaimer

This manual is intended to provide instruction regarding some of the internal operations of the Illinois Occupational Safety and Health Administration 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 Illinois Department of Labor. Statements that reflect current Administrative Review Board or court precedents do not necessarily indicate agreement with those precedents.

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CHAPTERS

Chapter 1

PRELIMINARY MATTERS

- **Purpose**

This version of the IL OSHA Whistleblower Investigations Manual (WIM) supersedes the July 1, 2017, version. This manual outlines legal concepts, procedures, and other information related to the handling of retaliation complaints under the Illinois Occupational Safety and Health Act (IL OSHA) [820 ILCS 219/110] and may be used as a ready reference. Any divergence from procedures established in the WIM must be approved by Director of IDOL as a pilot before it may be implemented.

- **Scope**

IL OSHA-wide.

- **References**

The whistleblower provisions of the following statutes:

- 820 ILCS 219/110 Discrimination against employee prohibited.
- 56 Ill. Admin. Code 350.125 Discrimination Prohibited Against Employees
- 56 Ill. Admin. Code 350.700 Adoption of Federal Standards
- 29 CFR Part 1977 Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970
- Occupational Safety and Health Act (Section 11(c)), 29 U.S.C. § 660(c)

Additional relevant instructions, and memoranda:

- CPL02-03-011 [CPL02-03-007]- National - Whistleblower Investigations Manual - 04/29/2022 - PDF

Dual Filing

The State of Illinois does not have jurisdiction over private-sector Complainants. Complainants filing public sector whistleblower complaints in Illinois do not have rights to dual filing with Federal OSHA.

Illinois has a State Plan that covers state and local government employees only.. All private-sector 11(c) coverage remains solely under the authority of federal OSHA. In the Illinois State Plan, complaints from state and local government employees are covered only by the State Plan's Section 11(c) analog. In addition, issues arising from the State Plan's handling of retaliation cases are eligible for review under Complaint About State Program Administration (CASPA) procedures.

Reopening cases

Illinois has the authority to reopen cases based on the discovery of new facts, the results of, a CASPA, or other circumstances.

Background

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* ("OSH Act"), is a federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the Nation.

As a result of the Federal OSH Act of 1970 the State of Illinois General Assembly has created (820 ILCS 219/1 *et seq.*) Occupational Safety and Health Act.

(820 ILCS 219/20)
Sec. 20. Duties of employers and employees.

(a) Every public employer must provide reasonable protection to the lives, health, and safety of its employees and must furnish to each of its employee's employment and a workplace which are free from recognized hazards that cause or are likely to cause death or serious physical harm to its employees.

(b) Every public employer must comply with the occupational safety and health standards promulgated under this Act.

(c) Every public employer must keep its employees informed of their protections and obligations under this Act, including the provisions of applicable standards or rules adopted under this Act.

(d) Every public employer must furnish its employees with information regarding hazards in the workplace, including information about suitable precautions, relevant symptoms, and emergency treatment.

(e) Every employee must comply with the rules that are promulgated from time to time by the Director under this Act and that are applicable to the employee's actions and conduct.

(Source: P.A. 98-874, eff. 1-1-15.)

(820 ILCS 219/110)
Sec. 110. Discrimination against employee prohibited.

(a) A person may not discharge or in any way discriminate against an employee because the employee has: (i) filed a complaint or instituted or caused to be instituted any proceeding under this Act, (ii) testified or is about to testify in any such proceeding, or (iii) exercised, on his or her own behalf or on behalf of another person, any right afforded by this Act.

(b) An employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this Section may, within 30 calendar days after the violation occurs, file a complaint with the Director alleging the discrimination.

(c) Upon receipt of the complaint, the Director shall cause an investigation to be made as the Director deems appropriate. After the investigation, if the Director determines that the employer has violated this Section, the Director shall bring an

action in the circuit court for appropriate relief, including rehiring or reinstatement of the employee to his or her former position with back pay, after taking into account any interim earnings of the employee.

(Source: P.A. 98-874, eff. 1-1-15.)

- **Definitions, Acronyms, and Terminology**
  - **Adverse Action:** See Chapter 2. C, *Adverse Action*.
  - **Bilateral Agreements:** Settlement agreements under (820 ILCS 219/110) between IL OSHA and Respondent without Complainant's consent. See Chapter 7.VI.
  - **Cat's Paw Theory:** See Chapter 2.V.B.
  - **Complaints About State Program Administration (CASPA):** Complaints filed with OSHA about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to (820 ILCS 219/110) complainants.
  - **Complainant:** Any person who believes that they have suffered an adverse action in violation of the IL OSHA whistleblower provision and who has filed, with or without a representative, a whistleblower complaint with IL OSHA. When this manual discusses investigatory communication and coordination, the term "Complainant" also includes the Complainant's designated representative.
  - **Designated Representative:** A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in IL OSHA's investigation of a whistleblower complaint. If a representative has been designated, IL OSHA typically communicates with the Complainant or the Respondent through the designated representative, although IL OSHA may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. Director's Findings are sent to both the parties and their representatives.
  - **Division Manager** (DM). IL OSHA
    The DM has overall responsibility for all whistleblower investigations.
  - **Employer-Employee Agreements**: Settlement agreements between Complainant and Respondent, subject to IL OSHA's approval. See Chapter 7.
  - **Docketing** The term "to docket" means to open a case for an investigation, document the case as an open investigation in OITSS-Whistleblower, and formally notify both parties in writing of IL OSHA's receipt of the complaint and intent to investigate.

- **Enforcement Case:** Refers to an inspection or investigation conducted by an Enforcement Inspector as distinguished from a whistleblower case.
- **Inspector or Enforcement Inspector**: a person authorized by the Division of Occupational Safety and Health within the Illinois Department of Labor, to conduct inspections.
- **Investigator:** An IL OSHA employee assigned to investigate and prepare an ROI (see below) in an IL OSHA whistleblower case.
- **Lack of Cooperation (LOC)**: A complainant's failure to provide information necessary for a whistleblower investigation.
- **Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU)**: An agreement between two agencies regarding the coordination of related activities.
- **Nexus**: See Chapter 2.V.D, *Nexus*.
- **Non-Public Disclosure**: A disclosure of information from the investigative case file made to Complainant or Respondent during the investigation in order to resolve the complaint.
- **OIS / OITSS-Whistleblower / WebIMIS:** OIS - IL OSHA Information System is the current Whistleblower case management system in use. IL OSHA IT Support System – OITSS-Whistleblower, was the case management system formerly used to process complaint data for IL OSHA's WPP, formerly known as *WebIMIS*.
- **Personal Identifiable Information (PII)**: Information about an individual which may identify the individual, such as a Social Security number or a medical record. See Chapter 9.III.A.4.a.
- **Protected Activity**: See Chapter 2.V.A, *Protected Activity*.
- **Whistleblower Supervisor**. (WB Supervisor)
  Investigators will be supervised by the Occupational Health and Safety Coordinator (OHSC). In this manual, the term "WB Supervisor" is used to refer to the OHSC, who has responsibility for supervising the work of an investigator.
- **Respondent:** Any employer or individual company official against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term "Respondent" also includes Respondent's designated representative.
- **Report of Investigation (ROI)**: The report prepared by an Investigator in an IL OSHA whistleblower case, setting forth the facts, analyzing the evidence, and making recommendations.
- **Whistleblower complaint or complaint:** A complaint filed with IL OSHA alleging unlawful retaliation for engaging in protected activity. For example, a public works employee complains to IL OSHA that she was suspended for reporting a lack of fall protection to IL OSHA. The whistleblower complaint is the complaint to IL OSHA regarding the suspension for reporting a safety

violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to IL OSHA regarding the lack of fall protection.

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

- **Functional Responsibilities**

The following describes the functions and responsibilities of the various positions and offices within IL OSHA's WPP. These descriptions are intended neither to be all-inclusive nor to describe actual position descriptions and/or job functions. Rather, the following descriptions are intended to provide a general overview of IL OSHA and IDOL functions that may be different depending on the needs or staffing of each office or unit.

Division Manager (DM). IL OSHA

The DM has overall responsibility for all whistleblower investigations and outreach activities, as well as for ensuring that all IL OSHA 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 IL OSHA and are trained to take whistleblower complaints via the intake form(s). The DM is authorized to issue determinations and approve settlement of complaints filed under (820 ILCS 219/110). This authority may be re-delegated to, but not lower than, the WB Supervisor.

Whistleblower Supervisor. (WB Supervisor)

Investigators will be supervised by the Occupational Health and Safety Coordinator (OHSC). In this manual, the term "WB Supervisor" is used to refer to the OHSC, who has responsibility for supervising the work of an investigator.

Under the guidance and direction of the DM the WB Supervisor is responsible for implementation of policies and procedures, and also for the effective supervision of field whistleblower investigations, including the following functions:

The WB Supervisor will monitor the DOL.Whistleblower@Illinois.gov email account and upon receiving a whistleblower complaint the WB Supervisor will assign whistleblower cases to individual investigators. In the event that the WB Supervisor is absent the DM or his or her designee shall monitor the DOL.Whistleblower@Illinois.gov account for incoming complaints.

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

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

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

Reviewing investigative reports for comprehensiveness and technical accuracy, reviewing for revision drafts of Director's Findings, and then signing the reports

when they are complete.

At the direction of the DM, coordinating and maintaining liaison with the IDOL legal team.

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

Providing training (formal and field) for investigators.

Investigator

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

1. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
2. Reviewing investigative and/or enforcement case files in field offices for background information concerning any other proceedings that relate to a specific complaint.
3. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
4. Following up on leads resulting from interviews and statements.
5. Interviewing and obtaining statements from respondent's officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
6. Applying knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzing the evidence, drafting an investigative report, and recommending appropriate action to the WB Supervisor.
7. Composing draft Director's Findings for supervisory review.
8. Negotiating with the parties to obtain a written settlement agreement that provides prompt resolution and satisfactory remedies to Complainant where appropriate.
9. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.
10. Organizing and maintaining whistleblower investigation case files.

G. Enforcement Inspector or Inspector

A person authorized by the Division of Occupational Safety and Health within the Illinois Department of Labor, to conduct inspections. Each inspector maintains a basic understanding of the whistleblower protection provision administered by IL OSHA, in order to advise employers and employees of their responsibilities and rights under these laws. Each Inspector must accurately record information about potential whistleblower complaints on an IL OSHA-87 form and immediately forward it to the OSH Coordinator. In every instance, the date of the initial contact must be recorded. Additionally, as noted in the FOM, Inspectors should

instruct employers and employees about 820 ILCS 219/110 rights during opening and closing conferences.

- **Languages**

IL OSHA Regional Offices are encouraged to communicate with complainants, respondents, and witnesses in the language in which they understand, both orally or in writing. Translators may be used. If any communication, including Director's Findings, is written in a language other than English, an English-language version must also be written. Oral and written communication in any language must be grammatically correct.

Chapter 2

LEGAL PRINCIPLES

I. Scope

This Chapter explains the legal principles applicable to investigations under the IL OSHA whistleblower protection provision, including:

- the requirement to determine whether there is reasonable cause to believe that unlawful retaliation occurred;
- the prima facie elements of a violation of the whistleblower provision of IL OSHA;
- the standards of causation relevant to the provision of IL OSHA;
- the types of evidence that may be relevant to determine causation and to detect pretext (a.k.a. "pretext testing") in whistleblower retaliation cases; and
- other applicable legal principles.

II. Introduction

The IL OSHA-enforced whistleblower protection provision (820 ILCS 219/110) prohibits a covered entity or individual from retaliating against an employee for the employee's engaging in activity protected by IL OSHA. In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of the IL OSHA whistleblower provision has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., but-for, or substantial reason).

III. Gatekeeping

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

IV. Reasonable Cause

If the case proceeds beyond the screening phase, IL OSHA investigates the case by gathering evidence to determine whether there is reasonable cause to believe that retaliation in violation of the whistleblower provision occurred. Reasonable cause means that the evidence gathered in the investigation would lead IL OSHA to believe that unlawful retaliation occurred –

i.e. that there could be success in proving a violation in court based on the elements described in more detail below.

A reasonable cause determination requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent but does not generally require as much evidence as would be required at trial. Although IL OSHA will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, IL OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred.[1] Because IL OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a hearing.

If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, IL OSHA will consult with IDOL Legal to evaluate whether the case is appropriate for settlement or litigation. If the investigation does not establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed.

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

V. Elements of a Violation

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

A. Protected Activity

The evidence must establish that Complainant engaged in activity protected under IL OSHA. Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities.

