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# **Whistleblower (Discrimination) Investigations Manual**

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**New Jersey Office of Public Employees  
Occupational Safety and Health**

**(PEOSH )**

# PEOSH INSTRUCTION

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| <b>DIRECTIVE NUMBER:</b> PEOSH 02-03-003                             | <b>EFFECTIVE DATE:</b> 09/18/2012 |
| <b>SUBJECT:</b> WHISTLEBLOWER (DISCRIMINATION) INVESTIGATIONS MANUAL |                                   |

## ABSTRACT

**Purpose:** This manual outlines procedures, and other information relative to the handling of retaliation complaints under the Public Employees Occupational Safety and Health Act (PEOSH Act), N.J.S.A. 34:6A-45 and may be used as a ready reference.

**Scope:** New Jersey Public Employees.

### References:

Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq.

Occupational Safety and Health Procedural Standards for Public Employees, N.J.A.C. 12:110

The federal whistleblower provisions of the following statutes:

- Occupational Safety and Health Act (OSHA 11(c)), 29 U.S.C. §660(c);
- Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109;
- National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142;

29 CFR Part 1982 – Interim Final Rule, Procedures for the Handling of Retaliation Complaints under the National Transit Systems Security Act and the Federal Railroad Safety Act

PEOSH Field Operations Manual (FOM), 03/08/2012

OSHA Instruction CPL 02-02-072, Rules of agency practice and procedure concerning OSHA access to employee medical records, August 22, 2007

OSHA Instruction CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993

**Cancellations:** OSHA Instruction DIS 0-0.9, Whistleblower Investigations Manual, August 22, 2003; and OSHA Instruction DIS .7, Referral of Section 11(c) Complaints to “State Plan” States, February 27, 1986.

**State Impact:** Notice of Intent, Adoption, and Submission of a Plan Change Supplement. See Chapter 1, paragraph VI.

**Action Offices:** New Jersey Office of Public Employees Occupational Safety and Health

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## **Executive Summary**

The Federal OSHA Instruction DIS 0-0.9, Whistleblower Investigations Manual, dated August 22, 2003, provided guidance for investigating complaints of retaliation in conjunction with the Occupational Safety and Health Procedural Standards for Public Employees, N.J.A.C. 12:110, SUBCHAPTER 7 – Discrimination Against Employees. As of September 20, 2011, Federal OSHA has cancelled Instruction DIS 0-0.9 and replaced it with Directive Number CPL 02-03-003 in order to accommodate new federal governed statutes. Other changes and enhancements have also been incorporated into the new federal directive. Because of these changes, the Office of Public Employees Occupational Safety and Health (OPEOSH) has adopted this instruction manual that establishes investigation procedures for discriminatory acts against public employees in accordance with N.J.A.C. 12:110-7 and N.J.S.A. 34:6A-45. This investigation manual satisfies the OPEOSH state plan requirement for occupational safety and health discrimination protection to be at least as effective as the federal 11(c) policies.

## **Significant Changes**

- There is potential overlapping coverage for public employees under the Federal Railroad Safety Act and the National Transit Systems Security Act. Because of this potential overlap in coverage, this manual includes the statutes for reference and the purpose of advising complainants of their options for filing either with the OPEOSH state plan or Federal OSHA.
- Investigation procedures and report format will mirror the new federal directive except as modified in this instruction in accordance with New Jersey statutes and codes to the extent that this instruction manual shall be at least as effective as the Federal OSHA requirement.
- This instruction incorporates the federal changes in procedures for release of records from discrimination investigations for public disclosure as allowed to the extent of the law without violating individual privacy rights in accordance with the New Jersey Open Public Records Act (OPRA).
- This instruction clarifies that discrimination complaints under the PEOSH Act may be filed orally or in writing, and in any language. These complaints may be submitted via mail, fax, or email.
- This instruction contains an expanded discussion of causation, burdens of proof, and the elements of a violation.
- This instruction specifies that the Investigator must attempt to interview the complainant(s) in all cases.
- This instruction renames the Final Investigation Report (FIR) to the Report of Investigation (ROI), to be consistent with Federal OSHA format, and for the purpose of streamlining the report-writing process to eliminate redundancy.
- This instruction specifies that interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes.

## **Disclaimer**

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

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# **Chapter 1**

## **PRELIMINARY MATTERS**

### **I. Purpose**

This Instruction implements the Office of Public Employees Occupational Safety and Health (OPEOSH) Whistleblower Investigations Manual, and supersedes the August 22, 2003 Instruction that was previously used as a guidance document in conjunction with the Occupational Safety and Health Procedural Standards for Public Employees, N.J.A.C. 12:110-7. This manual outlines procedures, and other information relative to the handling of retaliation complaints under the Public Employees Occupational Safety and Health Act, 34:6A-45 and may be used as a ready reference.

### **II. Scope**

New Jersey Public Employees Occupational Safety and Health State Plan.

### **III. References**

The whistleblower provisions of the following statutes: Occupational Safety and Health Act (OSHA 11(c)), 29 U.S.C. §660(c); Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109; National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142; 29 CFR Part 1982 – Interim Final Rule, Procedures for the Handling of Retaliation Complaints under the National Transit Systems Security Act and the Federal Railroad Safety Act.

PEOSH's Field Operations Manual (FOM).

OSHA Instruction CPL 02-02-072, Rules of agency practice and procedure concerning OSHA access to employee medical records, August 22, 2007.

OSHA Instruction CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993.

### **IV. Cancellations**

- A. OSHA Instruction DIS 0-0.9, Whistleblower Investigations Manual, August 22, 2003.
- B. OSHA Instruction DIS .7, Referral of Section 11(c) Complaints to "State Plan" States, February 27, 1986.

### **V. Action Information**

#### **A. Responsible Office**

New Jersey Office of Public Employees Occupational Safety and Health (OPEOSH)

## **VI. State Impact**

### **A. Notice of Intent, Adoption, and Submission of a Plan Change Supplement are Required**

This PEOSH Whistleblower Investigations Manual incorporates federal program changes as applicable for public employee jurisdiction only and establishes procedures for the investigation of whistleblower complaints including several important new federal requirements. The State Plans requires that the OPEOSH shall have statutory authority parallel to section 11(c) of the OSH Act. The OPEOSH has established as a part of its state plan, policies and procedures for occupational safety and health discrimination protection (analogous to federal protections under section 11(c) in Chapters 1-7 of this manual) that are at least as effective as the federal 11(c) policies. This instruction manual also provides for the implementation of a referral/deferral policy established in Chapter 7.

### **B. Appeal Process**

The OPEOSH has included in its policies and procedures manual and other implementing documents, a procedure for appeal of an initial discrimination case determination which is at least as effective as the Federal procedures. Chapter 4, paragraph VI.A., of this Instruction in accordance with N.J.A.C. 12:110-7.7(g) and 7.8, provides that complainants are afforded the opportunity for reconsideration of an initial negative determination. Complainants will be required to exhaust this remedy before Federal OSHA will accept a Complaint About State Program Administration (CASPA) regarding a discrimination case filed only with the OPEOSH.

### **C. Dual Filing vs. Overlapping Coverage**

The OPEOSH state plan coverage is for public employees only as defined in the PEOSH Act, N.J.S.A. 34:6A-25 et seq. There is no provision for public employee coverage under Federal OSHA jurisdiction. Because Federal OSHA has jurisdiction over private employers, there are no provisions for public employees to file a concurrent discrimination complaint (Dual Filing) under section 11(c) with Federal OSHA.

However, there may be instances where this could potentially occur where public employees in New Jersey have potential overlapping coverage under certain federal statutes. There are two federal acts where overlapping jurisdiction can occur as follows: 1) the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109; and 2) the National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142. In these instances, the complainant must choose one election of remedy. There is no provision for a public employee to file under both federal and state statutes.

### **D. Reopening cases**

The OPEOSH maintains the authority, through the PEOSH Act, to reopen an investigation of a PEOSH discrimination complaint upon the discovery of new

facts in a closed case provided the statutory filing time requirements have been met. This includes the authority for the Commissioner of NJLWD to exercise the provisions of N.J.A.C. 12:110-7.8(c) to adopt, reject, or modify the recommended report and decision of an Administrative Law Judge from an appeal hearing at the Office of Administrative Law.

#### **E. Referrals**

In addition to section 11(c) of the OSHA Act, Federal OSHA administers, at the time of this publication, 20 other whistleblower statutes. These 20 statutes are administered solely by Federal OSHA. The OPEOSH state plan defers to Federal OSHA directive CPL 02-03-003 (Whistleblower Investigations Manual) as a reference to the full listing of those statutes for the purpose of distinguishing complaints falling under the jurisdiction of Federal OSHA and making the appropriate referrals. All referrals from the OPEOSH shall be made to the Region 2 Federal OSHA Regional Office.

#### **F. Action**

States must provide notice of their intent within 60 days to adopt either policies and procedures identical to those set out in this directive or at least as effective alternative policies and procedures. State policies and procedures must be adopted within 6 months of issuance of this Instruction. Each state must: 1) submit a copy of its revised procedures as a plan change supplement to OSHA within 60 days of adoption, in electronic format, together with a comparison document identifying the differences from the Federal manual and the rationale for equivalent effectiveness; and 2) either post its different policies on its state plan website and provide the link to OSHA or provide information on how the public may obtain a copy. OSHA will provide summary information on the state responses to this instruction on its website.

