



Labor Commission
Occupational Safety and Health

Whistleblower Investigations Manual

May 10, 2023
(Version 2)

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RESERVED

(RESERVED)

Chapter 1

INTRODUCTION

I. Purpose.

To provide the Utah Occupational Safety and Health Division (UOSH) of the State of Utah Labor Commission (Commission) with policy and procedures concerning the handling of retaliation complaints filed under Utah Code Ann. §34A-6-203 of the Utah Occupational Safety and Health Act, 34A-6-101 et seq., Utah Code Ann., 1953 as amended (Utah OSH Act).

This Whistleblower Investigation Manual is intended to provide instruction on some of the internal operations of UOSH and is solely for the benefit of the State of Utah pertaining to the implementation of the Utah OSH Act.

The contents of this Whistleblower Investigation Manual are not enforceable by any person or entity against the Commission or UOSH.

II. Scope.

UOSH-wide.

III. References.

A. Utah Code - Statutes and Constitution.

- Title 34A - Utah Labor Code
- Chapter 6 - Utah OSH Act

B. Utah Administrative Code (UAC).

- Title R600 - Labor Commission, Administration
- Title R614 - Labor Commission, Occupational Safety and Health

C. United States Code, The Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590 et seq., 29 U.S.C. 651 et seq.) (the Act).

- Section 11(c)

D. Federal Whistleblower Statutes.

- Affordable Care Act (ACA), 29 U.S.C. § 218C.
- Anti-Money Laundering Act (AMLA), 31 U.S.C. § 5323a(5) & (g) & (j).

- Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651.
- Clean Air Act (CAA), 42 U.S.C. § 7622.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610(a).
- Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567.
- Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087.
- Criminal Antitrust Anti-Retaliation Act (CAARA), 15 U.S.C. § 7a-3.
- Energy Reorganization Act (ERA), 42 U.S.C. § 5851.
- FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d.
- Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109.
- Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367(a).
- International Safe Container Act (ISCA), 46 U.S.C. § 80507.
- Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171.
- National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142.
- Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129.
- Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j- 9(i)(1).
- Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A.
- Seaman's Protection Act, 46 U.S.C. § 2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281.
- Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971(a).
- Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105.
- Taxpayer First Act (TFA), 26 U.S.C. § 7623(d).
- Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622(a).
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

E. Federal OSHA Directives.

- Compliance (CPL) 02-03-011, *Whistleblower Investigations Manual*, April 29, 2022.

F. Federal Memorandums.

- *Clarification of OSHA's Position on Workplace Safety Incentive Programs and PostIncident Drug Testing Under CFR Section 1904.35 (b)(1)(iv)*, October 11, 2018.
- *Clarification of Guidance for Section 11(c) Cases Involving Temporary Workers*, May 11, 2016.

IV. Cancellations.

This instruction cancels and replaces the October 1, 2017, UOSH Whistleblower Investigations Manual.

This Whistleblower Investigation Manual is designed to be updated on a regular basis by amending chapters or sections thereof to embody modifications and clarifications to UOSH's general whistleblower investigation policies and procedures.

V. Effective/Amendment Dates.

May 10, 2023

VI. Definitions, Acronyms and Terminology.

AAG – State of Utah Assistant Attorney General

Administratively Closed – Complainant withdraws complaint, and no investigation is opened by UOSH.

Adjudication – State of Utah Labor Commission Adjudication Division

ADR – Alternative Dispute Resolution

ALJ – Administrative Law Judge

Commission – State of Utah Labor Commission

Commissioner – Utah Labor Commissioner

CSHO – Compliance Safety and Health Officers

Designation Form – Designation of Point-of-Contact and/or Legal Counsel Form

Director – Director/Administrator of UOSH

Docket – To record the case in the federal Occupational Safety and Health Administration(OSHA) Information System (OIS) and to formally notify both parties in writing of UOSH's receipt of the complaint and intent to investigate.

Docket and Dismiss – Where the prima facie elements are lacking, the whistleblower complaint is untimely, or is not within UOSH’s jurisdiction (or is of mixed jurisdiction), and the complainant chooses not to withdraw the complaint, an Order of Dismissal is issued, and the complaint is docketed and dismissed in OIS. This also applies to situations where the Investigator is unable to contact the complainant to conduct a preliminary interview to determine whether the allegations meet the criteria of a prima facie case.

DVD – Digital Versatile Disc

EEOC – U.S. Employment Opportunity Commission

GRAMA – Government Records Access Management Act

Investigator – Whistleblower Investigator

Interview Form – Whistleblower Preliminary Interview Form – UOSH 23A

Lack of Cooperation Letter – Notification of Failure to Cooperate Letter – UOSH 45C

Legal Counsel – Designated Point-of-Contact/Legal Counsel

MSHA – Mine Safety and Health Administration

Notification of Investigation Letter – Whistleblower Notification of Investigation Letter – UOSH 41C (Complainant) and 41R (Respondent) – certified mailed letters to the complainant and respondent informing them that a UOSH whistleblower investigation has been opened.

NLRB – National Labor Relations Board

No Contact Letter – Notification of Failure to Contact Letter – UOSH 22C

OSHA Information System (OIS) – OIS-Whistleblower is the case management system used to process complaint data for UOSH’s Whistleblower Protection Program, formerly known as WebIMIS and most recently, OITSS.

OSC – Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

OSHA – Federal Occupational Safety and Health Administration

PFE – Whistleblower Prima Facie Evaluation Form – UOSH 24A

Program Manager – Whistleblower Program Manager

PDF – Portable Document Format

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.

ROI – Report of Investigation prepared by an Investigator in a UOSH whistleblower case, setting forth the facts, analyzing the evidence, and making recommendations.

The Act – The Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.)

UAC – Utah Administrative Code

UALD – Utah Antidiscrimination and Labor Division

UOSH – Utah Occupational Safety and Health Division

UOSH Complaint Form – UOSH Whistleblower Complaint Form – UOSH 21A

USPS – United States Postal Service

Utah OSH Act – Utah Occupational Safety and Health Act, 34A-6-101 et seq., Utah Code Ann., 1953 as amended (UOSHA), initially approved on January 04, 1973

Whistleblower Complaint or Complaint – A complaint filed with UOSH or OSHA alleging unlawful retaliation for engaging in protected activity under the Utah OSH Act. For example, a roofing employee complains to UOSH that he was suspended for reporting lack of fall protection to UOSH. The whistleblower complaint is the complaint to UOSH regarding the suspension for reporting a safety violation, i.e., the unlawful retaliation. The whistleblower complaint is not the report to UOSH regarding the lack of fall protection.

Withdrawal Letter – Withdrawal Confirmation Letter – UOSH 26C

VII. Background.

- A. Utah enacted the Utah OSH Act in 1973, giving UOSH the mandate to administer all laws and lawful orders to ensure that every employee in Utah has a workplace free of recognized hazards. According to the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590 et seq., 29 U.S.C. 651 et seq.) (the Act), states can apply for approval to operate their own occupational safety and health programs. Utah started the state plan application and approval process in 1973 and was granted official approval on July 16, 1985. Since that date, occupational safety and health in Utah falls under the authority of the Commission and includes the protection of employees who are discharged from employment or retaliated against for exercising their rights under the Utah OSH Act. UOSH has jurisdiction over all public and private sector places of employment in the state, with the exception of areas that fall under the jurisdiction of the Mine Safety and Health Administration (MSHA) and those that are subject to federal Occupational Safety and Health Administration (OSHA) jurisdiction which include federal employees, the United States Postal Service (USPS), private sector maritime, Hill Air Force Base, Tooele Army Depot and Dugway Proving Ground.

- B. Utah Code Ann. §34A-6-203(1) provides that a person may not discharge or in any way retaliate against an employee because the employee: (a) files a complaint or institutes or causes to be instituted a proceeding under or related to the Utah OSH Act; (b) testifies or is about to testify in any proceeding under or related to the Utah OSH Act; or (c) exercises a right granted by the Utah OSH Act on behalf of the employee or others.

VIII. Responsibilities.

A. Director.

The Director/Administrator of UOSH (Director) provides guidance, assistance, supervision and direction to the Whistleblower Program Manager (Program Manager) and Whistleblower Investigators (Investigators) and has the authority to issue orders of dismissal or orders of findings based on evidence obtained from parties prior to and during a whistleblower investigation.

B. Whistleblower Program Manager.

The Program Manager, under the direction of the Director, supervises the Investigators and has the following, but not necessarily exhaustive, responsibilities:

1. Reviews the Whistleblower Prima Facie Evaluation Form – UOSH 24A (PFE) submitted by Investigators and recommends appropriate action;
2. Assigns whistleblower investigations to Investigators;
3. Provides guidance, assistance, supervision, and direction to Investigators during the conduct of investigations;
4. Reviews investigative reports for comprehensiveness and technical accuracy;
5. Provides approval for recommendations of administratively closing complaints, dismissing complaints, finding merit or non-merit;
6. Reviews proposed orders for technical accuracy;
7. Ensures Investigators are provided training; and
8. Testifies in proceedings, appeals and/or litigation.

C. Whistleblower Investigators.

Investigators, under the direction of the Program Manager, have the following, but not necessarily exhaustive, responsibilities:

1. Receives whistleblower complaints;

2. Conducts preliminary interview and uses the PFE to assess whether the allegations warrant opening a whistleblower investigation or making a referral to OSHA or the appropriate agency;
3. Conducts whistleblower investigation upon assignment by Program Manager;
4. Reviews UOSH enforcement casefiles for background information concerning any related proceedings. An “enforcement case” refers to an inspection or investigation conducted by a UOSH Compliance Safety and Health Officer (CSHO).
5. Enters case information into the OSHA Information System (OIS) and UOSH internal database;
6. Updates and maintains OIS, UOSH internal database and casefiles;
7. Interviews parties and witnesses, obtains statements, obtains supporting documentary evidence, and reviews pertinent records;
8. Shares ongoing communication and evidence obtained with all parties;
9. Follows up on leads resulting from interviews and statements;
10. Applies knowledge of the legal elements, when applicable, and recommends appropriate action to the Program Manager;
11. Prepares Report of Investigation (ROI);
12. Prepares proposed Findings of Fact and Order, Notice of Appeal Rights and Certificate of Mailing;
13. Mails signed Findings of Fact and Order, Notice of Appeal Rights and Certificate of Mailing to all parties;
14. Facilitates negotiations between parties during settlement; and
15. Testifies in proceedings, appeals and/or litigation.

D. UOSH Personnel.

In order to advise employers and employees of their rights and responsibilities, each UOSH staff member is responsible for maintaining a basic understanding of the whistleblower protections provided by the Utah OSH Act and must be familiar with whistleblower statutes that fall under OSHA’s jurisdiction (see Section X., *Referrals*, of this chapter). Familiarity of these federal statutes will enable staff to recognize a potential whistleblower complaint that would warrant a referral to OSHA. UOSH staff receiving a potential whistleblower complaint must accurately document information in accordance with Chapter 2, Paragraph II.A., *Intake*, of this manual and provide the information to the Program Manager or designee within one (1) business day of receipt.

IX. Equivalency.

UOSH has statutory authority parallel to Section 11(c) of the Act and has established policies and procedures for occupational safety and health discrimination protection that are at least as effective as the federal 11(c) implementing policies. The Compliance Program of UOSH has direction and oversight over the Whistleblower Program.

X. Referrals.

UOSH has jurisdiction over complaints that fall under Utah Code Ann. §34A-6-203. Whistleblower complaints received by UOSH may fall under the jurisdiction of OSHA or another agency. The Program Manager or designee must ensure that appropriate referrals are made to the applicable agency in accordance with UOSH's policies and procedures if the complaint is not covered under the Utah OSH Act.

A. Whistleblower Complaints under OSHA Jurisdiction.

Complaints that fall outside of Utah Code Ann. §34A-6-203 that are based on one or more federal statutes affording whistleblower protection, or contain a mixed safety and health whistleblower complaint with other federal whistleblower claims (See Chapter 3, Subparagraph III.A.1., *Non-UOSH Jurisdiction/Mixed Safety and Health Whistleblower Complaint*, of this manual), should be referred to OSHA, Region VII, Denver Regional Office, for disposition.

The Whistleblower statutes investigated by OSHA are as follows:

1. Affordable Care Act (ACA), 29 U.S.C. § 218C. Protects employees from retaliation for reporting violations of any provision of Title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium. Respondents covered: private and public sector employers. Days to file: 180.
2. Anti-Money Laundering Act (AMLA), 31 U.S.C. § 5323a(5) & (g) & (j). Protects employees from retaliation for reporting potential money laundering-related violations or a violation of section 1956, 1957 or 1960 of title 18 of the U.S. Code (or any rule or regulation under these provisions) or engaging in other protected activities such as initiating, testifying in, or assisting in investigation or judicial or administrative action of the Department of the Treasury or the Department of Justice related to money laundering violations. Respondents covered: employers. Days to file: 90.
3. Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651. Protects employees who report to any person, including a state or federal agency, violations of AHERA, which deals with asbestos in public or private nonprofit schools, including violations involving the accreditation of a contractor or laboratory to do asbestos work under 15 U.S.C. § 2646. Key elements to trigger referral include asbestos in covered schools, contractors or laboratories that do asbestos work. Respondents covered: private sector, state and local government, certain Department of Defense schools, certain tribal schools. Days to file: 90.

4. Clean Air Act (CAA), 42 U.S.C. § 7622. Protects employees from retaliation for reporting violations of the CAA, which provides for the development and enforcement of standards regarding air quality and air pollution. Key elements to trigger referral include air emissions from area, stationary and mobile sources, acid rain, ground-level ozone, stratospheric ozone depletion and air toxins. Respondents covered: private sector, federal, state and municipal. Days to file: 30.
5. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610(a). Protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. CERCLA also protects employees who report violations related to the clean-up of uncontrolled or abandoned hazardous waste sites, also known as “Superfund” sites. Key elements to trigger referral include hazardous waste sites, accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Covered: private sector, federal, state, and municipal. Days to file: 30.
6. Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of Title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau. Respondents covered: any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person’s affiliate acting as a service provider to it. Days to file: 180.
7. Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission. CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers. Respondents covered: manufacturing, private labeling, distribution, and retail employers in the United States. Days to file: 180.
8. Criminal Antitrust Anti-Retaliation Act (CAARA) (2020) 15 U.S.C. § 7a-3. Protects employees from retaliation for reporting criminal antitrust violations or violations of another criminal law committed in conjunction with a potential violation of the antitrust laws or initiating, testifying in, participating in, or otherwise assisting in certain Federal Government investigations or proceedings related to these violations. Respondents covered: persons (including corporations or associations existing under and authorized by the laws of the U.S., a territory of the U.S., a State, or a foreign country), officers, employees, contractors, subcontractors, and agents of such persons. Days to file: 180.
9. Energy Reorganization Act (ERA), 42 U.S.C. § 5851. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors

of nuclear power plants licensed by the Nuclear Regulatory Commission (NRC), and employees of contractors working with the Department of Energy (DOE) under a contract pursuant to the Atomic Energy Act. Respondents covered: NRC contractors and subcontractors; NRC licensees and applicants for licenses, including contractors and subcontractors; agreement state licensees and applicants for licenses from agreement states, including their contractors and subcontractors; and DOE contractors and subcontractors. Days to file: 180.

10. FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act. Respondents covered: any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food. Days to file: 180.
11. Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a workplace injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition. Respondents covered: railroad carriers and their contractors, subcontractors, and officers. Days to file: 180. *State plan coordination. A retaliation complaint against a railroad carrier or a contractor or subcontractor to a railroad carrier will have potential coverage under both FRSA and the Utah OSH Act. In these types of circumstances, UOSH and OSHA must coordinate to ensure complainants are informed of their rights under the various whistleblower provisions administered by UOSH and OSHA, including informing them of how the election of remedies provision may affect those rights, and that proper referrals are made. Election of remedies means that an employee may not recover remedies under both FRSA and another provision of law for the same act of retaliation.*
12. Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367(a). Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act. Key elements to trigger referral include pollutants from a point source into navigable waters, waterways, finance municipal wastewater treatment facilities and polluted runoff. Respondents covered: private sector, state, and municipal, Indian tribes. Days to file: 30.
13. International Safe Container Act (ISCA), 46 U.S.C. § 80507. Protects employees who report to the United States Coast Guard, the employer, or others an unsafe intermodal cargo container, or a violation of ISCA, 46 U.S.C. § 80507, et seq., which includes, among other things, procedures for the testing, inspection, and initial approval of containers, or a violation of an ISCA regulation. Key elements to trigger referral include intermodal cargo containers designed to be transported interchangeably by sea and land carriers and moving in or designed to move in international trade. Respondents covered: private sector, local government, certain state government and interstate

compact agencies. Days to file: 60.

14. Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171. Protects employees from retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the United States Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision. Respondents covered: motor vehicle manufacturer, part supplier, or dealership. Days to file: 180.
15. National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety. Key elements to trigger referral include locally planned, constructed and operated public transportation systems throughout the United States including buses, subways, light rail, commuter rail, streetcars, monorail, passenger ferry boats and inclined railways. Respondents covered: public transportation agencies and their contractors and subcontractors, and officers. Days to file: 180.

State plan coordination. A retaliation complaint against a public transportation agency or a contractor or subcontractor to a public transportation agency will have potential coverage under both NTSSA and the Utah OSH Act. In these types of circumstances, UOSH and OSHA must coordinate to ensure complainants are informed of their rights under the various whistleblower provisions administered by UOSH and OSHA, including informing them of how the election of remedies provision may affect those rights, and that proper referrals are made. Election of remedies means that an employee may not recover remedies under both NTSSA and another provision of law for the same act of retaliation.

16. Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129. Protects employees from retaliation for reporting potential violations of federal law related to pipeline safety or engaging in other protected activities such as refusing to violate federal pipeline safety law or commencing, assisting, participating, or testifying in a proceeding related to federal pipeline safety law. Respondents covered: owners and operators of pipeline facilities and their contractors and subcontractors. Days to file: 180.
17. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j- 9(i). Protects employees from retaliation for reporting violations of the SDWA, which requires that all drinking water systems have potable water as determined by the Environmental Protection Agency. Key elements to trigger referral include the quality of water, actually or potentially designated for drinking use, whether from above ground or underground sources. Respondents covered: private sector, federal, state and municipal, Indian tribes. Days to file: 30.

18. Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud, violations of the United States Securities and Exchange Commission (SEC) rules and regulations, or violations of federal laws related to fraud against shareholders. This Act covers employees of publicly traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers. Respondents covered: companies registered under §12 or required to report under §15(d) of the Securities Exchange Act (SEA) and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations. Days to file: 180.
19. Seaman's Protection Act, 46 U.S.C. § 2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281. Protects seamen from retaliation for reporting to the United States Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, this Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public. Respondents covered: private-sector and State and local government employers – vessel on which seaman was employed must be American-owned (including U.S. Flagged), as defined; world-wide coverage. Days to file: 180.
20. Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971(a). Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act. Key elements to trigger referral include the generation, transportation, treatment, storage and disposal of hazardous waste. Respondents covered: private sector, federal, state and municipal, Indian tribes. Days to file: 30.
21. Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc. Key elements to trigger referral include any self-propelled or towed vehicle used on the highways in commerce to transport cargo or passengers if the vehicle has a gross vehicle weight of at least 10,001 pounds, or is designed to transport more than 10 passengers, including the driver, or is used to transport hazardous materials. Respondents covered: private sector. Days to file: 180.
22. Taxpayer First Act (TFA), 26 U.S.C. § 7623(d). Protects employees from retaliation for reporting underpayment of taxes, potential violations of internal revenue laws, or potential violations of any provision of federal law relating to tax fraud to their employers or to the federal government, or engaging in other protected activities. Respondents covered: employer, or any officer, employee, contractor, subcontractor, or agent of such employer. Days to file: 180.
23. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622(a). Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to

Know Act (EPCRA). Key elements to trigger referral include industrial chemical storage, transport, and release. Respondents covered: private sector. Days to file: 30.

24. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

Protects certain aviation industry employees from retaliation for providing information or causing information to be provided to the employer or the federal government relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety; or filing, causing to be filed, testifying, participating, or assisting in a proceeding under one of these categories of law. Key elements to trigger referral include air carriers, air transportation and transportation of mail via aircraft. Respondents covered: holders of certificates under 49 U.S.C. § 44704 (relating to design and manufacture of aircraft, engines, propellers, and related equipment) or 49 U.S.C. § 44705 (air carrier operating certificates) and contractors, subcontractors, and suppliers of such certificate holders. Days to file: 90.

Multi-Statute Complaint: If UOSH receives a whistleblower complaint that is covered by both the Utah OSH Act and one of OSHA's whistleblower statutes (see above), UOSH will refer the case to OSHA who will conduct the whistleblower investigation. The complainant may choose to either withdraw the whistleblower complaint filed with UOSH or have an order issued dismissing the complaint due to a referral to OSHA.

B. Complainants under OSHA Jurisdiction.

OSHA has jurisdiction over the following in the State of Utah:

1. Employees of USPS;
2. Employees of contractor-operated facilities engaged in USPS mail operations;
3. Employees of tribal enterprises or Indian-owned enterprises on reservations or trust lands;
4. Employees working in workplaces on federal enclaves where the state has not retained authority;
5. Maritime employees (generally, longshoremen, shipyard workers, marine terminal workers, and seamen); and
6. Employees working in aircraft cabins in flight (as defined by the Federal Aviation Administration Policy Statement).

UOSH will refer, to OSHA, whistleblower complaints received by employees under OSHA's jurisdiction. Such complainants will have the option to either withdraw the whistleblower complaint filed with UOSH or have an order issued dismissing the complaint as UOSH not having jurisdiction to investigate the allegation.

C. Whistleblower Complaints outside UOSH/OSHA Jurisdiction.

Complaints that fall outside the jurisdiction of UOSH/OSHA should be referred to the appropriate agency that has jurisdiction over the alleged complaint. A list of agencies, not inclusive, is included below to assist the Program Manager or designee in making appropriate referrals.

1. Utah Antidiscrimination and Labor Division (UALD).

Investigates discriminatory employment practices based on race, color, religion, sex, age (over 40), national origin, disability, sexual orientation, gender identity, pregnancy, childbirth or pregnancy-related conditions. Also investigates retaliation against employees based on reasonable expressions of religious, political, or personal belief inside and outside of the workplace. <https://laborcommission.utah.gov/divisions/AntidiscriminationAndLabor/index.html>

2. U.S. Equal Employment Opportunity Commission (EEOC).

Investigates discriminatory employment practices based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. <https://www.eeoc.gov/employees/charge.cfm>

3. National Labor Relations Board (NLRB).

Protects the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions. Protects the rights of employees to engage in “concerted activity,” which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action. <https://www.nlr.gov/rights-we-protect>

4. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Investigates discriminatory employment practices based on immigration or citizenship status or national origin. <https://www.justice.gov/crt/immigrant-and-employee-rights-section>

XI. Languages.

UOSH is encouraged to communicate with complainants, respondents, and witnesses in the language in which they understand, both orally, and in writing. The translation service with whom the Commission has a contract may be used. If any communication, including the Order of 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

INTAKE AND EVALUATION OF WHISTLEBLOWER COMPLAINTS

I. Scope.

This chapter explains the general process for receipt and evaluation of whistleblower complaints and the elements required to open a whistleblower investigation or to close the complaint.

II. Receipt of Complaint.

Any applicant for employment, employee, former employee or his or her authorized representative may file a whistleblower complaint with UOSH. No particular form of complaint is required. Complaints may be filed orally or in writing and may be submitted in any language. All complaints received by UOSH must be assigned a local case number and logged in UOSH's internal database. Materials indicating the date the complaint was made must be retained for investigative use. Such materials include envelopes bearing postmarks or other tracking information, emails and fax cover sheets.

A. Intake.

When taken by telephone or in person, the complainant's information must be documented on the UOSH Whistleblower Complaint Form - UOSH 21A (*UOSH Complaint Form*) and must include the following information: intake date; adverse action date; complainant's full name, address, email address and telephone number; respondent's name, address, telephone number and contact person; and a brief summary of the alleged retaliation.

B. Dual Filing.

A dual filed complaint is:

- an occupational safety or health whistleblower complaint filed with OSHA and UOSH within the respective filing periods of both UOSH and OSHA; or
- an occupational safety or health whistleblower complaint that was timely filed with OSHA, and OSHA has referred the complaint to UOSH.