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

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

2. **Reporting a work-related injury or illness** – Reporting a work-related injury or illness to management personnel. In some instances, these injury-reporting cases may be covered under PART 350 HEALTH AND SAFETY SUBPART B: INJURY/ILLNESS RECORDKEEPING AND REPORTING REQUIREMENTS, and 29 CFR 1904.35(b)(1)(iv). For additional information, refer to the memorandum *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 CFR 1904.35(b)(1)(iv)*, October 11, 2018, and related memoranda. See also Chapter 2.VIII, *Policies and Practices Discouraging Injury Reporting* for related information.
3. **Providing information to a government agency –** Providing information to a government entity such as IL OSHA.
4. **Filing a complaint –** Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to IL OSHA under the IL OSH Act.
5. **Instituting or causing to be instituted any proceeding under or related to the Act** – Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue.
6. **Assisting, participating, or testifying in proceedings –** Testifying in proceedings, such as hearings, or assisting or participating in inspections or investigations by agencies such as IL OSHA.
7. **Work Refusal –** The IL OSHA whistleblower provision generally protects employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected).

   As a general matter, there is no right afforded by the Act that entitles employees to walk off the job because of potential unsafe conditions at the workplace, because hazardous conditions that may be a violation of the Act will ordinarily be corrected by the employer, once brought to their attention. Under these circumstances, an employer would not ordinarily be in violation of Section 110 by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards. Notwithstanding the above, if corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have the opportunity to request inspection of the workplace. In no circumstance shall an employee be subject to discipline solely because the employee files, or plans to file, a complaint with Illinois IL OSHA.

   An employee may be confronted with a choice between performing assigned tasks or risking serious injury or death arising from a hazardous condition in the workplace. If the employee, with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition, the employee would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, when possible, must also have sought from the employer, and been unable to obtain, a

correction of the dangerous condition.

If the work refusal is determined to be invalid, the investigator must still investigate any other protected activities alleged in the complaint.

See memorandum *Clarification of the Work Refusal Standard under 29 CFR 1977.12(b)(2)*, January 11, 2016.

If the protected work refusal includes ambiguous action by Complainant that Respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, Complainant's subsequent lack of employment may constitute a discharge. If it is ambiguous whether Complainant quit or was discharged, consultation with IDOL Legal may be appropriate. See Chapter 2.V.C.1, Discharge.

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

B. Employer Knowledge

The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that Complainant or someone closely associated with Complainant, such as a spouse or coworker, engaged in protected activity.[2] For example, one of Respondent's managers need not know that Complainant contacted a regulatory agency if their previous internal complaints would cause Respondent to suspect Complainant initiated a regulatory action.

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

- An IL OSHA complaint is about the only lathe in a plant, and Complainant is the only lathe operator.
- A complaint is about unguarded machinery and Complainant was recently injured on an unguarded machine.
- A union grievance is filed over a lack of fall protection and Complainant had recently insisted that his foreman provide him with a safety harness.
- Under the ***small plant doctrine***, in a small company or small work group where everyone knows each other, knowledge can generally be attributed to the employer.

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

If Respondent's decision-maker takes action based on the recommendation of a lower-level supervisor who knew of and was motivated by the protected activity to recommend action against Complainant, employer knowledge and motive are imputed to the decision maker. This concept is known as the **cat's paw theory**.

C. Adverse Action

An adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the employee. The evidence must demonstrate that Complainant suffered some form of adverse action. An adverse action typically relates to the terms or conditions of employment, although it does not necessarily have to.[3]

It may not always be clear whether Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the action at issue might have dissuaded a reasonable employee from engaging in protected activity.[4] The investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

Some examples of adverse actions are:

1. Discharge – Discharges include not only straightforward firings, but also situations in which the words or conduct of a supervisor would lead a reasonable employee to believe that they had been terminated (e.g., a supervisor's demand that the employee clear out their desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge. If it is ambiguous whether the action was a quit or a discharge, consultation with IDOL Legal may be appropriate.
2. Demotion
3. Suspension
4. Reprimand or other discipline
5. Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when the employer participates in the harassment or knowingly or recklessly allows the harassment to occur and the harassment is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive such that it would dissuade a reasonable person from engaging in protected activity.

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[3] *Burlington Northern and Santa Fe Ry, Co. v. White* , 548 U.S. 53, 63-64 (2006) (where not otherwise specified retaliation need not be related to employment; e.g., filing a false criminal charge against a former employee is adverse action).

[4] *Id*

6. Hostile work environment – Separate adverse actions that occur over a period of time may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. A hostile work environment typically involves ongoing severe and pervasive conduct, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
7. Lay-off
8. Failure to promote
9. Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.
10. Failure to recall
11. Transfer to different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and should be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, and reduced opportunities for promotion and training. In such cases, it is important to gather evidence indicating what positions Respondent(s) had available at the time of the transfer and whether any of Complainant's similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments. See Memorandum *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers* issued May 11, 2016, for further information.
12. Change in duties or responsibilities
13. Denial of overtime
14. Reduction in pay or hours
15. Denial of benefits
16. Making a threat
17. Intimidation
18. Constructive discharge – The employee quitting after the employer has *deliberately,* in response to protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
19. Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.
20. Reporting or threatening to report an employee to the police or immigration authorities.

D. Nexus

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

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

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

- **Temporal Proximity** – A short time between the protected activity (or when the employer became aware of the protected activity or the agency action related to the protected activity, such as the issuance of an IL OSHA citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action;
- **Animus** – Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager's attitude towards Complainant following the protected activity, can be important circumstantial evidence of nexus;
- **Disparate Treatment** – Evidence of inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity can support a finding of nexus;
- **Pretext** – Shifting explanations for the employer's actions, disparate treatment of the employee as described above, evidence that Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer's explanation for taking adverse action against the employee is pretext and that the employer's true motive for taking the adverse action was to retaliate against the employee for the protected activity.

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

VI. Causation Standards

The causation standard is the type of causal link (a.k.a. nexus), required between the protected

activity and the adverse action. That causal link will be either that the adverse action would not have occurred ***but for*** the protected activity, or that the protected activity was a ***substantial reason*** for the adverse action.

A. But-For Causation

A good explanation of but- for causation is found in *Bostock v. Clay County, Georgia*, __ U.S.__, 140 S. Ct. 1731 (2020). As the Supreme Court ruled, but-for causation analysis directs the courts to change one thing at a time and see if the outcome changes; if it does, there is but-for causation.

This test does not require that the illegal motive (in whistleblower cases, the protected activity) be the sole reason for the adverse action. It also does not require that illegal motive (protected activity) be the primary reason for the adverse action. *Id.* at 1739. Further, it does not require a showing that the protected activity was the sole reason for the adverse action, only that it was independently sufficient. *Id.*

B. Substantial Reason Causation

Substantial reason causation is a lesser burden than but-for causation. As the standard states, the illegal motive must be a substantial reason for the adverse action. These situations must be examined on a case-by-case basis.

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

Testing the evidence supporting and refuting Respondent's defense is a critical part of a whistleblower investigation. IL OSHA refers to this testing loosely as "pretext testing" although a showing that the employer's explanation for the adverse action was pretextual is not, strictly speaking, required under the whistleblower protection provision. Investigators are required to conduct pretext testing of Respondent's defense.

- A **pretextual position** or argument is a statement that is put forward to conceal a true purpose for an adverse action.
- Thus, **pretext testing** evaluates whether the employer took the adverse action against the employee for the legitimate business reason that the employer asserts or whether the action against the employee was in fact retaliation for Complainant's engaging in protected activity.

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

- An employer's shifting explanations for its actions;
- The falsity of an employer's explanation for the adverse action taken;
- Temporal proximity between the protected activity and the adverse action;
- Inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity;

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

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

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

- Did Complainant actually engage in the misconduct or unsatisfactory performance that Respondent cites as its reason for taking adverse action? If Complainant did not engage in the misconduct or unsatisfactory performance, does the evidence suggest that Respondent's actions were based on its actual but mistaken belief that there was misconduct or unsatisfactory performance?
- What discipline was issued by Respondent at the time it learned of the Complainant's misconduct or poor performance? Did Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did Complainant's productivity, attitude, or actions change after the protected activity?
- Did Respondent's behavior toward Complainant change after the protected activity?
- Did Respondent discipline other employees for the same infraction and to the same degree?

In circumstances in which witnesses, or relevant documents are not available, the investigator should consult with the WB Supervisor. Consultation with IDOL Legal may also be appropriate in order to determine how to resolve the complaint. See Chapter 5.III.B.4, Employer *Defense/ Affirmative Defense and Pretext Testing*.

VIII. Policies and Practices Discouraging Injury [5] Reporting

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

There are several types of workplace policies and practices that could discourage injury reporting and thus violate section 820 ILCS 219/110. Some of these policies and practices may also violate IL OSHA's recordkeeping regulations at 29 CFR 1904.35 where there is coverage under the OSH Act. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

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

For guidance on evaluating injury-based incentive programs and drug/alcohol testing after

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

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

Reporting an injury is a protected activity. This includes filing a report of injury under a worker's compensation statute. Disciplining all employees who are injured, regardless of fault, is a discriminatory policy. Discipline imposed under such a policy against an employee for reporting an injury is therefore a direct violation of section 820 ILCS 219/110. In addition, such a policy is inconsistent with the employer's obligations under Section 350.390 Employee Involvement, and where it is encountered in an IL OSH Act case, a referral for a recordkeeping investigation will be made.

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

Cases involving employees who are disciplined by an employer following their report of an injury warrant careful scrutiny, most especially when the employer claims the employee has violated rules governing the time or manner for reporting injuries. Because the act of reporting an injury directly results in discipline, there is a clear potential for violating 820 ILCS 219/110. IL OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize employees who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination.

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

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

Where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, not only may application of the employer's reporting rules be a pretext for unlawful retaliation, but also the reporting rules may have a chilling effect on injury reporting that may result in inaccurate injury records, and a referral for a recordkeeping investigation of a possible Section 350.400 violation.

D. **Discipline for Violating Safety Rule**

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

Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer's treatment of similarly-situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination in violation of 820 ILCS 219/110.

Chapter 3

INTAKE AND INITIAL PROCESSING 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, and recording the case data in IL OSHA's OITSS-Whistleblower. The procedures outlined in this chapter are designed to ensure that cases are efficiently evaluated to determine whether an investigation is appropriate; that IL OSHA achieves a reasonable balance between accuracy in screening decisions and timeliness of screening; and to determine when it is appropriate to investigate complaints in which unlawful retaliation may have occurred.

II. Incoming Complaints

A. Flexible Filing Options

1. Who May File

Any employee or other individual covered by the IL OSHA whistleblower provisions is permitted to file a whistleblower complaint with IL OSHA.

No particular form of complaint is required. IL OSHA will accept the complaint in any language.

A complaint under the statute may be filed orally or in writing.

a. Written Complaints

IL OSHA accepts electronically-filed complaints at: https://www2.illinois.gov/idol/Laws-Rules/safety/Documents/Discrimination%20Complaint%20Form%20Fillable.pdf IL OSHA also accepts written complaints delivered by other means.

Complaints where the initial contact is in writing do not require the completion of an IL OSHA-87 form or other appropriate intake worksheet, as the written filing will constitute the complaint.

b. Oral Complaints

For oral complaints, when a complaint is received, the receiving officer must accurately record the pertinent information on an IL OSHA-87 form or other appropriate intake worksheet and immediately forward it to the WB Supervisor or designated whistleblower e-mail box to complete the filing. Whenever possible, the minimum complaint information on the IL OSHA Form 87 or other appropriate intake worksheet should include for each Complainant and Respondent: full name, mailing address, email address, and phone number; date of filing; and date of the adverse action. In every instance, the **date of the initial contact must be recorded**.

B. **Receiving Complaints**

All public sector WB complaints received must be logged into OIS. Even those complaints that on their face are untimely or have been wrongly filed with IL OSHA (e.g., a complaint alleging racial discrimination) must be logged. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets.

Upon receipt of a public sector WB complaint, a diary sheet (which will become the Case Activity Log should the complaint be docketed) documenting all contact with Complainant must be initiated and maintained.

C. **Complaint Requirements**

The complaint, supplemented as appropriate with information obtained in interviews with the complainant, and any additional information, should ultimately contain the following:

1. Complainant's name and contact information, and if applicable, name and contact information of Complainant's representative. If represented, IL OSHA should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.
2. Respondents' name(s) and contact information (if multiple Respondents, then all contact information should be present).
3. Worksite address (if different from employer address).
4. The current or final job Complainant performed for Respondent(s).
5. An allegation of retaliation for having engaged in activity that is at least potentially protected by the IL OSHA whistleblower protection statute (i.e., a prima facie allegation). That is, the complaint, supplemented as appropriate by the screening interview and any additional information, should contain an allegation of:
    a. Some details that could constitute protected activity under the IL OSHA whistleblower statute;
    b. Some details indicating that the employer knew or suspected that Complainant engaged in protected activity;
    c. Some details indicating that an adverse action occurred and the date of the action; and
    d. Some details indicating that the adverse action was taken at least in part because of the protected activity.

If any of the above information is missing after the screening interview (or after reasonable attempts to contact Complainant for a screening interview), IL OSHA will preserve the filing date for timeliness purposes and inform Complainant that Complainant needs to provide the missing information (IL OSHA should be specific as to what is missing).