NJ OPEOSH Action as follows:

11/21/2011 – OPEOSH State Plan notification to adopt federal policies and procedures with modifications.

03/20/2012 – OPEOSH State Plan adoption of PEOSH policies and procedures.

10/15/2012 – OPEOSH State Plan posting of PEOSH policies and procedures / provision on the NJLWD PEOSH web link.

### **VII. Significant Changes**

#### **A. General**

Two federal statutes are included within this instruction due to the potential overlapping jurisdiction by the PEOSH Act. The FRSA and the NTSSA are provided as a reference for the purpose of differentiating the jurisdictional coverage between these two statutes and the PEOSH Act. When a circumstance arises and

there is an overlapping jurisdiction, the Investigator must inform the complainant of their filing options. The complainant can only file under one statute as there is no provision to file concurrently under both jurisdictions.

**B. Chapter 1. Preliminary Matters.**

1. Chapter 1, section X: Incorporates the federal changes in procedures for handling Privacy Act files for discrimination investigations. This section provides that throughout the investigation, the OPEOSH will provide to the complainant a copy of the respondent's submissions to OPEOSH redacted if necessary, in accordance with applicable confidentiality laws.

**C. Chapter 2. Intake and Evaluation of Complaints.**

1. Chapter 2, paragraph II: Clarifies that discrimination complaints under the PEOSH Act may be filed orally, or in writing (including email submissions), and in any language. This section is in alignment with OSHA's longstanding practice to reduce all orally-filed complaints to writing. The clarifications in this section are being made to ensure that all complainants have equal access to the complaint process.
2. Chapter 2, paragraph II.A: Clarifies that the PEOSH Discrimination Complaint form is to be used for recording new discrimination complaints.
3. Chapter 2, paragraph III.A: Specifies that as a part of the intake process, the Supervisor will verify that applicable coverage requirements have been met and that the *prima facie* elements of the allegation have been properly identified.
4. Chapter 2, paragraph III.B.3: Specifies that notification letters to the complainant may either be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation), or may be hand-delivered to the complainant.

**D. Chapter 3. Conduct of the Investigation.**

1. Chapter 3, sections V and VI.A: Contain an expanded discussion of causation, burdens of proof, and the elements of a violation.
2. Chapter 3, section VI.B.2: Clarifies the procedures for processing complaint amendments.
3. Chapter 3, section VI.C: Removes the prior requirement that all recordings must be transcribed if they are to be used as evidence, and clarifies the procedures for digitally recording investigative interviews.
4. Chapter 3, section VI.D: Specifies that the Investigator must attempt to interview the complainant in all cases.

5. Chapter 3, section VI.F: Offers expanded guidance on dealing with uncooperative respondents and clarifies the procedures for issuance of administrative subpoenas during whistleblower investigations.
6. Chapter 3, section VI.H: Removes the former requirement that a signed statement be obtained from each relevant witness, but retains the requirement that the Investigator must attempt to interview each relevant witness.

**E. Chapter 4. Case Disposition.**

1. Chapter 4 provides details on determinations, case dismissal, Orders to Comply, and the appeal process.

**F. Chapter 5. Documentation and Commissioner's Determination.**

1. Chapter 5, section IV.B: Renames the Final Investigation Report (FIR) to the Report of Investigation (ROI), to be consistent with the terminology used by Federal OSHA, and streamlines the report-writing process to eliminate redundancy in report-writing. Use of the ROI is intended to afford greater flexibility to the Regions in documenting the investigation in the manner most appropriate to each case.
2. Chapter 5, section V: Offers expanded guidance on the content of, and procedures for issuing the Commissioner's determination.
3. Chapter 5, paragraph V.B.1: Requires that the Commissioner's determination be issued in all dismissals of complaints investigated under the PEOSH Act for discrimination against public employees.
4. Chapter 5, Paragraph VII: Adds a new section on documenting key dates in OSHA's Integrated Management Information System (IMIS) case tracking system. The OPEOSH state plan enters all discrimination complaints received onto the IMIS.

**G. Chapter 6. Remedies and Settlement Agreements.**

1. Chapter 6, section II: Lists the various remedies available under the PEOSH Act.
2. Chapter 6, paragraph II.E: Specifies that an award of reasonable attorney's fees must be made where authorized.
3. Chapter 6, paragraph II.F: Specifies that interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes.
4. Chapter 6, section IV.E: Details expanded procedures for review and approval of settlement agreements.

5. Chapter 6, section V: Offers expanded guidance for the use of bilateral settlements.
6. Chapter 6, section V: Indicates that payment in PEOSH settlements should be made in the form of a certified or cashier's check to the complainant.

**H. Chapter 7. Section N.J.S.A. 34:6A-45, Discriminatory Acts Against Employees**

Chapter 7, section V: Clarifies the OPEOSH state plan referral process and PEOSH non-jurisdiction of private employers which negates the potential of dually-filed complaints with Federal OSHA.

**VIII. Background**

- A. The New Jersey Public Employees Occupational Safety and Health Act, N.J.A.C. 34:6A-25 et seq. declares:
  - a. "That it is the policy of this state to ensure that all public employees be provided with safe and healthful work environments free from recognized hazards"
  - b. "That it is the responsibility of the state to promulgate standards for the protection of the health and safety of its public workers"
- B. "That it is in the public interest for public employers and public employees to join in a cooperative effort to enforce these standards." The PEOSH Act provides, among other things, for the adoption of Federal occupational safety and health standards. In addition, the state may adopt more stringent standards which include: research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. The PEOSH Act also provides for the administration of the PEOSH Act, proceedings initiated by the New Jersey Department of Labor and Workforce Development, review proceedings before an independent quasi-judicial agency (Public Employees Occupational Safety and Health Review Commission), and judicial review.
- C. Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the PEOSH Act. Moreover, effective implementation of the PEOSH Act and achievement of its goals depend in large measure upon the active and orderly participation of employees, individually and through their representatives, at every level of safety and health activity. Such participation and employee rights are essential to the realization of the fundamental purposes of the PEOSH Act.
- D. N.J.S.A. 34:6A-45(a) of the PEOSH Act provides, in general, that no person shall discharge or in any manner discriminate (retaliate) against any employee because the employee has exercised rights under the Act. The OPEOSH has overall responsibility for the investigation of retaliation complaints under the PEOSH Act. This responsibility includes the authority to dismiss non-meritorious complaints (absent withdrawal), approve acceptable withdrawals, and negotiate settlement of



meritorious complaints or issue an Order to Comply for a violation of the PEOSH Act that includes a requirement of remedy as abatement.

## **IX. Functional Responsibilities**

### **A. Responsibilities.**

- 1. Commissioner of Labor and Workforce Development.** The Commissioner through his designee, upon receipt of a discrimination, shall cause an investigation to be made as in accordance with the PEOSH Act and OPEOSH state plan procedures. If upon that investigation, the Commissioner or his designee, determines that the provisions of N.J.S.A. 34:6A-45 have been violated, he shall notify the employer and the employee of his determination, which shall include an order for all appropriate relief. That notice shall become the Commissioner's final determination unless within 15 days of receipt of the notice, the employer or employee requests a hearing before the Commissioner or his designee, in which case the Commissioner shall issue his final determination not more than 45 days after the hearing report is issued.
- 2. Chief/Assistant Chief (Supervisor).** The Chief, through the Assistant Chief(s) has overall responsibility for all discrimination investigations and outreach activities, as well as for ensuring that all PEOSH personnel, especially compliance safety and health officers (CSHOs), have a basic understanding of the rights afforded to employees under the PEOSH Act enforced by the OPEOSH and are trained to take discrimination complaints via the PEOSH Discrimination Complaint Form.

Under the guidance and direction of the Commissioner or his or her designee, the Chief/Assistant Chief(s) is responsible for implementation of policies and procedures and for the effective supervision of field discrimination investigations, including the following functions:

- a. Receiving discrimination complaints and promptly transmitting them to the OPEOSH Supervisor, and/or the Investigator. The Supervisor may receive discrimination complaints directly from complainants or from Federal OSHA referrals regarding public employee jurisdiction, Investigators, CSHOs, or other persons.
- b. Ensuring that safety or health ramifications are identified during complaint intake and, when necessary, making referrals to the appropriate office or agency when not under the jurisdiction of the PEOSH Act.
- c. Assigning discrimination cases to individual Investigators.
- d. As needed, investigating or conducting settlement negotiations for cases that are unusual or of a difficult nature.
- e. Providing guidance, assistance, supervision, and direction to Investigators during the conduct of investigations and settlement negotiations.

- f. Reviewing investigative reports for comprehensiveness and technical accuracy.
- g. Coordinating and maintaining liaison with Federal OSHA and other governmental agencies regarding whistleblower program-related matters within the region.
- h. Recommending to the Commissioner and the OPEOSH changes in policies and procedures in order to better accomplish agency objectives.
- i. Developing outreach programs and activities.
- j. Providing training (formal and field) for Investigators.
- k. Performing necessary and appropriate administrative and personnel actions such as performance evaluations.
- l. Performing other special duties and representing the OPEOSH to other agencies at the Commissioner's discretion.