When receiving complaints, because employers under UOSH's jurisdiction do not use the federal OSHA poster, UOSH must advise private-sector complainants of their right to file a federal section 11(c) complaint within the 30-day statutory filing period if they wish to maintain their rights to federal protection. This may be accomplished through such means as the following language provided to the complainant at the time of complaint intake and, if a whistleblower investigation is opened by UOSH, in the Whistleblower Notification of Investigation Letter – UOSH 41C (Complainant) and 41R (Respondent) (*Notification of Investigation Letter*):

In addition to filing your retaliation complaint with UOSH, you have the right to “dual-file” under the Federal OSHA Whistleblower Statute. Federal complaints must be made within 30 days of the date of the adverse action. Federal complaints may be filed with the following office:

*Denver Regional Office, Region VIII OSHA
Cesar Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, Colorado 80204
Telephone: (720) 264-6557
Fax: (720) 264-6585*

OSHA will defer to UOSH for investigation of such retaliation complaints, but dual filing preserves a complainant’s right to seek a federal review should the complainant allege that UOSH was unable to effect appropriate relief. A complainant may request federal review of a dually filed complaint, or, if not dually filed, submit a Complaint About State Program Administration (CASPA) to OSHA. Complainants are required to exhaust the appeal process (see Chapter 6, Section III., *Appeals*, of this manual) before OSHA will accept a “request for federal review” or a CASPA as indicated in Chapter 1, Paragraph VI.B., *Review Process*, of OSHA’s *Whistleblower Investigations Manual*, Directive Number CPL 02-03011, April 29, 2022. OSHA’s review of UOSH’s decisions or findings may only lead to recommended changes in UOSH’s policies or operating procedures.

Whistleblower complaints that fall under OSHA’s jurisdiction should be submitted to the Denver Regional Office, Region VIII, Occupational Safety & Health Agency, Cesar Chavez Memorial Building, 1244 Speer Boulevard, Suite 551, Denver, Colorado 80204, Telephone: (720) 264-6557, Facsimile: (720) 264-6585.

C. Initial Handling of Complaint.

The UOSH Complaint Form must be signed by the person taking the information and provided via email (or hard copy) to the Program Manager or designee within one (1) business day of receiving the information from the complainant. The Program Manager is responsible for determining if the whistleblower complaint falls under the Utah OSH Act, and if not, to ensure that appropriate referrals are made. Refer to Chapter 1, Section X., *Referrals*, and Chapter 3, Subparagraph III.A.1., *Non-UOSH Jurisdiction/Mixed Safety and Health Whistleblower Complaint*, of this manual.

D. Entering Whistleblower Complaints in OIS and UOSH’s Internal Database.

All whistleblower complaints and referrals received by UOSH must be entered into OIS and UOSH’s internal database by the Investigator within one (1) business day of receipt of the complaint or referral. Refer to Chapter 7, Paragraph IV.A., *Entering Whistleblower Complaints into OIS and UOSH’s Internal Database*.

E. Casefile.

Electronic casefiles will be completed for all whistleblower cases upon receipt of the whistleblower complaint, regardless of disposition, and stored on the whistleblower

Googleshared drive located at O:\Shared drives\LC_UOSH_Whistleblower. The Investigator assigned to the case must create an electronic casefile folder by:

1. Copying the “!Blank Folder Template” folder, located in the “Cases” folder;
2. Pasting it into the “!PENDING DOCKETING or ADMIN CLOSURE” folder, which is also located in the “Cases” folder; and
3. Renaming the copied “!Blank Folder Template” folder as follows:
 - a. “Case Number_Respondent Name_Complainant Last Name_assigned Investigator’s first and last initials” (e.g., 180111_ABC Corp_Smith_JD).
 - b. If dually filed with OSHA, “(Dual)” must be added to the folder name prior to the assigned Investigator’s initials (e.g., 180111_ABC Corp_Smith_(Dual)_JD).

Casefiles will be prepared in accordance with Chapter 7, Section III., *Casefile Structure*, of this manual.

III. Preliminary Interview and Evaluation.

A. Preliminary Interview.

1. Whenever possible, the preliminary interview should be assigned to the Investigator anticipated to handle the investigation. The assigned Investigator must contact the complainant to conduct a preliminary interview as soon as possible after the Investigator receives the complaint. Contact with the complainant must be made even if the Investigator’s caseload is such that the actual field investigation may be delayed. The interview may take place either in person or by telephone.
2. During the preliminary interview, the Investigator will verify the information initially obtained from the complainant and obtain additional information as follows:
 - a. Complainant’s name and contact information, and if applicable, name and contact information of the complainant’s representative. If represented, UOSH should facilitate scheduling the interview with the representative rather than directly with the complainant unless the representative authorizes direct access to the complainant.
 - b. Respondents’ name(s) and contact information (if multiple respondents, then all contact information should be present).
 - c. Worksite address.
 - d. The current or final job the complainant performed for the respondent(s).
 - e. An allegation of retaliation for having engaged in activity that is at least potentially protected by the Utah OSH Act (i.e., a *prima facie* allegation). That is, the complaint, supplemented as appropriate by the preliminary interview and any additional information, should contain an allegation of:

- i. Some details that could constitute protected activity under the Utah OSH Act;
- ii. Some details indicating that the employer knew or suspected that the complainant engaged in protected activity;
- iii. Some details indicating that an adverse action occurred and the date of the action; and
- iv. 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 preliminary interview, UOSH will preserve the filing date for timeliness purposes and inform the complainant that the complainant needs to provide the missing information (UOSH should be specific as to what is missing).

- If the complainant provides the missing information, UOSH will either docket the complaint or close the complaint if criteria is not met to open an investigation via withdrawal or Order of Dismissal (if the complainant does not withdraw the complaint).
 - If the complainant does not provide the missing information within 3 business days, UOSH will send a Notification of Failure to Cooperate Letter – UOSH 45C (*Lack of Cooperation Letter*) to the complaint providing the complainant 10 calendar days from issuance of the letter to provide the requested information to UOSH, that if the complainant does not provide the information to UOSH within the allotted time frame provided in the letter, an order will be issued dismissing the complaint.
3. Unable to Contact Complainant. When the Investigator has tried and failed to reach a complainant via email and telephone, the Investigator must send a Notification of Failure to Contact Letter – UOSH 22C (*No Contact Letter*) to the complainant. Refer to Chapter 3, Paragraph III.B, *Unable to Contact Complainant for Preliminary Interview*. The letter must state that attempts to contact the complainant have failed and that the whistleblower complaint will be dismissed unless the complainant contacts UOSH within 10 calendar days of the issuance date of the letter. If the complainant fails to contact UOSH within 10 calendar days from issuance of the letter, the Investigator will prepare and submit a PFE to the Program Manager recommending the issuance of an order for the complainant's failure to contact the Investigator. After the Program Manager approves and signs the PFE, the Investigator will prepare and submit a proposed Order of Dismissal and related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual. At no time will the disposition of a case be considered withdrawn, unless the complainant submits a recorded or written statement to UOSH requesting that the whistleblower complaint be withdrawn. The Investigator must document all attempts to contact the complainant on the *UOSH Case Notes Form* located in the casefile.

4. Interview statements shall normally be audio or video recorded, with the consent of the person being interviewed, and placed in the casefile. Before the interview begins, the Investigator shall ensure the following information is recorded:
 - a. Consent from complainant to record interview;
 - b. Name and job title of complainant;
 - c. The date of the interview;
 - d. Respondent name; and
 - e. Investigator's name and job title.
5. Written Statements.
 - a. If recording an interview statement is not possible, it shall be written by the complainant. The complainant shall initial any changes or corrections; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end in the wording "This statement is true to the best of my knowledge." The complainant shall sign and date the interview statement and the Investigator shall sign it as a witness. Statements taken in a language other than English shall be subsequently translated.
 - b. In circumstances where recording an interview statement is not possible and the complainant is unable to make a written statement, the Investigator must take accurate and complete notes during the interview, as these tend to be more credible than later general recollections. The wording of the statement shall be in third person (e.g., he/she/her/him/they/them/etc.), understandable to the complainant and reflect only the information that has been brought out in the interview. The complainant shall initial any changes or corrections; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end in the wording "I have read the above, or the statement has been read to me, and it is true to the best of my knowledge." The complainant shall sign and date the interview statement and the Investigator shall sign it as a witness.
 - c. Refusal to Sign Statement. If the complainant refuses to sign the statement, the Investigator shall note such refusal on the statement. Statements shall be read to the complainant and an attempt made to obtain an agreement. A note to this effect shall be documented in the casefile.
6. During the interview, the Investigator should obtain as much information as possible including information needed to substantiate a *prima facie* allegation (protected activity, employer knowledge, adverse action, nexus) and information regarding the complainant's employment status, wages and current losses. The Investigator will review information received for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation (Refer to Paragraph III.B, *Evaluation*, of this chapter).

7. The Investigator must request, from the complainant, witness contact information and copies of all documentation in his or her possession that may be relevant to the case. Relevant records may include, but are not limited to:
 - a. Copies of any termination notices, reprimands, warnings or personnel actions;
 - b. Performance appraisals;
 - c. Earnings and benefits statements;
 - d. Grievances;
 - e. Unemployment benefits, claims, and determinations;
 - f. Job position descriptions;
 - g. Company employee and policy handbooks;
 - h. Copies of any charges or claims filed with other agencies;
 - i. Collective bargaining agreements;
 - j. Arbitration agreements; and
 - k. 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 should familiarize themselves with the requirements of Utah Administrative Code (UAC) R614-1-10. *Rules of Agency Practice and Procedure Concerning UOSH Access to Employee Medical Records.*
8. The remedies sought by the complainant should be ascertained during the preliminary interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the backpay to which the complainant might be entitled in the event of merit findings and order. The complainant should be advised that the respondent's backpay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement.
9. The Investigator must also inform the complainant that he or she 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 the complainant replaces it), photographs, social media posts, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies the complainant seeks. Thus, for instance, the complainant should retain documentation supporting the complainant's compensation with the respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting from the adverse action. Refer to Chapter 5, *Remedies and Settlement Agreements*, of this manual for appropriate remedies provided by the Utah OSH Act.

10. If the complainant does not wish to, or is uncertain whether to, proceed with the whistleblower complaint, the Investigator will inform the complainant of the whistleblower withdrawal process per Chapter 3, Paragraph II.A., *Withdrawal of Case*, of this manual. If the complainant chooses not to withdraw the timely complaint, and, if a *prima facie* allegation is present (Refer to Paragraph III.B., *Evaluation*, of this chapter), the Investigator will recommend to the Program Manager that the complaint be docketed, and an investigation opened.

11. Documentation.

The information obtained during the preliminary interview must be properly documented. At a minimum, the Whistleblower Preliminary Interview Form – UOSH 23A (*Interview Form*) must be completed with the complainant's account of the facts necessary to determine whether the complaint was timely filed and if a *prima facie* allegation exists. This information can be used later to refresh the complainant's memory in the event his or her account deviates from the initial information provided; this is often the key to later assessing the credibility of the complainant. Refer to Subparagraphs III.B.2., *Timeliness*, and III.B.3., *Prima Facie Allegation*, of this chapter for evaluation of these elements.

The Investigator must also complete the *UOSH Complaint Form* using the information from the *Interview Form*. The *UOSH Complaint Form* will be mailed with the appropriate *Notification of Investigation Letter* to the parties, or will be mailed with the Order of Dismissal (where *prima facie* allegations were not met, and an investigation was not opened).

The *UOSH Complaint Form* must be concise and contain the *prima facie* allegations specific to the allegations of retaliation that are covered under the Utah OSH Act. An example of how the information should be included in the *Summary of Alleged Retaliation* section of the *UOSH Complaint Form* is as follows:

Complainant alleges his/her employment was terminated (retaliation) on [DATE] as a result of Complainant raising safety concerns on [DATE] to Supervisor (knowledge) regarding a drill press not being guarded (protected activity).

Only the basic *prima facie* allegations to which the respondent needs to provide a position statement and supporting documentation must be included in the *UOSH Complaint Form*.

B. Evaluation.

1. **Non-UOSH Jurisdiction.** If the whistleblower complaint is not covered by the Utah OSH Act and the allegations may be covered by another governmental agency, the Investigator will complete a PFE and submit it to the Program Manager for review and signature recommending referral to the appropriate agency and closing the whistleblower complaint. Where the complainant withdraws the whistleblower complaint, the recommended closure on the PFE will be "Administratively Close (Withdrawn)." Where the complainant chooses not to withdraw the whistleblower complaint, the recommended closure will be "Docket and Dismiss." After the Program

Manager reviews and signs the PFE, where the complainant chooses not to withdraw the whistleblower complaint, the Investigator will prepare and submit a proposed Order of Dismissal and related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual. At no time will the disposition of a case be considered withdrawn, unless the complainant submits a recorded or written statement to UOSH requesting that the whistleblower complaint be withdrawn.

2. **Timeliness.** The Investigator must determine the timeliness of the complaint after the preliminary interview with the complainant and must not rely on the complaint alone. More detailed information from the complainant may resolve timeliness issues that may not be apparent in the original complaint. If deemed untimely, the complaint will be closed and not investigated.
 - a. Complainants alleging discharge or retaliation in violation of the Utah OSH Act must file whistleblower complaints with UOSH within 30 calendar days from the date of the adverse action. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant. Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the Labor Commission 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 UOSH Office is closed, then the next business day will count as the final day. Complaints filed after these deadlines will normally be closed without further investigation. However, there are certain extenuating circumstances that could justify tolling the statutory filing deadline under equitable principles.
 - b. **Equitable Tolling.** There may be circumstances which would justify tolling of the 30day period on recognized equitable principles or because of strongly extenuating circumstances. The following reasons may justify the tolling of a deadline, and the investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them.
 - i. 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; and
 - The employer purports to lay off a group of employees, but immediately rehires all of the employees who did not engage in protected activity.

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

- ii. The employee has, within the 30-day period, resorted in good faith to grievance/arbitration proceedings under a collective bargaining unit or filed a complaint regarding the same general subject with another agency;
 - iii. The discrimination is in the nature of a continuing violation;
 - iv. The employee is unable to file within the statutory time period due to a debilitating illness or injury which occurred during the filing period;
 - v. The employee is unable to file within the required period due to a major 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 UOSH within the filing period; or
 - vi. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights. For example, tolling may be appropriate when an employer had repeatedly assured the complainant that he or she would be reinstated so that the complainant reasonably believed he or she would be restored to the former position. However, the mere fact that settlement negotiations were ongoing between the 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).
- c. Conditions that will not justify equitable tolling include:
- i. Ignorance of the statutory filing period.
 - ii. Filing of unemployment compensation claims.
 - iii. Filing a worker's compensation claim.
 - iv. Filing a private lawsuit.
- d. **Untimely Filed Complaint.** If a complaint is deemed untimely, the Investigator will complete a PFE and submit it to the Program Manager for review and signature prior to moving forward with closing the complaint. After the Program Manager reviews and signs the PFE, where the complainant chooses not to withdraw the whistleblower complaint, the Investigator will prepare and submit a proposed Order of Dismissal and related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual. At no time will the disposition of a case be considered withdrawn, unless the complainant submits a recorded or written statement to UOSH requesting that the whistleblower complaint be withdrawn.

3. *Prima Facie* Allegation.

Prior to opening an investigation and as soon as possible after the preliminary interview with the complainant, the information provided by the complainant must be reviewed for the presence of a *prima facie* allegation. If the complaint is covered by the Utah OSH Act, is timely filed, and includes the *prima facie* elements (protected activity, respondent knowledge, adverse action, nexus), a whistleblower investigation will be opened by the Investigator to determine whether a violation of the Utah OSH Act has occurred.

a. *Prima Facie* Elements.

i. Protected activity. The complainant must have engaged in activity protected by the Utah OSH Act. Protected activities include:

- Filing a complaint or instituting or causing to be instituted a proceeding under or related to the Utah OSH Act;
- Testifying or being about to testify in any proceeding under or related to the Utah OSH Act; or

Exercising a right granted by the Utah OSH Act on behalf of the employee or others.

Rights are granted to employees under the Utah OSH Act both explicitly and implicitly. These rights include, but are not limited to, the right to contact UOSH for guidance on standards, the right to contest an abatement deadline, the right to make a safety complaint to the employer, and the right to report a work-related injury/illness.

1. Safety and Health Complaints.

In addition to complaints made to UOSH, complaints to other government agencies or to members of the employer's management team are protected as long as they pertain to employee safety and health (as opposed to the safety of clients or the general public). It is not necessary to prove that an unsafe condition existed or that an occupational safety and health standard was violated. In other words, the complainant does not need to show that the conduct about which he/she initially complained, for example, employees driving forklift trucks unsafely, took place. Rather, the action of making a safety and/or health complaint would be considered a protected activity if the complaint was made in good faith and a reasonable person could have raised the same issue.

2. Reporting Work-Related Injury.

There are several types of workplace policies and practices that could discourage injury reporting and thus violate the Utah OSH Act. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

Injury-Based Incentive Programs and Drug/Alcohol Testing.

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

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 the Utah OSH Act. In addition, such a policy is inconsistent with the employer's obligations under 29 CFR 1904.35(b), and where it is encountered in a UOSH case, a referral for a recordkeeping investigation will be made.

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 the Utah OSH Act. UOSH 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 29 CFR 1904.35(b)(1) violation should be made if applicable.

Discipline for Violating a 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. UOSH encourages employers to maintain and enforce legitimate workplace safety rules to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. A careful investigation is warranted 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 noninjured employees may suggest that the rule is a pretext for discrimination in violation of the Utah OSH Act.

3. Work Refusal. Refusing to perform an assigned task simply because it is unsafe is not normally a protected activity. However, such refusal may be a protected activity where:

- The employee refused in good faith to expose himself or herself to the dangerous condition;
- The condition causing the employee's apprehension of death or injury is of such nature that a reasonable person would conclude there is a real danger of death or serious injury;
- There was insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels; and
- The employee, where possible, sought from his or her employer, and was 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. If the protected work refusal includes ambiguous action by the complainant that the respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, the complainant's subsequent lack of employment may constitute a discharge. If it is ambiguous whether the complainant quit or was discharged, consultation with the State of Utah Assistant Attorney General (AAG) may be appropriate.

ii. Respondent Knowledge.

The person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, one of the respondent's managers need not have specific knowledge that the complainant contacted a regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant. Also, the investigation need not show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity. If the respondent does not have actual knowledge, but could reasonably deduce that the complainant

filed a complaint, it is referred to as *inferred knowledge*. Examples of *inferred knowledge* include, but are not limited to:

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

If the 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 the complainant, employer knowledge and motive are imputed to the decision maker. This concept is known as the **cat's paw theory**.

iii. Adverse Action.

The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer after the employee engaged in a protected activity. An adverse action may occur at work, or, in certain circumstances, outside of work. Examples of adverse actions may include, but are not limited to:

- Discharge – Includes 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 the AAG may be appropriate.
- Demotion
- Suspension

- Reprimand or other discipline
- Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct 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.
- 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 30-day statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
- Lay-off
- Failure to hire
- Failure to promote
- Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about the complainant to potential employers to discourage them from hiring him or her.
- Failure to recall
- Transfer to a 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 the 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.

- Change in duties or responsibilities **NOTE:** A change in job duties must be more than an inconvenience and/or immaterial change. For a change in duties to be an adverse action, a reasonable employee must perceive the new duties as more demeaning in nature.
- Denial of overtime
- Reduction in pay or hours
- Denial of benefits
- Making a threat
- Intimidation
- 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.
- Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.
- Reporting or threatening to report an employee to the police or immigration authorities.

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

iv. Nexus.

There must be reasonable cause to believe that there is a causal link between the protected activity and the adverse action. That causal link will be either:

- That the protected activity was a substantial reason for the adverse action; or
- That the adverse action would not have occurred but for the protected activity.

Nexus can be demonstrated by direct or circumstantial evidence, such as timing (proximity in time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees or in comparison to how the complainant was treated prior to engaging in protected activity, and/or animus (ill will towards the protected activity).

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

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

b. *Prima Facie* Evaluation Form – UOSH 24A (PFE).

The Investigator must complete and sign a PFE recommending action based on the Investigator's evaluation of timeliness and the *prima facie* allegations. The form must be submitted to the Program Manager for review, approval and signature.

- i. Complaint Timely Filed and *Prima Facie* Allegations Present. The Investigator will recommend that the complaint be docketed in OIS and a whistleblower investigation opened if the complaint was filed within the required statutory timeframe and all *prima facie* allegations are present. Refer to Chapter 7, Section IV., *Data Entry*, of this manual, for entering and docketing complaints in OIS. When recommending an investigation be opened, the Investigator must determine whether a compliance investigation is pending and avoid providing advanced notice to the respondent. If a compliance investigation is pending, the Investigator must indicate so on the PFE and must recommend deferral of the whistleblower investigation until after the compliance investigation has opened.
- ii. Untimely or Lacking *Prima Facie* Allegations. If deemed untimely and/or lacking any *prima facie* allegation, the Investigator will recommend that the case be administratively closed (complainant withdraws complaint) or docketed and dismissed (complaint not withdrawn by complainant). Refer to Chapter 7, Section IV., *Data Entry*, of this manual, for entering and closing such complaints in OIS.
- iii. Non-UOSH Jurisdiction. A recommendation for referral to the appropriate agency and administratively closing the complaint (complainant withdraws complaint) or docketing and dismissing the complaint (complaint not withdrawn by complainant) will be made by the Investigator if the allegations are covered by other governmental agencies. Refer to Chapter 3, Subparagraph III.A.1, *NonUOSH Jurisdiction/Mixed Safety and Health Whistleblower Complaint*, of this manual.

- i. The Program Manager will review the information provided on the PFE and will make a determination to either assign the Investigator to open an investigation or to close the case. The Program Manager may also request that the Investigator obtain more information in order to determine the course of action. The Program Manager will document actions to be taken by the Investigator on the PFE, provide a signature on the form and return it to the Investigator who conducted the *prima facie* evaluation. Based on the direction provided by the Program Manager, the Investigator will either open an investigation, administratively close or docket and dismiss the complaint in accordance with Chapter 4, *Opening and Conducting the Whistleblower Investigation*, or Chapter 3, *Administratively Closing/Dismissing Complaints*, of this manual, respectively.

C. Referral of Complainants to the NLRB.

If an employee files a whistleblower complaint with UOSH and the safety or health activity appears to have been undertaken in concert with or on behalf of co-workers, including, but not limited to, the filing of a grievance under a collective bargaining agreement, the following procedures will be followed:

1. If the complaint is timely, UOSH shall inform the employee of the additional right to file a charge with the NLRB.
2. If the complaint is untimely, UOSH will advise the complainant that he or she may file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than UOSH's (30 days). UOSH, therefore, will recommend that the complainant contact the NLRB as soon as possible to discuss their rights.

In both situations, UOSH should provide the complainant with the NLRB's toll-free number, 1-844-762-NLRB (1-844-762-6572).

IV. Geographical Coverage.

In cases involving temporary worksites, such as construction sites, the case should be investigated by the state that includes the respondent's State of incorporation or the respondent's principal place of business. For example, if an employee of a construction company engaged in protected activity in Utah, but the company's principal place of business is in Colorado, UOSH should refer the case to the Region VIII OSHA Office. If an employee of a construction company engaged in protected activity in Colorado, but the company's principal place of business is in Utah, UOSH should investigate the case.

V. Amended Complaints.

After filing a retaliation complaint with UOSH, a complainant may wish to amend the complaint to add additional allegations and/or additional respondents. It is UOSH's policy to permit liberal amendments of complaints, provided that the original complaint was timely.

A. Form of Amendment.

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

B. Amendment Filed Within Statute of Limitations.

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

C. Amendments Filed After Statute of Limitations Has Expired.

For amendments received after the statute of limitations for the original complaint, the Investigator must evaluate whether the proposed amendment (adding subsequent alleged adverse actions and/or additional respondents) reasonably falls within the scope of the original complaint. If the amendment reasonably relates to the original complaint, then it must be accepted as an amendment, provided that the investigation remains open. If the amendment is determined to be unrelated to the original complaint, then it may be handled as a new complaint of retaliation and processed in accordance with the Utah OSH Act.

D. Processing of Amended Complaints.

Amended complaints must be processed in the same manner as the original complaint in that all parties must be provided with a copy of the amended complaint and the respondent(s) must be afforded an opportunity to respond. Copies of all correspondence must be included in the casefile and notification of parties must be documented on the *UOSH Case Notes Form*. Refer to Chapter 4, Section VIII., *Communicating with Parties*, of this manual.

VI. Amended Complaints Distinguished from New Complaints.

The mere fact that 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, 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. Refer to Chapter 4, *Opening and Conducting the Whistleblower Investigation*, of this manual.

Chapter 3

ADMINISTRATIVELY CLOSING/DISMISSING COMPLAINTS

I. Scope.

This chapter explains the reasons and general process for administratively closing and dismissing whistleblower complaints. This chapter does not pertain to dismissal of complaints as a result of whistleblower investigations and findings by UOSH.