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

- If Complainant does not provide the missing information within a reasonable amount of time (usually 10 days),[6] IL OSHA may administratively close the complaint.

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

III. Screening Interviews and Docketing Complaints

A. Overview

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

If the complaint is private sector it falls under the Federal OSH Act section 11(c) and should be forwarded to the OSHA-REG-5-WB@dol.gov email in a timely manner.

All Illinois public sector WB complaints shall be entered into OIS, and an Electronic Case File created.

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

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

B. Complaint/Case Assignment

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

The WB Supervisor will approve the case for docketing and assign for investigation. Intake screening may be performed directly by the WB supervisor or may be delegated to an investigator. It is recommended that one investigator handle the case from screening interview to closing conference. While the case assignment may happen before or after the screening interview, the case must be assigned to an investigator no later than the completion of the screening.

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

C. Initial Contact/Screening Interviews

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

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

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

As noted above, the primary purpose of the screening interview is to ensure that (a) a prima facie allegation of unlawful retaliation exists and (b) that the complaint is timely.

During the complaint screening process, it is important to confirm that the complaint was timely filed and that a prima facie allegation has been made under 820 ILCS 219/110.

1. Timeliness of Filing

Whistleblower complaints must be filed within a 30-day time frame which generally begins when the adverse action takes place. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to Complainant. Generally, the date of the postmark, facsimile transmittal, email communication, online complaint, telephone call, hand- delivery, delivery to a third-party commercial carrier, or in-person filing at an Illinois 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 holiday, or if the IL OSHA Office is closed, then the next business day will count as the final day.

2. Tolling (Extending) the Complaint Filing Deadline

The following is a non-exclusive list of reasons that may justify the tolling (extending) of the complaint filing deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. Tolling suspends the running of the filing period and allows days during which Complainant was unable to file a complaint to be added to the regular filing period. If in doubt, the investigator should consult the WB Supervisor.

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

- After the employee engaged in protected activity, the employer placed a note in the personnel file that will negate the employee's eligibility for promotion but never informed the employee of the notation; or
- The employer purports to lay off a group of employees, but immediately rehires all of the employees who did not engage in protected activity.

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

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

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

d. The employer's acts or omissions have lulled the employee into foregoing prompt attempts to vindicate their rights. For example, tolling may be appropriate when an employer had repeatedly assured Complainant that they would be reinstated so that Complainant reasonably believed they would be restored to their former position. However, the mere fact that settlement negotiations were ongoing between Complainant and Respondent is not sufficient for tolling the time for filing a whistleblower complaint. *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010).

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

f. Conditions which do not justify extension of the filing period include, but are not limited to:

   i. Ignorance of the statutory filing period;

   ii. Filing with another agency;

   iii. Filing of unemployment compensation claims;

   iv. Filing a workers' compensation claim;

   v. Filing a private lawsuit;

   vi. Filing a grievance or arbitration action; or,

   vii. Filing a retaliation complaint with a State Plan state or another agency that has the authority to grant the requested relief.

IV. Untimely Complaint or Incomplete Allegations: Administrative Closures and Docket-and-Dismissals; Withdrawal

Following the screening interview (or reasonable attempts to conduct one), complaints that do not meet threshold requirements (i.e., do not contain a prima facie allegation or fail for some other threshold reason such as untimeliness or lack of coverage under the IL OSHA whistleblower provisions) will be administratively closed.

A. Administrative Closures

1. Administrative Closure where complaint does not meet threshold requirements.

   Complaints that do not meet the threshold requirements following a screening interview will be administratively closed. All administrative closures should be reviewed by the WB Supervisor. When a complaint is administratively closed the following must be completed by the investigator:

   a. Notification: The investigator will notify Complainant, verbally or in writing, that the complaint does not meet threshold requirements for investigation. The notification can be done as part of a screening interview and should include:

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

      ii. If the explanation was made verbally, the investigator should send the Complainant a notification of the administrative closure of the complaint and document the administrative closure in the case file.

      iii. The notification should inform the Complainant that if they have additional information to provide or wish IL OSHA to reconsider the administrative closing, they should contact IL OSHA in writing within 10 days or before the filing period ends, whichever is later.

      iv. If Complainant sends additional information or requests reconsideration of the administrative closure within the day 10 day time frame, IL OSHA shall review the additional information or request for reconsideration. If after reviewing it is determined that the complaint still has not meet threshold requirements for investigation then the case will be docketed and dismissed.

      v. If after review of the additional information it is determined that the threshold requirements are met then IL OSHA will Docket the case for investigation.

2. **Administrative Closures for lack of responsiveness.**

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

   a. Reasonable attempts include attempting to contact Complainant through more than one method of communication (e.g., telephone and email), if Complainant has provided more than one form of contact information and allowing Complainant 48 hours to respond. In the case of phone calls, at least two attempts

should be made at different hours of the day during allowed work-band hours. IL OSHA's attempts to contact Complainant must be documented in the case file.

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

c. If Complainant contacts IL OSHA and indicates a desire to pursue the complaint, IL OSHA will reopen the case, complete the screening interview, and either docket the case or administratively close the case if it does not meet the necessary threshold requirements.

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

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

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

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

4. **Documenting Administrative Closures**

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

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

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

   i. The complaint;

ii. Complaint assignment memo or email;

iii. All internal and external emails and other correspondence;

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

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

vi. Administrative closure letter to Complainant; and

vii. OIS-Whistleblower Summary page.

B. **Docket and Dismiss**

If the complaint was administratively closed and the Complainants reconsideration of the administrative closure was denied, then the case will be reopened in OIS, Docketed, and then Dismissed. IL OSHA will docket and dismiss the complaint without conducting an investigation.

The Complainant and Respondent will be sent a copy of the complaint and the Docket and Dismiss Letter. The Docket and Dismiss Letter will indicate that the case has been received and docketed, briefly explain the basis for the dismissal, and include a notification explaining the complainants rights to appeal have been exhausted.

C. **Election Not To Proceed, a.k.a. Withdrawal Before Docketing or Before Notification Letters are Issued**

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

V. Docketing

The term "to Docket" means to open a case for an investigation, document the case as an open investigation in OIS-Whistleblower, and formally notify both parties in writing of IL OSHA's receipt of the complaint and intent to investigate.

The appropriate case file identification format for electronic case files (ECF) is "*OIS Case Number*[space - space]*Respondent*[space - space]*Complainant Last Name*."

The appropriate case identification format in correspondence is the same: "*OIS Case Number*[space - space]*Respondent*[space - space]*Complainant*."

OIS-Whistleblower automatically designates the case number when a new complaint is entered into the system.

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

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

VI. Named Respondents

All relevant employers should be named as Respondents in all docketed cases unless Complainant refuses. This includes relevant staffing agencies, as well as individual public sector officials. Failing to name a Respondent may create confusion regarding whether Complainant has properly exhausted administrative remedies which could impede future settlement of the case, impede relevant interviews, or unnecessarily delay or prevent Complainant from obtaining reinstatement and other remedies.

820 ILCS 219/110 does not limit the actions to employers against employees. A person may be chargeable with discriminatory action against an employee of another person. It would extend to such entities as organizations representing employees for collective bargaining purposes or any other person in a position to discriminate against an employee.

VII. Notification Letters

A. Complainant

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

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

Complainant will be notified using a method that permits IL OSHA to confirm receipt. This includes but is not limited to email or U.S. mail, delivery confirmation required, or hand delivery.

B. Respondent

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

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

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

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

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

Respondent will be notified using a method that permits IL OSHA to confirm receipt. This includes but is not limited to email or U.S. mail, delivery confirmation required, or hand delivery.

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

VIII. Early Resolution

IL OSHA will work to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is encouraged to contact Respondent soon after completing the intake interview and docketing the complaint if they believe an early resolution may be possible. However, the investigator must first determine whether a safety/health inspection is pending with IL OSHA. **The investigator must wait until the commencement of the safety and health inspection (or partner agency inspection) before contacting Respondent.**

IX. Case Transfer

If a case file has to be transferred to another investigator the transfer must be documented in the case file and the parties notified. Only the WB Supervisor is authorized to transfer case files. Every attempt to limit the number of transfers should be made.

Chapter 4

CONDUCT OF INVESTIGATION

I. Scope

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

II. General Principles

A. Reasonable Balance

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

B. Investigator as Neutral Party

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

C. Investigator's Expertise

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

D. Reasonable Cause to Believe a Violation Occurred

For 820 ILCS 219/110 cases, when IL OSHA believes that there may be reasonable cause to believe that a violation occurred (i.e., the case may be a merit case), IL OSHA should consult informally with the IDOL Legal in order to ensure that the

investigation captures as much relevant information as possible for IDOL Legal to evaluate whether the case is suitable for litigation. See Chapter 2.IV, *Reasonable Cause*, for more information.

E. Whistleblower Supervisor Review is Required

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

If the WB Supervisor has conducted the investigation, the IL OSHA Division Manager must agree that closure is appropriate, and the Division Manager's agreement should be documented in the case file.

III. Case File

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

A. File Format

1. Electronic Case Files (ECF)

IL OSHA will use the ECF or abbreviated ECF which are based upon the format found in CPL 02-03-009, *Electronic Case File System Procedures for the Whistleblower Protection Program*, dated June 18, 2020. Case file naming protocols have been modified to fit IL OSHA's needs.

2. Paper Case Files

Paper Case Files are no longer being kept by IL OSHA and should both Complainants and Respondents should be encouraged to submit materials in electronic format. Parties are not however, required, to submit materials in electronic format.

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

a PDF, the PDF becomes the official government record, investigators should retain the paper submissions in accordance with the record retention schedule.

To the extent a paper file is kept, the file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.

B. Documenting the Investigation

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

arranged chronologically by date of receipt where feasible.

C. **Case Activity Log**

All telephone calls made, and voice mails received during the course of an investigation, other than those with IL OSHA Whistleblower personnel, must be accurately documented and notation of calls and voice mails must be typed in the case activity log. If a telephone conversation with one of the parties or witnesses is lengthy and includes a significant amount of pertinent information, the investigator should document the substance of this contact in a "Memo to File" to be included as an exhibit in the case file.

In addition to telephone calls, the case activity log must, at a minimum, note the key steps taken during the investigation. For example, investigative research and interviews conducted, notifications sent, and documents received from the parties should be noted in the activity log.

D. **Investigative Correspondence**

Templates for complaint notifications, due process letters, Director's Findings, and 10-day contact letters are available on the DOL shared drive N:\ in the OIS Enforcement \ Whistleblower \ Whistleblower Support folder.

The templates will be used to the extent possible. Correspondence must be sent (either by mail, third party carrier, or electronic means) in a way that provides delivery confirmation.
Delivery receipts will be preserved in the case file. Findings in all cases may be sent by electronic means.

Correspondence by Email. Subject lines of emails delivering formal investigative correspondence should be appropriately descriptive (e.g., "Case Number/ Respondent/Complainant" or "Case Number/ Respondent/Complainant – Notification"). The formal correspondences are sent as letters attached to the emails. These emails should also be new emails, not sent as responses to other emails. Formal investigative correspondence emails must provide delivery confirmation. The original email of any email sent with the delivery confirmation option engaged must be placed in the relevant correspondence folder separately from the delivery confirmation (i.e., do not place in the folder just the delivery confirmation email with the original email attached; any attachments to the original email are lost this way).

E. **Investigative Research**

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

the investigator did in OITSS-Whistleblower and OIS) and that no relevant results were found.

IV. Referrals and Notifications

Allegations of safety and health hazards will be referred promptly through established channels. This includes new allegations that arise during witness interviews. Allegations of occupational safety and health hazards covered by the IL OSH Act, will be referred to the appropriate Regional Enforcement Manager as soon as possible.

A. Coordination with Other Agencies

If information received during the investigation indicates that Complainant has filed a concurrent retaliation complaint, safety and health complaint, or any other complaint with another government agency, the investigator should consider whether to request from Complainant any other agency investigative documents or information regarding contact persons and should consider contacting such agency to determine the nature, status, and results of that complaint. This coordination may result in the discovery of valuable information pertinent to the whistleblower complaint, and may, in certain cases, preclude unnecessary duplication of government investigative efforts.

B. Other Legal Proceedings

The investigator should also gather information concerning any other current or pending legal actions that Complainant may have initiated against Respondent(s) related to the protected activity, the adverse action and/or other aspects of Complainant's employment with Respondent, such as lawsuits, arbitrations, and grievances. Obtaining information related to such actions could result in the

postponement of the investigation or deferral to the outcome of the other proceedings. See Section 350.125(p) and Chapter 5.XII, *Postponement/Deferral*.

V. Amended Complaints

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

A. Form of Amendment

No particular form of amendment is required. A complaint may be amended orally or in writing. IL OSHA will reduce oral amendments to writing. If Complainant is unable to file the amendment in English, IL OSHA will accept the amendment in any language.