**3. Investigator.** Under the direct guidance and ongoing supervision of the Chief/Assistant Chief(s) (Supervisor), the Investigator assumes the following responsibilities:

- a. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
- b. Reviewing investigative and/or enforcement case files in field offices for background information concerning any other proceedings that relate to a specific complaint. As used in this manual, an "enforcement case" refers to an inspection or investigation conducted by an OPEOSH Compliance Safety and Health Officer (CSHO).
- c. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
- d. Following up on leads resulting from interviews and statements.
- e. Interviewing and obtaining statements from respondents' officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
- f. Applying knowledge of the legal elements and evaluating the evidence revealed, analyzing the evidence, and recommending appropriate action to the Supervisor.
- g. Composing draft Determinations for review by the Director, Chief or Assistant Chief.

- h. Negotiating with the parties in merit cases to obtain a settlement agreement that provides prompt resolution and satisfactory remedy and negotiating with the parties when they are interested in early resolution of any case in which the Investigator has not yet recommended a determination.
- i. Monitoring implementation of settlement agreements, compliance with Orders to Comply, the Commissioner's final determination for appeals hearing decisions upon return from the Office of Administrative Law, determining specific actions necessary and the sufficiency of action taken or proposed by the respondent. If necessary, recommending that legal advice be sought on whether further legal proceedings are appropriate to seek enforcement of such settlement agreements or orders.
- j. Assisting and acting on behalf of the Chief/Assistant Chief in discrimination matters with other public employer agencies, or the Federal OSHA Regional/Area Offices, and with the general public to perform outreach activities.
- k. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings as required.
- l. Maintaining case files that include some or all of these elements.

**4. OPEOSH Whistleblower (Discrimination) Protection Program.** Under the direction of the Commissioner, the OPEOSH Whistleblower Protection Program performs the following functions, in addition to others that may not be listed:

- a. Developing policies and procedures for the Whistleblower Protection Program.
- b. Transferring appeals requests to the Office of Administrative Law for hearings in accordance with N.J.A.C. 12:110-7.8(a).
- c. Developing and presenting formal training for OPEOSH whistleblower (discrimination) Investigators.
- d. Providing technical assistance to OPEOSH whistleblower investigative staff, obtaining legal interpretations relevant to the OPEOSH state plan whistleblower program, relevant federal statutes that have overlapping jurisdiction (FRSA and NTSSA), and disseminating those legal interpretations to OPEOSH whistleblower investigative staff.
- e. Maintaining a law library of legal cases and decisions pertinent to PEOSH discrimination investigations. Sharing significant legal developments with OPEOSH whistleblower Investigators.

- f. Maintaining a statistical database on whistleblower investigations.
- g. Assisting in commenting on legislation on whistleblower matters as required.
- h. Processing and reviewing significant discrimination cases.
- i. Maintaining PEOSH Whistleblower (discrimination) Protection Program Web pages on the OPEOSH Internet websites.
- j. Acting as liaison between the OPEOSH Whistleblower (Discrimination) Protection Program and other New Jersey public employer agencies.
- k. Supporting Federal OSHA state plan audits of case files to ensure national consistency.
- l. Assisting in the investigation of complex cases, or providing technical assistance in the investigation of such cases.
- m. Providing statistical information on whistleblower complaints to the public, both in response to informal requests and by publishing statistics on the Web.

**5. Compliance Safety and Health Officer (CSHO).** Each CSHO is responsible for maintaining a basic understanding of the employee protection provisions administered by the OPEOSH, in order to advise employers and employees of their responsibilities and rights under the PEOSH Act. Each CSHO must accurately record information about potential complaints on a PEOSH Discrimination Complaint form or record the appropriate complaint information and immediately forward it to the Chief/Assistant Chief(s). In every instance, the date of the initial contact must be recorded.

## **X. Investigative Records**

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

The disclosure of information in investigative records is governed by the Privacy Act (PA), the goal of which is to protect the privacy of individuals in whose names records are kept, and the Open Public Records Act (OPRA), the goal of which is to enable public access to government records. The guidelines below are intended to ensure that the

PEOSH Whistleblower Protection Program meets its obligations under both of these statutes.

**A. Non-public Disclosure.**

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

1. During an investigation, disclosure must be made to the respondent (or the respondent's legal counsel if respondent is represented by counsel) of the complaint and any additional information provided by the complainant that is pertinent to the resolution of the complaint. If the complaint or information provided by the complainant contains personal, identifiable information about individuals other than the complainant, such information, where appropriate, should be redacted (without listing the specific exemptions that would be used if it were released under OPRA) before disclosure to the respondent.
2. Throughout the investigation, the OPEOSH will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of the respondent's submissions to the OPEOSH that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, OPEOSH will redact them, if necessary, in accordance with applicable confidentiality laws.
3. Personal, identifiable information about individuals, other than the complainant and management officials representing the respondent, that is contained in the investigative file, such as statements taken by the OPEOSH or information for use as comparative data, such as wages, bonuses, the substance of promotion recommendations, supervisory assessments of professional conduct and ability, or disciplinary actions, should generally be withheld when such information could violate those persons' privacy rights, cause intimidation or harassment to those persons, or impair future investigations by making it more difficult for the OPEOSH to collect similar information from others.
4. In taking statements from individuals other than management officials representing the respondent, the Investigator must specifically ask if confidentiality is being requested, and must document the answer in the case file. Witnesses who request confidentiality will be advised that their identity and all of the OPEOSH's records of the interview (including interview statements, audio or video recordings, transcripts, and Investigator's notes) will be kept confidential to the fullest extent allowed by law, but that if they are going to testify in a proceeding, the statement and their identity may need

to be disclosed. Furthermore, they should be advised that their identity and the content of their statement may be disclosed to another Federal agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.

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

## **B. Attorney-Client Privileged Information**

1. Attorney-complainants filing a discrimination complaint under the PEOSH Act may use privileged information to the extent necessary to prove their claims, regardless of their employer's claims of attorney-client or work-product privilege. Thus, an employer who refuses to produce documents for which it claims attorney-client privilege does so at the risk of negative inferences about their contents.
2. In cases involving privileged information submitted by attorney-complainants, OPEOSH will assure the parties that the evidence submitted by the attorney-complainant will receive special handling, will be shared only with them, and will be secured from unauthorized access. Further, to the extent that this evidence falls under attorney-client privilege, it will be withheld, to the extent allowed by law, from public disclosure under OPRA. Generally, if the respondent has asserted that the information referred to in the complaint is privileged, the entire case file should be clearly labeled as containing information that is to be withheld because the complainant is an attorney bound by attorney-client privilege. If the respondent asserts that only certain information is privileged, then that information should be sealed in an envelope, labeled as above, and placed under a clearly labeled tab. If requested, assurance may be made in writing that the evidence will receive special handling and will be held permanently in confidence to the extent allowed by law.
3. The guidance above applies only when there is an attorney-complainant and does not apply to other cases in which respondents assert attorney-client privilege. In such cases where the complainant is not an attorney for the respondent, OPEOSH will not accept blanket claims of privilege. Rather, the respondent will be required to make specific, per-document claims, which the OPEOSH will assess and handle accordingly. If these claims are found to be reasonable, and if the respondent so requests, assurance may be made in writing that the information will be held in confidence to the extent allowed by

law, and submitters of confidential commercial or financial information will be notified in writing of a pending OPRA request for disclosure of such information and will be given an opportunity to comment on the impact of any potential disclosure before the agency reaches a decision regarding its disclosure. If the OPEOSH does not agree with the submitter that materials identified by the business submitter as Confidential Business Information (CBI) should be protected, business submitters must be notified in writing and granted reasonable time to protest the release in a court of competent jurisdiction.

### **C. Public Disclosure.**

Requests from non-party requesters must be directed through the OPRA request procedure. Upon receipt of an OPRA request relating to a closed case, the Disclosure Officer must process the request in compliance with New Jersey OPRA regulations. The following definitions should be used in determining whether a case is considered open or closed:

- 1. Open Cases.** If a case is open, information contained in the case file may generally not be disclosed to the public. (Note: appropriate non-public disclosures are made to the parties while the case is open, as described above.) In the event that the matter has become public knowledge because the complainant has released information to the media, limited disclosure may be made to an equivalent extent, if circumstances warrant doing so. Consultation with the Commissioner is advisable before disclosure, especially in high-profile cases.
- 2. Closed Cases.** Generally, PEOSH discrimination cases should be considered closed when a final determination has been made.
- 3. Statistical Data.** Disclosure may be made to Congress, Federal OSHA, the media, researchers, or other interested parties, of statistical reports containing aggregate results of program activities and outcomes.

Disclosure may be in response to requests made by telephone, e-mail, fax, or letter, by a mutually convenient method. Statistical data may also be posted by the federal system manager on the OSHA Web page.

### **D. OPEOSH – Initiated Disclosure.**

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

## **XI. Statistics**

Statistics derived from reports containing aggregate results of program activities and

outcomes may be posted by the Federal OSHA system manager on the OSHA Web page.



## Chapter 2 INTAKE AND EVALUATION OF COMPLAINTS

### I. Scope

This chapter explains the general process for receipt of PEOSH whistleblower (discrimination) complaints under the various statutes, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in OSHA's Integrated Management Information System (IMIS). Requirements for complaint-taking procedures, screening, coverage, timely filing, etc., will be discussed in subsequent chapters.