II. Reasons for Administrative Closure (No Order Issued).

A. Withdrawal of Case.

Where a *prima facie* case is missing, the whistleblower complaint is untimely filed, the allegations fall outside of Utah Code Ann. §34A-6-203, or a mixed jurisdiction whistleblower complaint exists (refer to Chapter 2 Paragraph III.B., *Evaluation*), the complainant must be provided the opportunity to withdraw the whistleblower complaint or have an order issued dismissing the complaint. The Investigator will communicate to the complainant that if an order is not issued, the complainant will **not** have any appeal rights and that the deadline to re-file a complaint (30 calendar days from the adverse action) will not be tolled.

If the complainant chooses to withdraw the whistleblower complaint, he or she must submit a recorded or written statement to UOSH requesting that the whistleblower complaint be withdrawn. After receipt of the recorded or written statement from the complainant, and the Program Manager's approval as indicated by signature on the PFE, the whistleblower complaint will be administratively closed in OIS and UOSH's database will be updated to reflect the closure. Refer to Sections VI. and VII. of this chapter for *Closing Complaints in OIS* and *Updating UOSH's Internal Database*, respectively. The Investigator will email the complainant a Withdrawal Confirmation Letter – UOSH 26C (*Withdrawal Letter*) confirming withdrawal of the complaint. If no email address was provided, the Investigator will mail the letter to the complainant via USPS.

Complaints withdrawn by the complainant will **not** be forwarded to the respondent.

III. Reasons for Dismissal (Order Issued).

A. Lacking Criteria to Open Investigation.

After approval by the Program Manager as indicated on the PFE (see Section IV., *Prima Facie Evaluation Form – UOSH 24A*, of this chapter), all whistleblower complaints not meeting the criteria to open an investigation, and not withdrawn by the complainant (refer to Paragraph II.A., *Withdrawal of Case*, above), must be dismissed by issuance of an order. Criteria that would warrant issuance of an order when the complainant does not withdraw the complaint is as follows:

1. **Non-UOSH Jurisdiction/Mixed Safety and Health Whistleblower Complaint.** Complaints that fall outside of Utah Code Ann. §34A-6-203 that may be covered by one or more federal statutes affording whistleblower protection (Refer to Chapter 1, Section X., *Referrals*, of this manual for list of statutes), or contain a mixed safety and health whistleblower complaint with other federal whistleblower claims, must be referred to OSHA, Region VIII, Denver Regional Office, for disposition and docketed and dismissed in accordance with Section VI., *Closing Complaints in OIS*, of this chapter and Chapter 6, *Orders and Appeals*, of this manual. A mixed safety and health complaint is where the complainant's allegations fall under both OSHA's and UOSH's jurisdiction. In such cases, where OSHA will investigate complaints that are covered by a federal statute, they will generally investigate the entire complaint, including the allegations UOSH would have normally investigated, but using federal whistleblower statutes rather than Utah Code Ann. §34A-6-203. Whistleblower complaints that are not safety and health related but are covered by another agency or division of the Commission, for example, Utah Antidiscrimination and Labor Division, must be appropriately referred for disposition and dismissed following UOSH's policies and procedures.
2. **Untimely Filed.** Whistleblower complaints must be filed within 30 calendar days after the date of the adverse action. The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant. Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at the Labor Commission 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 UOSH Office is closed, the next business day will count as the final day. Complaints filed after these deadlines will normally be closed without further investigation. However, there are certain extenuating circumstances that could justify tolling these statutory filing deadlines under equitable principles. Refer to Chapter 2, Subparagraph III.B.2.b., *Equitable Tolling*, of this manual.
3. **Lack of Prima Facie Allegation.**

Before an investigation can be opened, the information provided by the complainant must indicate that a *prima facie* allegation is present. The allegations must show that the complainant engaged in protected activity, the respondent had knowledge of such protected activity and the complainant suffered some form of adverse action as a result of the protected activity. Refer to Chapter 2, Subparagraph III.B.3., *Prima Facie Allegation*, of this manual. If any of the *prima facie* allegations are lacking, the complaint will be closed in accordance with UOSH's policies and procedures.

B. Unable to Contact Complainant for Preliminary Interview.

Within 3 business days of receiving a whistleblower complaint, the Investigator will email and call the complainant in order to conduct a preliminary interview. If the complainant does not answer the phone, the Investigator will leave a voicemail informing the complainant that he/she has 3 business days to contact the Investigator for an interview. If the complainant does not contact the Investigator within 3 business days of the email being sent and the voicemail being left with the complainant, a *No Contact Letter* will be mailed (certified mail) and emailed to the complainant providing the complainant 10 calendar days from issuance of the *No Contact Letter* to contact UOSH, that if the complainant does not contact UOSH within the allotted time frame provided in the *No Contact Letter*, an order will be issued dismissing the complaint.

The *No Contact Letter* must state that attempts to contact the complainant have been unsuccessful and that the complainant's complaint will be dismissed via an order which will be mailed to both the complainant and respondent unless the complainant contacts UOSH within 10 calendar days of the issuance date of the letter. If the complainant does not respond within 10 calendar days from the date the letter was issued, the Investigator will complete and submit a PFE to the Program Manager recommending an order be issued, dismissing the complaint, due to the inability to contact the complainant.

All attempts to contact the complainant must be documented in the *UOSH Case Notes* located in the casefile. Copies of the emails attempting to contact the complainant must be placed in the *Email* folder located in the *Communication with Complainant* folder in the casefile.

NOTE: There may be occasions where the complainant did not provide sufficient contact information for the parties. Where there is lack of information to issue an order, and where the Investigator is unable to contact the complainant, the complaint will be marked as "Screened Out" on the PFE form, and, after approval by the Program Manager as indicated by signature on the PFE, administratively closed (not docketed) in OIS as "lack of cooperation".

C. Withdrawal After Investigation Opened.

If a whistleblower complaint is withdrawn after docketing the complaint and opening an investigation, the Investigator will communicate to the complainant that an Order of Dismissal and related documents will be issued to both the respondent and complainant. The Investigator will inform the complainant of his or her appeal rights.

After receipt of the recorded or written statement from the complainant requesting withdrawal of the whistleblower complaint, the Investigator will complete and submit and abbreviated ROI (Refer to Chapter 4, Paragraph X.J., *Report of Investigation*, of this manual) to the Program Manager for approval. Upon approval, the Investigator will prepare an Order of Dismissal in accordance with Chapter 6, Section II., *Orders*, of this manual. Upon issuance of the order, the whistleblower complaint will be closed in OIS and UOSH's database will be updated to reflect the closure. Refer to Sections VI. and VII. of this chapter for *Closing Complaints in OIS* and *Updating UOSH's Internal Database*, respectively.

NOTE: Enforcement of the provisions of Utah Code Ann. §34A-6-203 is not only a matter of protecting the rights of individual employees, but also of public interest. Attempts

by an employee to withdraw a previously filed complaint will not necessarily result in termination of UOSH's investigation. UOSH's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his or her complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

D. Settlement Agreement Reached Between Parties.

Refer to Chapter 5, Section III., *Settlement Agreement*, of this manual.

IV. Prima Facie Evaluation Form – UOSH 24A.

If facts discussed during the preliminary interview with the complainant suggest the complaint should be closed (refer to Chapter 2, Paragraph III.B, *Evaluation*), the Investigator will complete and submit to the Program Manager a PFE recommending either administrative closure (complainant chooses to withdraw complaint) or docketing and dismissing the complaint (where complainant chooses to have an order issued). The information provided on the form must include the reasons for the recommendation.

After the Program Manager reviews and signs the PFE, the Investigator will either provide the *Withdrawal Letter* to the complainant (complainant withdraws complaint) or, where an order will be issued, communicate the closure to the complainant via telephone or in person and explain to the complainant why the matter will not be investigated. The Investigator will explain the process of issuing an Order of Dismissal and the complainant's appeal rights. Refer to Chapter 6, *Orders and Appeals*, of this manual. The Investigator will then prepare a proposed Order of Dismissal and related documents, docket and dismiss the complaint in OIS and update UOSH's internal whistleblower tracking database. Refer to Chapter 7, Paragraph IV.C., *Investigation Opened or Complaint Docketed and Dismissed*.

V. Issuing Order of Dismissal.

The Investigator will complete a proposed Order of Dismissal and related documents in accordance with Chapter 6, Section II., *Orders*, of this manual.

NOTE: Prior to issuing the order, the Investigator must determine if a compliance inspection is pending with UOSH. If an inspection is pending, the order must not be issued until the inspection has commenced in order to avoid giving advance notice of a potential inspection.

VI. Closing Complaints in OIS.

After approval from the Program Manager, as indicated by signature on the PFE, the Investigator must close the complaint in OIS. Where an order is issued, the Investigator will close the complainant in OIS after the Director signs the Order of Dismissal. A reason for closure will be included in the casefile. For detailed information on closing whistleblower complaints in OIS, refer to Chapter 7, Section IV., *Data Entry*.

VII. Updating UOSH's Internal Database.

The Investigator must enter the following information in the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet) for whistleblower complaints where an investigation was not opened by UOSH:

- A. In the Investigator Date, enter "N/A";
- B. Ensure the preliminary information is entered correctly (e.g. Filed Date, File Number, Party Names, and Party Addresses);
- C. Enter the "First Contact with CP Date";
- D. In the Investigator Name, enter "N/A";
- E. Enter the "Prima Facie Evaluation Completed Date";
- F. In the "File Closed Date," enter the date order was signed or date the *Withdrawal Letter* was emailed to the complainant or complainant's representative, as applicable;
- G. Enter the "Dismissal Closure Order (Or Withdrawal Approved)" date;
- H. In the "Notes" column, enter "Administratively Closed" (complaint withdrawn) or "Dismissed" (order issued) followed by the reason; and
- I. In the "Closed Code" column, enter one of the following codes, replacing "20XX" with the fiscal year in which the closure occurred:
 - 1. AA20XX = Lack of Adverse Action
 - 2. AC20XX = No Contact/Cooperation
 - 3. AJ20XX = Lack of Jurisdiction/Mixed Jurisdiction
 - 4. AK20XX = Lack of Respondent Knowledge
 - 5. AN20XX = Lack of Nexus
 - 6. AP20XX = Lack of Protected Activity
 - 7. AS20XX = Settlement Agreement (Settled before an investigation is opened)
 - 8. AU20XX = Untimely
 - 9. AW20XX = Withdrawn
 - 10. AX20XX = Screened Out (Unable to contact the complainant **and** not enough information to issue an order)

Chapter 4

OPENING AND CONDUCTING THE WHISTLEBLOWER INVESTIGATION

I. Scope.

This chapter sets forth the process for opening a whistleblower investigation and the policies and procedures Investigators must follow throughout the course of an investigation. The policies and procedures are designed to ensure that complaints are efficiently investigated, and that the investigation is well documented. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. If there is a conflict between the Utah OSH Act or UOSH rules and the procedures set out in this Chapter, the statutory and/or regulatory provisions take precedence. Investigators should consult with the Program Manager 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 UOSH's quality standards. **Reasonable balance** is achieved when further evidence is not likely to change the outcome.

B. Investigator as a Neutral Party.

The Investigator should make clear to all parties that UOSH does not represent either the complainant or respondent. Rather, the Investigator acts as a neutral party 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 to reach an appropriate determination in the case.

C. Investigator's Expertise.

The Investigator, not the complainant or the respondent, is the expert regarding the information required to satisfy the elements of a violation of Section 34A-6-203 of the Utah OSH Act. The Investigator will review all relevant documents and interview relevant witnesses 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 the complainant, respondent, and witnesses.

D. Preponderance of Evidence that a Violation Occurred.

The Investigator must use the evidence gathered from the complainant and respondent to determine whether there is a preponderance of the evidence (greater than 50%) that the complainant's allegation or respondent's position is true.

III. Opening Investigation.

If the complaint is covered by the Utah OSH Act, is timely and contains a *prima facie* allegation, as discussed in Chapter 2, Section III.B., *Evaluation*, of this manual, the Investigator will complete and submit a PFE to the Program Manager recommending that a whistleblower investigation be opened. The Program Manager will review the information provided and if agreed upon, will provide a signature on the form, and assign the Investigator to docket the complaint in OIS and open a whistleblower investigation. The date of the Program Manager's signature on the PFE will serve as the opening date of the investigation.

IV. Docketing Complaints.

The term "to docket" means to record the case in OIS and to formally notify both parties in writing of UOSH's receipt of the complaint and intent to investigate.

A. When to Docket.

If a whistleblower complaint is covered under the Utah OSH Act, is timely and contains the *prima facie* allegations, the Investigator who conducted the preliminary interview will be assigned by the Program Manager to docket the complaint in OIS (Refer to Chapter 7, Subparagraph IV.C. 1., *OIS*, of this manual) and conduct a whistleblower investigation. Cases will be docketed, and investigations opened after approval by the Program Manager as indicated on the PFE. The docket date entered in OIS is the date the Program Manager signed the PFE.

B. Multiple Complainants or Respondents

1. Multiple Complainants. Cases involving multiple complainants will be docketed under separate case numbers.
2. Multiple Respondents. Cases involving multiple respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.

V. Updating UOSH's Internal Database.

UOSH's internal database must be updated after the Program Manager assigns the Investigator to open the investigation. The Investigator must enter the following information in the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet):

- Date Investigator Assigned;

- Name of Assigned Investigator; and
- Date opening letters were sent to the respondent and complainant.

VI. 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 the complainant or the respondent. Such information normally will be available from OITSS-Whistleblower, OIS, and the UOSH Office. Examples of information sought may include copies of safety and health complaints filed with OSHA/UOSH, inspection reports, and citations. Research results must be documented in the casefile. When research reveals no relevant results, the Investigator must still note in the case activity log the pre-investigation research that was performed (for example, by listing the searches that the Investigator did in OIS) and that no relevant results were found.

VII. Scheduling Investigation.

The Investigator should generally schedule investigations in chronological order of the date the complaint/referral was filed with UOSH, taking into consideration economy of time and travel costs, unless otherwise directed by the Program Manager.

VIII. Communicating with Parties.

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

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

A. Investigative Correspondence.

Templates for complaint/investigation notifications, orders, and complainant/respondent letters are located in the Google O:\Shared drives\LC_UOSH_Whistleblower\Admin\0Completed folder. The templates are merged with the *Whistleblower Tracking Sheet* and will be used to the extent possible, except where modifications are deemed necessary as approved by the Program Manager.

Notification of Investigation Letters, No Contact Letters, Lack of Cooperation Letters, and the Order of Findings must be sent by USPS Certified Mail, electronic copies of which shall be saved to the respective casefile. Delivery receipts will be preserved in the casefile in the communication folder for the party recipient. Other correspondence where a receipt date is not critical to the case may be sent by electronic means.

B. Complainant.

1. **Notifying Complainant of Investigation.** The Investigator will mail, via certified mail, a copy of the *UOSH Complaint Form* and the *Notification of Investigation Letter* stating that UOSH will open an investigation into the complainant's allegations to determine if the respondent retaliated against the complainant in violation of the Utah OSH Act. The letter will also include information on the complainant's right to dual file under the federal OSHA whistleblower statute. As requested in the letter, the complainant will have 20 calendar days, from the date of issuance of the letter, to provide documents (e.g., notes, minutes, pay stubs, etc.) to the Investigator that may support the complainant's allegations. The complainant will be advised that failure to respond to investigative inquiries and/or requests may result in dismissal and closure of the complaint.
2. **Lack of Cooperation/Unresponsiveness.** Complaints may be dismissed for lack of cooperation on the part of the complainant. These circumstances may include, but are not limited to, the complainant's:
 - a. Failure to be reasonably available for an interview;
 - b. Failure to respond to repeated correspondence or telephone calls from UOSH;
 - c. Failure to attend scheduled meetings; and
 - d. Other conduct making it impossible for UOSH to continue the investigation, such as excessive requests for extending deadlines.
 - e. Harassment, inappropriate behavior, or threats of violence may also justify dismissal for lack of cooperation.
 - f. When the complainant fails to provide requested documents in the complainant's possession or a reasonable explanation for not providing such documents, UOSH may draw an adverse inference against the complainant based on this failure unless the documents may be acquired from the respondent. If the documents cannot be acquired from the respondent, then the 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 lack of cooperation.
3. **Dismissal Procedures for Lack of Cooperation/Unresponsiveness.** In situations where the Investigator is having difficulty locating the complainant to continue the investigation, or where the complainant is unresponsive to the Investigator's requests, the following steps must be taken:

- a. Telephone/text the complainant during normal business hours and contact the complainant by email. Notify the complainant that he or she is expected to respond within 48 hours of receiving the phone/text message or email. Document attempts to contact the complainant in the *UOSH Case Notes Form*.
- b. If the complainant fails to contact the Investigator within 48 hours, UOSH will mail a *Lack of Cooperation Letter* via certified mail, return receipt requested, to the last known address stating that the Investigator must be contacted within 10 calendar days from the issuance of the letter, or the whistleblower complaint will be dismissed. The notification will specify direct contact information for the Investigator including: mailing address, telephone number, and email address. The letter must also be emailed to the complainant if an email address was provided. The date received will be the date the complainant receives the letter.
- c. The complainant has an obligation to provide UOSH with all available methods of contact, including a working telephone number, email address, or mailing address of record. The complainant also has an obligation to update UOSH when contact information changes. UOSH may dismiss a complaint for lack of cooperation if UOSH is unable to contact the complainant due to the absence of up-to-date contact information.
- d. If the complainant fails to contact UOSH within 10 calendar days of issuance of the letter, the Investigator will prepare a ROI with a recommendation of dismissing the complaint due to the complainant's lack of cooperation. The ROI must contain the complainant's allegations of retaliation, the date the investigation was opened, and details regarding the lack of cooperation which led to the recommendation of dismissal. Upon the Program Manager's approval of the ROI, the Investigator will prepare and submit a proposed Order of Findings and related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual.

4. Deceased Complainant.

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

C. Respondent.

1. All relevant employers should be named as respondents in all docketed cases unless the complainant refuses. This includes contractors, subcontractors, host employers, and relevant staffing agencies, as well as individual company

officials as discussed below. Failing to name a respondent may create confusion regarding whether the complainant has properly exhausted remedies which could impede future settlement of the case, impede relevant interviews, or unnecessarily delay or prevent the complainant from obtaining reinstatement and other remedies provided by the Utah OSH Act. For more information on temporary workers and host employers, see OSHA's Memorandum, [Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers](#), issued May 11, 2016, and OSHA's [Protecting Temporary Workers](#) webpage. An individual company official who carries out the retaliatory adverse action may be liable if they have the authority to hire, transfer, promote, reprimand, or discharge the complainant. *Anderson v. Timex Logistics*, 2014 WL 1758319 (ARB 2014).

2. Prior to making the first contact with the respondent, the Investigator must determine whether there is a pending UOSH safety and health complaint with the respondent. If a UOSH inspection is pending, the respondent must not be contacted until such inspection has commenced to avoid giving advance notice of a potential inspection.
3. After ensuring that a UOSH inspection is not pending, the Investigator will mail, via certified mail, to the respondent the following documents:
 - *UOSH Complaint Form*, which includes the alleged adverse action and protected activity;
 - *Notification of Investigation Letter*, stating the complainant has filed a whistleblower complaint with UOSH and an investigation into the complainant's allegations has been opened; and
 - Designation of Point-of-Contact and/or Legal Counsel Form – (*Designation Form*).
4. The *Notification of Investigation Letter* notifies the respondent that it has twenty (20) calendar days from receipt of the letter to provide UOSH a written account of the facts and a statement of the respondent's position with respect to the complainant's allegations. The letter further provides that if the respondent fails to provide a written response as requested, UOSH will make a determination based on the preponderance of the evidence, using the materials and information provided by the complainant, and issue an Order of Findings, whether a violation occurred. Electronic copies of relevant documents and records should be requested in the letter to the respondent, including disciplinary records if the complaint involves a disciplinary action. The letter will include that at any time during the investigation process, the respondent may settle the matter through offer of a compromised settlement.
5. If the respondent fails to provide UOSH a written response within twenty (20) calendar days from receipt date of the *Notification of Investigation Letter*, UOSH will make a determination based on the preponderance of evidence and issue an Order of Findings, whether a violation occurred. In such instances, the Investigator will prepare a ROI and make a recommendation of merit or non-merit based on the evidence and materials gathered from the complainant (Refer to Paragraph X.J., *Report of Investigation*, of this chapter). Upon the Program Manager's approval of the ROI, the Investigator will prepare and submit a proposed Order of Findings and

related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual. If deemed meritorious, the order will include awarding remedies available under Utah Code Ann. §34A-6-203. NOTE: There may be circumstances out of the respondent's control that may toll the twenty (20) calendar days. If the respondent requests more time to respond to the complainant's allegations, the Program Manager or designee must approve the request for extension.

D. Both Parties.

1. A *Designation Form* will be enclosed with the *Notification of Investigation Letters* that are mailed to the complainant and respondent. If either party chooses to designate a representative, they must complete and return this form to UOSH. Once UOSH receives a completed *Designation Form*, the Investigator will work through and communicate only with the designated point-of-contact and/or legal counsel. In the absence of a signed *Designation Form* from the respondent, the person who signed the position statement will be the point-of-contact for the Investigator.
2. The parties will be informed that the Investigator's role in the whistleblower investigation is that of a neutral fact finder. The Investigator should make it clear that UOSH does not represent the complainant or respondent. The parties will be informed that the Investigator will gather facts, review those facts, conduct interviews of witnesses and process the gathered information as it pertains to the whistleblower statute. The Investigator will inform the parties that the fact gathering period, investigation and analysis to determine whether or not a violation of the whistleblower statute has occurred (finding of merit or non-merit) may take up to several months.
3. UOSH is required to share, with all parties, evidence and materials received during the whistleblower investigation, including pertinent email communications. Phone conversations should be recorded and become part of the investigation file. The Investigator will communicate to all parties any additional allegations and/or other information that may influence the investigation.
4. Early Resolution.

Both parties may seek resolution (settlement agreement), at any point, prior to the completion of the investigation. If the Investigator believes that an early resolution may be possible, he or she is encouraged to contact the respondent regarding potential resolution options as warranted. See Chapter 5, Section III., *Settlement Agreement*, of this manual.

E. Telephone Conversations.

The Investigator must note all telephone conversations with the respondent, complainant, witnesses and/or party representatives on the *UOSH Case Notes Form*.

1. Respondent and Complainant. If a telephone conversation with the respondent or complainant, or their representatives, includes a significant amount of pertinent

information, the Investigator should document this information in a “*Memo to File*” to be included as complainant/respondent communication in Folder 1B – Party Communication – of the casefile (See Chapter 7, Subparagraph III.A., *Overall Structure*, of this manual). In this instance, or when written correspondence is noted, the *UOSH Case Notes* may simply indicate the nature and date of the contact and the comment “See Memo in Folder 1B.”

2. Non-Party Witnesses.

The Investigator should document pertinent information received during a telephone conversation from non-party witnesses in a “*Memo to File*” to be included as witness statements in Folder 2A – Protected Evidence – of the casefile (See Chapter 7, Subparagraph III.A., *Overall Structure*, of this manual). The Investigator will enter the date of the conversation on the *UOSH Case Notes Form* and the comment “See Memo in Folder 2A.”

IX. Receipt of Correspondence.

The Investigator will review the information provided by the respondent and complainant and provide copies, via email and/or USPS, to all parties. Assertions made by the parties via written communication do not constitute evidence. The Investigator must test all party assertions through investigation. Generally, the Investigator should interview witnesses, review records, and obtain documentary evidence in order to determine whether the parties' assertions are supported. An investigation must be completed even when materials submitted appear to negate a *prima facie* allegation (refer to Chapter 2, Paragraph III.B.3., *Prima Facie Allegation*, of this manual). The Investigator must contact the respondent within 5 calendar days of receiving the official response to the complaint to arrange interviews and obtain documentary evidence. The Investigator should attempt to interview all potential witnesses who are named by the parties and who may have first-hand knowledge of relevant facts.

X. Investigation.

Interviews and collection of documentary evidence may be conducted on-site, whenever practicable. Witness statements and evidence may be obtained by telephone, mail or electronically.

A. Witness Interviews.

1. General.

Investigations should be planned in such a manner as to personally interview all appropriate witnesses during a single on-site visit. The Investigator will inform witnesses, in a tactful and nonthreatening manner, that any person who knowingly makes a false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Utah OSH Act is guilty of a class A misdemeanor in accordance with Utah Code Ann. §34A-6-307(5)(c).