B. Amendments Filed within Statutory Filing Period

At any time prior to the expiration of the statutory filing period for the original complaint, a complainant may amend the complaint to add additional allegations and/or additional Respondents.

C. Amendments Filed After the Statutory Filing Has Expired

If amendments are received after the limitations period for the original complaint has expired, the investigator must evaluate whether the proposed amendment

(adding subsequent alleged adverse actions and/or additional Respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint and the investigation remains open, then it must be accepted as an amendment unless the exception noted in the last sentence of paragraph E below applies. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with the IL OSHA whistleblower provision.

D. **Processing of Amended Complaints**

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

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

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

F. **Deceased Complainant**

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

VI. Lack of Cooperation/Unresponsiveness

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

- Failure to be reasonably available for an interview;
- Failure to respond to repeated correspondence or telephone calls from IL OSHA
- Failure to attend scheduled meetings; and
- Other conduct making it impossible for IL OSHA to continue the investigation, such as excessive requests for extending deadlines.
- **Harassment, inappropriate behavior, or threats of violence** may also justify dismissal for LOC.
- When Complainant fails to provide requested documents in Complainant's possession or a reasonable explanation for not providing such documents, IL

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

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

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

1. Telephone Complainant during normal work hours and contact Complainant by email. Notify Complainant that they are expected to respond within 48 hours of receiving this phone message or email.
2. If Complainant fails to contact the investigator within 48 hours, IL OSHA will notify Complainant in writing that it has unsuccessfully attempted to contact Complainant to obtain information needed for the investigation and that Complainant must contact the investigator within 10 days of delivery of the correspondence. Complainant will be notified using a method that permits IL OSHA to confirm delivery, such as email or U.S. mail, delivery confirmation required, or hand delivery. The notification will specify direct contact information for the Springfield Office or the investigator including: mailing address, telephone number, and email address. If no response is received within 10 days, the WB Supervisor may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the communication must be preserved in the file.
3. Complainant has an obligation to provide IL OSHA with all available methods of contact, including a working telephone number, email address, or mailing address of record. Complainant also has an obligation to update IL OSHA when contact information changes. IL OSHA may dismiss a complaint for lack of cooperation if IL OSHA is unable to contact Complainant due to the absence of up-to-date contact information.
4. Consistent with the applicable regulations, when IL OSHA dismisses a case for lack of cooperation, an abbreviated Director's Findings letter, with an explanation of the right to request review by IL OSHA Division Manager will be provided to the Complainant. IL OSHA has discretion to reopen the investigation within 30 days of delivery of the dismissal letter to Complainant if Complainant contacts IL OSHA, indicates a desire to pursue the case, and provides a reasonable explanation for the failure to maintain contact with IL OSHA.

VII. On-site Investigation, Telephonic and Recorded Interviews

At the beginning of all interviews, the investigator will inform the interviewee in a tactful and professional manner that 820 ILCS 219/120(c) makes it a criminal offense to knowingly make a false statement or misrepresentation to a government representative during the course of the investigation. If the interview is recorded electronically, this notification and the interviewee's acknowledgement must be on the recording.

Respondent's designated representative generally has the right to be present for all interviews with currently employed managers, but interviews of non-management employees are to be conducted in private.[7] The witness may request that an attorney or other personal representative be present at any time and, if the witness does so, the investigator should obtain a signed "Designation of Representative" form and include it in the case file. Witness statements and evidence may be obtained by telephone, mail, or electronically.

If an interview is recorded electronically, the investigator must be a party to the conversation, and it is IL OSHA's policy to have the witness acknowledge at the beginning of the recording that the witness understands that the interview is being recorded. At the Whistleblower Supervisor's discretion, in consultation with IDOL Legal, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and must be included in the case file.

VIII. Confidentiality

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

Under IL OSHA's statutes, any witness (other than the Whistleblower Complainant) may provide information to IL OSHA confidentially. *See e.g.*, IL OSH Act 820 ILCS 219/65(b)(3). There may be circumstances where there is reason to interview current management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the above procedures for handling confidential witness interviews should be followed.

IX. Complainant Interview and Contact

The investigator must attempt to interview Complainant in all docketed cases. This interview may be conducted as part of the screening process. If a full Complainant interview is not conducted as part of the complaint screening process, IL OSHA will endeavor to interview Complainant within 30 days of receiving Respondent's position statement or two months of the docketing of the complaint, whichever is sooner. It is highly desirable to record the Complainant interview (if Complainant agrees) or obtain a

[7] IL OSHA provides that, to the extent permissible by the Illinois Freedom of Information Act ("FOIA") 5 ILCS 140/1 *et seq.*, investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the Whistleblower complainant. An inspector may inspect and investigate…. to question privately the employer or any

agent or employee of the employer. Thus, IL OSHA will interview a managerial employee in private if the managerial employee requests confidentiality.

signed interview statement from Complainant during the interview. Complainant may have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "Designation of Representative" form.

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

- Copies of any termination notices, reprimands, warnings, or other personnel actions
- Performance appraisals
- Earnings and benefits statements
- Grievances
- Unemployment or worker's compensation benefits, claims, and determinations
- Job position descriptions
- Company employee policy handbooks
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Emails, voice mails, phone records, texts, and other relevant correspondence related to Complainant's employment, as well as relevant social media posts.
- Medical records. Most often medical records should not be obtained until it is determined that those records are needed to proceed with the investigation. Because medical records require special handling, investigators must familiarize themselves with the requirements of IL OSHA for Handling and Storage of Medical Records.

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

The Investigator must also inform Complainant that Complainant must preserve all records that relate to the whistleblower complaint, such as documents, emails, texts (including preserving texts, photographs, and other documentation from a prior cell phone if Complainant replaces it), photographs, social media posts, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies Complainant seeks. Thus, for instance, Complainant should retain documentation supporting

Complainant's compensation with Respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting from the adverse action, such as medical bills, pension plan losses and fees, repossessed property, moving or job search expenses, etc.

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

X. Contact with Respondent

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

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

B. If Respondent requests time to consult legal counsel, the investigator must advise Respondent that future contact in the matter will be through such representative and that this does not alter the 20-day time to respond to the complaint. A reasonable extension to the deadline may be granted, but the investigator must be mindful that for any leeway given to Respondent, substantially equivalent leeway should also be granted to Complainant for the rebuttal if needed. A Designation of Representative form should be completed by Respondent's representative to document Respondent's representative's involvement.

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

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

D. The investigator should, in accordance with the reasonable balance standard, interview all relevant Respondent witnesses who can provide information relevant to the case. The investigator should attempt to identify other witnesses at Respondent's facility that may have relevant knowledge. Witnesses must be

interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality.

Witnesses must be advised of their rights regarding protection under the whistleblower statute and advised that they may contact IL OSHA if they believe that they have been subjected to retaliation because they participated in an IL OSHA investigation. See also Chapter 4.XII.B, *Early Involvement of IDOL Legal*.

There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to Complainant and does not wish the company to know that they are speaking with the investigator. In that event, an interview should ordinarily be scheduled in private and the procedures for handling confidential witness interviews must be followed. See Chapter 4.VIII, *Confidentiality*.

To the extent permitted by law, investigations will be conducted in a manner that preserves the confidentiality of any person who wishes to provide information on a confidential basis, other than the complainant.

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

E. The investigator should make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence which Respondent offers and which the investigator believes is relevant to the case.

F. Per Chapter 4.III.C, *Case Activity Log*, if a telephone conversation with Respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a Memo to File to be included as an exhibit in the case file. In this instance or when written correspondence is noted, the case diary may simply indicate the nature and date of the contact and the comment "See Memo/Document – Exhibit #."

XI. Unresponsive/Uncooperative Respondent

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

A. Uncooperative Respondent

When conducting an investigation under 820 ILCS 219/110 of the IL OSH Act, subpoenas may be obtained for witness interviews or records. See Chapter 4.XII.A below for procedures for obtaining subpoenas.

When dealing with a nonresponsive or uncooperative Respondent under any statute, it will frequently be appropriate for the investigator, in consultation with the WB Supervisor and / or IDOL Legal, to draft a letter informing Respondent of the

possible consequences of failing to provide the requested information in a timely manner.
Specifically, Respondent may be advised that its continued failure to cooperate with the investigation may lead IL OSHA to reach a determination without Respondent's input. Additionally, Respondent may be advised that IL OSHA may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

B. Uncooperative Respondent Representative

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

XII. Subpoenas, Document and Interview Requests

A. Subpoenas

When conducting an investigation under section 820 ILCS 219/110 of the IL OSH Act subpoenas may be obtained for witness interviews or records. [Reference 820 ILCS 219/65(c)

IL OSHA has two types of subpoenas for use in these cases. A Subpoena *Ad Testificandum* is used to obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to obtain documentary evidence. They can be served on the same party at the same time, and IL OSHA can require the named party to appear at a designated office for production. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present).

Subpoenas should be obtained following procedures established by the Division Manager. The assigned investigator will draft the subpoena using the appropriate subpoena template and send it to the WB Supervisor for review. The WB Supervisor will forward the reviewed subpoena to the Director of IDOL who has the signature authority to approve the subpoena. Once the Director signs the subpoena it will be notarized. The signed and notarized subpoena shall be scanned and placed into the ECF.

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

A designated representative may accept service of the subpoena. If the designated representative has not accepted service of the subpoena, the subpoena will be served

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

If the witness fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the WB Supervisor regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The Office of the Attorney General enforces subpoenas in Circuit Court for the relevant county..

B. **Early Involvement of IDOL Legal**

In general, IL OSHA should consult IDOL Legal as early as possible in the investigative process for all instances where IL OSHA believes that there is a potential that the case will be referred for litigation, or that IDOL Legal may otherwise be of assistance. For example, IDOL Legal may be of assistance in cases where settlement discussions reach an impasse, where assistance is needed to determine the appropriate remedy (see Chapter 6, Remedies), or where a case presents a novel question of statutory coverage or protected activity. When IL OSHA has reasonable cause to believe that a violation occurred, IL OSHA should consult informally with IDOL Legal, if it has not already done so. Consulting early with IDOL Legal is particularly important in cases that IL OSHA anticipates referring to the Illinois Attorney General's office for litigation as early consultation helps to ensure that the investigation captures as much relevant information as possible so that IDOL Legal can evaluate whether the case is suitable for litigation.

C. **Further Interviews and Documentation**

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

The investigator must document all telephone conversations with witnesses or party representatives in the case activity log and, if the conversation is substantive, in a Memo to File. (See Chapter 8 on handling requests for disclosure of case activity logs and Memos to File.)

XIII. Party Representation at Witness Interviews

Respondent and Complainant do not generally have the right to have a representative present during the interview of a non-managerial employee. Where either party is attempting to interfere with the rights of witnesses to request confidentiality, investigators should coordinate with their WB Supervisor, and IDOL Legal and insist on private interviews of non-management witnesses. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator may decide to simply get their names and personal telephone numbers and contact these witnesses later, outside of the workplace.

XIV. Records Collection

The investigator must attempt to obtain copies of appropriate records, including

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

XV. Resolve Discrepancies

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

XVI. Analysis

After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions to support a recommended outcome based on the evidence and the law using the guidance given in Chapter 2.

XVII. Closing Conference

Upon completion of the field investigation and after discussion of the case with the WB Supervisor, the investigator will conduct a closing conference with Complainant (in cases in which IL OSHA anticipates issuing non-merit findings) or Respondent (in administrative cases in which IL OSHA anticipates issuing merit findings).[8] The closing conference may be conducted in person, by telephone, or via videoconference, depending on the circumstances of the case. In addition, depending on the case's investigative stage, the closing conference may be conducted in conjunction with the rebuttal interview, if warranted.

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

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

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

D. the request for hearing.

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

[8] In section 820 ILCS 219/110 cases referred to the Illinois Attorney General's office where the Attorney General plans to file suit, any post- investigation contact with Respondent and Complainant will generally be made by the Attorney General.

F. Where IL OSHA anticipates issuing merit findings, the closing conference may be used to explore the possibility of settlement with Respondent before referral for litigation.

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

H. If Complainant becomes combative during the course of the closing conference, the investigator may end the conference. The investigator will document their attempt to hold a closing conference in the file and proceed to issue Director's Findings. Combativeness is not the simple questioning of the evidence and IL OSHA's determination. Combativeness includes overtly hostile behavior, such as cursing the investigator or making threats.

XVIII. Document Handling and Requests

A. Requests to Return Documents Upon Completion of the Case

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

B. Documents Containing Confidential Information

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

C. Witness Confidentiality

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

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

Ensure that medical records are handled in keeping with requirements of IL OSHA policies for Handling and Storage of Medical Records.

Chapter 5

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, dismissal, postponement, deferrals, reviews, and litigation; and agency tracking procedures for timely completion of cases.