### II. Receipt of Complaint

Any applicant for public employment, public employee, former public employee, or his or her authorized representative is permitted to file a whistleblower complaint with the OPEOSH. No particular form of complaint is required. The complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, OPEOSH will accept the complaint in any language. The OPEOSH will also accept electronically-filed complaints via email on the OPEOSH website: [http://lwd.dol.state.nj.us/labor/lsse/safetyhealth\\_index.html](http://lwd.dol.state.nj.us/labor/lsse/safetyhealth_index.html).

Potential complaints received by the OPEOSH should be logged or in some manner tracked to ensure delivery and receipt by the appropriate investigative unit. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or FedEx tracking information, emails, and fax cover sheets. Complaints are usually received at the OPEOSH but may be referred by Federal OSHA or other government offices such as Congress or other administrative agencies.

- A. For orally filed complaints, when a potential complaint is received, the receiving officer must accurately record the pertinent information on an OPEOSH Discrimination Complaint form or record the appropriate complainant information and immediately forward it to the Supervisor (Chief/Assistant Chief). In every instance, the date of the initial contact must be recorded. Complaints where the initial contact is in writing do not require the completion of an OPEOSH Discrimination Complaint form, as the written filing will constitute the complaint.
- B. Complaints received by the Federal OSHA Office are forwarded to the OPEOSH for intake.
- C. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the name, address, and phone number of the respondent or respondents; date of filing; date of adverse action; a brief summary of the alleged retaliation addressing the *prima facie* elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus), other potential statute(s) involved; and, if known, whether a safety, health, or other statutorily protected complaint has also been filed with Federal OSHA or another

enforcement agency.

- D. The OPEOSH is responsible for properly determining the jurisdiction under which a complaint is filed. That is, the complaint may be misfiled from a private business employee or there may be a potential overlapping jurisdiction with Federal OSHA, i.e. FRSA and NTSSA. If a complaint indicates protected activities under multiple statutes (i.e. Federal Whistleblower Statutes), it is important to forward that complaint to Federal OSHA immediately as there may be a statute of limitations for filing, ranging from 30 to 180 days, in order to preserve the parties' rights under each of the laws.

Reference:

Table II-1 below provides the statute of limitations filing deadline for Federal statutes should they be misfiled with the OPEOSH and require forwarding to the Federal OSHA Regional Office (Region 2).

| <b>Table II-1: Specific Federal statutes and their filing deadlines</b> |                        |
|---|------------------------|
| <b>Statute</b>  | <b>Filing Deadline</b> |
| OSHA [11(C)]  | 30 days                |
| CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA                                    | 30 days                |
| ISCA  | 60 days                |
| AHERA, AIR21  | 90 days                |
| STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA          | 180 days               |

### **III. Intake and Docketing of Complaints**

#### **A. Intake of Complaints.**

As soon as possible upon receipt of the potential complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation. This usually requires preliminary contact with the complainant to obtain additional information.

1. Whenever possible, the evaluation of a potential complaint should be completed by the Investigator that the Supervisor anticipates will be assigned the case, and the evaluation should cover as many details as possible. When practical and possible, the Investigator will conduct face-to-face interviews with complainants. When the Investigator has tried and failed to reach a complainant at various times during normal work hours and in the evening, he or she must send a letter to the complainant stating that attempts to reach the complainant have been unsuccessful, and stating that if the complainant is interested in filing a complaint under the PEOSH Act, the complainant should make contact within 10 days of receipt of the letter, or the OPEOSH will assume that the individual does not wish to pursue a complaint, and no further

action will be taken. This letter must be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of delivery must be preserved in the file with a copy of the letter to maintain accountability.

2. Complaints

- a. Discrimination complaints that set forth a *prima facie* allegation and are filed within statutory time limits must be docketed for investigation.
  - b. Discrimination complaints that do not set forth a *prima facie* allegation, or are not filed within statutory time limits may be closed administratively – that is, not docketed – provided the complainant accepts this outcome. When a complaint is thus “screened out,” the Investigator must appropriately enter the administrative closure in the IMIS. Additionally, the Investigator must draft a letter to the complainant explaining the reason(s) the complaint is not going to be investigated and send it to the Supervisor for concurrence. Once approved, it must be sent to the complainant, either by the Investigator or the Supervisor. A copy of the letter, along with any related documents, must be preserved for five years, as are whistleblower case files, per Federal OSHA Instruction ADM 12-0.5A. However, if the complainant refuses to accept this determination, the case must be docketed and dismissed with appeal rights.
3. As part of the intake process, the Supervisor will verify that applicable coverage requirements have been met and that the *prima facie* elements of the allegation have been properly identified.
4. OPEOSH must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the Investigator is encouraged to contact the respondent soon after completing the intake interview and docketing the complaint if he or she believes an early resolution may be possible. However, the Investigator must first determine whether an enforcement action is pending with the OPEOSH Compliance Enforcement prior to any contact with a respondent.

**B. Docketing.**

The term “to docket” means to record the case in the Federal OSHA Integrated Management Information System (IMIS). The OPEOSH will assign the case number utilizing the OPEOSH State Plan case file numbering system, and to formally notify both parties in writing of OSHA’s receipt of the complaint and intent to investigate. The appropriate way to docket a case file by title is Respondent/Complainant/Local Case Number.

1. Cases assigned for investigation are given a State Plan local case number, which uniquely identifies the case. The Investigator will manually enter this

case number when logging the case file data on the IMIS. Note: The IMIS will automatically designate a Federal case number when a new complaint is entered into the system if the Investigator does not enter the state plan case number. All case numbers follow the format Daa-bb-ccc, where each series of numbers is represented as follows:

- a. The two digit county number.
  - b. The two-digit municipality/town number.
  - c. The three-digit sequential file number for a specific municipality/town.
  - d. The prefix identifier for the complaint is always “D” for a Discrimination Complaint.
2. Cases involving multiple complainants and/or multiple respondents will ordinarily be docketed under one case number, unless the allegations are so different that they must be investigated separately.
  3. As part of the docketing procedures, when a case is opened for investigation, the Supervisor must send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an Investigator. The name, address, and telephone number of the Investigator will be included in the docketing letter. A Designation of Representative Form will be attached to this letter to allow the complainant the option of designating an attorney or other official representative. The complainant notification may either be sent by certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation), with the tracking number included on the first page of the notification letter, or may be hand-delivered to the complainant.
  4. Also at the time of docketing, or as soon as appropriate, the Supervisor must prepare a letter notifying the respondent that a complaint alleging retaliation has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the respondent’s due process rights and the timely completion of the investigation.
    - a. A copy of the whistleblower complaint should be sent to the respondent along with the notification letter.
    - b. A Designation of Representative Form will be attached to this letter to allow the respondent the option of designating an attorney or other official representative.
    - c. The respondent notification may either be sent by certified U.S. mail, return receipt requested, with the tracking number included on the first page of the notification letter, or may be personally served on the respondent. Proof of receipt must be preserved in the file with copies of

the letters to maintain accountability.

- d. Prior to sending the notification letter, the Supervisor must first attempt to determine if an enforcement inspection is pending with the OPEOSH Safety and/or Health Compliance Enforcement groups. If it appears from the complaint and/or the initial contact with the complainant that such an inspection may be pending with either PEOSH compliance enforcement groups, then the Supervisor must determine the status of the inspection. If a short delay is requested, then the notification letter must not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.

#### **IV. Timeliness of Filing**

##### **A. Timeliness.**

Discrimination complaints must be filed within the specified statutory time frames (180 days) which generally begins when the adverse action takes place or at the time when the employee first had knowledge or should reasonably have known that such discrimination violation occurred. Typically, 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 OPEOSH 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 federal holiday, or if the OPEOSH is closed, then the next business day will count as the final day.

##### **B. Dismissal of Untimely Complaints.**

Discrimination Complaints filed after the deadline will normally be closed without further investigation. However, there are certain extenuating circumstances that could justify tolling the statutory filing deadline under equitable principles. If the complainant does not withdraw, a dismissal must be issued if the complaint was untimely and there was no valid extenuating circumstance. The general policy is outlined below, but each case must be considered individually. Additionally, when it appears that equitable tolling may be applicable, it is advisable for the Investigator to seek concurrence from the Supervisor before beginning the investigation.

##### **C. Equitable Tolling.**

The following are reasons that may justify the tolling of a deadline, and an investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of them. However, these circumstances are not to be considered all-inclusive, and the reader should refer to appropriate regulations and current case law for further information.

1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action in such a way as to prevent the complainant from knowing or discovering the requisite elements of a *prima facie* case, such as presenting the complainant with forged documents purporting to negate any basis for supposing that the adverse action was relating to protected activity. Mere misrepresentation about the reason for the adverse action is insufficient for tolling.
2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
3. The employee is unable to file within the required period due to a major natural or man-made disaster such as a major snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
4. The employee mistakenly filed a timely retaliation complaint with Federal OSHA or under a whistleblower statute enforced by Federal OSHA that does not have the authority to grant relief.
5. The employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his rights. For example, when an employer repeatedly assured the complainant that he would be reinstated so that the complainant reasonably believed that he would be restored to his former position tolling may be appropriate. However, the mere fact that settlement negotiations were ongoing between the complainant and the respondent is not sufficient.