- a. **Respondent/Legal Counsel Right to be Present.**The respondent's designated point-of-contact/legal counsel (legal counsel) has the right to be present for all interviews with currently employed managers. The respondent and respondent's designated legal counsel does not have the right to be present, and should not be permitted to be present, during interviews of nonmanagerial or non-supervisory employees.
- b. **Employer Interference with Interviews.**The Investigator may question privately non-managerial employees regardless of employer preference. If an employer interferes with the Investigator's ability to do so, the Investigator will inform the Program Manager who will then inform the Director. The Program Manager and/or Director will consult with the AAG to determine appropriate legal action. Interference with the Investigator's ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.
- c. **Request to have Attorney/Representative Present.**Any witness may request and have an attorney or other personal representative present at any time during the interview. If a non-managerial or non-supervisory employee witness requests the respondent's legal counsel be present, the Investigator should ask the respondent's legal counsel on the record who he/she represents and specifically ask the respondent's legal counsel if he/she represents the nonmanagerial witness in the matter.

If the respondent's legal counsel states he/she does not represent the non-managerial witness, it must be made clear to the witness that:

- i. Respondent's legal counsel represents respondent and not the witness; and
- ii. The witness has a right to be interviewed privately.

Once these facts are explained to the witness, if the witness still requests the respondent's legal counsel be present, the interview may proceed.

d. Respondent's Legal Counsel Representing Non-Managerial Employees.

If the respondent's legal counsel indicates he/she represents the non-managerial witness, a signed *Designation Form* must be completed by the respondent's legal counsel memorializing that he/she represents the non-managerial witness.

2. Informer's Privilege.

- a. The informer's privilege shall be governed by Utah Rules of Evidence 505. This Rule allows the government to withhold the identity of individuals who provide information about the violation of laws, including UOSH rules and regulations. This privilege may be claimed by counsel for the government. No privilege exists if the informer voluntarily discloses his or her own identity and information and if the informer appears as a witness for the government.
- b. The informer's privilege also protects the contents of statements to the extent that disclosure would reveal the witness' identity. When the contents of a statement will not disclose the identity of the informant (i.e., statements that do not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply, and such statements may be released.
- c. The Investigator will inform each witness that his/her interview statements may be released if he or she authorizes such a release, if he or she voluntarily discloses the statement to others, or if he or she appears as a witness for the government, resulting in a waiver of the privilege.

3. Language and Wording of Statement.

- a. Interview statements shall normally be audio or video recorded, with the consent of the person being interviewed, and placed in the casefile. Statements from nonmanagerial employees (former employees or employees of employers not named in the complaint) must be placed in *Folder 2A – Protected Evidence* – of the casefile in accordance with Chapter 7, Subparagraph III.B.5., *Folder 2A – Protected Evidence*, of this manual.

Before the interview begins, the Investigator shall ensure that the following information is recorded:

- i. Consent from interviewee to record interview;
- ii. The date of the interview;
- iii. Investigator's name and job title;
- iv. Case name and number; and
- v. Name and job title of interviewee.

b. Written Statements.

- i. If recording an interview statement is not possible, it shall be written by the individual giving the statement. The individual shall initial any changes or corrections; otherwise, the statement shall not be modified, added to, or altered in any way. The statement shall end in the wording “This statement is true to the best of my knowledge.” The individual shall sign and date the interview statement and the Investigator shall sign it as a witness. Statements taken in a language other than English shall be subsequently translated.
- ii. In circumstances where recording an interview statement is not possible and an individual is unable to make a written statement, the Investigator must take accurate and complete notes during the interview, as these tend to be more credible than later general recollections. The wording of the statement shall be in third person (e.g., he/she/her/him/they/them/etc.), understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end in the wording “I have read the above, or the statement has been read to me, and it is true to the best of my knowledge.” The individual shall sign and date the interview statement and the Investigator shall sign it as a witness.
- iii. Refusal to Sign Statement. If the individual refuses to sign the statement, the Investigator shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement that the statement is true to the best of the individual’s knowledge. A note to this effect shall be documented in the casefile.
- iv. All written interview statements from non-managerial employees (former employees or employees of employers not named in the complaint) must be placed in *Folder 2A – Protected Evidence* – of the casefile in accordance with Chapter 7, Subparagraph III.B.5., *Folder 2A – Protected Evidence*, of this manual.

B. Contact with Respondent.

1. The written position statement provided by the respondent may or may not include supporting documentation. The Investigator should not rely on assertions in the 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 the respondent to interview witnesses, review records, and obtain additional documentary evidence to test the respondent’s stated defense(s). Refer to Paragraph X.C., *Testing Respondent’s Defense (a.k.a. Pretext Testing)* of this chapter 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 the respondent claims the complainant was terminated or disciplined for violating a policy.

2. If the respondent has designated a representative, as indicated on the *Designation Form*, interviews should ordinarily be scheduled through the representative, who generally will be afforded the right to be present during any interviews of currently employed management officials.

In the absence of a signed *Designation Form*, the Investigator is not bound or limited to making contact with the respondent through any one individual or other designated representative (e.g., safety director). In such cases, the Investigator's initial contact should be the person who signed the position statement unless otherwise specified in the letter.

3. The Investigator should, in accordance with the reasonable balance standard, interview all relevant respondent witnesses who can provide information relevant to the case, as well as company officials who had direct involvement in the alleged protected activity or retaliation. The Investigator should attempt to identify other persons (witnesses) at the employer's facility who may have relevant knowledge. With the exception of currently employed managers and supervisors who are represented by the respondent's designated legal counsel, 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 Utah Code Ann. §34A-6-203 and advised that they may contact UOSH if they believe that they have been subjected to retaliation because they participated in a UOSH investigation.
4. The Investigator must obtain evidence about disparate treatment, i.e., how the respondent treated other employees who engaged in conduct similar to the conduct of the complainant which respondent claims is the legitimate non-discriminatory reason for the adverse action. A review of personnel files would be appropriate to obtain this information.
5. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to the complainant and does not want the company to know he or she is speaking with the Investigator. In that event, the interview should ordinarily be scheduled away from the premises. Utah Code Ann. §34A-6-301(1)(a)(iii) provides that the division or its representatives, upon presenting credentials to the owner, operator, or agent in charge, may question privately any such employer, owner, operator, agent, or employee. Thus, under the Utah OSH Act, UOSH has a statutory right to interview such individuals in private.
6. 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 the respondent offers and which the Investigator construes as being relevant to the case.

7. If a telephone conversation with the respondent or representative includes a significant amount of pertinent information, the Investigator should document the substance of this conversation in a “*Memo to File*” in accordance with Paragraph VIII.E., *Telephone Conversations*, of this chapter.
8. If the respondent or respondent’s representative suggests the possibility of an early resolution to the matter at any time during the initial (or subsequent) meeting(s), the Investigator must explore the possibility of moving towards a settlement agreement (See Chapter 5, Section III., *Settlement Agreement*, of this manual).

C. Testing Respondent’s Defense (a.k.a. Pretext Testing).

Testing the evidence supporting and refuting the respondent’s defense is a critical part of the whistleblower investigation. Investigators are required to conduct pretext testing of the respondent’s defense.

1. A *pretextual position* or argument is a statement that is put forward to conceal a true purpose for an adverse action.
2. Thus, *pretext testing* evaluates whether the employer took 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 the 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 the 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. Relevant circumstantial evidence can include a wide variety of evidence, such as:

1. An employer’s shifting explanations for its actions;
2. The falsity of an employer’s explanation for the adverse action taken;
3. Temporal proximity between the protected activity and the adverse action;
4. 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;
5. A change in the employer’s behavior toward the complainant after he or she engaged (or was suspected of engaging) in protected activity; and
6. Other evidence of antagonism or hostility toward the protected activity.

For example, if the respondent has claimed the complainant’s misconduct or poor performance was the reason for the adverse action, the Investigator should evaluate whether the 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 the respondent's position will vary depending on the facts and circumstances of the case and include questions such as:

1. Did the complainant engage in the misconduct or unsatisfactory performance that the respondent cites as its reason for taking adverse action? If the 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?
2. What discipline was issued by the respondent at the time it learned of the complainant's misconduct or poor performance? Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
3. Did the complainant's productivity, attitude, or actions change after the protected activity?
4. Did the respondent's behavior toward the complainant change after the protected activity?
5. Did the 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 Program Manager. Consultation with the AAG may also be appropriate to determine how to resolve the complaint. In cases decided based on the nexus element of the *prima facie* case, a description of the Investigator's pretext testing (or reason(s) it was not performed) must be included in the ROI. See Subparagraph J.5., *Defense*, of this chapter.

D. Unresponsive/Uncooperative Respondent.

1. Failure to Respond to *Notification of Investigation Letter*.

If the respondent fails to provide UOSH a written response within twenty (20) calendar days from receipt date of the *Notification of Investigation Letter*, UOSH will make a determination, based on the preponderance of evidence, using the materials and information provided by the complainant. In such instances, the Investigator will prepare a ROI and make a recommendation of merit or non-merit based on the evidence gathered (Refer to Paragraph X.J., *Report of Investigation*, of this chapter). Upon approval by the Program Manager, the Investigator will prepare and submit a proposed Order of Findings and related documents to the Director or designee for signature in accordance with Chapter 6, Section II., *Orders*, of this manual. If deemed meritorious, the order will include awarding remedies available under Utah Code Ann. §34A-6-203.

NOTE: There may be circumstances out of the respondent's control that may toll the twenty (20) calendar days. If the respondent requests more time to respond to the complainant's allegations, the Program Manager or designee must approve the request for extension.

2. Notification of Failure to Cooperate Letter – UOSH 45C (*Lack of Cooperation Letter*).

When dealing with a nonresponsive or uncooperative respondent, it may be appropriate for the Investigator, in consultation with the Program Manager and/or AAG, to draft a *Lack of Cooperation Letter* informing the respondent of the possible consequences of failing to provide the requested information in a timely manner. Specifically, the letter will state that if the respondent does not contact the Investigator within 10 calendar days of the issuance of said letter, UOSH will continue the investigation with the cooperative parties and make a determination based on the preponderance of evidence provided. Once a determination has been made, UOSH will issue an order finding either merit or non-merit to the complainant and respondent in accordance with Chapter 6, Section II, *Orders*, of this manual.

3. 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 the respondent and the representative requesting them to affirm the designation of representation in the casefile. If the designation of representation is not affirmed within 10 business days, the Investigator may treat the respondent as unrepresented. UOSH should not decline to accept written information received directly from a represented respondent.

4. Administrative Subpoena.

Utah Code Ann. §34A-6-104(1)(d) authorizes the Commission to issue administrative subpoenas to obtain relevant information. In accordance with this statute, the “commission may in its discretion administer oaths, take depositions, subpoena witnesses, compel production of documents, books, and accounts in any inquiry, investigation, hearing or proceeding in any part” of the State of Utah. Whenever there is a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing a whistleblower investigation, the Director or designee may issue an administrative subpoena to provide testimony and/or to produce documents. The subpoena must contain language mandating a reasonable timeframe in which to comply (the party should be given a short timeframe to comply), identify the statutory provision under which the subpoena is issued, use broad language for requests (e.g., “any and all documents” or “including but not limited to”), and identify the Investigator responsible for delivery and completion of the service form. The Director or designee can choose to modify the subpoena requirements at his/her discretion.

5. Refusal to Cooperate with Subpoena.

If the respondent fails to cooperate or refuses to respond to an administrative subpoena, the Investigator will consult with the Program Manager and Director or designee regarding how best to proceed. One option is to evaluate the case and decide based on the information gathered during the investigation. In this case, a certified letter must be sent to the respondent notifying the respondent that a decision on the

case will be made with the evidence gathered to that date. The certified letter will give a timeline of seven calendar days for the respondent to comply with the subpoena prior to issuing a decision on the case. The other option is to request the AAG enforce the subpoena.

6. **Respondent Bankruptcy.** When investigating a respondent that has filed for bankruptcy, the Investigator should promptly consult with the Program Manager and AAG. Otherwise, complainants may lose their rights to obtain any remedies provided by the Utah OSH Act.

7. **Respondent Out-of-Business.**

When investigating a respondent that has gone out of business, the Investigator should consult with the Program Manager and AAG, as appropriate. UOSH should determine whether there are legal grounds to continue the investigation against successors in interest of the original respondent.

E. Early Involvement of the AAG.

In general, UOSH should consult the AAG as early as possible in the investigative process for all instances where UOSH believes there is potential for meritorious findings or where a case presents a novel question of statutory coverage or protected activity. Early involvement of the AAG helps ensure that he/she can evaluate whether an order finding merit is likely to be upheld if appealed with Adjudication or with the Utah State Appellate Court.

F. Further Interviews and Documentation.

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

1. The Investigator must attempt to interview each relevant witness. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent and the complainant do not have the right for a representative to be present during the interview of a non-managerial employee. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the Investigator may decide to get their names and telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative at any time.
2. The Investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but are not limited to, safety and health inspections, or records of inspections conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the Investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so they may be subpoenaed or later produced during proceedings.

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

G. Resolve Discrepancies.

After obtaining the respondent's position statement, the Investigator will provide an electronic copy of the position statement and corresponding documents to the complainant and provide the complainant an opportunity to submit a rebuttal statement related to the respondent's allegations. The Investigator will contact the complainant to conduct a rebuttal interview and will contact other witnesses as necessary to resolve any relevant discrepancies between the complainant's allegations and the respondent's defenses.

H. Weighing the Evidence.

1. Evaluating Evidence.

After gathering all available relevant evidence from the complainant, respondent, and other witnesses or sources, the Investigator must evaluate the evidence using the guidance given in Chapter 2, Subparagraph III.B.3.a., *Prima Facie Elements*, of this manual and in accordance with Utah Code Ann. §34A-6-203. The Investigator, in consultation with the Program Manager, will make a preliminary determination of merit (violation of the whistleblower statute is established) or non-merit based on the preponderance (51%) of evidence.

2. Establishing a Violation.

The Investigator must evaluate the facts of the case as they relate to the four elements (protected activity, knowledge, adverse action, nexus) of a violation (refer to Chapter 2, Subparagraph III.B.3.a., *Prima Facie Elements*, of this manual). Questions of credibility and reliability of evidence should be resolved and a detailed analysis of the elements of a violation must be presented in a ROI in accordance with Paragraph X.J., *Report of Investigation*, of this chapter.

To establish a violation of Utah Code Ann. §34A-6-203, the complainant's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" the engagement in protected activity, the whistleblower statute has been violated. (See, *Mitchell v. Goodyear Tire and Rubber Co.*, 278 F. 2d 562 (8th Cir., 1960); *Goldberg v. Bama Manufacturing*, 302 F. 2d 152 (5th Cir., 1962).) Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined based on the facts in the particular case. Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of Utah Code Ann. §34A-6-203 apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Utah OSH Act does not automatically render him or her immune from discharge or

discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. (See, *NLRB v. Dixie Motor Coach Corp.*, 128 F. 2d 201 (5th Cir., 1942).)

If UOSH believes, after considering all the evidence gathered during the investigation, that the whistleblower statute was violated by the respondent, it is appropriate to issue a merit finding under Utah Code Ann. §34A-6-203. If such a determination is made, the AAG must be consulted to ensure that the finding provided will be upheld if appealed with Adjudication or with the Utah State Appellate Court.

I. Review of Investigative File and Consultation Between the Investigator and Program Manager.

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

J. Report of Investigation.

The Investigator must report the results of the investigation in a ROI. The ROI is UOSH's internal summary of the investigation written as a memorandum from the Investigator to the Program Manager. Upon completion of the investigation and after discussion of the case with the Program Manager and/or AAG (where applicable), the Investigator must report the results of the investigation by means of a ROI and submit the ROI to the Program Manager for review and signature. The ROI must be signed by the Investigator.

The ROI must contain the information below, but may also include, as needed, a chronology of events and a witness log. The ROI must include citations to specific exhibits in the casefile as well as other information necessary to facilitate the Program Manager's review of the casefile. In many cases, significant portions of the narrative from the ROI may be merged into the Order of Findings, taking care that the identities of any confidential witnesses listed in the ROI, as well as any exhibits included in the ROI, are not included in the order. The first page of the ROI must include a list of the parties' and their representatives' names, mailing addresses, email addresses, telephone numbers and fax numbers, but nothing else.

Elements of the ROI.

The ROI must include an analysis of the following elements, as applicable to the investigation:

1. Allegation Summary.

Give a brief summary of the following:

- a. Complainant's allegation of protective activity and adverse action taken as a result of engaging in protected activity.

- b. Respondent's defense: e.g., "Respondent claims that Complainant was discharged for excessive absenteeism."

2. Background.

Include a basic description of the respondent's business and a chronological order of significant events that occurred from the date the complainant was hired through the date the whistleblower complaint was filed with UOSH. This information will include pertinent facts received by the Investigator throughout the investigation which are relevant to the merit determination of the case.

3. Coverage and Timeliness.

- a. Whistleblower Statute. Include Utah Code Ann. §34A-6-203 prohibitions of retaliation and timeliness of filing a whistleblower complaint.
- b. Coverage. Delineate the information that brings the case under Utah Code Ann. §34A-6-203. If coverage was disputed, this is where UOSH's determination on the issue should be addressed.
- c. Timeliness. Indicate the actual date that the complaint was filed and whether the filing was timely.

4. *Prima Facie* Allegation. All the *prima facie* elements (protected activity, adverse action, respondent knowledge and nexus) need to be present for a whistleblower case to be considered merit. Include the *prima facie* elements necessary to establish a violation of Utah Code Ann. §34A-6-203. Relevant portions of statutes, rules, or case law used to determine whether an element is satisfied must be referenced in the report.

a. Protected Activity.

Include the activity in which the complainant was engaged that is protected under Utah Code Ann. §34A-6-203.

b. Knowledge.

Include how the respondent had direct or indirect knowledge of the protected activity in which the complainant engaged.

c. Adverse Action.

Include acts of retaliation taken against the complainant allegedly as a result of the complainant engaging in protected activity.

d. Nexus.

Include the connection between the protected activity and the adverse action taken by the respondent. To establish a violation, the complainant's engagement

in protected activity need not be the sole consideration for the adverse action. It is enough to show that the protected activity was a substantial reason for the action or that the adverse action would not have taken place “but for” the complainant’s engagement in protected activity. Causation can be established directly through evidence of retaliatory animus, or indirectly by showing a temporal proximity between the protected activity and the adverse action, or through other evidence such as disparate treatment of similarly situated employees.

5. Defense.

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

- b. Pretext

Include an analysis of the defense presented by the respondent to determine if the reason provided for the adverse action taken appears to be a plausible and a believable motivating factor. The Investigator must include whether or not the respondent believed the reason provided and acted in good faith on that belief when taking the adverse action. Evidence of pretext may include proof that: the reason provided is false; the reason provided is so inconsistent or implausible that it is unworthy of belief; or the respondent acted contrary to policy or standard practices.

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

Respondent claimed 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.

6. Recommended Disposition. This is a concise statement of the Investigator's recommendation for disposition of the case (i.e., merit, non-merit) and the reason for such recommendation (e.g., the nexus element could not be established).
7. Remedy. In merit cases, this section should describe all appropriate relief due to the complainant, as determined using Chapter 5, Section II., *Remedies*, of this manual. Any cost that will continue to accrue until payment, such as back wages, should be stated as formulas – that is, amounts per unit of time, so that the proper amount to be paid to the complainant is calculable as of the date of payment. For example, “Back wages in the amount of \$13.90 per hour, for 40 hours per week, from January 2, 2023, through the date of payment, less the customary deductions, shall be paid by Respondent.” In non-merit cases, this section should say “None.”
8. Other Relevant Information. Any novel legal or other unusual issues, information about related complaints, or any other relevant consideration(s) in the case may be addressed here. For instance, if the Investigator is recommending that UOSH defer to another proceeding, discussion of the other proceeding and why deferral is appropriate should be contained in this section of the ROI.
9. Incomplete Investigations and Abbreviated ROI.

For docketed cases that are being dismissed as untimely or not covered, or where an early settlement has been reached, it is generally sufficient to include information only on the facts leading up to the withdrawal, settlement, or dismissal (referred to as an “Abbreviated ROI”). However, in all cases in which a determination of the merits is being recommended, all of the information in Subparagraphs X.J.1-7 of this chapter must be provided in the ROI.

K. Case Review and Approval by the Program Manager.

1. Review. The Investigator will notify the Program Manager when the completed casefile, including the ROI and other draft case closing documents, are ready for review on the Google shared drive. The Program Manager will review the file to ensure technical accuracy, thoroughness, and adequacy of the investigation; and that the correct application of the Utah OSH Act was applied to the facts. Such a review will be completed as soon as practicable after receipt of the file.
2. Approval.

If the Program Manager determines that appropriate issues have been explored and concurs with the analysis and recommendation of the Investigator, the Program Manager will sign the ROI and record the date the review was completed. If the Program Manager does not concur with the analysis and recommendation of the Investigator, the Program Manager will make a note on the draft ROI of the reason for non-concurrence and notify the Investigator that additional work/investigation needs to be conducted. The Program Manager's signature on the ROI serves as initial approval of the recommended determination.

L. Closing Conference.

After the Program Manager reviews and provides a signature on the ROI, the Investigator will conduct a closing conference with the complainant (in cases in which UOSH anticipates issuing non-merit findings) or the respondent (in cases in which UOSH anticipates issuing merit findings). 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.

1. During the closing conference, the Investigator will provide a brief verbal summary of the recommendation and basis for the recommendation.
2. It is unnecessary and improper to reveal the identity of witnesses interviewed. The complainant (or the respondent) should be advised that UOSH does not normally reveal the identity of witnesses, especially if they requested confidentiality.
3. Although UOSH anticipates that in most cases no new evidence or argument will be raised in the closing conference, if the 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. Should the Investigator decide that the potential new evidence or witnesses are not relevant or would not be of value in reaching a fair decision of the case on its merits, this should be explained along with an explanation of why additional investigation does not appear to be warranted.
4. The Investigator should advise the complainant and respondent (or their representatives) that the Investigator's recommendation for merit determination is subject to review and final approval by the Director. After final approval, UOSH will mail an order with UOSH's findings. The parties will be informed of their appeal rights, that if they disagree with the findings, a written request for review must be filed with Adjudication within thirty (30) calendar days from the date the order was issued. The order will become a final order of the Commission if a written request for review is not received by Adjudication within the thirty (30) day filing period.
5. Where UOSH anticipates issuing merit findings, the closing conference may be used to explore the possibility of settlement with the respondent.
6. Where the complainant (or respondent) cannot be reached despite UOSH's reasonable attempts to conduct a closing conference, UOSH will document its attempts to reach the complainant/respondent in the *UOSH Case Notes* and proceed to issue the Order of Findings. Reasonable attempts include attempting to contact the complainant/

respondent through more than one method of communication (e.g., telephone and email), if more than one form of contact information was provided and allowing the complainant/respondent 48 hours to respond. In the case of phone calls, at least two attempts should be made at different hours of the day during working hours. All of UOSH's attempts to contact the complainant/respondent must be documented in the *UOSH Case Notes*.

7. If the complainant/respondent becomes combative during 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 the Order of Findings. Combativeness is not the simple questioning of the evidence and UOSH's determination. Combativeness includes cursing the Investigator and making threats.

XI. Document Handling and Requests.

A. Requests to Return Documents Upon Completion of Case.

All physical documents received by UOSH from the parties during an investigation become part of the casefile and will not be returned. The Investigator must encourage the parties to submit documentation by email and to only submit UOSH-requested documents, as well as those documents they believe are relevant to the UOSH whistleblower investigation. At the beginning of the investigation, it is important to tell the parties to keep the originals of their documents (if not emailed) because any documents they provide will not be returned.

B. Documents Containing Confidential Information.

If the 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 the complainant, the Investigator must place such documents in the "Protected" folder in the casefile to avoid inadvertent disclosure of the information. Information obtained during the investigation may be disclosable or nondisclosable based on criteria established in Utah Code Ann. §63G-2, *Government Records Access and Management Act (GRAMA)*.

C. Witness Confidentiality.

Confidential witness statements must be placed in the "Protected" folder in the casefile.

D. Medical Records.

Ensure that medical records are handled in accordance with Utah Administrative Code (UAC) R614-1-10, *Rules of Agency Practice and Procedure Concerning UOSH Access to Employee Medical Records*, and *GRAMA*.

XII. Arbitration and Other Agency Proceedings.

An employee who files a complaint under Utah Code Ann. §34A-6-203(2) may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. UOSH's jurisdiction to entertain Utah Code Ann. §34A-6-203 complaints, to investigate, and to determine whether retaliation has occurred, is independent of the jurisdiction of other agencies or bodies.