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

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

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

III. Report of Investigation

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

The first page of the ROI must note the names and titles of the investigator and the reviewing WB Supervisor. It must also list the parties' and their representatives' (if any) names, addresses, phone numbers, fax numbers, and email addresses, and nothing else. The remainder of the ROI must follow the policies and format described below.

The ROI must contain the elements listed below in Chapter 5.III.B, *Elements of the ROI*, that are relevant to the case, as well as a chronology of events. It may also include, as needed, a witness log and any other information required by the WB Supervisor.

The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate supervisory review of the case file. The citations must note the page number of the exhibit. Using abbreviations for the citations, which should be explained, is helpful to reduce writing time. If a witness log is included in the ROI, any witnesses who were suggested by the Complainant or Respondent but who IL OSHA did not interview should be identified with contact information (if it

exists) and the reason for not interviewing.

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

A. **No ROI Required**

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

B. **Elements of the ROI**

The ROI must include a chronology of the **relevant** events of the case and, **as applicable**,[9] analysis of the following issues:

1. **Coverage**

   Give a brief statement of the basis for coverage. This statement includes information about Respondent and Complainant relevant to the implicated statute, 820 ILCS 219/110 applies. (i.e., X if a public sector entity and the CP is or was employed by X at the time the adverse action occurred.)

   If coverage was disputed, this is where IL OSHA's determination on the issue should be addressed. **If it is determined that there is no coverage, then no further discussion of the elements is required in the ROI.** In addition, this section should note the location of the public sector employer and the nature of the public sector employer's operation, if not already addressed.

2. **Timeliness**

   Indicate the actual date that the complaint was filed and whether or not the filing was timely under 820 ILCS 219/110, including any equitable tolling. **If it is determined that the complaint is untimely, then no further discussion of the elements is required in the ROI.**

3. **The Elements of a Violation**

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

   a. Protected Activity

   b. Respondent Knowledge or Suspicion

   c. Adverse Action

[9] For example, if no protected activity is found after analysis of Complainant's alleged protected

activity, the investigator may proceed to the recommended disposition and need not analyze the remaining elements of the case (knowledge, adverse action, and nexus).

d. Nexus

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

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

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

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

Respondent claimed that Complainant was laid off to conform with the CBA provision that required seven journeymen on the job before hiring a second apprentice. However, interviews and Respondent's employee roster revealed that this provision in the CBA was routinely disregarded and that second apprentices had been hired on several occasions in recent years, even with less than seven journeymen present. Therefore, Respondent's defense is not believable and is a pretext for retaliation.

An example where pretext is not found is:

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

5. **Remedy**

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

6. **Recommended Disposition**

The investigator will put the recommendation for the disposition of the case and reason for it here. The ROI must include the recommended disposition.

7. **Other Relevant Information**

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

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

<table>
<tr><th colspan="2">Elements of a ROI</th></tr>
<tr><td colspan="2">Standard first page:
1) Names & titles of investigator and reviewing WB Supervisor
2) Implicated Act 820 ILCS 219/110
3) Parties' and their representatives' (if any) full contact information</td></tr>
<tr><td colspan="2">Chronology with citations to evidence (Fact/Assertion notation optional)</td></tr>
<tr><td colspan="2">Analysis of: (as applicable)</td></tr>
<tr><td rowspan="5"></td><td>Coverage. If coverage found, then: (write-up can be same as Findings)</td></tr>
<tr><td>Timeliness. If timely, then: (write-up can be same as Findings)</td></tr>
<tr><td>Elements of violation, as applicable:
Protected activity
Respondent's knowledge
Adverse action
Nexus
If all elements are found, then:</td></tr>
<tr><td>Respondent's defense/pretext testing</td></tr>
<tr><td>Remedy, only if merit has been found.</td></tr>
<tr><td colspan="2">Recommended disposition</td></tr>
<tr><td colspan="2">Other relevant information, if any.</td></tr>
<tr><td colspan="2">Signatures of investigator and reviewing WB Supervisor</td></tr>
</table>

IV. Case Review and Approval by the WB Supervisor

A. Review

The investigator will notify the WB Supervisor when the completed case file, including, if applicable, the ROI and draft Director's Findings or other draft case closing documents (such as approvals of withdrawal requests, and settlements, actions), is ready for review on the shared drive. The WB Supervisor will review the file to ensure technical accuracy, the thoroughness and adequacy of the

investigation, the correct application of law to the facts, and completeness of the Director's Findings or other closure letter. Such a review will be completed as soon as practicable after receipt of the file.

B. Approval

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

Depending on the Division Manager's policy and procedures, the WB Supervisor's approval may be the final approval in most cases. The Division Manager's review of the case file and final approval is required for all merit and novel cases. Cases in which the Division Manager is providing final approval will be reviewed by the Division Manager once the WB Supervisor approves the ROI and draft Director's Findings or other case closing documents and notifies the Division Manager that the case is ready for review.

V. Case Closing Alternatives

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

1. A referral to the Illinois Attorney General for litigation (in cases under 820 ILCS 219/110 where IL OSHA, working with IDOL Legal, has reasonable cause to believe that unlawful retaliation has occurred and the case is appropriate for litigation), or
2. The issuance of Directors Findings in non-merit cases.
3. Complainants may also request to withdraw their whistleblower claims at any point in the investigation. See Chapter 5.IX, *Withdrawal*.
4. IL OSHA may close a case due to a settlement. See Chapter 5.X, *Settlement*.
5. IL OSHA may determine that a deferral to the results of another proceeding is appropriate under the circumstances. IL OSHA will issue findings noting the deferral in these circumstances. See Chapter 5.XI.B, *Deferral*.

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

VI. Recommendation to Litigate or Recommendation for Dismissal

A. Recommendation to Litigate

Where IL OSHA believes that a case is meritorious under 820 ILCS 219/110 the case must be forwarded to IDOL Legal for review. The Division Manager (or designee) and other IL OSHA staff will work with IDOL Legal prior to and after the referral, so that the case may be fully reviewed for legal sufficiency

prior to filing a complaint in circuit court.

If the Division Manager approves an 820 ILCS 219/110 case for litigation and obtains the permission of IDOL Legal, then IDOL Legal shall submit a request for representation to the Office of the Illinois Attorney General (OAG). The OAG generally litigates the case on behalf of the Director in circuit court. For merit cases under 820 ILCS 219/110, the circuit court complaint filed by OAG constitutes the Director's Findings.

If Chief Legal Counsel determines that additional investigation is required prior to approving a case for litigation, the WB Supervisor normally will assign such further investigation to the original investigator.

If Chief Legal Counsel determines that an 820 ILCS 219/10 case is not suitable for litigation, Director's Findings will be issued dismissing the case and Complainant will be notified of the dismissal.

B. Dismissals

1. Issuance of Non-Merit Determination Letter

For all dismissal determinations, the parties must be notified of the results of the investigation by the issuance of a determination letter addressed to Complainant (or Complainant's counsel if applicable, with a copy to Complainant), and copied to Respondent (and Respondent's counsel if applicable). The determination letter must advise Complainant of the right to request a review of the determination.

The determination letter must be sent to the parties by a method that can be tracked. This includes, but is not limited to email, certified mail, or hand delivery. Proof of delivery will be preserved in the file with copies of the determination letter to maintain accountability.

IL OSHA retains the right to reopen a dismissal or an RFR determination upholding a dismissal for further investigation or review, where appropriate.

2. Requests for Review (RFRs)

If an 820 ILCS 219/110 is dismissed, Complainant may seek review of the dismissal by the Director of IDOL. The request for review must be made in writing to the Director of IDOL within **15** calendar days of Complainant's receipt of the region's dismissal letter (unless equitable tolling applies; see Chapter 3.III.D.2, *Tolling (Extending) the Complaint Filing Deadline*), with a copy to the Division Manager The request may be mailed, faxed, or emailed (DOL.Whistleblower@Illinois.gov). Verbal requests for review are not accepted.

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

Upon the Director of IDOL's receipt of a request for review under 820 ILCS 219/110 the WB Supervisor must promptly make available a copy of the case file and any additional comments regarding the request for review to the Director of IDOL for review. The request for review must be preserved in the file.

The Director of IDOL reviews the case file and findings for proper application of the law to the facts:

- If the decision is supported by the evidence and is consistent with the law, the Director of IDOL will uphold the determination and issue a Director's Findings Letter.
- If not, the case will be returned to the WB Supervisor for further investigation.
    - After additional investigative efforts are completed and, if the original determination (e.g., dismissal) does not change, the WB Supervisor will send a written report of findings, accompanied by any new evidence it obtained during the reinvestigation, to the Director of IDOL for further review and analysis. The Director of IDOL will then determine if it will affirm or not affirm the original determination and shall prepare a Director's Findings letter to be sent to the Complainant.
    - If another determination is made (e.g., settlement, withdrawal, etc.), the WB Supervisor will notify the Director of IDOL of this outcome.
- Alternatively, if the Director of IDOL, after consultation with the Chief Legal Counsel, determines that the case has merit, the case will be sent to the Attorney General for litigation consideration.
    - If the Attorney General determines that the suit should not be filed, the division manager (or designee) will generally dismiss the case and no further request for review of that dismissal is permitted. However, on a case-by-case basis, the Division Manager, in consultation with IDOL Legal Counsel, may delay the dismissal of an individual case to permit IDOL Legal Counsel to consult with the Attorney General. Next steps, e.g., dismissal or litigation, will be based on the results of that consultation.

VII. Dismissal Letter and Director's Findings Letter

Upon receipt of a request for

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Director's Findings are written in the form of a letter, rather than a report, and generally must follow the format described below.

A. Format of Director's Findings

Director's Findings should contain the following elements, as applicable:

1. **Introduction**

   In the opening paragraph, identify the parties, the statute 820 ILCS 219/110, and include a brief sentence summary of the allegation(s) made in the complaint.

   The second paragraph will contain standard language such as:

   > *Following an investigation by a duly-authorized Investigator, the Illinois Director of Labor, acting through his agent with the Illinois Department of Labor, Illinois OSHA finds that there is reasonable cause to believe that Respondent violated Section 110 of the Illinois Occupational Safety and Health Act, 820 ILCS 219 (the Act) and issues the following findings:*

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

2. **Coverage**

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

3. **Timeliness**

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

4. **Narrative**

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

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

5. **Analysis and Conclusion About Violation**

Following the narrative, Director's Findings should contain a brief summary of IL OSHA's analysis on each element or issue relevant to the determination and IL OSHA's conclusion regarding whether there has been a violation of the whistleblower provision

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

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

- *Complainant or Respondent [or both] is not covered by [insert acronym for statute and reason that there is no coverage];*
- *Complainant did not file the complaint within the [insert days] allowed by [insert acronym for statute] and there is no basis for tolling the filing period;*
- *IL OSHA has no reasonable cause to believe that Complainant engaged in protected activity under [insert acronym for statute and reason that there is no protected activity];*
- *IL OSHA has no reasonable cause to believe that Complainant suffered an adverse action; [insert reason for IL OSHA's conclusion]; or*
- *IL OSHA has no reasonable cause to believe that but for Complainant's protected activity the adverse action would not have been taken against Complainant. [Insert brief explanation for IL OSHA's conclusion that there is no nexus between the protected activity and the adverse action];*

6. **The Right to File an Objection**

The Director's Findings may advise Complainant that they could seek judicial review of the decision in Circuit Court.

7. **Signature**

The Division Manager (or designee) must sign the Director's Findings.

B. **Abbreviated Director's Findings**

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

VIII. Dismissals for Lack of Cooperation/Unresponsiveness

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

IX. Withdrawal

Complainant, with IL OSHA's approval, may withdraw the complaint at any time during IL OSHA's processing of the complaint.[10] However, it must be made clear to Complainant that by entering a withdrawal, they are forfeiting all rights to seek review or object, and the case will not be reopened.

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

Withdrawals may be requested either orally or in writing. It is advisable, however, for the investigator to obtain a signed withdrawal request whenever possible. In cases where the withdrawal request is made orally, the investigator will either record the withdrawal conversation or confirm in writing the Complainant's desire to withdraw. As part of the request, Complainant must also indicate whether the withdrawal is due to a settlement.

More information regarding IL OSHA's review and approval of settlement agreements is available in Chapter 7.

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

Although Complainant's request to withdraw is usually granted, there may be situations in which approval of the withdrawal is not warranted. See, e.g. Section 350.125(o) (approval of Director of IDOL required for withdrawal of 820 ILCS 219/110 complaint; Director's authority not affected by Complainant's request to withdraw) Situations in which approval for withdrawal may be denied include, but are not limited to, a withdrawal made under duress, the existence of similarly situated complainants other than Complainant requesting withdrawal, adverse effects on employees in the workplace other than Complainant if the case is not pursued, and the existence of a discriminatory policy or practice.

When Complainant elects not to pursue their complaint before docketing, the complaint will be administratively closed. See Chapter 3.IV.C, *Election Not To Proceed, a.k.a. Withdrawal Before Docketing*.