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

1. Ignorance of the statutory filing period
2. Filing of unemployment compensation claims
3. Filing a workers' compensation claim
4. Filing a private lawsuit
5. Filing a grievance or arbitration action

**V. Scheduling the Investigation.**

- A. The Supervisor must assign the case for investigation. Ordinarily, the case will be assigned to an Investigator, taking into consideration such factors as the Investigator's current caseload, work schedule, geographic location, and statutory time frames. However, in cases involving complex issues or unusual circumstances, the Supervisor may conduct the investigation or assign a team of Investigators.
- B. As part of the case assignment process, the Supervisor will transmit the complaint materials to the Investigator, who must prepare a case file that includes the original complaint and other evidentiary materials supplied by the complainant.

- C. The Investigator should generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the Supervisor. Also, priority must be given to cases according to the statutory time frames to conduct the investigation (90 days).

## **VI. Case Transfer**

- A. Careful planning must be exercised in the docketing of cases to avoid the need to transfer cases from one Investigator to another. However, if caseload or case priority considerations warrant the transfer of a case, the parties should be promptly provided with the name, address, and telephone number of the newly-assigned Investigator. Any such transfer must be documented in the case file and IMIS.
- B. Only Supervisors are authorized to transfer cases among Investigators under the supervision.

## **VII. Investigative Assistance**

When assistance is needed to interview witnesses or obtain evidence, the Investigator requiring assistance must contact the Supervisor, who must coordinate with the assistance of the OPEOSH, if needed.

## **Chapter 3**

### **CONDUCT OF THE INVESTIGATION**

#### **I. Scope**

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

#### **II. General Principles**

The Investigator should make clear to all parties that the OPEOSH 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 PEOSH Act. This applies not only to complainants and respondents but to other witnesses as well; quite often witnesses are unaware that they have knowledge that would help resolve a jurisdictional issue or establish an element. This is solely the responsibility of the Investigator, although it assumes the cooperation of the complainant. If, having interviewed the parties and relevant witnesses and examined relevant documentary evidence, the complainant is unable to establish the elements of a *prima facie* allegation, then the case should be dismissed.

#### **III. Case File**

The Investigator must prepare a standard case file containing the PEOSH Discrimination Complaint form or the appropriate intake documentation, all documents received or created during the intake and evaluation process, copies of all required opening letters, and any original evidentiary material initially supplied by the complainant. All evidence, records, administrative material, photos, recordings and notes collected or created during an investigation must be maintained in a case file and cannot be destroyed, unless they are duplicates. Detailed guidance regarding proper case file organization may be found in Chapter 5, "Documentation and Findings."

#### **IV. Preliminary Investigation**

##### **A. Intake and Evaluation.**

Whenever possible, the intake and evaluation of a complaint should be completed



by the Investigator to whom the Supervisor anticipates the case will be assigned. Regardless of who completes the evaluation, it should cover as many details as possible, and may take place either in person or by telephone. Whenever practical and possible, the Investigator will conduct face-to-face interviews with complainants. The individual conducting the intake should ensure all elements of a *prima facie* allegation are addressed and should attempt to obtain specific information regarding current losses and employment status.

The information obtained during the intake interview must be properly documented. At a minimum, a Memorandum of Interview must be prepared. As with any record of an interview, this Memorandum of Interview must preserve the complainant's account of the facts and record facts necessary to determine whether a *prima facie* allegation exists. This memorandum 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.

**B. Early Resolution.**

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

**C. Threshold Issues of Timeliness and Coverage.**

During both the complaint evaluation process and after receiving a whistleblower case file, it is important to confirm that the complaint was timely filed, that a *prima facie* showing has been made, that the case has been properly docketed and that all parties have been notified.

**1. Coverage.**

The Investigator must ensure that the complainant and the respondent(s) are covered under the jurisdiction of the PEOSH Act. It may be necessary for the Investigator to consult with the Supervisor in order to identify and resolve issues pertaining to coverage.

**D. Pre-Investigative Research.**

If he or she has not already done so, the Investigator should determine whether there are prior or current retaliation, or safety and health cases related to either the complainant or employer. Such information normally will be available from the IMIS or the OPEOSH database. This enables the Investigator to coordinate related investigations and obtain additional background data pertinent to the case at hand. Examples of information sought during this pre-investigation research phase are:

1. Copies of complaints filed with the OPEOSH.
2. Copies of the result of any enforcement actions, including inspection reports, which were recently taken against the employer.
3. Copies of all relevant documents, including inspector's notes, from regulatory files administered by OPEOSH.
4. Information on any previous discrimination complaints filed by the complainant or against the respondent.

**E. Coordination with Other Agencies.**

If information received during the investigation indicates that the complainant has filed a concurrent retaliation complaint, safety and health complaint, or any other complaint with another government agency (such as an unemployment compensation agency, FRA, etc.), the Investigator should contact such agency to determine the nature, status, or results of that complaint. This coordination may result in the discovery of valuable information pertinent to the discrimination complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

**F. Other Legal Proceedings.**

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

**V. Weighing the Evidence.**

Standards of causation and burdens of proof – the “motivating factor”.

**A. “Motivating Factor” Statute.**

The PEOSH Act requires a high standard of causation – “motivating factor” – and applies the traditional burdens of proof.

1. Under this standard, the investigation must disclose facts sufficient to raise the inference that the protected activity was a motivating factor in the adverse

action.

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

#### **B. Gatekeeping Provisions.**

The "contributing factor" statutes also contain "gatekeeping" provisions, which provide that the investigation must be discontinued and the complaint dismissed if *no prima facie* showing is made. These provisions help stem frivolous complaints and simply codify the commonsense principle that no investigation should continue beyond the point at which enough evidence has been gathered to reach a determination.

### **VI. The Field Investigation**

Investigators ordinarily will be assigned multiple complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

#### **A. The Elements of a Violation.**

An illegal retaliation is an adverse action taken against an employee by a covered entity or individual in reprisal for the employee's engagement in protected activity. An effective investigation focuses on the elements of a violation and the burden of proof required. If the investigation does not establish, by preponderance of the evidence, any of the elements of a *prima facie* allegation, the case should be dismissed. Therefore, the Investigator should search for evidence that would help resolve each of the following elements of a violation:

##### **1. Protected Activity.**

The evidence must establish that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed. However, with the exception of certain cases involving refusals to work, it is

not necessary to prove the referenced statute(s) were actually violated. In other words, the complainant does not need to show that the conduct about which he/she initially complained, for example, safety or health violations, actually took place. Rather, as long as the complainant's protected activity was made in good faith and a reasonable person could have raised the same issue, the action meets this element. Protected activity generally falls into four broad categories:

- a. Providing safety and/or health concern information to a government agency (including, but not limited to OPEOSH), a Supervisor (the employer), a union, health department, fire department, Congress, or the President.
- b. Filing a complaint or instituting a proceeding provided for by law related to safety and/or health issues in the work place, for example, a formal PEOSH complaint.
- c. Testifying in proceedings such as trials, hearings before the Office of Administrative Law Judges or the PEOSH Review Commission. And, participating in inspections or investigations by the OPEOSH or other agencies that may be related to the PEOSH Act.
- d. Refusal to perform an assigned task. The PEOSH Act specifically protects employees from retaliation for refusing to engage in an unsafe or unhealthful work practice that exposes an employee to an imminent danger that would result in serious injury or death. Generally, a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful which would result in serious injury or death to the employee, and he or she does not receive an adequate explanation from a responsible official that the conditions are safe.

As an example, Federal OSHA's refusal to work provision at 29 CFR 1977.12 provides an employee the right to refuse to perform an assigned task if the employee:

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

## 2. **Employer Knowledge.**

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

### **3. Adverse Action.**

The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer. An adverse action may occur at work; or, in certain circumstances, outside of work. Some examples of adverse actions may include, but are not limited to:

- Discharge
- Demotion
- Reprimand
- 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 becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- 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. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.

- Lay-off
- Failure to hire
- Failure to promote
- Blacklisting
- Failure to recall
- Transfer to different job
- Change in duties or responsibilities
- Denial of overtime
- Reduction in pay
- Denial of benefits
- Making a threat
- Intimidation
- Constructive discharge – the employer *deliberately* created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.

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

#### **4. Nexus**

A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited ill will) toward the protected activity, 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), false testimony or manufactured evidence.

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

- Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did the complainant’s productivity, attitude, or actions change after the protected activity?

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

## **B. Contact with Complainant.**

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

### **1. Activity/Telephone Log.**

All telephone calls made, messages received, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the Investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case.

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

### **2. Amended Complaints.**

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

- a. Form of Amendment.** No particular form of amendment is required. A complaint may be amended orally or in writing. Oral amendments will be reduced to writing by the OPEOSH. If the complainant is unable to file the amendment in English, the OPEOSH will accept the amendment in any language.
- b. Amendments Filed within Statute of Limitations.** At any time prior to the expiration of the statutory filing period for the original complaint, a complainant may amend the complaint to add additional allegations and/or additional respondents.
- c. Amendments Filed After Statute of Limitations Has Expired.** For amendments received after the statute of limitations for the original complaint has run, the Investigator must evaluate whether the proposed

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

- d. **Processing of Amended Complaints.** Regardless of the statute, any amended complaint must be processed in the same manner as any original complaint. This means that all parties must be provided with a copy of the amended complaint, that this notification must be documented in the case file, and that the respondent(s) must be afforded an opportunity to respond. Investigators must review every amendment to ensure that a *prima facie* allegation is present. The Investigator must ensure that all parties have been notified of the amendment in accordance with the Occupational Safety and Health Procedural Standards for Public Employees (N.J.A.C. 12:110-7).