A. Postponement of Determination and Deferral.

Where a complainant is in fact pursuing remedies other than those provided by Utah Code Ann. §34A-6-203, postponement of the Director's determination and deferral to the results of such proceedings may be in order. (See, *Burlington Truck Lines, Inc., v. U.S.*, 371 U.S. 156 (1962).) UOSH may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement, arbitration agreement, a statute (other than those provided by Utah Code Ann. §34A-6-203), or common law. The rights asserted in the other proceeding must be substantially the same as the rights under Utah Code Ann. §34A-6-203 and the proceedings must not violate the rights of the complainant under the Utah OSH Act. The factual issues to be addressed by such proceedings must be substantially similar to those raised by the complaint under the Utah Code Ann. §34A-6-203. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. (See, *Rios v. Reynolds Metals Co.*, F. 2d (5th Cir., 1972), 41 U.S.L.W. 1049 (October 10, 1972); *Newman v. Avco Corp.*, 451 F. 2d 743 (6th Cir., 1971).) 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 the Program Manager and AAG to make these determinations. To postpone the UOSH case, the parties must be notified that the investigation is being postponed pending the outcome of the other proceeding and that UOSH must be notified of the results of the proceeding upon its conclusion. The case must remain open during the postponement.

B. Deferral to Outcome of Other Proceedings.

A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis, after careful scrutiny of all available information.

When another agency has issued a final determination regarding the same adverse action(s) alleged in a UOSH whistleblower complaint, the Investigator will review the determination and assess, based upon the requirements listed below, whether or not UOSH should defer to the agency's conclusion and dismiss the case. The Investigator and Program Manager 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 UOSH whistleblower statute.

The Program Manager must obtain the concurrence of the AAG for this determination. This assessment will be documented in a 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 the complainant's alleged protected activity under the Utah OSH Act. In this regard, if such actions initiated by a complainant are dismissed without adjudicative hearing thereof, such dismissal will not ordinarily be regarded as determinative of the Utah Code Ann. §34A-6-203 complaint.

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

If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. However, if a settlement was approved or entered into by another government agency, such as the NLRB, or another third-party entity such as a labor union, deferral could be appropriate if the criteria for deferral above are met. Employer-employee settlements that release a UOSH whistleblower claim will be approved by UOSH in accordance with Chapter 5, *Remedies and Settlement Agreements*, of this manual.

In cases where the Investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration, or other appropriate determination, an abbreviated Order of Findings based on the deferral will be issued dismissing the case. The parties will be notified of their right to appeal with Adjudication. The case will be considered closed at the time of the deferral and will be recorded in OIS 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 5, *Remedies and Settlement Agreements*, of this manual.

XIII. Reopening Cases.

UOSH has the authority to reopen cases up until the time the issued order has become a final order of the Commission. An issued order becomes a final order of the Commission 30 calendar days from the issuance date of the order unless a written request for review and/or an appeal is filed with Adjudication within the 30 calendar-day time period.

A. Reopening Investigation Not Warranted.

Generally, in addition to the criteria in the above paragraph, UOSH may also not reopen an investigation for the following reasons:

1. Settlement agreement was executed between parties;
2. Complainant withdrew whistleblower complaint; or

3. Order was appealed with Adjudication or the Utah State Appellate Court; when an order issued by UOSH is appealed, UOSH loses its decision-making authority over the matter and is unable to reopen an investigation.

B. Director Discretion.

Where the issued order is not a final order of the Commission, if OSHA recommends the reopening of a whistleblower case, the Director or designee will determine if reopening the case is warranted based on information provided by OSHA and based on above listed criteria.

Chapter 5

REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope.

This chapter provides guidance on determining appropriate remedies in whistleblower cases, where a violation of the whistleblower statute has been found, and guidance on early resolution of whistleblower cases, including UOSH facilitated settlement agreement and alternative dispute resolution (“ADR”).

II. Remedies.

In the event of a meritorious finding, the whistleblower statute provides for appropriate relief to the complainant, such as reinstatement of the complainant to the complainant’s former position with backpay. Where a violation of the whistleblower statute has occurred, the complainant will be compensated for the losses caused by the unlawful conduct and restored to terms, conditions and privileges of their employment or former employment (if the complainant was terminated) as they existed prior to the respondent’s adverse actions. The complainant’s remedies may also include non-monetary remedies, such as receipt of a promotion that the complainant was denied, expungement of adverse references in the employment record, a neutral employment reference, and other remedies that would make the complainant whole. Meritorious awards to the complainant should result from a fact-specific evaluation of the evidence developed during the investigation. Investigators should consult with the Program Manager and AAG in determining the appropriate remedy.

A. Reinstatement and Front Pay.

Reinstatement of the complainant to his or her former position is the presumptive remedy in merit whistleblower cases involving a discharge or demotion and is a critical component of making the complainant whole.

Front pay is a substitute for actual reinstatement in rare cases where actual reinstatement, the presumptive remedy in cases of discharge, demotion, or adverse transfer, is not possible. The Investigator must consult with the Program Manager, AAG and the Director (or designee) when considering an award of front pay. In cases where front pay may be a remedy, the Investigator should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors such as the length of time that the complainant expects to be out of work and the complainant’s compensation prior to the retaliation. Front pay should be adjusted to account for any income the complainant is earning. For example, if the complainant has a new job, front pay should be adjusted to account for any difference in pay between the complainant’s old job and the new job.

B. Backpay.

1. Lost Wages.

Lost wages generally comprise the bulk of the backpay award. Investigators should compute backpay by deducting the complainant's interim earnings (See Subparagraph II.B.3., *Interim Earnings*, below) from gross backpay. Gross backpay is defined as the total earnings (before taxes and other deductions) that the complainant would have earned during the period of unemployment. Generally, this gross backpay is calculated by multiplying the hourly wage by the number of hours per week that the complainant typically worked. If the complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be broken down into a daily rate and then multiplied by the number of days that the complainant typically would have worked. If the complainant has not been reinstated, the gross backpay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. The backpay award should include any cost-of-living increases or raises/promotions that the complainant would have received if he or she had continued to work for the respondent. The Investigator should ask the complainant for evidence of such increases or raises and keep the evidence in the casefile. Investigators should support recommendations of backpay awards with documentary evidence.

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

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 the 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 the complainant's coworkers were offered new assignments. In addition, the Investigator should ask the complainant whether the complainant applied for an alternate assignment. If the complainant reapplied and was not rehired and the complaint is still pending, the complainant may amend the complaint to include failure to rehire. See OSHA memorandum, [Clarification of Guidance for Section 11\(c\) Cases Involving Temporary Workers](#), issued May 11, 2016, for further information.

2. Bonuses, Overtime and Benefits.

Investigators should also include lost bonuses, overtime, and benefits in the backpay award when there is evidence to determine these figures.

3. Interim Earnings and Unemployment Benefits.

Interim earnings obtained by the complainant will be deducted from a backpay award. Interim earnings are the total earnings (before taxes and other deductions) that the complainant earned from interim employment subsequent to his or her termination. 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, mandated special training and education costs, and other related expenses. If the interim earnings exceed the lost wages in a given period, the amount of backpay owed for that period would be \$0.00 – not a negative amount.

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

4. Mitigation Considerations.

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

C. Compensatory Damages.

Where UOSH finds a violation of the whistleblower statute has occurred, Utah Code Ann. §34A-6-203(c)(i) provides for reinstatement of the employee to the employee's former position with backpay as appropriate relief. The whistleblower statute does not provide for compensatory damages.

D. Undocumented Workers.

Undocumented workers are not entitled to reinstatement, front pay, or backpay. *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 backpay).

III. Settlement Agreement.

A. Early Resolution Benefits.

Voluntary resolution of disputes is often desirable, and Investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. Investigations require a considerable amount of resources. UOSH must expend the Investigator's time and bear the cost of investigation expenses. The complainant and respondent must expend their own time and bear their own costs such as attorney's fees and the cost of producing materials. It benefits all parties, including UOSH, to reach an early resolution where possible and is favorable because it avoids the delay and the public and private expense of litigation.

It is UOSH's policy to seek settlement of all cases determined to be meritorious prior to issuing an Order of Findings. Furthermore, at any point prior to the completion of the investigation, UOSH will make every effort to accommodate requests for early resolution.

B. UOSH Facilitated Settlement.

The Investigator may facilitate settlement negotiations. If a party wishes to convey a settlement proposal, the Investigator must inform the opposing party of the proposal. The Investigator must remain neutral when conveying settlement proposals, but may discuss the state of the investigation and possible outcomes to help a party weigh the benefits of early resolution.

If the parties reach a settlement agreement through UOSH facilitated negotiations, the Investigator must confirm the terms of the settlement with both parties to ensure both parties have reached the same understanding. The Investigator will also request a copy of the settlement agreement from the respondent. When received, the Investigator will review the settlement agreement for consistency with public policy, i.e., the settlement agreement is not repugnant to the Utah OSH Act and does not undermine the protection the UOSH whistleblower statute provides.

C. Direct Settlement.

- a. **Between Parties.** The parties are free to reach a settlement on their own without UOSH involvement. Usually one of the parties will inform the Investigator that a settlement has been reached. The Investigator must confirm with the other party that a settlement has been reached. In some instances, the parties may wish to keep the terms of the settlement confidential, in which case, the Investigator only needs written confirmation that a settlement has been reached and that the matter may be administratively closed. NOTE: All settlements, even those where the settlement terms include withdrawal of the complaint, must be entered as settled into OIS under the "Determination" tab. Do not undocket and administratively close a settled case in OIS – doing so will result in incorrect settlement statistics.
- b. **Mediation/Arbitration.** The parties may utilize a mediator or arbitrator to resolve a dispute rather than using the forum normally exercising jurisdiction. Both mediation and arbitration are alternatives and must be agreed to by the parties. A list of court-qualified mediators and arbitrators can be found at: <https://www.utcourts.gov/en/about/miscellaneous/mediation/roster.html>.
 1. **Mediation.** In mediation, a "mediator" will attempt to help the parties reach a resolution. A resolution is not guaranteed in mediation as either party may decline to reach an agreement. If the parties are unable to reach a resolution through mediation, the Investigator must continue the investigation of the whistleblower complaint in accordance with Chapter 4, Section X., *Investigation*, of this manual.

2. Arbitration.

In arbitration, an “arbitrator” is given authority by the parties to make a determination and the parties agree to be bound by the arbitrator’s determination thereby guaranteeing a resolution. If an arbitration award is made, it should be evaluated according to criteria set forth in Chapter 4, Section XII, *Arbitration and Other Agency Proceedings*, of this directive and deferred where appropriate.

D. Withdrawal/Non-Withdrawal of Complaint.

If the settlement terms include withdrawal of the whistleblower complaint, the complainant must submit to UOSH a recorded or written request to withdraw the complaint. Once received, the Investigator will treat the complaint as withdrawn and recommend that the complaint be dismissed. If the settlement terms do not include withdrawal of the whistleblower complaint, the Investigator must get written confirmation from each party that the settlement resolves the whistleblower complaint and that the matter may be dismissed. In either case, the Investigator must prepare and submit an abbreviated ROI to the Program Manager for approval (Refer to Paragraph III.F., *Report of Investigation and Order*, below).

NOTE: All settlements, even those where the settlement terms include withdrawal of the complaint, must be entered as settled into OIS under the “Determination” section. Do not undocket and administratively close a settled case in OIS – doing so will result in incorrect settlement statistics.

E. Report of Investigation and Order.

In the event that a settlement agreement is reached between the parties, the Investigator will prepare an abbreviated ROI, in accordance with Chapter 4, Subparagraph X.J.9., *Incomplete Investigations and Abbreviated ROI*, of this manual, which will include details of the investigation up until the time the settlement was reached and a recommendation to dismiss the case. After the Program Manager’s approval and signature of the ROI, the Investigator will prepare an Order of Administrative Closure in accordance with Chapter 6, Section II., *Orders*.

F. UOSH Case Notes.

The Investigator must document in the UOSH Case Notes that a copy of the settlement agreement has been requested by the Investigator and if received, that said agreement was reviewed by the Investigator to ensure it is not repugnant to the Utah OSH Act and does not undermine the protection the UOSH whistleblower statute provides.

Chapter 6

ORDERS AND APPEALS

I. Scope.

This chapter provides guidance on preparing and issuing Orders of Dismissal and Orders of Findings and provides information on the parties' appeal process.

II. Orders.

A. General.

In accordance with Utah Code Ann. §34A-6-203(c), UOSH must issue an order upon completion of a whistleblower investigation. An Order of Dismissal or an Order of Findings will be issued to the parties in all whistleblower cases, with the exception of a complaint that has been withdrawn by the complainant prior to UOSH opening an investigation. A recorded or written request to withdraw the whistleblower complaint must be submitted to UOSH by the complainant *before* an investigation is opened if he or she does not want an order to be issued. If a complaint is withdrawn after an investigation is opened, an Order of Dismissal must be issued to the parties.

Proposed orders will be prepared by the Investigator after the Program Manager approves and signs a PFE recommending dismissal (where an investigation was not opened) or approves and signs the ROI (where an investigation was opened). The proposed order must be submitted to the Director or designee via email for final approval and signature. Where an investigation is not opened, the Program Manager, acting as the Director's Designee, may sign orders dismissing a case. The Investigator will send the signed order and related documents to the parties in accordance with Paragraph II.C., *Mailing Orders and Related Documents*, below.

B. Content.

All orders will be prepared by the Investigator and must be supported by evidence included in the casefile. The order must include, at a minimum, the following information:

1. UOSH's Disposition of the Case.

The three possible dispositions of a case are as follows:

- a. Dismissed; NOTE: Here, dismissed is used where:
 - Minimum criteria are not met for opening an investigation;
 - Parties enter into a settlement agreement;

- The Investigator is unable to conduct a preliminary interview with the complainant; or
- Complainant withdraws the complaint after the investigation is opened.

b. Merit;

- i. Finding that a violation of Utah Code Ann. §34A-6-203(2)(c) has occurred;
- ii. Requiring that the violation cease; and
- iii. Awarding appropriate relief, such as reinstatement of the employee to the employee's former position with backpay; or

c. Non-merit;

- i. Finding that a violation of Utah Code Ann. §34A-6-203(2)(c) has not occurred.

NOTE: For non-merit cases, the Order of Findings will include that the complaint is dismissed; however, for the internal purposes of differentiating between cases, the disposition of dismissal is used for cases where there is not a finding of merit or nonmerit.

2. Reasons for Disposition.

- a. Dismissing Cases – Order of Dismissal. Reasons for dismissing cases may include, but are not limited to, the following:
 - i. Complaint is untimely filed (filed more than 30 days after the adverse action date);
 - ii. Complaint does not fall under UOSH's jurisdiction;
 - iii. *Prima facie* allegation does not exist (Refer to Chapter 2, Subparagraph III.B.3., *Prima Facie Allegation*, of this manual);
 - iv. Complaint contains mixed safety and health whistleblower complaint with other federal whistleblower claims (Refer to Chapter 3, Subparagraph III.A.1., *NonUOSH Jurisdiction/Mixed Safety and Health Whistleblower Complaint*, of this manual);
 - v. Unable to Contact Complainant for Preliminary Interview (Refer to Chapter 3, Paragraph III.B., *Unable to Contact Complainant for Preliminary Interview*, of this manual);
 - vi. Complainant withdraws complaint after the complaint has been docketed in OIS and an investigation has been opened by the Investigator; or

vii. A settlement agreement has been reached between the parties.

b. Merit/Non-Merit – Order of Findings.

An order finding merit or non-merit is required for all whistleblower complaints that are not administratively closed (withdrawn) or dismissed (refer to Subparagraph II.B.2.a., *Dismissing Cases - Order of Dismissal*, above).

After the Program Manager reviews and approves the ROI, the Investigator must prepare a proposed order explaining UOSH's findings and any appropriate relief, if applicable. Significant portions of the narrative from the ROI (refer to Chapter 4, Paragraph X.J., *Report of Investigation*, of this manual) may be merged into the order, taking care that the identities of any confidential witnesses or other protected information listed in the ROI, as well as exhibits, are not included in the order. The order must include the following information:

- i. Complainant and Respondent Names;
- ii. Case Number;
- iii. Statute Governing the Whistleblower Complaint;
- iv. Date the Complaint was Filed;
- v. Allegation Summary;
- vi. Background;
- vii. Coverage and Timeliness;
- viii. *Prima Facie* Allegation;
- ix. Defense;
- x. Damages (merit cases only—refer to Chapter 5, Section II., *Remedies*, of this manual);
- xi. Order (dismissing the complaint or awarding appropriate remedies for damages in a merit case); and
- xii. Signature of the Director or Designee.

3. Notice of Appeal Rights. A written Notice of Appeal Rights must be attached to all orders informing the parties that a review of the issued order may be sought within 30 calendar days from the date the order was issued by filing a written request for review with Adjudication. The notice must inform the parties of the following:

- a. That Adjudication will conduct a *de novo* review of the order if the written request is timely;
 - b. That a written request for review must:
 - be signed by the party seeking review;
 - state the grounds for review and the relief requested;
 - state the date upon which it was mailed;
 - and be mailed to the presiding officer and to each party; and
 - c. If a written request is not received by Adjudication within 30 calendar days of the order issue date, the order will become a final order of the Commission.
4. Certificate of Mailing.

A Certificate of Mailing must be attached to all orders. The Certificate of Mailing must include the name and address of all parties who will receive a copy of the order, the date the orders were mailed (issuance date), and the signature of the person mailing the documents.

C. Mailing Orders and Related Documents.

The Investigator will add the “Issued Date” on the orders indicating the date the orders were mailed and send the signed orders, with attached Notice of Appeal Rights and Certificate of Mailing, to the parties via certified USPS mail, return receipt requested, and via email to the parties who have provided an email address (with the “request read receipt” option activated). Proof of the parties’ receipt must be preserved in the casefile with copies of the order and other related documents.

1. Closing Letters

- a. Order of Finding. When an order finding merit or non-merit is issued, the parties will be sent closing letters (*Respondent Closing Letter/Complainant Closing Letter*) that reiterate the limited scope of the order (e.g., only whether a violation of §34A-6-203 of the Utah OSH Act has or has not occurred), state the order is based on the evidence provided, and will include a list of enclosures (Order of Finding, Notice of Appeal Rights, and Certificate of Mailing) that accompany the letter.
- b. Order of Dismissal. When an Order of Dismissal is issued, the parties will be sent closing letters (*Respondent Closing Letter/Complainant Closing Letter*) stating the reason the case was dismissed. The closing letters will list the enclosures (Order of Dismissal, Notice of Appeal Rights, Certificate of Mailing, etc.) that accompany the letter. Referrals. If the whistleblower complaint was dismissed for lack of

jurisdiction and was referred by UOSH to another agency (e.g., OSHA), a copy of the referral letter must be included with the closure letter sent to the complainant.

2. Dual Filed Cases.

If the whistleblower complaint was referred to UOSH from OSHA, or if UOSH has received notice from OSHA that the whistleblower complaint was dual filed, a Case Disposition Letter to OSHA, including a copy of the complainant's closing letter and all enclosures, must be emailed or mailed to OSHA at the address indicated on OSHA's original referral or notice of dual filing.

D. Multi-Respondent Mixed Determinations.

In some cases, the complainant may allege retaliation by multiple respondents and UOSH may find that one respondent violated the Utah OSH Act, but another respondent did not. In those cases, UOSH will address both respondents in a single Order of Findings. UOSH will issue merit findings against the respondent found to have violated the law and, in the same Order, indicate that it has determined that the allegations against the other respondent(s) are not meritorious.

The order should be addressed to the complainant and all respondents. The order must be sent to all parties by USPS Certified Mail or a third-party commercial carrier that provides delivery confirmation. Proof of delivery to each party should be preserved in the file with copies of the order to maintain accountability.

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

III. Appeals.

Per Utah Code Ann. §34A-6-203(3)(a), a party to a claim of a violation of the whistleblower statute, whether a violation did or did not occur, may seek review of the order issued by UOSH within 30 calendar days from the date the order was issued (Refer to Subparagraph II.B.3., *Notice of Appeal Rights*, of this chapter) by filing a written request for review with Adjudication. The parties may also seek review of an Order of Dismissal issued by UOSH in accordance with Utah Code Ann. §34A-6-203(3), Utah Code Ann. §63G-4-301, and Utah Code Ann. §63G-4-302, as applicable. The Order of Findings becomes a final order of the Commission if a written request for review has not been filed with Adjudication during the 30 calendar-day time period from the date the order was issued.

If a request for review is properly made (i.e., the requirements of Utah Code Ann. §63G-4-301 are met), Adjudication will conduct a *de novo* review of the order meaning the evidence previously submitted will not be considered unless presented again by parties. Adjudication will order relief if it determines a violation of the Utah OSH Act occurred or will issue an order finding that a violation of the Utah OSH Act has not occurred.

A. Request for Review.

Requests for Review must be made in accordance with Utah Code Ann. §63G-4-301, meaning the request must:

1. Be filed within 30 days of the date the order was issued;
2. Be signed by the party seeking review;
3. State the grounds for review and the relief requested;
4. State the date upon which it was mailed; and
5. Be mailed to the presiding officer and to each party.

B. UOSH Participation.

1. Merit Finding. If the request for review is based on a finding that a violation occurred, UOSH will appear in the review proceeding to defend its finding.
2. Non-Merit Finding.

If the request for review is based on a finding that a violation did not occur, UOSH may not participate in the review proceeding.

C. Determination Based on Review.

If Adjudication determines that a violation of the whistleblower statute has occurred, it may order appropriate relief to the complainant, such as reinstatement of the employee to the employee's former position with backpay. If a determination has been made that a violation has not occurred, Adjudication will issue an order stating that determination.

If a case is dismissed prior to an investigation and the order dismissing the case is appealed, Adjudication may reverse the grounds for dismissal and order UOSH to complete an investigation.

D. Further Appeals.

1. Commissioner/Appeals Board Review.

A party may appeal an order issued by the administrative law judge (ALJ) by filing a motion for review with Adjudication. See Utah Code Ann. §34A-1-303. Unless a party elects to have the review conducted by the Appeals Board, the review of an order

issued by Adjudication will be conducted by the Commissioner. The Appeals Board or Commission may not conduct a *de novo* review but must rely on the facts previously presented, the arguments of the parties, and any supplemental evidence requested by the Commissioner or Appeals Board. The Commissioner or the Appeals Board may affirm the decision of the ALJ, modify the decision of the ALJ, return the case to the ALJ for further action as directed, or reverse the findings, conclusions, and decision of the ALJ. The decision of the Commissioner or the Appeals Board is the final decision of the Commission.

2. Judicial Review.

A party may seek judicial review of a final decision of the Commission by filing a petition for judicial review of agency action with the Utah Court of Appeals or Utah Supreme Court within 30 calendar days of the date the final decision was issued. See Utah Code Ann. §63G-4-401. The appellate court will only grant relief if it finds the petitioner was substantially prejudiced by the Commission's procedures.

E. OIS and UOSH's Internal Database.

The Investigator must update OIS and UOSH's internal database with order and appeal information in accordance with Chapter 7, Paragraph IV.D., *Order of Findings/Dismissal*, and Paragraph IV.E., *Appeals*, of this manual.

Chapter 7

CASEFILE PREPARATION AND DATA ENTRY

I. Scope.

This chapter provides guidance on whistleblower complaint and investigation data entry into OIS and UOSH's internal database as well as preparing and properly organizing the investigative casefile.

II. General.

An electronic casefile will be prepared for all whistleblower complaints received by UOSH regardless of disposition.

The Investigator must create a case folder by copying the "*Blank Folder Template*" (located in the "Cases" folder in O:\Shared drives\LC_UOSH_Whistleblower\Cases) and pasting it in the "*PENDING DOCKETING*" folder (also located in the "Cases" folder). The copy of the template folder that was created must be renamed using the following format: "Case Number_Respondent Name_Complainant Last Name" (for example: 180111_ABC Corp_Smith). If dually filed with OSHA, "*Dual*" must be added to the folder name, for example, 180111_ABC Corp_Smith (Dual). In addition, the first and last initials of the Investigator assigned to the case must be added to the end of the casefile name, for example, 180111_ABC Corp_Smith JD, or, 180111_ABC Corp_Smith (Dual) JD (when dually filed with OSHA).

The Investigator will prepare all electronic casefiles and ensure they are placed in the appropriate folder (e.g., "*PENDING DOCKETING* or *ADMIN CLOSURE*," "*Active Cases*," or "*Closed*") located in the UOSH Google shared drive. Note that all casefiles will initially be placed in the "*PENDING DOCKETING* or *ADMIN CLOSURE*" folder and will be moved to the appropriate folder following the relevant action taken. Casefiles must only be moved after the action has taken place that would place the casefile in the designated folder. For example, a casefile will be moved to the active folder only after the opening letters are mailed to the parties and the case is opened in OIS. Another example is the casefile will be moved to the closed folder after the closing documents have been mailed to the parties and the case is closed in OIS, as well as in UOSH's internal tracking sheet. Moving casefiles only after taking the appropriate action will ensure proper handling of the cases.