X. Settlement

Voluntary resolution of disputes is desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is IL OSHA 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, IL OSHA will make every effort to accommodate an early resolution of

complaints in which both parties seek it. Settlement requirements and procedures, including the requirement to submit the settlement agreement for IL OSHA's review and approval, are discussed in detail in Chapter 7.

XI. Postponement/Deferral

Arbitration or Other Agency Proceedings. The Division's jurisdiction to entertain Section 110 complaints, to investigate, and to determine whether discrimination has occurred is independent of the jurisdiction of other agencies or bodies. Due deference may be paid to the jurisdiction of other forums established to resolve disputes that may also be related to Section 110 complaints. Postponement of the Division's determination, and deferral to the results of the proceedings of another jurisdiction, may be warranted. This policy on postponement and deferral is based on Section 350.125(p), which governs 820 ILCS 219/110 cases.

A. Postponement

The Agency may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement, arbitration agreement, a statute, or common law. The rights asserted in the other proceeding must be substantially the same as the rights under the relevant IL OSHA whistleblower statute and those proceedings must not violate the rights of Complainant under the relevant IL OSHA whistleblower statute. The factual issues to be addressed by such proceedings must be substantially similar to those raised by the complaint under the relevant whistleblower statute. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective state whistleblower statute but not when the proceeding is under an unemployment compensation statute, which typically does not address retaliation. The investigator must consult with Legal Counsel to make these determinations. To postpone the IL OSHA case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that IL OSHA must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement.

B. Deferral

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

1. All relevant issues were addressed;
2. The proceedings were fair, regular, and free of procedural infirmities; and
3. The outcome of the proceedings was not repugnant to the purpose and policy of the relevant IL OSHA whistleblower statute.

The WB Supervisor must obtain the concurrence of IDOL Legal for this determination. This assessment will be documented in an ROI prepared for the case.

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

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

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

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

XII. Documenting Key Dates in OITSS-Whistleblower

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

A. Date Complaint Filed

The date a complaint is filed is the date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an IL OSHA office. If tolling applies, the basis for tolling should be explained in the OITSS-Whistleblower case comments. See Chapter 3.III.D.1, *Timeliness of Filing*, and 3.III.D.2, *Tolling (Extending) the Complaint Filing Deadline*.

B. ROI Dates

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

C. Determination Date

The date upon which the Director's Findings or closing letter is dated is the determination date.

D. **Date Request for Review**

The date an 820 ILCS 219/110 request for review is filed is the date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an IDOL Office. The Director of IDOL (or designee) will enter the RFR filing date into OITSS-Whistleblower.

E. **Date of Key Post-IL OSHA Events**

For cases filed under 820 ILCS 219/110, the Attorney General generally litigates merit cases on behalf of Director of IDOL in circuit court and appeals are heard in the Illinois appellate court. The WB Supervisor is responsible for entering the following dates into OITSS-Whistleblower: the date on which Attorney General files suit, the date on which the circuit court decides the case, the date on which an appeal is filed, and the date on which the appellate court decides the case.

Chapter 6

REMEDIES

I. Scope

This chapter provides guidance on gathering evidence and determining appropriate remedies in whistleblower cases where a violation has been found. Investigators should consult with their WB Supervisor in designing the appropriate remedies for purposes of settlement. IDOL Legal also should be consulted on determining potential remedies in any case that IL OSHA anticipates referring for litigation or issuing merit findings.

II. General Principles

Whistleblower remedies are generally designed to compensate complainants for the losses caused by unlawful retaliation and to restore to complainants the terms, conditions, and privileges of their employment as they existed prior to Respondent's adverse actions. Whistleblower remedies are also designed to mitigate the deterrent or "chilling" effect that retaliation has on employees other than the Complainant, who may be unwilling to report violations or hazards if they believe the employer will retaliate against whistleblowers.

IL OSHA's whistleblower provision provides for appropriate relief, including rehiring, reinstatement and back pay. Where appropriate, Complainant's remedies also include other remedies designed to make Complainant whole, such as receipt of a promotion that Complainant was denied, expungement of adverse references in the employment record, or a neutral employment reference. These will depend upon the facts and circumstances surrounding an individual Complainant's claim.

III. Reinstatement and Front Pay

A. Reinstatement and Preliminary Reinstatement

Reinstatement of Complainant to their former position is the presumptive remedy in merit whistleblower cases involving a discharge, demotion, or an adverse transfer and is a critical component of making Complainant whole. Where reinstatement is not feasible for reasons such as those described in the following paragraph, front pay in lieu of reinstatement may be awarded from the date of the findings up to a reasonable amount of time for Complainant to obtain another comparable job.

B. Front Pay

Front pay, which IL OSHA considers to be economic reinstatement, is a substitute for actual reinstatement in cases where actual reinstatement, the presumptive remedy in cases of discharge, demotion, or adverse transfer, is not possible. Situations where front pay may be appropriate include those in which Respondent's retaliatory conduct has caused Complainant to be medically unable to return to work, or Complainant's former position or a comparable position no longer exists. Similarly, front pay may be appropriate where it is determined that a respondent's offer of reinstatement is not made in good faith or where returning to the workplace would result in debilitating anxiety or other risks to Complainant's mental health. Front pay also may be available in the case where such

extreme hostility exists between Respondent and Complainant that Complainant's continued employment would be unbearable.

In cases where front pay may be a remedy, the Department should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors such as the length of time that Complainant expects to be out of work and Complainant's compensation prior to the retaliation. Front pay should be adjusted to account for any income Complainant is earning. For example, if Complainant has a new job, front pay should be adjusted to account for any difference in pay between Complainant's old job and the new job. IDOL Legal should be consulted when considering provisions for front pay in a settlement agreement or when the issue may arise in litigation.

IV. Back Pay

A. Lost Wages

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

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

If Complainant has not been reinstated, the gross back pay figure should be calculated up to the time of the settlement or award and should be expressed as a formula, such as x dollars per hour times x hours per week minus interim earnings.

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

A respondent's cumulative liability for back pay ceases when a complainant rejects (or does not accept within a reasonable amount of time) a bona fide offer of reinstatement, which must afford Complainant reinstatement to a job substantially equivalent to the former position. Whether a reinstatement offer meets this requirement sometimes requires an evaluation of the facts and circumstances of the offer as compared to the complainant's

previous position, and consultation with IDOL Legal may be necessary to determine whether an offer is a bona fide offer of reinstatement. A respondent's liability for back pay can also cease in other circumstances, such as when Complainant becomes totally disabled or otherwise unable to perform their former job.

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

B. **Bonuses, Overtime and Benefits**

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

C. **Interim Earnings and Unemployment Benefits**

Interim earnings obtained by Complainant will be deducted from a back pay calculation. Interim earnings are the total earnings (before taxes and other deductions) that Complainant earned from interim employment subsequent to Complainant's termination and before assessment of the damage's calculation.

Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job, assuming the expenses would not have been incurred at the former job. Such expenses may include special tools and equipment, necessary safety clothing, union fees, mileage at the applicable IRS rate per driving mile for any increase in commuting distance from the distance travelled to Respondent's location, special subscriptions, mandated special training and education costs, special lodging costs, and other related expenses.

Interim earnings should be deducted from back pay using the periodic mitigation method. Under this method, the time in which back pay is owed is divided into periods. The period should be the smallest possible amount of time given the evidence available. Interim earnings in each period are subtracted from the lost wages attributable to that period. This yields the amount of back pay owed for that period. If the interim earnings exceed the lost wages in a given period, the amount of back pay owed for that period would be $0.00, not a negative amount. The back pay owed for each period is added together to determine a total back pay award.

Unemployment benefits received are not deducted from gross back pay. The investigator should determine whether workers' compensation benefits that replace lost wages during a period in which back pay is owed should be deducted from gross back pay after consultation with IDOL Legal.

D. **Mitigation Considerations**

Complainants have a duty to mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a complainant must exercise reasonable

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

After preliminary reinstatement is ordered, Complainant mitigates their damages simply by being available for work. Under these circumstances, 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. 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 three percentage points. A definite amount should be computed for the interim (the time up to the date of the award), but the findings should state that interest at the IRS underpayment rate at 26 U.S.C. § 6621, compounded daily, also must be paid on back pay for the period after the award until actual payment is made. Interest typically is not awarded on damages for emotional distress or on any punitive damages. However, interest may be awarded on compensatory damages of a pecuniary nature.

VI. Evidence of Damages

Investigators must collect and document evidence in the case file to support any calculation of damages that might be sought in a court proceeding or settlement. This includes evidence to adequately support a 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 non-pecuniary compensatory damages. In addition to collecting evidence of damages, it is important to have a clear record of total damages calculated and itemized compensatory damages.

VII. Non-Monetary Remedies

A. IL OSHA may also seek non-monetary remedies in litigation or settlement Non-monetary remedies may include:

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

   In some instances, for example where respondent has a legal obligation to maintain certain records, it may be appropriate to limit an expungement order. This may be done, for instance, by stating that the requirement to expunge records is fulfilled by

maintaining information in a restricted manner such that physical and electronic access to it is limited, and by refraining from relying on the information in future personnel actions or referencing it to prospective employers or others.

2. Providing Complainant with at least a neutral reference for future employers and others.
3. Requiring Respondent to provide employee or manager training regarding the rights afforded by IL OSHA's whistleblower statutes. Training may be appropriate particularly where 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.
4. Posting of an informational poster about the whistleblower provision.
5. Posting of a notice regarding the IL OSHA order.

B. Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact their WB Supervisor and IDOL Legal for guidance on these and other non-monetary remedies.

VIII. Enforcement of Department of Labor Orders

When IL OSHA is notified that a respondent has failed to comply with the terms of final settlement, including an order approving a settlement, the supervisor should refer the case to IDOL Legal so that they can consider referring the matter to the Office of the Illinois Attorney General to enforce the order in circuit court.

In such instances, under normal circumstances, the enforcement action should not be treated as a new retaliation complaint, but rather as a continuation of the existing whistleblower claim. If, however, the supervisor, in consultation with IDOL Legal, determines that the particular situation calls for a new case to be opened, the supervisor may do so and an investigation will be conducted.

IX. Undocumented Workers

Undocumented workers are not entitled to reinstatement, front pay, or back pay. *Cf. Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) (under National Labor Relations Act, undocumented workers are not entitled to reinstatement or back pay). Other remedies, including compensatory and punitive damages, and conditional reinstatement,[37] may be awarded, as appropriate.

Chapter 7

SETTLEMENTS

I. Scope

This chapter provides guidance on the following topics: (1) standard IL OSHA settlement agreements; (2) IL OSHA's approval of settlement agreements negotiated between Complainant and Respondent where applicable; (3) terms that IL OSHA believes are inappropriate in whistleblower settlement agreements because they are contrary to the public interest and the policies underlying the whistleblower protection statute enforced by IL OSHA; (4) bilateral agreements; and (5) enforcement of agreements.

II. Settlement Policy

Voluntary resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is IL OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. IL OSHA will not enter into or approve a settlement agreement unless it determines that the settlement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement is not repugnant to the whistleblower provision and does not undermine the protection that the whistleblower provision provides.

As discussed below, Complainant and Respondent should be encouraged whenever possible to use the IL OSHA standard settlement agreement. However, the parties may negotiate their own settlement agreement and submit it for IL OSHA's approval. Such settlement agreements are referred to as employer-employee settlement agreements in this manual.
IL OSHA may also enter into an agreement with Respondent to settle claims under section 820 ILCS 219/110 of the IL OSH Act without Complainant's consent. Such settlement agreements are referred to as bilateral agreements in this manual.

III. Settlement Procedure

A. Requirements

Requirements for settlement agreements are:

1. The settlement agreement must be in writing and the settlement must be knowing and voluntary, provide appropriate relief to Complainant, and be consistent with public policy, i.e., the settlement agreement must not be repugnant to the whistleblower provision and must not undermine the protection that the whistleblower provision provides.
2. Every IL OSHA settlement agreement must be signed by the appropriate IL OSHA official.
3. In every employer-employee agreement, the settlement approval letter must be signed by the appropriate IL OSHA official.
4. Every settlement agreement must be signed by Respondent(s).

5. Every settlement agreement must be signed by Complainant, except in bilateral agreements.
6. Employer-employee settlements must be submitted to IL OSHA for review and approval (as explained in Chapter 7.VI.A below).

B. Adequacy of Settlements

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

1. Knowing and Voluntary

Except in the case of a bilateral agreement (described below at Chapter 7.VII), Complainant and Respondent must enter into the settlement agreement voluntarily, with an understanding of the terms of the settlement agreement and, if desired, an opportunity to consult with counsel or other representative prior to signing the settlement agreement.