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

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

### 4. **Early Dismissal.**

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

### 5. **Inability to Locate Complainant.**

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

- a. Telephone the complainant at various times during normal work hours and in the evening.
- b. Mail a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation) to the complainant's last known address, stating that the Investigator must be



contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, management may approve the termination of the investigation and dismiss the complaint. Proof of delivery of the letter must be preserved in the file along with a copy of the letter to maintain accountability.

**C. On-site Investigation.**

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

If an interview is recorded electronically, the Investigator must be a party to the conversation, and it is the OPEOSH's policy to have the witness acknowledge at the beginning of the recording that they understand that the interview is being recorded. See 18 U.S.C. §2511(2)(c). This does not apply to other audio or video recordings supplied by the complainant or witnesses. Upon management approval, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and need to be included in the case file.

Prior to electronically recording an interview, Investigators should familiarize themselves with the guidance set forth in Federal OSHA Instruction CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993.

**D. Complainant Interview.**

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

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

- a. Copies of any termination notices, reprimands, warnings or personnel actions
  - b. Performance appraisals
  - c. Earnings and benefits statements
  - d. Grievances
  - e. Unemployment benefits, claims and determinations
  - f. Job position descriptions
  - g. Company employee and policy handbooks
  - h. Copies of any charges or claims filed with other agencies
  - i. Collective bargaining agreements
  - j. Arbitration agreements
  - k. Medical records. Because medical records require special handling, Investigators should familiarize themselves with the requirements of OSHA Instruction CPL 02-02-072, Rules of agency practice and procedure concerning OSHA access to employee medical records, August 22, 2007.
2. The restitution sought by the complainant should be ascertained during the interview. If discharged or laid off by the respondent, the complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the complainant might be entitled in the event of settlement, issuance of merit findings and order, or litigation. The complainant should be advised that the respondent's back pay liability ordinarily ceases only when the complainant refuses a bona fide, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.
  3. If the complainant is not personally interviewed and his or her statement is taken by telephone, a detailed Memo to File will be prepared relating the complainant's testimony.

**E. Contact with Respondent.**

1. Often, after receiving the notification letter that a complaint has been filed, the respondent or respondent's attorney calls the Investigator to discuss the allegation or inquire about the investigative procedure. The call should be

noted in the activity/telephone log, and, if pertinent information is conveyed during this conversation, the Investigator must document it in the activity/telephone log or in a Memo to File.

2. Following receipt of OPEOSH's notification letter, the respondent is given 20 days to respond with a written position statement, which may or may not include supporting documentation. Assertions made in the respondent's position statement do not constitute evidence, and generally, the Investigator must still contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense. At a minimum, copies of relevant documents and records should be requested, including disciplinary records if the complaint involves a disciplinary action.
3. If the respondent requests time to consult legal counsel, the Investigator must advise him or her that future contact in the matter will be through such representative. A Designation of Representative form should be completed by the respondent's representative to document his or her involvement.
4. In the absence of a signed Designation of Representative, the Investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the Investigator's initial contact should be the person who signed the letter.
5. The Investigator should interview all company officials who had direct involvement in the alleged protected activity or retaliation and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually, in private, to avoid confusion and biased testimony, and to maintain confidentiality. Witnesses must be advised of their rights regarding protection under the PEOSH Act, and advised that they may contact the OPEOSH if they believe that they have been subjected to retaliation because they participated in an OPEOSH investigation.
6. The Investigator must also obtain evidence about disparate treatment, i.e. how respondent treated other employees who engaged in conduct similar to the conduct of the complainant which respondent claims is the legitimate non-discriminatory reason for the adverse action. A review of personnel files would be appropriate to obtain this information.
7. If the respondent has designated an attorney to represent the company, interviews with management officials should ordinarily be scheduled through the attorney, who generally will be afforded the right to be present during any interviews of management officials.
8. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the employer, such as where the official has information helpful to the

complainant and does not wish the employer to know he or she is speaking with the Investigator. In that event, an interview should ordinarily be scheduled away from the premises.

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

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

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

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

#### **F. Uncooperative Respondent.**

1. When conducting an investigation under the PEOSH Act, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the OPEOSH. There are two types of subpoenas for use in these cases: A Subpoena *Ad Testificandum* is used to

obtain an interview from a reluctant witness. A Subpoena *Duces Tecum* is used to obtain documentary evidence. They can be served on the same party at the same time, and the OPEOSH can require the named party to appear at a designated office for production, at OPEOSH costs. Subpoenas *Ad Testificandum* may specify the means by which the interviews will be documented or recorded (such as whether a court reporter will be present). When drafting subpoenas, the party should be given a short timeframe in which to comply, using broad language like “any and all documents” or “including but not limited to,” and making the Investigator responsible for delivery and completion of the service form. If the respondent decides to cooperate, the Supervisor can choose to lift the subpoena requirements.

2. If the respondent fails to cooperate or refuses to respond to the subpoena, the Investigator will consult with the Supervisor regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The other option is to request that the subpoena be enforced.
3. When dealing with a nonresponsive or uncooperative respondent, it will frequently be appropriate for the Investigator, in consultation with the Supervisor, to draft a letter informing the respondent of the possible consequences of failing to provide the requested information in a timely manner. Specifically, the respondent may be advised that its continued failure to cooperate with the investigation may lead the OPEOSH to reach a determination without the respondent’s input. Additionally, the respondent may be advised that the OPEOSH may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

#### **G. Further Interviews and Documentation.**

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

1. The Investigator must attempt to interview each relevant witness. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the Investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative present at any time.
2. The Investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but not be limited to, safety and health inspections, or records of inspections

conducted by other enforcement agencies, depending upon the issues in the complaint. If this is not possible, the Investigator should review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceedings.

3. In cases where the complainant is covered by a collective bargaining agreement, the Investigator should interview relevant union officials and obtain copies of grievance proceedings or arbitration decisions specifically related to the retaliation case in question.
4. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another government agency, under a pledge of confidentiality from that agency. In addition, all interview statements obtained from non-managers (including former employees or employees of employers not named in the complaint) must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.
5. The Investigator must document all telephone conversations with witnesses or party representatives in the case file.

#### **H. Resolve Discrepancies.**

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

#### **I. Analysis.**

After having gathered all available relevant evidence, the Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above in accordance with the PEOSH Act and the Occupational Safety and Health Procedural Standards for Public Employees.

#### **J. Conclusion of Investigations of Non-Merit Complaints.**

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

1. During the closing conference, the Investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
2. It is unnecessary and improper to reveal the identity of witnesses interviewed. The complainant should be advised that the identity of, and information provided by, non-management witnesses are confidential. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the Investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
3. During the closing conference, the Investigator must inform the complainant of his/her rights to appeal and request a hearing under the provisions of the PEOSH Act, as well as the time limitation for filing the appeal or objection (15 days upon receipt of written notice).
4. The closing conference with the complainant must be documented in the case file.
5. Where the complainant cannot be reached in order to conduct a closing conference, a letter will be sent to the complainant explaining that the case has been dismissed on the basis of a non-merit determination. The letter will explain the complainant's rights to appeal under the PEOSH Act including the time limitation for filing an appeal. In closing, the letter will invite the complainant to contact the assigned Investigator if he or she wishes to discuss the investigative findings.

**K. Documenting the Investigation.**

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

## **Chapter 4**

### **CASE DISPOSITION**

#### **I. Scope**

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

#### **II. Preparation**

##### **A. Investigator Reviews the File.**

Throughout the investigation, the Investigator will keep the Supervisor apprised of the progress of the case, as well as any novel issues encountered. During the investigation, the Investigator must thoroughly review the file and its contents to ensure all pertinent data is organized consistent with the requirements set forth in Chapter 5 of this Manual.

##### **B. Investigator and Supervisor Discuss the Case.**

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

#### **III. Report of Investigation**

The Investigator must report the results of the investigation by means of a Report of Investigation (ROI), following the policies and format described in detail in Chapter 5 of this Manual. Once the ROI is approved, the Investigator will write a draft Final Determination letter for non-merit determinations or an Order to Comply with abatement remedy for review and signature by the Chief/Assistant Chief.

#### **IV. Case Review and Approval by the Supervisor**

##### **A. Review.**

The Investigator will provide the completed case file and draft determination letter/Order to Comply to the Supervisor. Upon receipt of the completed case file, the Supervisor will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, completeness of the final determination, and merits of the case. If an Order to Comply is being considered, the Supervisor will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practicable after receipt of the file.



## **B. Approval.**

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

### **1. Withdrawal.**

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

### **2. Dismissal.**

For recommendations to dismiss, the Commissioner or his/her designee must issue the case determination to the complainant, with a copy to the respondent. The letter must include the rationale for the decision and the necessary information regarding the parties' rights to object or to appeal, as appropriate under the various whistleblower statutes. (Commissioner's determinations are discussed in detail in Chapter 5.)