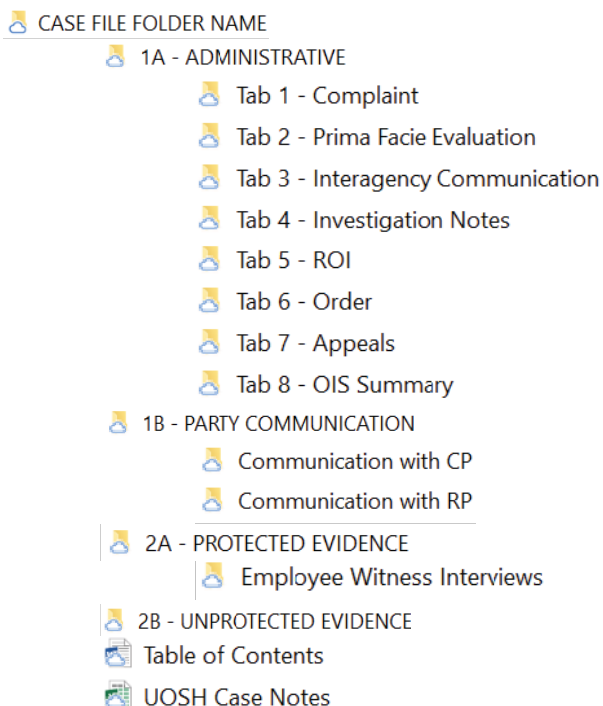
III. Casefile Structure

Casefiles are stored electronically on the UOSH shared drive. Cases filed prior to January 1, 2018, were stored physically in a blue case folder.

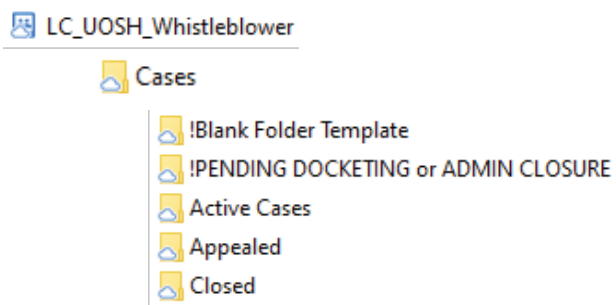
A. Overall Structure.

All casefile folders will contain 4 main folders (designated as 1A – Administrative, 1B – Party Communication, 2A – Protected Evidence, and 2B – Unprotected Evidence), as

well as a Table of Contents and the UOSH Case Notes. The 4 main folders, listed above, will also contain subfolders and files related to the casefile. See below for the overall structure of the casefile.



Note that all casefiles will initially be placed in the “!PENDING DOCKETING OR ADMIN CLOSURE” folder for processing. Following the Investigator’s preliminary interview with the complainant and the Program Manager’s approval/signature of the PFE, and after appropriate actions are taken based on approval, the casefile will be moved to the relevant folder – “Closed” or “Active” – located in O:\Shared drives\LC_UOSH_Whistleblower\Cases. See below for folder location in the Google shared drive.



B. Casefile Folder Overview.

The main casefile folder contains the “Table of Contents” and “UOSH Case Notes,” as well as subfolders “1A – Administrative,” “1B – Party Communication,” “2A – Protected Evidence,” and “2B – Unprotected Evidence.” Table 1., *Casefile Form Location*, at the end

of this paragraph contains document location in a table format. See below for contents and content location within the casefile folder.

1. Table of Contents.

The “Table of Contents” will be placed in the main casefile folder; it is meant to serve as a map to documents and evidence saved in the casefile folder. The Investigator must “hyperlink” all documents and evidence in the casefile to the relevant document listed in the Table of Contents. For convenience, a number of items are already listed in the table of contents which can be “hyperlinked” as they become available. Additional items may be added to the table of contents to suit the needs of each case. To “hyperlink” an item, highlight the desired text then “right click” the text and select “hyperlink” – this will give you the option to select a document in the file to link to the text.

2. UOSH Case Notes.

The “UOSH Case Notes” will be placed in the main case folder. This document serves as a case activity log and telephone log and must be kept up-to-date from the date the complaint was received by UOSH up until the closing date of the complaint. An example of some activities that will be included on the sheet are the date the complaint/referral was received, the date the complainant was initially contacted by Investigator, the date the PFE was completed and submitted to the Program Manager, the date the case was assigned to investigate, the date the complaint was docketed, the date opening letters were sent to parties, the date the settlement agreement was requested from parties, the date the settlement agreement was reviewed by the Investigator, the date orders were issued, etc. The person who enters the action item will initial and date the form in the designated area. Guidance on noting telephone conversations is provided in Chapter 4, Paragraph VIII.E., *Telephone Conversations*, of this manual.

3. Folder 1A – Administrative.

This folder is divided into eight (8) tabs:

a. Tab 1: Complaint.

- Complaint and referral-related intake/initial complaint documents.
- Whistleblower Complaint Form [UOSH and OSHA (if applicable)].
- Pre-investigation Interview.
- Pre-investigation Interview Form.

b. Tab 2: Prima Facie and Evaluation (PFE).

- PFE Form – completed by the Investigator and approved/signed by the Program Manager. Refer to Chapter 2, Subparagraph III.B.3.b, *Prima Facie Evaluation Form – UOSH 24A (PFE)*, of this manual.

c. Tab 3: Interagency Communication.

- OSHA (or other agency) whistleblower referral letters to UOSH.
- Emails from OSHA (or other agencies) referring whistleblower complaints to UOSH.
- UOSH referral letters to OSHA or other agencies.
- Emails from UOSH referring whistleblower complaints to OSHA or other agencies.
- Case disposition letters (when complaint is dual filed).
- Copy of materials emailed (and copy of email) to OSHA when a dual-filed case is closed:
 - o Case disposition letter
 - o Closing letter to the complainant
 - o Order
- Emails and memoranda between UOSH employees.
- Emails and memoranda between UOSH and other agencies.

d. Tab 4: Investigation Notes.

- All non-evidentiary investigation-related documents.
 - o Calendars
 - o Tables
 - o Case timelines
 - o Investigator's notes

NOTE: Protected information, such as, but not limited to, non-managerial witness statements or records of employee injuries, must be placed in Folder 2A – Protected Evidence.

e. Tab 5: Report of Investigation (ROI).

- Approved ROI – signed by the Program Manager.

Refer to Chapter 4, Section X.J., *Report of Investigation*, of this manual.

- f. Tab 6: Order.
 - Signed Orders. Refer to Chapter 6, Section II., *Orders*, of this manual.
 - g. Tab 7: Appeals.
 - All adjudication and court-appeal-related documents, such as:
 - o Notices of appeals; and
 - o Any resulting orders.
 - h. Tab 8: OIS Summary.
 - Final OIS summary (after the case is closed in OIS).
 - i. Tab 9: Settlement.
 - If the parties reach a settlement agreement, documentation from the parties regarding confirmation of settlement terms will be included in Tab 9. Refer to Chapter 5, Section III, *Settlement Agreement*, of this manual.
4. Folder 1B – Party Communication.
- a. Communication with CP.
 - 0-Point of Contact.
 - o Completed *Designation Form*.
 - Documents received from the complainant.
 - Email.
 - o Email correspondence between UOSH and the complainant.
 - o Email correspondence between OSHA and the complainant (if applicable).
 - Interviews.
 - o All UOSH non-pre-investigation interviews conducted with the complainant.
 - Letters.

- o Includes, but is not limited to, withdrawal confirmation, notification of investigation, closing letters, no contact letters, etc.
 - o Letter from OSHA to the complainant stating the whistleblower case was referred to UOSH.
- Position Statement to CP.
 - o *Notification of Response Received* letter – informing the complainant that the respondent’s response to the complaint allegations (position statement) has been received.
 - o Copy of email showing the position statement was provided to the complainant.
- Rebuttal Statement.
 - o Complainant’s rebuttal to the respondent’s position statement.
- Withdrawal Request.
 - o Recorded statement or email from the complainant requesting that the complaint be withdrawn.
- b. Communication with RP.
 - 0-Point of Contact.
 - o Completed *Designation Form*.
 - Documents received from the respondent.
 - Email.
 - o Email correspondence between UOSH and the respondent.
 - Interviews.
 - o All UOSH interviews conducted with management.
 - Letters.
 - o Includes, but is not limited to, notification of investigation, closing letters, no contact letters, etc.
 - Position Statement.
 - o Position statement with supporting documents provided by the respondent.

NOTE: Additional folders may be added to suit individual cases.

5. Folder 2A – Protected Evidence.

Save all protected documents, protected exhibits, and trade-secret business information in Folder 2A. Protected information may include, but is not limited to, medical records, employee witness statements, personnel records of non-complainants, settlement agreements, and alternate dispute resolution-related documents. Protected documents and employee witness statements, including storage media (e.g., DVDs), must be stamped as “PROTECTED Under the Utah Records Access Management Act.” Confidential business information that is deemed a trade secret, as defined in Utah Code Ann. §13-24-2(4), must be labeled “confidential-trade secret.”

Protected exhibits must be named as follows: “Protected Ex [##] - Description [exhibit date]” (for example: “Protected Ex 01 - Medical Evaluation 01_01_2018”). Protected witness statements must be named as follows: “Protected Statement of [Name] ([Relation]) [date of statement]” (for example: “Protected Statement of John Doe (Coworker) 01_01_2018”).

6. Folder 2B – Unprotected Evidence.

Save all unprotected evidence obtained by parties in Folder 2B. This includes, but is not limited to, emails, text messages or other records of communication between the parties, complainant personnel records (e.g., disciplinary, performance evaluation, job description, etc.) and photographs.

Unprotected exhibits must be named as follows: “Unprotected Ex [##] - Description [exhibit date]” (for example: “Unprotected Ex 01 - Written Warning 01_01_2018”). Unprotected witness statements are usually party statements which should be saved inside Folder 1B – Party Communication. However, if the evidence includes an unprotected witness statement that is not from a party, it must be named as follows: “Unprotected Statement of [Name] ([Relation]) [date of statement]” (for example: “Unprotected Statement of John Doe (Coworker) 01_01_2018”).

NOTE: Folders 2A and 2B contain material evidence provided by the parties or third parties. This does not include UOSH communication with the complainant and respondent. Anything created by UOSH (other than witness statements) should be saved in Folder 1A or 1B. Table 1. Casefile Form Location.

MAIN CASE FOLDER
<ul style="list-style-type: none">• Table of Contents• UOSH Case Notes• Folder 1A – Administrative• Folder 1B – Party Communication• Folder 2A – Protected Evidence• Folder 2B – Unprotected Evidence

FOLDER 1A - ADMINISTRATIVE	
TAB #	DOCUMENT
1	Complaint <ul style="list-style-type: none"> Completed UOSH 21A complaint form (every file) UOSH whistleblower complaint received from complainant OSHA referral complaint Any form of written complaint of retaliation received from complainant Preliminary Interview Form (UOSH 23A)
2	Prima Facie Evaluation (UOSH 24A)
3	Interagency Communication <ul style="list-style-type: none"> Whistleblower Federal Referral Letter (UOSH 25A) Referral email from OSHA Case Disposition Letter to OSHA (UOSH 64A) UOSH Referral letter to OSHA UOSH email to OSHA showing referral Email or other written internal communication between UOSH staff. File memorandum [Internal Use (e.g., Conflicts of Interest)] (UOSH 46A) used for internal communication.
4	Investigation Notes <ul style="list-style-type: none"> Whistleblower Investigator's notes related to the investigation All non-evidentiary investigation-related documents
5	ROI <ul style="list-style-type: none"> Report of Investigation (UOSH 49A)
6	Order <ul style="list-style-type: none"> Finding or Administrative Closure
7	Appeals <ul style="list-style-type: none"> Notice of Appeal to Adjudication Notice of Adjudication's Decision Notices and/or Results of Further Appeals
8	OIS Summary <ul style="list-style-type: none"> Final (after case is closed)
9 (if applicable)	Settlement Agreement <ul style="list-style-type: none"> Documentation from parties regarding confirmation of settlement terms
FOLDER 1B – PARTY COMMUNICATION	

<p>Communication with CP</p> <ul style="list-style-type: none"> • Designation of Point-of-Contact and/or Legal Counsel • Documents received from complainant • Emails between UOSH and complainant • UOSH interviews conducted with complainant (after investigation is opened) • Letters UOSH mailed/emailed to complainant • OSHA’s letter to complainant referring case to UOSH, if applicable • Position statement to complainant – showing complainant was provided such • Rebuttal statement from complainant • Withdrawal request from complainant, if applicable <p>Communication with RP</p> <ul style="list-style-type: none"> • Designation of Point-of-Contact and/or Legal Counsel • Documents received from respondent/respondent representative • Emails between UOSH and respondent/respondent representative • UOSH interviews conducted with respondent’s management • Letters UOSH mailed/emailed to respondent/respondent representative • Position statement
<p>FOLDER 2A – PROTECTED EVIDENCE</p> <ul style="list-style-type: none"> • Employee Witness Interviews (nonmanagerial) • Trade secrets • Any documentation provided to UOSH that is protected under GRAMA
<p>FOLDER 2B – UNPROTECTED EVIDENCE</p> <ul style="list-style-type: none"> • Evidence list • Documents obtained from parties that support UOSH findings • Emails, texts, recordings, etc., from parties that support UOSH findings • Complainant personnel files (e.g., disciplinary, performance evaluation, job description, etc.)

C. Required in All Casefiles.

The following must be included in all casefiles, regardless if an investigation is opened or if the complaint is dismissed or administratively closed (complainant withdraws complaint).

1. Recorded preliminary interview with the complainant.
(Located in 1A – ADMINISTRATIVE / Tab 1 – Complaint)
2. Completed *UOSH Whistleblower Complaint Form*.
(Located in 1A – ADMINISTRATIVE / Tab 1 – Complaint)

3. PFE form, signed by the Program Manager, with recommended actions based on preliminary interview with the complainant.
(Located in 1A – ADMINISTRATIVE / Tab 2 – Prima Facie Evaluation)
4. Completed *UOSH Case Notes Form*.
(Located in main case folder)
5. OIS Case Summary – saved to casefile after closed in OIS.
(Located in 1A – ADMINISTRATIVE / Tab 8 – OIS Summary)

D. Dual Filed Cases.

Where OSHA refers a whistleblower complaint to UOSH (dual filed complaint), in addition to Section III.C., *Required in All Casefiles*, of this chapter, as well as Section III.E., *Investigation Not Opened*, or Section III.F., *Investigation Opened*, of this chapter (as applicable), the following documents are required to be included in the casefile:

1. Copy of OSHA's email to UOSH referring the whistleblower complaint to UOSH.
(Located in 1A – ADMINISTRATIVE / Tab 3 – Interagency Communication)
2. OSHA referral letter to UOSH.
(Located in 1A – ADMINISTRATIVE / Tab 3 – Interagency Communication)
3. OSHA Whistleblower Complaint/Intake Form.
(Located in 1A – ADMINISTRATIVE / Tab 1 – Complaint)
4. OSHA letter to the complainant stating the case was referred to UOSH.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Letters)
5. Copy of OSHA's OIS whistleblower complaint closeout information.
(Located in 1A – ADMINISTRATIVE / Tab 8 – OIS Summary)

NOTE: Investigators are required to enter the whistleblower complaint information under a new OIS complaint number. If a number has not yet been generated by UOSH in OIS, the Investigator may electronically copy the OIS complaint information using the OIS number generated by OSHA. This option in OIS will allow the Investigator to copy the selected whistleblower complaint information OSHA entered and automatically generate a new OIS case number with the copied information.

6. Copy of the Investigator's email to OSHA showing that the *Case Disposition Letter*, closing letter to the complainant and issued order (as applicable) were emailed to OSHA. (Located in 1A – ADMINISTRATIVE / Tab 3 – Interagency Communication)
7. Copy of the *Case Disposition Letter*, closing letter to the complainant and issued order (as applicable) that were emailed to OSHA.
(Located in 1A – ADMINISTRATIVE / Tab 3 – Interagency Communication)

8. Copy of email from OSHA stating they received the *Case Disposition Letter* and accompanying documents.
(Located in 1A – ADMINISTRATIVE / Tab 3 – Interagency Communication)

E. Investigation Not Opened.

1. Complainant Withdraws Complaint. In addition to Section III.B., *Required in All Casefiles*, of this chapter, the following are required to be included in the casefile where the complainant withdraws the whistleblower complaint prior to the opening of an investigation.
 - a. Recorded statement from the complainant requesting the whistleblower complaint be withdrawn. (Located in 1B – PARTY COMMUNICATION – Communication with CP – Withdrawal Request)
 - b. Copy of the *Withdrawal Letter*. (Located in 1B – PARTY COMMUNICATION – Communication with CP – Letters)
 - c. Copy of email (or USPS mail if email was not provided) to the complainant – showing the Withdrawal Letter was emailed (or mailed) to the complainant. [Located in 1B – PARTY COMMUNICATION – Communication with CP – Email or Letters (if mailed)]
2. Dismissed with an Order.
 - a. Lack of *Prima Facie* elements. In addition to Section III.C., *Required in All Casefiles*, of this chapter, the following are required to be included in the casefile where an order is issued where an investigation was not opened.
 - i. Order – approved and signed by the Director or designee. (Located in 1A – ADMINISTRATIVE / Tab 6 – Order)
 - ii. Copy of the following documents that were mailed to the respondent and complainant: (Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
 - USPS Return Receipt
 - Administrative Closure Letter
 - UOSH Whistleblower Complaint Form
 - Order
 - Notice of Appeal Rights
 - Certificate of Mailing

- iii. Signed certified mail return receipt (green card) showing when respondent and complainant received the issued order. (Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
- b. Unable to Contact the Complainant. In addition to the documents in Section III.E.2.a, *Lack of Prima Facie Elements*, above, the following are required to be included in the casefile where a complaint was dismissed with an order as a result of the complainant's failure to contact UOSH:
 - i. Notes in *UOSH Case Notes* to include:
(Located in main case folder)
 - Attempts to contact the complainant by phone. Minimum information required includes the date the phone call was made, initials of Investigator who made the call, and a brief description of the voicemail left with the complainant.
 - Attempts to contact the complainant by email. Minimum information required includes the date the email was sent, initials of Investigator who sent the email, and a brief description of the email sent to the complainant.
 - Date the *No Contact Letter* was mailed (by USPS certified mail) and emailed to the complainant, as well as the initials of the Investigator who mailed and emailed the *No Contact Letter*.
 - ii. Copy of the *No Contact Letter*.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Letters)
 - iii. Copy of email to the complainant – showing the *No Contact Letter* was emailed to the complainant.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Email)
 - iv. Copy of the *No Contact Letter* that was mailed to the complainant, along with the USPS Certified Mail Return Receipt.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Letters)
 - v. Signed certified mail return receipt (green card) showing when the complainant received the *No Contact Letter*.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Letters)

F. Investigation Opened.

1. Where a whistleblower investigation has been opened by UOSH (docketed in OIS and opening letters sent to the respondent and complainant), in addition to Section III.C., *Required in All Casefiles*, of this chapter, the following documents are required to be included in the casefile:
 - a. *Notification of Investigation Letters* to the complainant and respondent.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
 - b. Copy of the *Notification of Investigation Letter, Designation Form* and *UOSH Whistleblower Complaint Form* mailed to the complainant and respondent, along with a copy of the corresponding USPS Certified Mail Return Receipt.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
 - c. Signed certified mail return receipts (green cards) showing when the complainant and respondent received the documents listed in #1.b. above.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
 - d. Respondent's position statement.
(Located in 1B – PARTY COMMUNICATION – Communication with RP – Position Statement)
 - e. Completed *Designation Forms* from the complainant and respondent, if provided.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – 0Point of Contact)
 - f. Copy of email to the complainant showing the *Notification of Response Received* letter and the respondent's position statement were emailed to the complainant. The letter will inform the complainant that he or she may submit a written rebuttal statement to the respondent's position statement.
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Position Statement to CP)
 - g. Complainant's rebuttal statement (if submitted).
(Located in 1B – PARTY COMMUNICATION – Communication with CP – Rebuttal Statement)
 - h. Documents received from the complainant and respondent.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Documents Received)

- i. Interviews with the complainant after the whistleblower investigation has been opened.
(Located in 1B – Party Communication – Communication with CP – Interviews)
- j. Non-managerial witness statements and interviews.
(Located in 2A – Protected Evidence – Employee Witness Interviews)
- k. Supervisor/management witness statements and interviews.
(Located in 1B – Party Communication – Communication with RP – Interviews)
- l. UOSH email correspondence with the complainant and respondent.
(Located in 1B – Party Communication – Communication with CP/RP – Email)
- m. Evidentiary documents, recordings, interview statements and other materials used to support UOSH’s findings.
(Located in 2A – Protected Evidence) - if evidence contains information that is protected under the Government Records Access and Management Act (GRAMA);
or
(Located in 2B – Unprotected Evidence) – if not protected under GRAMA.

NOTE: Documents, emails, recordings, and any other materials that may contain protected information under GRAMA, or contain trade secrets, must be placed in the *Protected Evidence* folder (Located in 2A – Protected Evidence). There must be no protected information located in any other folder in the casefile.

- n. Evidence list containing document and interview (complainant, respondent and witnesses) exhibit numbers with correlating date and description of the exhibit.
(Located in 2B – Unprotected Evidence)
- o. Investigation notes created by the UOSH Investigator.
(Located in 1A – Administrative – Tab 4 – Investigation Notes)
- p. Report of Investigation.
(Located in 1A – Administrative – Tab 5 – ROI)
- q. Order of Findings.
(Located in 1A – Administrative – Tab 6 – Order)
- r. Closing Letters (Merit – Nonmerit) to the complainant and respondent.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
- s. Copy of the Closing Letters, Order, Notice of Appeal Rights, and Certificate of Mailing mailed to the complainant and respondent, along with a copy of the corresponding USPS Certified Mail Return Receipt.
(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)

- t. Signed certified mail return receipts (green cards) showing when the complainant and respondent received the Closing Letters, Order and Notice of Appeal Rights. (Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)
- 2. Lack of cooperation from the complainant or respondent.

In addition to the requirements of III.F.1. above, a *Lack of Cooperation Letter* is required where the complainant or respondent is not responding to the Investigator's phone calls and emails.

(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)

Lack of Cooperation Letters will be sent to the appropriate party via USPS Certified Mail. A copy of the letter, certified mail return receipt and signed mail return receipt (green card) will be placed in the casefile.

(Located in 1B – PARTY COMMUNICATION – Communication with CP/RP – Letters)

- 3. Appeal Records.

If either party appeals the decision of UOSH, save all adjudication and court-appeal-related documents (including, but not limited to, notices of appeals and any resulting orders) in the *Appeals* folder.

(Located in 1A – ADMINISTRATIVE – Tab 7 / Appeals)

IV. Data Entry.

All whistleblower complaints received must be entered into OIS and logged in UOSH's Internal Database, including complaints that are untimely, wrongfully filed with UOSH, or otherwise lacking information due to an uncooperative complainant.

The assigned Investigator is responsible for entering whistleblower complaint and referral information into OIS and UOSH's Internal Database. These databases will be updated by the Investigator, after Program Manager's approval as indicated on the PFE and ROI (if an investigation has been conducted), to reflect actions that have been taken after the complaint or referral has been received by UOSH. Such actions may include, but are not limited to, administratively closing the complaint (complainant withdraws complaint), docketing and dismissing the complaint, opening an investigation, providing merit determination, closing the investigation and entering appeal information.

A. Entering Whistleblower Complaints into OIS and UOSH's Internal Database.

The Investigator must enter whistleblower complaints and referrals into OIS and UOSH's internal database within one (1) business day from receipt date of the complaint or referral.

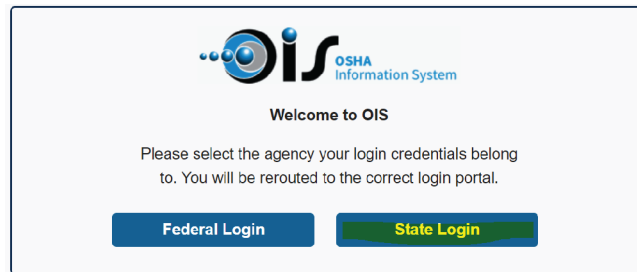
- 1. OIS.

- a. Whistleblower Complaints referred by OSHA (dual filed).