2. Reinstatement & Monetary Remedies

The settlement agreement must specify the remedies for Complainant, which may include reinstatement, back pay, front pay, damages, attorney fees, or other monetary relief. Alternatively, the settlement agreement may specify payment of a lump sum amount to Complainant, or the payment of separate lump sum amounts to Complainant and Complainant's counsel. It is recommended that the settlement agreement expressly state the allocation of payment between wages and other amounts.[11]

3. Other Remedies

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

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

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

b. The agreement of Respondent, and those acting on Respondent's behalf, to

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

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

d. Training of managers and employees regarding employees' right to report potential violations of the law without fear of retaliation under the whistleblower provision.

C. **Consistent With the Public Interest**

As explained below (see Chapter 7.V.E, *Criteria for Reviewing Employer-Employee Settlement Agreements*), IL OSHA will not enter into or approve a settlement agreement that contains provisions that it believes are inconsistent with the relevant whistleblower protection statute or contrary to public policy.

D. **Tax Treatment of Amounts Recovered in a Settlement**

Complainant and Respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with applicable tax law.[12] IL OSHA is not responsible for advising the parties on the proper tax treatment or tax reporting of payments made to resolve whistleblower cases.

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

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

3. The investigator should try to ensure that the settlement agreement expressly states the allocation of payment that is made for restitution or to come into compliance with

[12] For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to *IRS Counsel Memorandum*, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at: https://www.irs.gov/pub/lanoa/pmta2009-035.pdf . Further additional information is also available on the IRS's website: https://www.irs.gov/government-entities/tax-implications-of-settlements-and-judgments . The parties may also wish to refer to OSHA's *Taxability of Settlements Desk Aid* (Sept. 30, 2015), available at https://www.whistleblowers.gov/memo/2015-09-30 . However, OSHA notes that these guidance documents may change in the future.

the law (e.g., wages, compensatory damages). This will help determine the taxability of settlement amounts later if it becomes an issue.

IV. IL OSHA Settlement

A. Agreement General

Principles

Whenever possible, the parties should be encouraged to use the IL OSHA settlement agreement containing the elements outlined below.

B. Specific Requirements

An IL OSHA settlement agreement:

1. Must be in writing.
2. Must stipulate that Respondent agrees to comply with 820 ILCS 219/110.
3. Must document the agreed-upon relief.
4. Must be signed by Complainant, Respondent, and the Division Manager (or designee), except in bilateral agreements where Complainant's concurrence is not required. IL OSHA will send a copy of the signed agreement to each of the parties.
5. Should include whenever possible measures to address the chilling effect of the alleged retaliation in the workplace. Remedies to address the chilling effect of the alleged retaliation are particularly important in instances in which Complainant does not return to the workplace as a result of the settlement agreement. Appropriate remedial provisions to alleviate the chilling effect of retaliation in the workplace, such as postings and training of employees and managers are discussed further below (see next section, Chapter 7.V.C, *Provisions of the Agreement*) and model provisions are contained in IL OSHA's standard settlement template.
6. Should include a single payment of all monetary relief due to Complainant whenever possible. If Respondent sends the payment directly to Complainant (e.g., as a direct deposit), the investigator will obtain a confirmation of payment (e.g., a deposit slip or copy of the check) from Complainant or Respondent. If Respondent sends the payment to IL OSHA, the investigator will promptly note receipt of any check, copy the check for inclusion in the case file, and mail or otherwise deliver the check to Complainant.

C. Provisions of the Agreement

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

1. POSTING OF NOTICE. A provision stating that Respondent will post a Notice to Employees that it has agreed to abide by the requirements of the whistleblower provision pursuant to a settlement agreement. (Optional)
2. COMPLIANCE WITH NOTICE. A provision stating that Respondent will comply

with all of the terms and provisions of the Notice. (Optional)

3. POSTING OF AN INFORMATIONAL POSTER. A provision requiring Respondent to post an appropriate poster, which may include the mandatory IL OSH Act poster.[13] (Optional)
4. TRAINING. A provision requiring training for managers and employees on employees' rights to report actual or potential violations without fear of retaliation under the whistleblower provision. (Optional)
5. NON-ADMISSION. A provision stating that, by signing the agreement, Respondent does not admit or deny violating any law, standard, or regulation enforced by IL OSHA. (Optional)
6. REINSTATEMENT. This section may be omitted if reinstatement is not a possible remedy in the case. Otherwise, the settlement agreement should include one of the two options below:
   a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have had but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [If accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].
   b. Respondent is not offering reinstatement, and/or Complainant is not seeking reinstatement.
7. MONIES. This section may be omitted if monetary relief is not a part of the settlement. The parties should choose one of the options for monetary relief in the standard settlement agreement to indicate either:
   a. the payment of a specified amount of back pay;
   b. the payment of a specified lump sum amount; or
   c. a combination of a specified payment of back pay and a specified payment of a lump sum.

   In unique circumstances, with supervisory approval, it may be appropriate for the parties and IL OSHA to craft alternative provisions regarding the payment of money to Complainant. The settlement agreement should expressly identify the payments that are made for restitution or to come into compliance with the law (e.g., wages).
8. PERSONNEL RECORD. The settlement should include a provision expunging Respondent's records of references to Complainant's protected activities as well as any adverse actions taken against Complainant and requiring that Respondent provide Complainant with at least a neutral reference. The precise terms of this provision may vary depending on the facts of the case.
9. ENFORCEABILITY. In all cases under 820 ILCS 219/110 the settlement agreement must include language such as the following:

Respondent's violation of any terms of the settlement may prompt further

[13] The IL OSH Act poster, which provides information about section 820 ILCS 219 and other rights under the IL OSH Act, is mandatory.

investigation and the filing of an action by the Director in an appropriate Illinois circuit court under the statute. This Agreement shall be admissible in such an action. Respondent agrees to waive any and all defenses based on the passage of time and agrees that this Agreement constitutes the sole evidence required to prove such waiver. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court. [In bilateral settlement agreements add the following: Complainant is a third-party beneficiary of this agreement.]

10. CONFIDENTIALITY. Settlement agreements must not contain provisions that state or imply that IDOL is a party to a confidentiality agreement.

11. NON-WAIVER OF RIGHTS. The standard language reaffirming Complainant's right to engage in activity protected under the relevant IL OSHA's whistleblower statute may be included in the agreement:

    Nothing in this Agreement or in any separate agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by IL OSHA for providing information directly to a government agency.

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

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

D. **Side Agreements**

In some instances, Complainant and Respondent in a whistleblower case may negotiate to resolve multiple claims arising from Complainant's employment, including a claim under IL OSHA's whistleblower statute. In those instances, IL OSHA prefers that the parties use the IL OSHA settlement agreement to resolve the whistleblower claim pending before IL OSHA. If the parties' separate agreement contains terms relevant to settlement of the whistleblower case, the separate agreement must be submitted to IL OSHA for approval and the IL OSHA standard settlement agreement may incorporate the relevant (approved) parts of the employer- employee agreement by reference. This is achieved by inserting the following paragraph in the IL OSHA standard settlement agreement:

Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration's (IL OSHA's) authority. IL OSHA's authority over that agreement is limited to the statute within its authority. Therefore, IL OSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to the 820 ILCS 219/110.

It may be necessary to modify the last sentence to identify the specific sections or paragraph numbers of the agreement that are under the Directors authority.

E. OITSS-Whistleblower Recording for IL OSHA Settlements

All cases utilizing the IL OSHA settlement agreement, including those that also contain a side agreement as explained above (Chapter 7.V.D, *Side Agreements*), must be recorded in OITSS-Whistleblower as "Settled."

V. Employer-Employee Settlement Agreements

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, even in cases in which IL OSHA does not take an active role in the settlement negotiations. Because voluntary resolution of disputes is desirable, IL OSHA's policy is to defer to adequate employer-employee settlements (previously known as "third party agreements").

In most circumstances, an IL OSHA settlement agreement is optimal. As explained above, if the parties are amenable to signing one, the IL OSHA settlement agreement may incorporate the relevant (approved) parts of an employer-employee agreement by reference.

A. Review Required

Settlement agreements reached between the parties must be reviewed and approved by the Division Manager (or designee) to ensure that the settlement agreement is knowing and voluntary, provides appropriate relief to Complainant, and is consistent with public policy, i.e., the settlement agreement must not be repugnant to the whistleblower provision and not undermine the protection that the whistleblower provision provides.[14] IL OSHA's authority over settlement agreements is limited to the statutes within its authority. Therefore, IL OSHA's approval only relates to the terms of the agreement pertaining to the whistleblower provision under which the complaint was filed. Investigators should make every effort to explain this process to the parties early in the investigation to ensure that they understand IL OSHA's involvement in any resolution reached after a complaint has been initiated.

If the parties do not submit their agreement to IL OSHA or will not submit an agreement that IL OSHA can approve, IL OSHA may dismiss the complaint. The dismissal will state that the parties settled the case independently, but that the settlement agreement was not submitted to IL OSHA or that the settlement agreement did not meet IL OSHA's criteria for approval, as the case may be. The dismissal will not include factual findings. Alternatively, if IL OSHA's investigation has already gathered sufficient evidence for IL OSHA to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than Complainant, IL OSHA may issue merit findings or continue the investigation. The findings will note the failure to submit the settlement to IL OSHA or IL OSHA's decision not to approve the settlement. The determination should be recorded in OITSS-Whistleblower as either dismissed or merit, depending on IL OSHA's determination.

[14] For IL OSHA cases under the whistleblower provision, parties must submit employer-employee settlements for review and approval of the portion of that agreement pertaining to 820 ILCS 219/110.

B. **Required Language**

In 820 ILCS 219/110 cases, the settlement agreement must state the following:

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

The approval letter for employer-employee settlement agreements under any whistleblower statute must include the following statement:

> *The Occupational Safety and Health Administration's authority over this agreement is limited to the statutes it enforces. Therefore, the Occupational Safety and Health Administration approves only the terms of the agreement pertaining to* 820 ILCS 219/110.

This last sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under IL OSHA's authority. A copy of the reviewed agreement must be retained in the case file and the parties should be notified that IL OSHA will disclose settlement agreements in accordance with the FOIA, unless one of the FOIA exemptions applies.

C. **Complaint Withdrawal Request**

If Complainant requests to withdraw the whistleblower complaint, the investigator should inquire whether the withdrawal is due to settlement.[15] If the withdrawal is due to settlement, the investigator must inform the parties that the settlement agreement must be submitted for approval. Upon review, IL OSHA may ask the parties to remove or modify unacceptable terms or provisions in the agreement. The investigator should also advise the parties that upon IL OSHA's approval of the settlement and the completion of the terms of the settlement, the complaint will be closed.

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

Any case in which IL OSHA approves an employer-employee settlement agreement must be recorded in OITSS-Whistleblower as "Settled – Other."

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

To ensure that settlement agreements are entered into knowingly and voluntarily, provide appropriate relief to Complainant, and are consistent with public policy, IL OSHA must review unredacted settlement agreements in light of the particular circumstances of the case. The criteria below provide examples rather than an all-inclusive list of the types of terms that IL OSHA will not approve in a settlement agreement negotiated between Complainant and Respondent.

[15] See Chapter 5.IX, *Withdrawal*. Complainant must provide the reason for the withdrawal request.

As previously noted, IL OSHA prefers that parties use the IL OSHA settlement agreement whenever possible, as that agreement does not contain **terms that IL OSHA cannot approve**:

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

   Complainant and Respondent have agreed to keep the settlement confidential. The parties are advised that the settlement agreement is part of IL OSHA's records in this case and is subject to disclosure under FOIA unless an exemption applies.

   The approval letter should be maintained in the case file with the settlement agreement.

2. GAG PROVISIONS. IL OSHA will not approve a "gag" provision that prohibits, restricts, or otherwise discourages Complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. Potential "gag" provisions often arise from broad confidentiality or non-disparagement clauses, which Complainants may interpret as restricting their ability to engage in protected activity. Other times, they are found in specific provisions, such as the following:

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

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

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

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

Nothing in this Agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statute administered by IL OSHA.

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

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

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

4. OVERLY BROAD TERMS.

   a. CLAIMS AND PARTIES RELEASED. IL OSHA will typically approve a settlement agreement that contains a general release of employment-related claims against Respondent with the understanding that IL OSHA's approval is limited to the settlement of the claims under the whistleblower provision. Because a general release cannot apply to future claims, IL OSHA prefers that a general release explicitly state that Complainant is releasing only employment-related claims that Complainant knew of as of the date of the settlement agreement. In addition, IL OSHA occasionally encounters settlement agreements that are extremely broad as to the parties released by the agreement or the claims released by the agreement, such as settlements containing terms that would release affiliates of Respondent unconnected to either Complainant's employment with Respondent or the protected activity alleged in the complaint or claims unconnected to Complainant's employment with Respondent. In order to ensure that Complainant's consent to the settlement is knowing and voluntary, IL OSHA may require that Respondent clearly list in the agreement the entities and/or individuals (e.g., the subsidiaries, affiliates, partners, directors, agents, attorneys, insurers, etc.) that are being released or provide more specific information regarding the claims that are being released.

   b. TAX ISSUES. IL OSHA occasionally encounters settlement agreements that have broad language relating to tax issues, e.g., requiring Complainant to indemnify and/or hold Respondent harmless for all taxes except those for which Respondent is solely liable. In order to ensure that the settlement agreement is not so vague regarding Complainant's potential liability that Complainant's consent cannot be regarded as knowing and voluntary, when IL OSHA

encounters such a term, IL OSHA will request that the parties (1) omit the term from their agreement, or (2) substitute a term that states that both parties are solely responsible for their own tax obligations on monies paid under the settlement agreement and/or (3) substitute a term that states that Complainant is solely liable for Complainant's tax obligations and will hold Respondent harmless if Complainant fails to comply with any legal obligations to report and pay taxes on the amount that Complainant is receiving under the settlement agreement.