### **3. Settlement.**

Voluntary resolution of disputes is desirable in many whistleblower cases, and Investigators are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached solely through the utilization of the OPEOSH's standard settlement agreement. The language of this agreement generally should not be altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation. The Investigator should use his/her judgment

as to when to involve the Supervisor in settlement discussions. The Investigator will obtain approval by the Supervisor of the settlement agreement language prior to the parties signing the agreement. For recommendations to approve settlement, the Supervisor's approval will be indicated by signature on both the settlement agreement and the ROI. The Chief/Assistant Chief will issue appropriate letters to the parties forwarding copies of the signed settlement agreement, posters, the Notice to Employees, the back pay check, or any other relevant documents, including tax-related documents. (Settlement procedures and settlement negotiations are discussed in detail in Chapter 6).

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

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

#### **4. Postponement.**

The Agency may decide to delay an investigation pending the outcome of an active proceeding under a collective bargaining agreement or another law. The rights asserted in the other proceeding must be substantially the same as the rights under the PEOSH Act. The factual issues to be addressed by such proceedings must be substantially the same as those raised by the complaint under the PEOSH Act. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. For example, it may be appropriate to postpone when the other proceeding is under a broadly protective statute, but not when the proceeding is under an unemployment compensation statute, which typically does not deal with retaliation. To postpone the PEOSH discrimination case, the parties must be notified that the investigation is being postponed in deference to the other proceeding and that the Agency must be notified of the results of that proceeding immediately upon its conclusion.

The case must remain open during the postponement, and the "postponed" status should be entered in IMIS, under the "Additional Information" tab. The IMIS user should enter "investigation postponed" in the "Tracking Text" field, and the date upon which the parties were formally notified of the OPEOSH's decision to postpone the investigation in deference to another proceeding should be entered in the "Tracking Date" field. When the OPEOSH is notified of the outcome of the proceeding, "Results of [grievance

hearing] received” should be entered in a new “Tracking Text” field, and the date upon which the results are received should be recorded in the “Tracking Date” field. The case should be closed following normal procedures, when the final determination letter/Order to Comply are issued.

**5. Deferral.**

Voluntary resolution of disputes is desirable in many whistleblower cases. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints under the PEOSH Act.

The Investigator and Supervisor must review the results of any proceeding to ensure all relevant issues were addressed, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the PEOSH Act. Repugnancy deals not only with the violation, but also the completeness of the remedies. If the other action was dismissed without an adjudicatory hearing, deferral is ordinarily not appropriate. If the determination is accepted, the Agency may defer to the decision as outlined above.

In cases where the Investigator recommends a deferral to another agency’s decision, grievance proceeding, arbitration or other appropriate action, the Supervisor will issue letters of deferral to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in IMIS as “Dismissed.” If the other proceeding results in a settlement, it will be recorded as “Settled Other,” and processed in accordance with the procedures set forth in Chapter 6. The OPEOSH may defer to the determination of another agency or tribunal.

**6. Merit Finding.**

All Commissioner’s determinations with an Order to Comply issuing merit determinations must be signed by the Chief/Assistant Chief. The Investigator shall include a comprehensive narrative in the draft Order to Comply outlining the supportive facts for a merit finding so that the case may be reviewed for legal sufficiency prior to issuing the determination.

The Supervisor must finalize and sign the Commissioner’s determination/Order to Comply which is to be issued to the respondent, with a copy sent to the complainant.

**7. Further Investigation Warranted.**

If, for any reason, the Supervisor does not concur with the Investigator’s analysis and recommendation or finds that additional investigation is warranted, the file must be returned for follow-up work.

**C. Legal Requirements.**

The Supervisor should confer with the NJLWD Legal and Regulatory Services for any advice or consultation necessary during the conduct of the investigation to ensure that legal requirements are met.

## **V. Agency Determination**

Once the Supervisor has reviewed the file and concurs with the recommendation, he or she will obtain the appropriate approval as required on the final determination letter or the Order to Comply. All non-merit determinations and Orders to Comply must be sent to the parties via certified U.S. mail, return receipt requested. Proof of receipt must be preserved in the file with copies of the determination to maintain accountability.

## **VI. Appeals and Objections.**

Any case may have objections to findings and may be heard by an Administrative Law Judge, both the complainant and respondent must be given the opportunity to object to findings in accordance with the procedures established under N.J.A.C. 12:110-7.8. Objections must be in writing, and must be submitted to the Commissioner within the statutory time period (15 days upon receipt of written notice).

### **A. Appeals Policy**

It has been the OPEOSH's long-standing policy and procedure to provide complainants with the right to appeal determinations under the PEOSH Act and the Occupational Safety and Health Procedural Standards for Public Employees, N.J.A.C. 12:110-7.

#### **1. Appeals Process.**

If a PEOSH discrimination complaint is dismissed, the complainant may appeal the dismissal to the Commissioner with a request for a hearing. The request must be made in writing within 15 calendar days of the complainant's receipt of the dismissal letter. If the request was timely filed, the case will be transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ) in accordance with N.J.A.C. 1:1, OAL hearing procedures. The Commissioner may then adopt, reject, or modify the recommended report and decision from the OAL and shall issue his or her final determination not more than 45 days after the hearing report is issued.

- a. Upon receipt of an appeal under N.J.A.C. 34:6A-45, the Supervisor must immediately forward a copy of the case file with a transmittal form to the OAL for scheduling a hearing with the complainant and the respondent parties.

Proof of receipt must be preserved in the file with copies of the letters to maintain accountability. A copy of the file must be retained by the OPEOSH.

- b. The OAL, upon receipt of the appealed file, will docket the case and notify the complainant, the respondent, and the OPEOSH that the case has been received. Information as to the OAL hearing rules and procedures are conveyed in this notice (N.J.A.C. 1:1-1). Follow-up notices are then sent for scheduling pre-hearing and hearing conferences which outline/inform the parties of the hearing procedures and rules. The ALJ will hear the case as presented by the complainant and respondent or their representation. If the complainant has appealed the determination of not meeting *prima facie* requirements, the respondent is still a named party when transmitting the case file to the OAL even though they may not have knowledge that a PEOSH Discrimination case has been filed. A report on the hearing results with the ALJ's decision shall then be sent to the Commissioner, who may adopt, reject, or modify the ALJ decision and issue a final determination not more than 45 days after the hearing report is issued
  
- c. If the complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief to the complainant, such as a union arbitration procedure, the OAL hearing of the appeal may be postponed pending a determination in the other forum, after which the ALJ must either recommend deferring to the other determination, if it appears fair and equitable, or proceed with hearing the case.

## **Chapter 5**

# **DOCUMENTATION AND COMMISSIONER'S DETERMINATION**

### **I. Scope.**

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

### **II. Administratively Closed Complaints.**

Discrimination cases that are not docketed after the initial intake, the file arrangement of materials as outlined below need not be followed. All administratively closed cases must be appropriately entered into the federal IMIS system. Additionally, a letter to the complainant, documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation, will be sent by the Investigator or Supervisor. A copy of the letter, along with any related documents, must be preserved for five years, as must be whistleblower case files, per federal Instruction ADM 12-0.5A.

### **III. Case File Organization**

- A. Upon receipt of a new complaint, the Supervisor will forward copies of the PEOSH Discrimination Complaint form and any accompanying documents to the Investigator as part of the case docketing process. The originals will be kept in the main file in the OPEOSH should additional copies be required.
- B. Upon assignment, the Investigator normally prepares a standard case file containing the PEOSH Discrimination Complaint form, screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file is organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.
  - 1. Evidentiary material normally is arranged as follows:
    - a. Copy of the complaint, OSHA-87 form or the appropriate regional intake worksheet
    - b. Documents from OSHA or other agency enforcement files
    - c. Complainant's signed statement
    - d. Remaining evidence (statements, records, etc., in logical sequence)
    - e. Investigator's rough notes
    - f. Case Activity/Telephone log

- g. Chronology of Events
  - h. Table of Contents (Exhibit Log)
- 2. Separation of Materials.** Administrative and evidentiary materials will be separated by means of blank paper dividers with numbered index tabs at the right or bottom.
- a. Administrative documents will be arranged in chronological order, with the newest being on top.
  - b. Evidentiary material tabs (right side of file) will be numbered consecutively using Arabic numerals, with the highest number at the top of the stack.
  - c. A Table of Contents (“Contents of Case File” sheet) identifying all the material by exhibit must be placed on top of the last exhibit on the right side. Nothing should be placed on top of the Contents of Case File sheet.
- 3.** Table V-1 depicts a typical case file.

| Table V-1: Case File Organization  |            |   |
|--|------------|---|
| Left Side  | Right Side |   |
| Administrative Materials   | Tab Number | Evidentiary Materials                       |
| Assignment Memorandum  | 1          | Complaint                                   |
| Complainant Notification   | 2          | PEOSH Safety/Health Complaint / S&H Related |
| Respondent Notification  | 3          | Complainant’s Statement                     |
| Designation(s) of Representative(s)  | 4          | CSHO Statement Timeline & Big “E”           |
| Correspondence, organized chronologically  | 5          | Witness Statement                           |
| Determination Letter   | 6          | Witness Statement                           |
| Final Case Summary Worksheet   | 7          | RP Position Statement                       |
| (Any post-determination documents such as appeals, ALJ, decisions or Orders to Comply, etc. filed on top, left side) | 8          | Records/Documentation                       |
|  | 9          | Investigator’s memos to file                |
|  | 10         | Investigator’s Rough Notes                  |
|  | 11         | Case Activity/Telephone Log                 |
|  | 12         | Report of Investigation                     |
|  | 13         | Table of Contents/Exhibit Log               |

- 4. Requests to Return Documents upon Completion of the Case.** All documents received by the OPEOSH from the parties during the course of an investigation become part of the case file and may not be returned. When

such a request is made, the Investigator should send a letter to the party that made the request, explaining that his or her request cannot be granted.