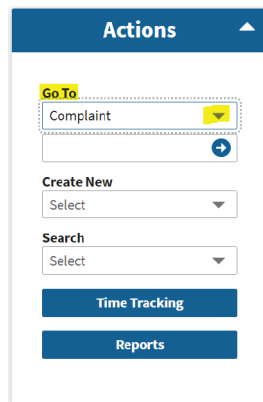
The Investigator must input whistleblower complaint information into OIS as follows:

- i. Log onto the OIS website.
<https://ois.dol.gov/saml/discovery?entityID=urn%3Agov%3Adol%3ASA%3A2.0.profiles%3Aasp%3Aaso%3Aosha%3Aprod-ois&returnIDParam=idp>

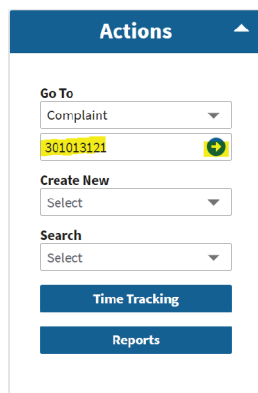
- ii. Click the “State Login” button and sign in.



- iii. In the “Actions” section, click on the dropdown box under “Go To” and select “Complaint.”



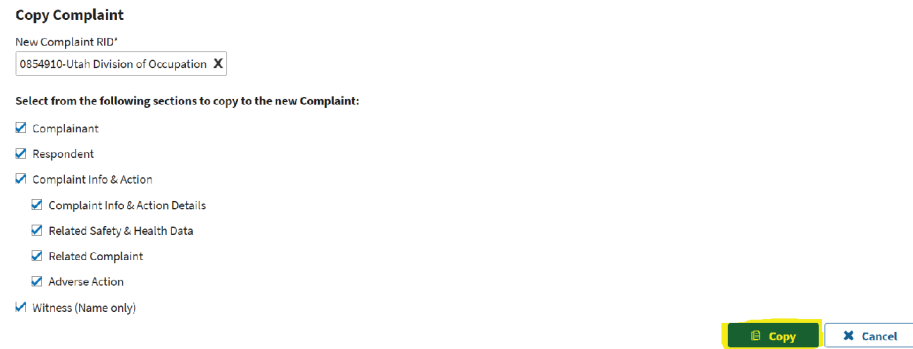
- iv. In the box below “Complaint,” enter the whistleblower complaint number provided on the referral letter received from OSHA. Click the blue arrow next to the number entered.



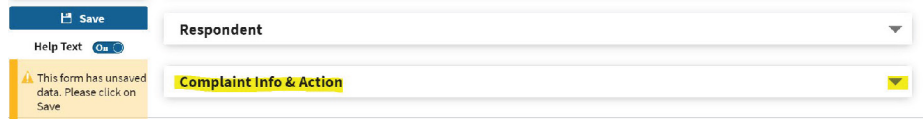
- v. Click the ellipses located on the top right-hand side of the webpage and select “copy complaint.”



- vi. Select all sections to “copy to the new Complaint” and click “Copy.”



- vii. Scroll to the bottom of the page and click on the dropdown arrow in the “Complaint Info & Action” box.



- viii. Scroll towards the bottom and click the plus sign next to “Investigator.”



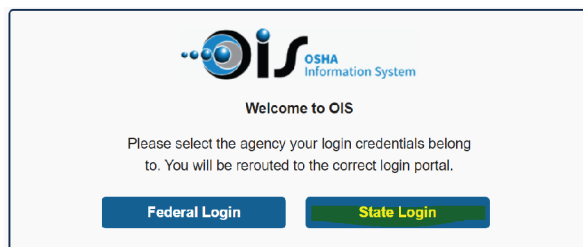
- ix. Click on the box under the “Investigator*” and choose the Investigator assigned to the case. Select “Yes” under the “Primary*” field and enter the date the complaint was assigned to the Investigator in the “Start Date*” field. Click the green check under “Actions.” Note that the Investigators’ names were removed from the screenshot below.

Complaint Info & Action

RID* 0854910-Utah Division of Occupational Safety X	Date Complaint Filed* 03-14-2023
First Contact with Complainant 03-15-2023	Date of Injury Report 12-21-2022
Method of Filing Mail	Local Case Number [Redacted]
National Focus Tracking Select one or more...	
Local Focus Tracking Select one or more...	

- xv. Click the “Save” button (refer to subparagraph xii. above).
- xvi. Enter the OIS generated complaint number in the last column (OIS Case Number) on the *Whistleblower Tracking Sheet*.
- xvii. Log off of OIS.

- a. UOSH Whistleblower Complaints. When OSHA does not refer a whistleblower complaint to UOSH, the Whistleblower Investigator must create a new complaint in OIS as follows:
- Log onto the OIS website <https://ois.dol.gov/saml/discovery?entityID=urn%3Agov%3Adol%3ASA%3A2.0.profiles%3AAsp%3AAsso%3Aosha%3Aprod-ois&returnIDParam=idp>
 - Click the “State Login” button and sign in.



- Select the dropdown box in the “Create New” field and select “Complaint” located at the top of the dropdown menu.

- Enter the complainant’s information.
 - In the “Complainant” section, enter the complainant’s first name, last name, physical address, phone and e-mail. Note that you need to click the plus sign next to “Phone” and “E-mail” to access these fields to enter the data. If the complainant’s mailing address is the same as the physical address, click on the “Copy Complainant Primary Address” button. If not, see the bullet below.

Complainant

First Name*

Middle Initial

Last Name*

Suffix

Primary Address

☐ Unknown

Street Address 1*

Street Address 2

Street Address 3

Country*

State*

City*

Zip Code*

+ Phone

+ E-mail

Mailing Address

Copy Complainant Primary Address

- If the complainant’s mailing address differs from the physical address, do not click on the “Copy Complainant Primary Address” button. Complete the additional fields following that button.

~~**Copy Complainant Primary Address**~~

Street Address 1*

Street Address 2

Street Address 3

Country*

State*

City*

Zip Code*

i. Enter the respondent’s information.

- Select the dropdown arrow next to “Respondent.” Then, click on the plus sign next to “Respondent.”

Respondent

+ Respondent

- Enter the respondent’s legal business name in the “Respondent Name” field. Do not click on any of the suggested Respondents that “pop-up” *unless the respondent’s name and address match exactly that of the Respondent’s information from the complaint.* If there is no exact match, hit the “esc” key on your keyboard.

Respondent Name* 

ABC

- ABC Block & Brick 3007 South Arkansas Avenue , RUSSELLVILLE, ARKANSAS
- ABC Recycling, LLC 815 East Gilbert Street , WICHITA, KANSAS
- ABC Home & Commercial Services, Inc. 11934 Barker Cypress Rd , CYPRESS, TEXAS**
- Harmony House Health Care Center - ABCM Corporation 2950 West Shaulis Road , WATERLOO, IOWA
- Rakuten ABC Golf LLC 1731 Kalakaua Ave, Space A , HONOLULU, HAWAII
- ABC autos
- ABC Home Healthcare Professionals 233 Albion Street , WAKEFIELD, MASSACHUSETTS
- Drummond Company Inc. dba ABC Coke A Division of Drummond Company, Inc. 1000 Urban Center Drive , BIRMINGHAM, ALABAMA
- ABC Supply Co. 184 State Road 130 , VALPARAISO, INDIANA
- ABC Phones Inc. DBA Victra Wireless 60c Pearl Street , ESSEX JUNCTION, VERMONT

Search...

Zip Code

Search...

 Search

- After hitting the “esc” key on the keyboard, click the dropdown arrow in the “Statute” field and select OSHA. Click on the “Search” button which will generate a list of establishments with the respondent’s name that was entered as the search criteria.

Respondent Name* 

ABC 

Statute

OSHA 

DOT Number

Country

Search...

State

Search...

City

Search...

Zip Code

Search...

 Search

- After the “Search” button is selected, a list of establishments with the respondent’s name that was entered as the search criteria will be generated. If none of the respondents exactly match the respondent listed on the whistleblower complaint, click on the “New” button on the top right-hand side of the page. This will allow the new respondent to be added into OIS.

[Accept and Continue](#)
[Home](#)
[Go Back](#)

Respondent Name*

ABC

State: OHIO

DOT Number

Country

State

City

Zip Code

[Search](#)

Respondent

Filtering Results By: Respondent Name: ABC Status: OSHA

[Close All](#)

Results Matching exact Respondent Name and Other Information:

No Results Found

Results Matching Respondent Name and/or Other Information:

- ☐ **ABC autos**
 - Physical Address 1 Complaints Respondent Type: Company
- ☐ **ABC Supply Co.**
 - Physical Address 1 Complaints Respondent Type: Company
- ☐ **ABC Block & Brick**
 - Physical Address 1 Complaints Respondent Type: Company

- Enter respondent's name, hit the "esc" key on the keyboard and click the blue arrow.

Respondent

Respondent Name*

Enter a name or location [+](#)

NOTE: Verify respondent's registered business name, by using the ["Business Name" search tool](#) on the State of Utah, Department of Commerce's webpage, and enter respondent's legal business name in the "Respondent Name" field. Enter respondent's North American Industry Classification System (NAICS), physical address, phone and e-mail. Note that you need to click the plus sign next to "Phone" and "E-mail" to access these fields to enter the data. If the respondent's mailing address is the same as the physical address, click on the "Copy Respondent Physical Address" button.

Respondent Type

☒ Company ☐ Union ☐ Person

Respondent Name*

Ownership Type: Select

NAICS Code*

Search...

DOT Number

Physical Address

☐ Unknown

Street Address 1*

Street Address 3

Country*

USA-UNITED STATES OF AMERICA

City*

Search...

Phone

E-mail

Mailing Address

[Copy Respondent Physical Address](#)

DBA

Number of Employees

☐ Does the Respondent have a Union?

Street Address 2

State*

Search...

Zip Code*

Search...

- If the respondent's mailing address differs from the physical address, do not click on the "Copy Respondent Physical Address" button. Complete the additional fields following that button.

The screenshot shows a form with a button labeled "Copy Respondent Physical Address" circled in red. Below the button are several input fields: "Street Address 1*", "Street Address 2", "Street Address 3", "Country*" (with a dropdown menu showing "USA-UNITED STATES OF AMERICA"), "State*" (with a search field), "City*" (with a search field), and "Zip Code*" (with a search field).

- After entering the respondent's information, click "SAVE."

The screenshot shows a sidebar menu with the title "Respondent". Below the title are three options: "Establishment Details", "Designated Representative", and "Save". The "Save" button is highlighted in green. Below the menu is a "Help Text" section with a toggle switch set to "On".

- If there are no results matching the exact respondent's name and other information, click the "Continue to Create Respondent" button.

The screenshot shows a search results page for a respondent. At the top, there are two buttons: "Accept and Continue" and "Continue to Create Respondent". Below the buttons is a table with the following information:

Respondent	Physical Address
Respondent Name ABC	123 SALT LAKE CITY, UTAH 84111 UNITED STATES OF AMERICA

Below the table is a message: "Below is the list of existing Respondent(s) matching the Name and Other Information entered by you." Below this message is a section titled "Results Matching exact Respondent Name and Other Information:" which contains the text "No Results Found".

- The respondent information previously entered will be pulled into the new whistleblower complaint.

vi. Enter complaint information and action taken.

- Enter:
 - UOSHs "RID" number (0854910);
 - "Date Complaint Filed" - earliest date the complainant filed a whistleblower complaint (either with OSHA or UOSH/Utah Labor Commission);NOTE: Generally, the date of the postmark, facsimile transmittal, e-mail communication, telephone call,hand-delivery, delivery to a third-party

commercial carrier, or in-person filing at the Labor Commission 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 UOSH Office is closed, then the next business day will count as the final day.

- “First Contact with Complainant” – the date the first attempt (email, phone, etc.) was made to contact the complainant, regardless if it was successful; and
- “Local Case Number” - UOSH’s whistleblower case number obtained from the *Whistleblower Tracking Sheet* (refer to Subparagraph IV.A.2.d. of this chapter for local case numbering).

Complaint Info & Action

RID*
0854910-Utah Division of Occupational Safety X

Date Complaint Filed*
mm-dd-yyyy

First Contact with Complainant
mm-dd-yyyy

Date of Injury Report
mm-dd-yyyy

Method of Filing
Select

Local Case Number
mm-dd-yyyy

National Focus Tracking
Select one or more...

Local Focus Tracking
Select one or more...

- Click on the dropdown arrow next to “Complaint Info & Action.”

Complainant

Respondent

Complaint Info & Action

- Click the plus sign next to “Investigator.”

+ Related Safety & Health Data

+ Related Complaint

+ Investigator

+ Adverse Action

- Click on the box under the “Investigator*” and choose the Investigator assigned to the case. Select “Yes” under the “Primary*” field and enter the date the complaint was assigned

to the Investigator in the “Start Date*” field. Click the green check under “Actions.” Note that the Investigators’ names were removed from the screenshot below.

Investigator

Investigator*	Primary*	Start Date*	End Date	Actions
<input type="text" value="Search..."/>	☒ Yes ☐ No	<input type="text" value="mm-dd-yyyy"/>	<input type="text" value="mm-dd-yyyy"/>	☒ ☐
<input type="button" value="+ Add"/>				

- Click the “Add” button in the “Investigator” box. Note that the Primary “Investigator” box will have the assigned Investigator’s name in this field – it was removed from the screenshot.

Investigator

Investigator*	Primary*	Start Date*	End Date	Actions
	Yes	03-17-2023		☒
<input type="button" value="+ Add"/>				

- Add the second Investigator (who was not assigned to the complaint) in this field following the instructions above. The only difference is that “No” will be selected under “Primary.”
- Click the plus sign next to “Adverse Action.”

Related Safety & Health Data

Related Complaint

Investigator

Investigator*	Primary*	Start Date*	End Date	Actions
	Yes	03-20-2023		☒
<input type="button" value="+ Add"/>				

Adverse Action

- Click on the dropdown arrow in the “Adverse Action Type” field and choose the appropriate alleged adverse action. Enter the date of said adverse action. Click on the green check mark on bottom right.

Adverse Action

Adverse Action Type* Select ▼ Date* mm-dd-yyyy Time hh:mm

Notes

Conclusion

Respondent Defense

Pretext Testing

✓ ✗

- On the left-hand side of webpage, click “Save.”

Complainant

Respondent

Complaint Info & Action

Save

Help Text On

⚠ This form has unsaved data. Please click on Save

- A “Successful” message will temporarily pop-up on the upper left-hand side of the screen. The automatically generated OIS complaint number will be on the top left tab and the status of the complaint will show “Intake/Screening Pending.”

Complaint #301013416 Statute Case Diary Case Chronology Documents

Intake/Screening Pending ...

- Enter the OIS generated complaint number in the last column (OIS Case Number) on the *Whistleblower Tracking Sheet*.
- Log off of OIS.

NOTE: The Investigator must not docket the complaint in OIS at this time. The only time a complaint will be docketed is after the Program Manager approves opening an investigation, as indicated on the PFE [Refer to Chapter 2, Subparagraph III.B.3.b., *Prima Facie Evaluation Form – UOSH 24A (PFE)*, of this manual].

2. UOSH's internal database.

The Investigator must enter the complaint information in the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet) as follows:

- a. Open the tracking sheet;
- b. Scroll to first available row in the sheet for the current fiscal year;
- c. Enter the date the complaint was filed;
- d. Create and enter a case number in the following format YYMM## with YY being the last two digits in the calendar year (i.e., 2022 = 22) that the complaint was received, MM being a two digit month code (i.e., November = 11), and ## being the serial number of the complaint in the current month (i.e., the first complaint = 01, the second complaint = 02, etc.). For example, case number **221101** indicates that this was the **first complaint** received in **November, 2022**;
- e. If known, enter the Protected Activity Date and Adverse Action Date;
- f. If dual-filed, enter the OSHA Case Number;
- g. Enter the Respondent Name and Respondent Address;
- h. Enter the Complaint Name and Complainant Address; and
- i. Save the file.

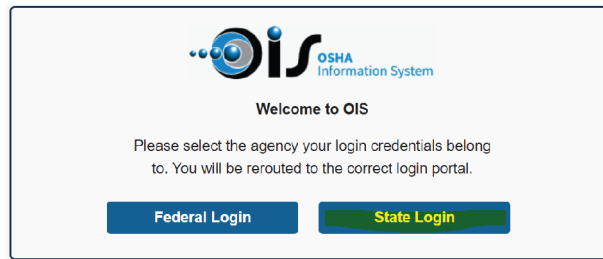
B. Administratively Closing Complaints.

1. OIS.

A complaint can be administratively closed only if the complainant withdraws the complaint prior to opening an investigation. Where an order is issued by UOSH, the case must be either docketed and dismissed (where minimum criteria to open an investigation is lacking – refer to Chapter 3.III.A., *Lacking Criteria to Open Investigation*, of this manual) or a determination entered.

After approval from the Program Manager, the Investigator must administratively close the complaint in OIS. A reason for closure will be included in the casefile. The Investigator will enter information into OIS as follows:

- a. Log into OIS using the following link: <https://ois.dol.gov/saml/discovery?entityID=urn%3Agov%3Adol%3ASAML%3A2.0.profiles%3Aasp%3Aaso%3Aosha%3Aprod-ois&returnIDParam=idp>;
- b. Click the “State Login” button and sign in.



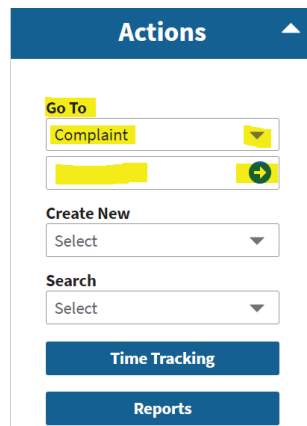
ois OSHA Information System

Welcome to OIS

Please select the agency your login credentials belong to. You will be rerouted to the correct login portal.

[Federal Login](#) [State Login](#)

- c. In the “Actions” box, click the dropdown arrow in the “Go To” field and select “Complaint.” Enter the OIS generated complaint number and click the blue arrow.



Actions

Go To

Complaint

Create New

Select

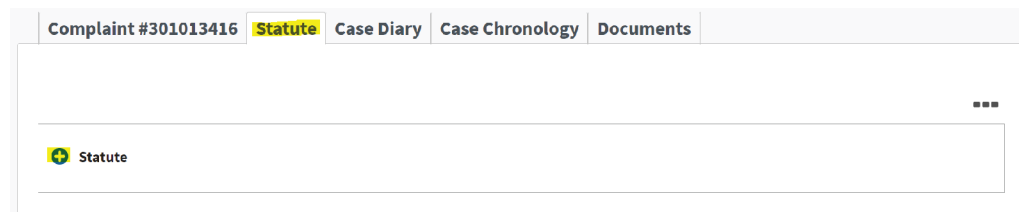
Search

Select

Time Tracking

Reports

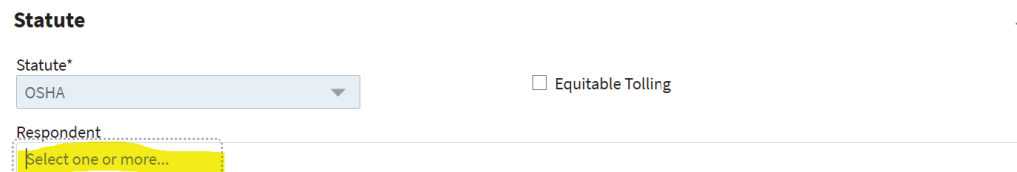
- d. Click on the “Statute” tab and click the plus sign next to “Statute.” Select “OSHA.”



Complaint #301013416 **Statute** Case Diary Case Chronology Documents

Statute

- e. In the Respondent field, click on the box and choose the Respondent related to the complaint.



Statute

Statute*

OSHA

☐ Equitable Tolling

Respondent

select one or more...

- f. In the “Allegation Summary” field, enter a brief narrative of prima facie allegations (protected activity, knowledge of protected activity, adverse action and nexus).

NOTE: Do not use acronyms for complainant (CP), respondent (RP), employer (ER) and employee (EE).

Statute

Statute*

OSHA

☐ Equitable Tolling

Respondent

Select one or more...

+ Protected Activity

Allegation Summary*

[Redacted]

Alleged Regulatory Violation

- g. Click on the plus sign next to “Protected Activity.”

+ Protected Activity

Allegation Summary*

[Redacted]

Alleged Regulatory Violation

- h. Using the dropdown arrow in the “Protected Activity” field, select the most relevant alleged protected activity. Enter the date of alleged protected activity. Click on green checkmark on bottom right-hand side.

Protected Activity

Protected Activity*

Complaint with management

Date*

11-11-2022

Time

hh:mm

Employer Knowledge

Select

Nexus

Select one or more...

Notes

[Redacted]

Conclusion

[Redacted]



NOTE: Additional allegations of protected activity may be added using the “Add” button in the protected activity field.

- i. Click the “Save” button on the left-hand side of the screen.

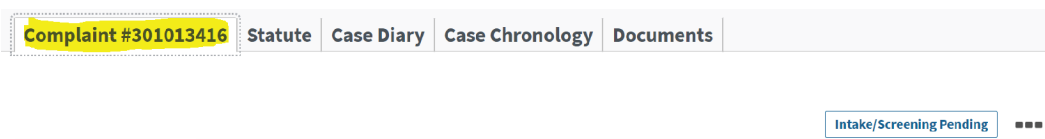
Statute - OSHA

Save

Help Text ☒

This form has unsaved data. Please click on Save

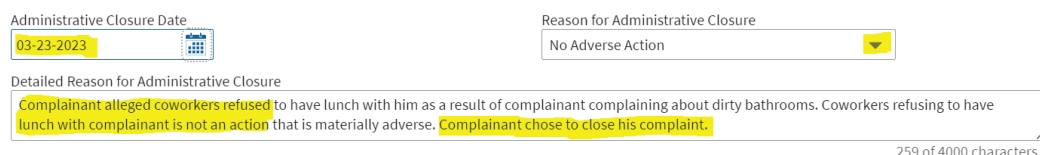
- j. A “Successful” message will temporarily pop-up on the upper left-hand side of the screen.
- k. Click on the first tab that contains the Complaint number.



- l. Click on the “Complaint Info & Action” button.

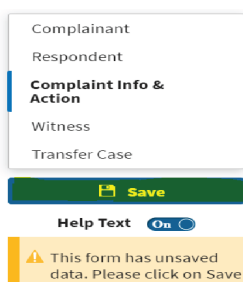


- m. Towards the bottom of the “Complaint Info & Action” field, enter the “Administrative Closure Date,” the “Reason for Administrative Closure” (using the dropdown arrow), and the “Detailed Reason for Administrative Closure.” The reason should include that the complainant chose to close or withdraw the complaint.



NOTE: The administrative closure date is the date the *Withdrawal Letter* is mailed/emailed to the complainant. NOTE: All settlements, even those where the settlement terms include withdrawal of the complaint, must be entered as settled into OIS under the “Determination” section. Do not undocket and administratively close a settled case in OIS – doing so will result in incorrect settlement statistics.

- n. Click the “Save” button on the left-hand side of the screen.



- o. Click on the ellipsis on the top right-hand side and select “Admin Close.”

The screenshot shows a form with fields for 'Complainant' and 'Respondent'. At the top right, there is a status box labeled 'Intake/Screening Pending' with an ellipsis icon. A dropdown menu is open, showing options: 'Admin Close' (highlighted in yellow), 'Docket', 'Case Summary', 'Delete', and 'Exit'.

- p. The box next to the ellipsis will now show “Admin Closed.”

The screenshot shows the same form as before, but the status box now displays 'Admin Closed' in yellow text next to the ellipsis icon.

- q. Click on the ellipsis again and select “Case Summary.”

The screenshot shows the form with the 'Admin Closed' status. A dropdown menu is open, showing options: 'Undo Admin Close', 'Case Summary' (highlighted in yellow), and 'Exit'.

- r. A summary of the case will generate. Click on the ellipsis and select “Print.” Save the summary as a pdf in the casefile’s OIS Summary folder (located in 1AADMINISTRATIVE folder) in the casefile.

The screenshot shows a new screen titled 'Complaint Case Summary #301013416'. It has tabs for 'Complaint #301013416', 'Statute', 'Case Diary', 'Case Chronology', and 'Documents'. A dropdown menu is open, showing options: 'Print' (highlighted in yellow), 'Details', 'Copy Complaint', and 'Exit'.