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

   a. **The breadth of the waiver.** Does the employment waiver effectively prevent Complainant from working in their chosen field and/or in the locality where they reside? Consideration should include whether Complainant's skills are readily transferable to other employers or industries. Waivers that narrowly restrict future employment for a limited time to a single, discrete employer may be less problematic than broader waivers. Thus, an agreement limiting Complainant's future employment for a limited time from a single employer is less problematic than a waiver that would prohibit Complainant from working for any companies with which Respondent does business.

   b. **Fairness.** The investigator must ask Complainant: "Do you feel that, by entering into this agreement, your ability to work in your field is restricted?" If the answer is yes, then the following question must be asked: "Do you feel that the monetary payment fairly compensates you for that?" Complainant also should be asked whether they believe that there are any other concessions made by Respondent in the settlement that, taken together with the monetary payment, fairly compensate for the waiver of employment. The case file must document Complainant's replies and any discussion thereof.

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

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

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

   f. **Comprehension and acceptance of the waiver**. If Complainant is not represented, the investigator must ask Complainant if they understand the waiver and if they accepted it voluntarily. Particular attention should be paid to whether there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, threats made to persuade Complainant to agree, or additional monies or forgiveness of debt promised as an additional incentive.

   g. **Other relevant factors.** Any other relevant factors in the particular case also must be

considered. For example, does Complainant intend to leave their profession, to relocate, to pursue other employment opportunities, or to retire? Have they already found other employment that is not affected by the waiver? In such circumstances, Complainant may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

VI. Bilateral Agreements

A bilateral settlement is one between the Illinois Department of Labor (IDOL), signed by the Division Manager (or designee) and Respondent—*without Complainant's consent*—to resolve a complaint filed under section 820 ILCS 219/110. It is an acceptable remedy to be used only under the following conditions:

- The settlement offer by Respondent 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. Although the desired goal is to obtain reinstatement and all back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
- Complainant refuses to accept the settlement offer by Respondent. The case file must fully set out Complainant's objections in the discussion of the settlement to ensure that the information is available when the case is reviewed by the WB Supervisor.
- When presenting the proposed agreement to Complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and IDOL may settle the case without Complainant's participation. This is also the time to explain that, once settled, Complainant may not request review of the case by the Director of IDOL because the settlement resolves the case.
- All potential bilateral settlement agreements must be reviewed and approved in writing by the Division Manager (or designee) and IDOL Legal. The bilateral settlement is then signed by both Respondent and the Division Manager (or designee). Once settled, the case is entered in OITSS- Whistleblower as "Settled."

A. Documentation and Implementation of Bilateral Agreements

1. Although each agreement will be unique in its details by necessity, in settlements negotiated by IL OSHA the general format and wording of the IL OSHA standard settlement 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 should be included in the case file, with explanations of calculating methods and relevant circumstances as necessary.
4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily.
5. Any check from Respondent must be sent to Complainant even if they did not agree with the settlement. If Complainant returns the check to IL OSHA, then IL OSHA will record this fact and return it to Respondent.

VII. Enforcement of Settlements

If there is a breach of a settlement agreement that IL OSHA has entered into or approved, then IL OSHA staff may refer the matter to the Illinois Attorney General's office to pursue court-ordered enforcement. The additional work is a continuation of the original case. IL OSHA does not open a new case to deal with the breach of a settlement agreement.

A. Cases Settled Under 820 ILCS 219/110

If there is a breach of a settlement agreement in an 820 ILCS 219/110 case, the WB Supervisor generally should consult with IDOL Legal. IL OSHA may also inform the parties that violation of a settlement agreement is a breach of contract for which the Illinois Attorney General's office may seek redress in an appropriate court.

IL OSHA staff will, after appropriate consultation with IDOL Legal, evaluate the case to determine how to proceed.

1. If the case settled before the merits of the complaint could be determined, the case may be reopened and investigated.
2. If the case had already been determined to have merit before the settlement was reached, the case may be referred to the Illinois Attorney General's office for litigation.
3. If the case was settled after the case had been determined to have merit and the settlement agreement was approved by the court, then IL OSHA generally will refer the case to the Illinois Attorney General's office to obtain further relief from the court.

Chapter 8

INFORMATION DISCLOSURE

I. Scope

This chapter explains the procedures for the disclosure of documents in IL OSHA's whistleblower investigation files. Whistleblower investigation files are subject to disclosure under and the Illinois Freedom of Information Act (FOIA).
Under the anti-retaliation provision that IL OSHA enforces, while a case is under investigation, information contained in the case file may be disclosed to the parties in order to resolve the complaint; we refer to these disclosures as non-public disclosures. Once a case is closed and the time period for filing objections to IL OSHA's determination has passed, parties to the case may seek disclosure of documents in IL OSHA's files under FOIA.

The disclosure of information in whistleblower investigation files is governed by (FOIA, the goal of which is to enable public access to government records, and relevant provisions in IL OSH Act and IDOL's regulations implementing IL OSH Act. The guidelines below are intended to ensure that IL OSHA's Whistleblower Protection Program fulfills its disclosure obligations under FOIA.

II. Overview

A. This Chapter Applies to IL OSHA's Whistleblower Investigation Records

The guidelines in this chapter apply to all investigative materials and records maintained by IDOL in relation to IL OSHA's whistleblower provision. These investigative materials or records include interviews, notes, work papers, memoranda, emails, documents, and audio or video recordings received or prepared by an investigator, concerning or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original records are the property of the State of Illinois and must be included in the case file. Under no circumstances is a government employee to destroy, retain, or use investigation notes and work papers for any private purpose. In addition, files must be maintained and destroyed in accordance with official agency schedules for retention and destruction of records. Investigators may retain copies of final ROI and Director's Findings for reference.

B. Processing Requests for Records in Open or Closed Cases

In most cases, the first question that must be answered in order to process a disclosure request is whether the case is open or closed. The following guidance should be used in determining whether a case is considered open or closed and in processing such requests.

1. Determining Whether a Case is Open or Closed

Generally, cases are open if IL OSHA's investigation is ongoing or if the Attorney General's office is involved in litigating the case.

Cases should be considered closed when a final determination has been made that the complaint lacks merit.. Accordingly, a case is considered open even if Director's Findings have been issued, but the case is under review for potential litigation or the

Attorney General's office is litigating the case.

2. **Processing Requests for Records**

   Generally, if a case is open, information contained in the case file may not be disclosed to the public; however, a denial letter will need to be sent within five (5) business days pursuant to 5 ILCS 140/3(d). The letter will need to cite 5 ILCS 140/7(1)(f) as the reason for the denial. In the event that the matter has become public knowledge, for example because Complainant has released information to the media, limited disclosure may be made after consultations with IDOL Legal.

   If a case is open, IL OSHA will generally respond to disclosure requests from Complainants and Respondents under its Non-Public Disclosure policy. Third-party requests for open cases and all requests for closed cases will be processed as FOIA requests. However, IL OSHA may make public disclosures of certain information to third parties or other government entities if consistent with FOIA and other confidentiality considerations.

C. **Public Disclosure of Statistical Data and Disclosure of Case Information to the Press**

IL OSHA may disclose aggregate results of Whistleblower program activities and outcomes to the General Assembly, media, or other sources.
IL OSHA may also post statistical data on the IL OSHA web page.

IL OSHA may decide that it is in the public interest or IL OSHA's interest to issue a press release or otherwise to disclose to the media the outcome of a complaint. A Complainant's name, however, generally will only be disclosed with their consent. As a result, press releases generally should not include personally identifiable information about Complainant.

D. **Sharing Records Between IL OSHA and Other Government Entities**

1. **Sharing Letters**

   Appropriate, relevant, necessary, and compatible investigative records may be shared with another agency or instrumentality of any governmental jurisdiction within or under the control of the State of Illinois for a criminal law enforcement activity, if the activity is authorized by law, and if that agency or instrumentality has made a written request to IL OSHA, signed by the head of the agency, specifying the particular records sought and the law enforcement activity for which the records are sought.

   A sharing letter makes a limited disclosure to the requesting government agency and asks the recipient government agency to make no further public disclosures. Before entering into a sharing letter agreement with another governmental agency please consult with IDOL Legal as some agencies are required by statute to make all records public.

2. **Memoranda of Understanding (MOU)**

   An MOU can also establish a method by which IL OSHA and another government agency may share whistleblower complaints and findings, as well as a process for the agencies to share information from investigative files.

E. **Subpoenas**

When IL OSHA receives a request for records via a subpoena in a case in which IDOL is not a party, refer the matter to IDOL Legal for further instructions.

III. IL OSHA's Non-Public Disclosure Policy

A non-public disclosure is a release by IL OSHA of material from a whistleblower investigation case file to a party to the whistleblower investigation to aid in the investigation or resolution of the whistleblower complaint. Non-public disclosures may occur during an open investigation. IL OSHA's non-public disclosure policy does not create any appeal rights or enforceable disclosure rights.

During an investigation, requests for material from whistleblower investigation case files from third party requesters must be directed to the appropriate FOIA Officer who will process the request in compliance with Departmental FOIA regulations and the guidance below.

A**. Procedures for Non-Public Disclosures**

IL OSHA will request that the parties:

1. Provide each other with a copy of all submissions they have made to IL OSHA related to the complaint. If a party does not provide its submissions to the other party, IL OSHA will follow the guidelines below so that the parties can fully respond to each other's positions and the investigation can proceed to a final resolution.
2. During an investigation, disclosure must be made to Respondent (or Respondent's legal counsel) of the filing of the complaint, the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. IL OSHA generally will accomplish this disclosure by providing Respondent with a copy of the complaint and any additional information provided by Complainant that is related to the complaint. In circumstances in which providing the actual documents would be inadvisable (for example, if providing the redacted versions of the documents is not possible without compromising the identity of potential confidential witnesses (such as non-management, employee witnesses identified by Complainant) or risking retaliation against employees), IL OSHA, in its discretion, may provide a summary of the complaint and additional information to Respondent. Before providing materials to Respondent, IL OSHA will redact them
3. During an investigation, IL OSHA will provide to Complainant (or Complainant's legal counsel) the substance of Respondent's response. IL OSHA generally will accomplish this disclosure by providing Complainant with a copy of Respondent's response and any additional information provided by Respondent that is related to the complaint. In circumstances in which providing the actual documents would be inadvisable (for example, if Respondent has indicated that certain documents contain information covered by the Trade Secrets Act, 18 U.S.C. § 1905, *Trade Secrets*, or if IL OSHA believes providing the redacted versions of the documents might lead to an incident of workplace violence), IL OSHA, in its discretion, may provide a summary of the response and additional information to Complainant. Before providing materials to Complainant, IL OSHA will redact them

Non-public disclosure must not cite FOIA exemptions, but redactions generally should be consistent with the redactions that would be made if the documents were being released under FOIA. Copies of redacted documents sent to parties under non-public disclosure procedures should be identified and maintained as such in the case file. IDOL Legal should review all non-public disclosures to ensure that redactions are consistent with Illinois law, including FOIA, and privacy and confidentiality concerns.

IV. Public Disclosure and Post-Investigation Disclosure

If a member of the general public requests documents from a whistleblower case file at any time, or if a Complainant or Respondent requests such documents following the close of IL OSHA's investigation and any period for objecting to IL OSHA's determination, IL OSHA will process the request according to its procedures under FOIA, 50 ILCS 140 *et seq*. Under FOIA, a person has a right to access federal agency records unless an exemption applies.

Specifically, IDOL's FOIA Officer will review the request to determine if an exemption applies. For example, specific records may be withheld to "the extent that disclosure would "interfere with active administrative enforcement proceeding" or "unavoidably disclose the identify of a confidential source, confidential information furnished by the confidential source" or the identify of "persons who file complaints with or provide information to administrative, investigate, [or] law enforcement agencies…"5 ILCS 140/7(d). If applicable, the FOIA Officer should also be sensitive to and redact any private information, as defined by 5 ILCS 140/2 C-5)ITE or "commercial or financial information obtained from a person or business" where the entity that produced the information did so under a claim that they are proprietary, privileged, or confidential, and that "disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business." 5 ILCS 140/7(g).