2. UOSH’s Internal Database. After approval from the Program Manager, the Investigator must administratively close the complaint in UOSH’s Internal Database. A reason for closure will be included in the casefile. The Investigator will enter information into UOSH’s Internal Database as follows:
 - a. Open the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet);
 - b. Scroll to the row containing the case information;
 - c. Enter the Protected Activity Date, Adverse Action Date, and Allegation Summary if not entered previously;
 - d. Enter the First Contact with Complainant Date (date contact was first attempted via phone, email, etc., whether successful or not);

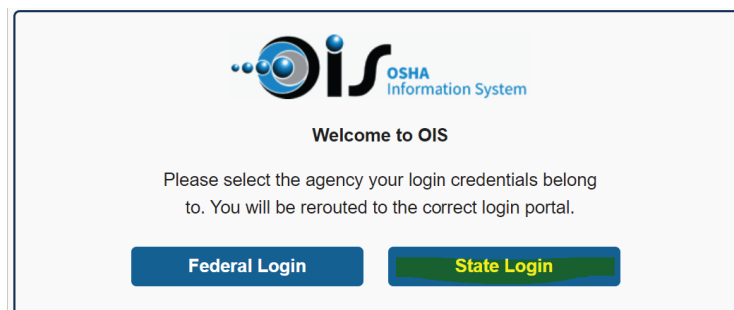
- e. Enter the *Prima Facie* Evaluation Completion Date;
- f. Enter the Withdrawal Approval Date – the date the Program Manager signs the PFE;
- g. Enter the *Withdrawal Letter* Sent Date;
- h. Leave the investigation fields (blue) and investigation order fields (orange) blank;
- i. Enter the administrative closure reason in the Notes field;
- j. Enter the following closed code in the Closed Code column, replacing “20XX” with the fiscal year in which the closure occurred: AW20XX = Withdrawn
- k. Save the file.

C. Investigation Opened or Complaint Docketed and Dismissed.

1. OIS.

The term “to docket” means to record the case in OIS and to formally notify both parties in writing of UOSH’s receipt of the complaint and UOSH’s intent to either investigate the allegations or, where a prima facie case is lacking and the complainant does not withdraw the complaint, dismiss the complaint via an order. The Investigator must docket the complaint in OIS within one (1) business day of the Program Manager’s approval of opening a whistleblower investigation/dismissing the complaint as indicated on the PFE and as follows:

- a. Log into OIS using the following link: <https://ois.dol.gov/saml/discovery?entityID=urn%3Agov%3Adol%3ASAML%3A2.0.profiles%3Aasp%3Aasosha%3Aprod-ois&returnIDParam=idp>.
- b. Click the “State Login” button and sign in.



- c. In the “Actions” box, click the dropdown arrow in the “Go To” field and select “Complaint.” Enter the OIS generated complaint number and click the blue arrow.

Actions ▲

Go To

Complaint
▼

[Redacted]
➔

Create New

Select
▼

Search

Select
▼

Time Tracking

Reports

- d. Click on the “Statute” tab and click the plus sign next to “Statute.” Select “OSHA.”

Complaint #301013416
Statute
Case Diary
Case Chronology
Documents

+ Statute

- i. In the Respondent field, click on the box and choose the Respondent related to the complaint.

Statute ▲

Statute*

OSHA

☐ Equitable Tolling

Respondent

select one or more...

- ii. In the “Allegation Summary” field, enter a brief narrative of prima facie allegations (protected activity, knowledge of protected activity, adverse action and nexus).

NOTE: Do not use acronyms for complainant (CP), respondent (RP), employer (ER) and employee (EE).

Statute

Statute*
 OSHA ▼

☐ Equitable Tolling

Respondent
 Select one or more...

+ Protected Activity

Allegation Summary*
 [Redacted]

Alleged Regulatory Violation
 [Redacted]

iii. Click on the plus sign next to “Protected Activity.”

+ Protected Activity

Allegation Summary*
 [Redacted]

Alleged Regulatory Violation
 [Redacted]

- Using the dropdown arrow in the “Protected Activity” field, select the most relevant alleged protected activity. Enter the date of alleged protected activity. Click on green checkmark on bottom right-hand side.

Protected Activity

Protected Activity*
 Complaint with management ▼

Date*
 11-11-2022 [Calendar Icon]

Time
 hh:mm

Employer Knowledge
 Select ▼

Nexus
 Select one or more...

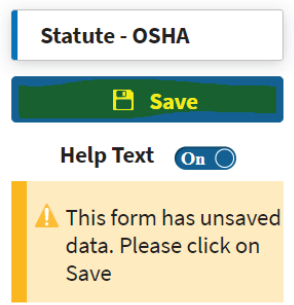
Notes
 [Redacted]

Conclusion
 [Redacted]

NOTE: Additional allegations of protected activity may be added using the “Add” button in the protected activity field.

- iv. Click the “Save” button on the left-hand side of the screen.



Statute - OSHA

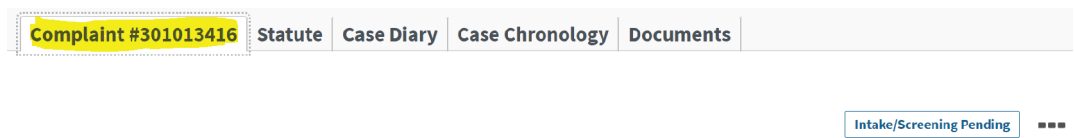
Save

Help Text ☒

⚠ This form has unsaved data. Please click on Save

- A “Successful” message will temporarily pop-up on the upper left-hand side of the screen.

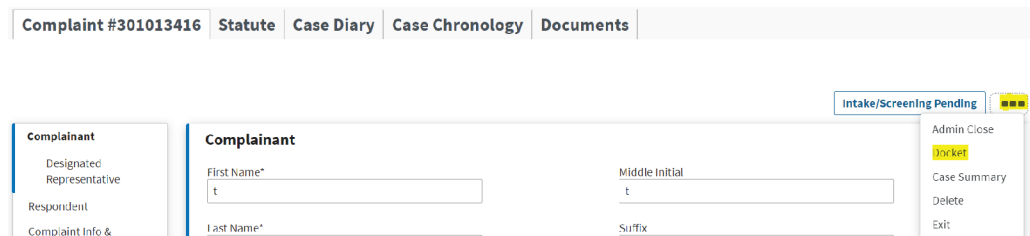
- e. Click on the first tab that contains the Complaint number.



Complaint #301013416 Statute Case Diary Case Chronology Documents

Intake/Screening Pending

- i. Click on the ellipsis on the right-hand side of screen and select “Docket.”



Complaint #301013416 Statute Case Diary Case Chronology Documents

Intake/Screening Pending

Complainant

Designated Representative

Respondent

Complaint info &

Complainant

First Name* t Middle Initial t

Last Name* Suffix

Admin Close

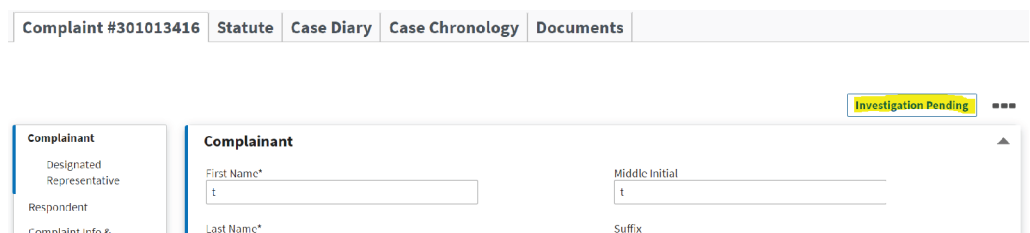
Docket

Case Summary

Delete

Exit

- ii. A “Successful” message will temporarily pop-up on the upper left-hand side of the screen and the status of the complaint will now show “Investigation Pending.”



Complaint #301013416 Statute Case Diary Case Chronology Documents

Investigation Pending

Complainant

Designated Representative

Respondent

Complaint info &

Complainant

First Name* t Middle Initial t

Last Name* Suffix

- iii. Click on the dropdown arrow in the Complaint Info & Action field.

Investigation Pending

Complainant

Respondent

Complaint Info & Action

Witness

Transfer Case

RFR - Appeal

- In the “Docket Date” field, enter the date the Program Manager signed the PFE, approving either docketing and opening an investigation or docketing and dismissing with an order of dismissal.

Investigation Dates

Docket Date*
03-22-2023

Witness Interviews Completed
mm-dd-yyyy

Case Submitted to Supervisor
mm-dd-yyyy

RSI/Manager Approval
mm-dd-yyyy

Case Returned from RSOL
mm-dd-yyyy

Complainant Interview Statement Taken

mm-dd-yyyy

Closing Conference

mm-dd-yyyy

Initial Investigator Recommendation

Select

Case Sent to RSOL for Advice/Review

mm-dd-yyyy

Case Accepted by RSOL

Select

- Click the “Save” button on the left-hand side of the screen.

Complainant

Respondent

Complaint Info & Action

Witness

Transfer Case

RFR - Appeal

Save

Help Text ☒

- A “Successful” message will temporarily pop-up on the upper left-hand side of the screen.

2. UOSH's Internal Database.

UOSH's internal database must be updated within one (1) business day after the Program Manager assigns the Investigator to either open an investigation or dismiss the complaint via an order. The Investigator must enter the following information in the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet):

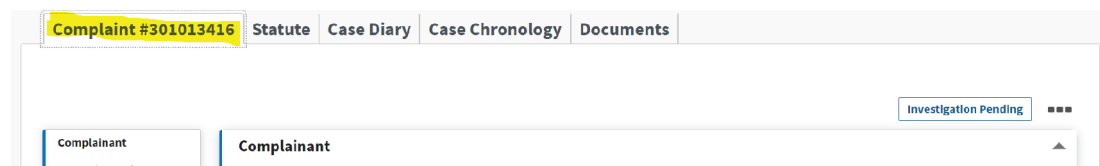
- a. Date Investigator Assigned;
- b. Investigation Opened Date (Date PFE is signed – also means docket date); and
- c. Opening Notices Sent Date (Date *Notification of Investigation Letters* are mailed to parties).

D. Order of Findings/Dismissal.

1. OIS.

Where an order is issued, the Investigator must update OIS with UOSH's findings/dismissal within one (1) business day of the date the Director or designee signs the order.

- a. Click the "Complaint #" Tab.



- b. Click the dropdown arrow in the "Complaint Info & Action" field and enter information into the "Investigation Dates" section as follows:
 - i. "Complainant Interview Statement Taken" – enter the date the Investigator took the complainant's interview statement;
 - ii. "Closing Conference" – enter the date the Investigator held a closing conference with the complainant (finding of non-merit) or respondent (finding of merit);NOTE: A closing conference will be held by the Investigator after the Program Manager approves and signs the ROI.
 - iii. "Case Submitted to Supervisor" – enter the date the ROI was submitted to the Program Manager;
 - iv. "Initial Investigator Recommendation" – enter the initial recommendation by clicking on the dropdown arrow and selecting "Merit" or "Non-Merit;"
 - v. "RSI/Manager Approval" – enter the date the Program Manager signed the ROI;

Investigation Dates	
Docket Date*	Complainant Interview Statement Taken
03-22-2023	03-22-2023
Witness Interviews Completed	Closing Conference
mm-dd-yyyy	03-22-2023
Case Submitted to Supervisor	Initial Investigator Recommendation
03-22-2023	Non-Merit
RSI/Manager Approval	Case Sent to RSOL for Advice/Review
03-22-2023	mm-dd-yyyy
Case Returned from RSOL	Case Accepted by RSOL
mm-dd-yyyy	Select

- vi. Click the “Save” button on the left-hand side of the screen.

Complainant
Respondent
Complaint Info & Action
Witness
Transfer Case
RFR - Appeal

 **Save**

Help Text ☒

- vii. A “Successful” message will temporarily pop-up on the upper left-hand side of the screen.

- c. Click the "Statute" Tab and click “OSHA” within the “Statute” field.

Complaint #301013416

Statute

Case Diary

Case Chronology

Documents

+

Statute

Statute	Status	Primary	Actions
OSHA	Investigation Pending	Yes	<div>...</div>

- i. Click on the dropdown arrow in the determination field.

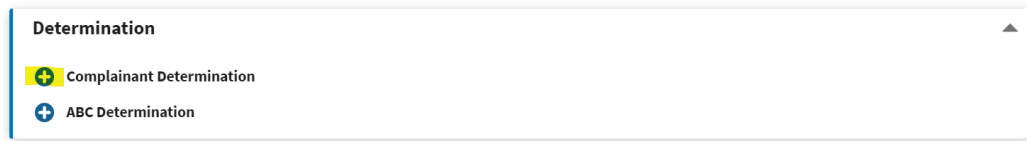
Statute - OSHA

Investigation

Determination

Remedies

- ii. Click on the plus sign next to “Complainant Determination.”



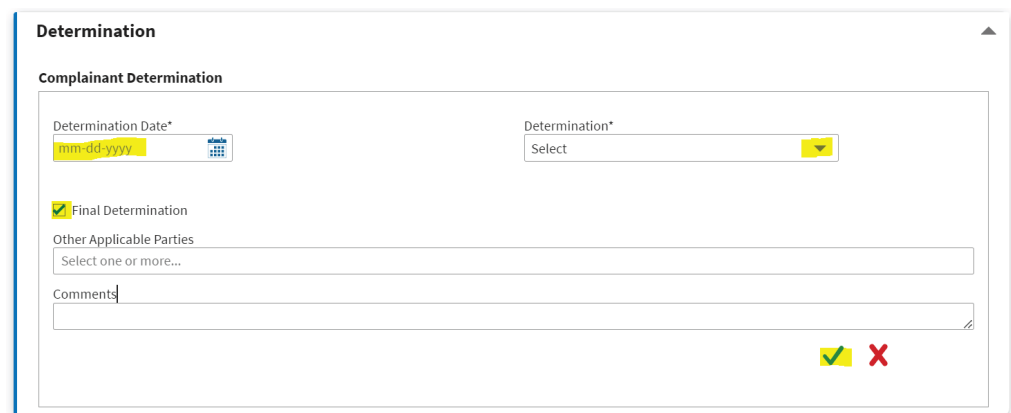
Determination

- + Complainant Determination
- + ABC Determination

- Enter the “Determination Date” (date the order is signed by the Director or designee) and the appropriate “Determination” using the dropdown menu.

NOTE: The determination of “Docket and Dismiss” will be used where an investigation was not opened and:

- There is a lack of a *prima facie* case and the complainant does not choose to withdraw the complaint; or
 - UOSH is unable to contact the complainant; or
 - The complainant is not cooperating with UOSH, for example, not scheduling an interview with the Investigator to discuss complaint or not providing requested information to determine if a *prima facie* case exists.
- Ensure the "Final Determination" box is checked.
 - Click on the green checkmark.



Determination

Complainant Determination

Determination Date*
mm-dd-yyyy

Determination*
Select

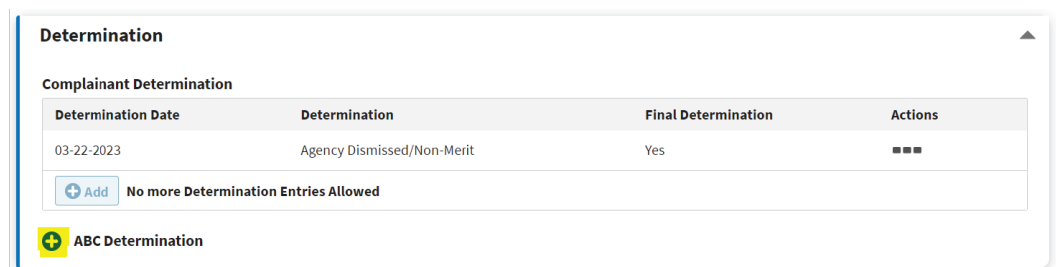
☒ Final Determination

Other Applicable Parties
Select one or more...

Comments

☐ ☒ ☐

- iii. Click on the plus sign next to “(Respondent Name) Determination.”



Determination

Complainant Determination

Determination Date	Determination	Final Determination	Actions
03-22-2023	Agency Dismissed/Non-Merit	Yes	...

+ Add No more Determination Entries Allowed

+ ABC Determination

- Enter the “Determination Date” (date the Director or designee signed the order) and the appropriate “Determination” using the dropdown menu.

NOTE: The determination of “Docket and Dismiss” will be used where an investigation was not opened and:

- There is a lack of a *prima facie* case and the complainant does not choose to withdraw the complaint; or
 - UOSH is unable to contact the complainant; or
 - The complainant is not cooperating with UOSH, for example, not scheduling an interview with the Investigator to discuss complaint or not providing requested information to determine if a *prima facie* case exists.
- Ensure the "Final Determination" box is checked.
 - Click on the green checkmark.

Determination

ABC Determination

Determination Date*

Determination*

☒ Final Determination

Comments

☒ ☐

iv. Merit Determination.

Where there is a merit determination, remedies must be entered into OIS as follows:

- Click on the dropdown arrow in the “Remedies” field;
- Click on the “Yes” bullet under “Settlement Agreement provided to OSHA” (even though it may not be a settlement agreement);
- Enter the calculated “Backpay” under the “Monetary” category;
- List other appropriate remedies in the available fields. Monetary remedies must be approved by the Director or designee.

Determination

Remedies

Settlement Agreement provided to OSHA

☒ Yes ☐ No

☐ Bilateral

Monetary

Backpay

Non-Monetary

☐ Posting of Notice

v. Click the “Save” button on the left-hand side of the screen.

Statute - OSHA

Investigation

Determination

Remedies

 **Save**

Help Text ☒

 This form has unsaved data. Please click on Save

vi. Click on the ellipsis and select “Close Case” from the dropdown menu.

Complaint #301013416 Statute Case Diary Case Chronology Documents

Statute - OSHA

Investigation

Determination

Remedies

 **Save**

Help Text ☒

Statute - OSHA

Statute* OSHA

☐ Equitable Tolling

Respondent ABC X

Protected Activity



Delete

Close Case

Exit

d. Click on the “Complaint #” tab and it will show “Case Closed” on the upper righthand side of page.

Complaint #301013416 Statute Case Diary Case Chronology Documents

Case Closed

Complainant

Designated

Complainant

e. Click on the ellipsis and select "Case Summary."

Complaint #301013613 Statute Case Diary Case Chronology Documents

Complainant Designated Representative

Complainant First Name* Middle Initial

Case Closed

Reopen Case Summary Exit

- f. Click on the ellipsis and select “Print.” Save a PDF printout to the casefile under Folder 1A - Administrative, Tab 8 – OIS Summary.

Complaint #301013613 Statute Case Diary Case Chronology Documents

Complaint Case Summary #301013613

Complainant

Print Details Copy Complaint Exit

2. UOSH’s Internal Database. The Investigator must close the complaint in UOSH’s Internal Database within one (1) business day of the date the Director or designee signs the order. The Investigator will enter information into UOSH’s Internal Database as follows:
 - a. Open the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet);
 - b. Scroll to the row containing the case information;
 - c. Ensure all investigation fields are complete (blue fields);
 - d. Enter the Date of Order (Non-Admin Closed);
 - e. Enter the Date Order Issued (Non-Admin Closed);
 - f. Enter a description of the findings/dismissal in the Notes field; and
 - g. Enter one of the following closed codes, replacing “20XX” with the fiscal year in which the closure occurred:

NM20XX = Non-Merit Finding

MT20XX = Merit Finding

AS20XX = Settlement Agreement

AA20XX = Lack of Adverse Action

AC20XX = No Contact/Cooperation

AJ20XX = Lack of Jurisdiction/Mixed Jurisdiction

AK20XX = Lack of Respondent Knowledge

AN20XX = Lack of Nexus Element

AP20XX = Lack of Protected Activity

AU20XX = Untimely

AX20XX = Screened Out

NOTE: The codes that begin with “A” denotes the cases where an investigation has not been opened and, because an order was issued, were “Docketed and Dismissed” in OIS.

h. Save the file.

E. Appeals.

1. OIS.

If a party appeals the Order of Findings, the Investigator must update the OIS with appeals information and findings within one (1) business day of the date the Investigator receives notice from Adjudication.

a. Reopen the case.

- i. Click on the “Complaint #” tab.
- ii. Click on the ellipses (upper right corner).
- iii. Select “Reopen.”

The screenshot displays the OIS system interface. At the top, there is a navigation bar with tabs: 'Complaint #301006008', 'Statute', 'Case Diary', 'Case Chronology', and 'Documents'. The 'Complaint #301006008' tab is currently selected. Below the navigation bar, there is a sidebar on the left with two main sections: 'Complainant' and 'Respondent'. The 'Complainant' section is active, showing fields for 'First Name*' and 'Middle Initial'. To the right of the main content area, there is a dropdown menu that is open, showing three options: 'Reopen' (highlighted in yellow), 'Case Summary', and 'Exit'. The 'Case Closed' button is also visible in the top right corner.

b. Click on the “Statute” tab and click on “OSHA.”

Complaint #301006008	Statute	Case Diary	Case Chronology	Documents
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Statute

Statute	Status
OSHA	Close Pending

- c. Go to the “Determination” section.
 - d. Click on the ellipsis and select “edit.”
 - e. Uncheck the “Final Determination” box.
 - f. Click the green check mark to save.
 - g. Click the “+ Add” box.
 - h. Enter the Determination Date and using the dropdown arrow, select the Determination. (NOTE – OIS dropdowns are being corrected by OSHA)
 - i. Click the green checkmark to save.
 - j. Entering Appeal Findings. When UOSH is informed of the outcome of the appeal, the Investigator will update OIS as follows:
 - i. Click on the "Determination" section and enter a new determination with the "Determination Date" as the date of Adjudication's order;
 - ii. Select the appropriate outcome from the drop-down menu and make sure the "Final Determination" box is checked then save; and
 - iii. Click the "Case Summary" Tab and print a new case summary for the casefile.
2. UOSH’s Internal Database.

If a party appeals an Order of Administrative Closure or an Order of Findings, the Investigator must update UOSH’s internal database with appeals information and findings within one (1) business day of the date the Investigator receives notice. The Investigator will enter information into UOSH’s Internal Database as follows:

- a. Open the *Whistleblower Tracking Sheet* (located in Google Drive (O:)/Shared drives/LC_UOSH_Whistleblower/Admin/Tracking Log/Whistleblower Tracking Sheet);
- b. Enter appeal information chronologically in the Appeal Details field (i.e., “7/31/2017 -Received notice of appeal to Adjudication; 12/3/2017 – Received notice of ALJ’s

non-merit finding; 1/15/2018 – Received notice of appeal to Commissioner;
3/26/2018 – Received notice of Commissioner’s Merit finding.”); and

- c. Save the file.

Chapter 8

RECORD RETENTION & INFORMATION DISCLOSURE

I. Scope.

This chapter provides guidance on the retention of whistleblower casefiles and the disclosure of investigative information to the public and other government agencies.

II. Record Retention.

Investigative materials or records, including interviews, notes, workpapers, 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, must be kept in the casefile. Such documents are the property of the State of Utah and must be retained in the casefile. Under no circumstance is a UOSH employee to destroy, retain, or use investigation notes and workpapers for any private purpose. In addition, electronic casefiles must be retained for a total of ten (10) years, in accordance with the Utah Division of Archives and Records Service Retention Schedules, and thereafter deleted from the database and “destroyed.”

III. Release of Investigation Information.

If a case is open, information contained in the casefile may not be disclosed to the public. The case is considered closed after an order is issued by UOSH or the complainant withdraws his or her complaint. The issuance date of the order or the withdrawal date of the complaint will serve as the closing date of the case. After such closure, information obtained during the investigation may be disclosable or non-disclosable based on criteria established in Utah Code Ann. §63G-2, *Government Records Access and Management Act (GRAMA)*. Disclosure of investigative information to other government agencies will also be based on criteria established in the GRAMA. Requests for release of investigation information shall be directed to the Director or designee; the Commission’s designated and certified records officer processes such requests and is responsible for ensuring records are disclosed in accordance with GRAMA requirements.

IV. Classified and Trade Secret Information.

Any classified or trade secret information and/or personal knowledge of such information by UOSH personnel shall be handled in accordance with Utah Code Ann. §34A-6-306 and UAC R614-1-6.I. Trade secrets are matters that are not of public or general knowledge. A trade secret, as referenced in Utah Code Ann. §34A-6-306, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. The collection of such information and the number of personnel with access to it shall be limited to the minimum necessary for the conduct of investigative activities.

A. Preserving Confidentiality.

It is essential to the effective enforcement of the Utah OSH Act that Investigators and all UOSH personnel preserve the confidentiality of all information and investigations which might reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless after following proper procedures, including consulting with the AAG, UOSH determines the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, video recordings and documentation forms, shall be labeled as “confidential-trade secret” in accordance with UAC R614-1-6.I.2.

B. Disclosure.

Under Utah Code Ann. §34A-6-306 and UAC R614-1-6.I., all information reported to or obtained by the Director or the Director’s representatives or any employee in connection with any inspection or other activity which contains or may reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other UOSH officials concerned with the enforcement of the Utah OSH Act or, when relevant, in any proceeding under the Utah OSH Act.

C. Respondent Refusal.

If the employer objects to the taking of photographs and/or video because trade secrets would or may be disclosed, Investigators should advise employers of protection against such disclosure afforded by Utah Code Ann. §34A-6-306 and UAC R614-1-6.I. If the employer still objects, Investigators shall contact the Director or designee for guidance.

Chapter 9

RESERVED