#### **5. Confidentiality Requests for Documents Submitted.**

Parties in a case frequently request that documents they submit be kept “confidential” and not disclosed to third parties. Sometimes they will even request that documents not be shared with the other parties in the case. See Chapter 1, Section X for policy regarding this issue.

- a. Requests that Documents not be Disclosed to Third Parties.** When a witness or informant has requested confidentiality, the witness statement should be clearly marked by means of a cover sheet to the exhibit stating “Confidential Witness Statement.”

### **IV. Documenting the Investigation.**

The Commissioner’s Findings (including an Order to Comply) must, at a minimum, be supported by the following documentation.

#### **A. Case activity/telephone log.**

List the date, time, and activity of telephone calls, interviews, onsite visits, etc. If the case is recommended for litigation, this must be typed.

#### **B. Report of Investigation (Formerly called Final Investigation Report or FIR).**

The Report of Investigation (ROI) is the OPEOSH’s internal summary of the investigation; and as such, while it contains similar information to the Commissioner’s Findings, it is written as a memo from the Investigator to the Supervisor rather than in the form of a letter to the parties. The ROI must contain the information below, but may also include, as needed, a chronology of events, a witness log, and any other information required by the Supervisor. The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate supervisory review of the case file. In many cases, significant portions of the narrative from the ROI may be merged into the Commissioner’s Findings, taking care that the identities of any confidential witnesses listed in the ROI are not included in the Commissioner’s Findings. The first page of the ROI must set forth the name of the statute and list the parties’ and their attorneys’ names, addresses, phone numbers, fax numbers, and e-mail addresses, but nothing else.

- 1. Timeliness.** Indicate the actual date that the complaint was filed and whether or not the filing was timely.
- 2. Coverage.** Give a brief statement of the basis for coverage and a basic description of the employer to include location of main offices, and nature of business. Delineate the information that brings the case under the PEOSH Act. If coverage was disputed, this is where the OPEOSH’s determination on



the issue should be addressed.

3. **The Elements of a Violation.** Evaluate the facts presented in the Commissioner's Findings as they relate to the four elements of a violation, following Chapter 3, Section IV. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented.
  - a. Protected Activity
  - b. Respondent Knowledge
  - c. Adverse Action
  - d. Nexus
4. **Defense.** Give a brief account of the respondent's defense; e.g., "Respondent claims that complainant was discharged for excessive absenteeism." If the respondent claims that complainant's misconduct or poor performance was the reason for the adverse action, discuss whether complainant engaged in that misconduct or performed poorly and, if so, how the employer's rules deal with this and how other employees engaged in similar misconduct or with similar performances were treated.
5. **Remedy.** In merit cases, this section should describe all appropriate relief due the complainant, as determined using Chapter 6, II. Any cost that will continue to accrue until payment, such as back wages, insurance premiums, and the like should be stated as formulas – that is, amounts per unit of time, so that the proper amount to be paid the complainant is calculable as of the date of payment. For example, "Back wages in the amount of \$13.90 per hour, for 40 hours per week, from January 2, 2007 through the date of payment, less the customary deductions, shall be paid by respondent." In non-merit cases, this section should simply be left blank.
6. **Recommended Disposition.** This is a concise statement of the Investigator's recommendation for disposition of the case.
7. **Other Relevant Information.** Any novel legal or other unusual issues, related complaints, Investigator's assessment of a proposed settlement agreement, or any other relevant consideration in the case may be addressed here.
8. **Incomplete Record.** For cases that are being dismissed as untimely or not covered, or for lack of cooperation, or where an early settlement has been reached, it is generally sufficient to include information only on aspects of the investigation completed up through the date of withdrawal, settlement, or dismissal on a threshold issue or lack of cooperation. Notation would be made of the reasons for the termination of the investigation in the field, "Other Relevant Info for Supervisor's Consideration," or its equivalent. However, in

all cases in which a determination on the merits is being recommended, all of the information must be provided.

**C. Closing Conference.**

The closing conference will be documented in the case file activity/telephone log and a separate Memo to File.

**V. Commissioner's Determination.**

**A. Purpose**

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

**B. Dismissals**

1. OPEOSH policy is to issue Commissioner's determination in all *dismissals* of discrimination cases.

**C. Orders to Comply**

A meritorious Commissioner's determination must include an Order to Comply. A non-meritorious Commissioner's determination will not include an Order to Comply because no relief is being awarded.

**D. Format of the Commissioner's Determination for Merit Cases.**

The Commissioner's determinations are written in the form of an Order to Comply report for merit cases, which includes a narrative in the following format:

1. **Introduction.** In the opening paragraph, identify the parties, the statute under which the complaint was filed, and include a one-sentence summary of the allegation(s) made in the complaint Timeliness. Explain whether the discrimination complaint was filed within the applicable statute of limitations; and if not, that the late filing can be excused for any of the reasons set forth in Chapter 2.
2. **Coverage.** Explain why the complainant and each respondent are covered by the PEOSH Act under which the complaint was filed.
3. **Background.** Briefly describe the respondent's business and the complainant's employment with the respondent.
4. **Succinct Analysis of the *Prima facie* Elements.** Within the framework of the

elements of a violation, succinctly narrate the events relevant to the determination. Beginning with protected activity, tell the story in terms of the facts that have been established by the investigation, addressing disputed facts only if they are critical to the determination. Only unresolved discrepancies should be presented as assertions. The findings generally should not state that a witness saw or heard or testified or stated to the Investigator such and such or that a document stated such and such. However, in some circumstances, such fuller description may be necessary or desirable. The dates for the protected activity and the adverse action should be stated to the extent possible. The elements of a violation should be addressed in order; if one of the elements is not met, then the analysis ends with that element. Care should be taken not to reveal or identify confidential witnesses or detailed witness information in the Commissioner's Findings.

5. **Punitive Damages.** The rationale for ordering any punitive damages should be concisely stated here.
6. **Abatement (or Remedy).** List all relief being awarded. The order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour (or other appropriate wage unit) covering the number of hours missed.
7. **Appeal Rights.** The applicable appeal or objection rights must be provided in the Order to Comply.
8. **Special Considerations for Merit Findings.** In general, meritorious determinations should only include a one-sentence description of the respondent's purported non-discriminatory reason for the adverse action, with no further analysis of the defense. However, in some circumstances, a fuller description may be necessary or desirable.
9. **Signature.** The Chief/Assistant Chief is authorized to sign the Commissioner's determination.

#### **E. Procedure for Issuing Non-Merit Determinations**

For all dismissal determinations, the parties must be notified of the results of the investigation by issuance of a non-merit determination letter. Appeal rights must be noted in the letter. The non-merit determination letter will be prepared for signature by the Chief/Assistant Chief. The OPEOSH will send the non-merit determination letter to the parties via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). Proof of receipt will be preserved in the file with copies of the letters to maintain accountability. Detailed information about the appeals process is provided in Chapter 4.

#### **VI. Delivery of the Case File.**

The case file delivery to the Supervisor shall be recorded as it is received in the office for

submittal.

## **VII. Documenting Key Dates in IMIS.**

The timely and accurate entry of information in Federal IMIS, as detailed in Federal OSHA Directive IRT 01-00-016, is critically important. In particular, key dates must be accurately recorded in order to measure program performance.

### **A. Date Complaint Filed.**

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

### **B. ROI (formerly FIR) Date.**

The date upon which the ROI was approved by the Supervisor is the ROI date.

### **C. Determination Date.**

The date upon which an Order to Comply or the non-merit determination closing letter is postmarked is the determination date.

### **D. Date Appeal or Objection Filed.**

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

## **Chapter 6**

### **REMEDIES AND SETTLEMENT AGREEMENTS**

#### **I. Scope**

This section covers policy and procedures for the determination of appropriate remedies in discrimination cases and for the effective negotiation of settlements and their documentation of cases at the OPEOSH.

#### **II. Remedies.**

In cases where the OPEOSH is ordering monetary and other relief, the Investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation.

##### **A. Reinstatement and Front pay**

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

##### **B. Back Pay**

Back pay is available under the PEOSH Act. Back pay is computed by deducting net interim earnings from gross back pay. Gross back pay is the total taxable earnings complainant would have earned during the quarter if he or she had remained in the discharging employer's employment. Usually, the hourly wage is multiplied by the number of hours a week the complainant typically worked. If the complainant has not been reinstated, the gross pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. Net interim earnings are interim earnings reduced by expenses. Interim earnings are the total taxable earnings complainant earned from interim employment (other employers). Expenses are: those incurred in searching for interim employment, e.g., mileage at the current IRS rate per driving mile; toll and long distance telephone call; employment agency fees, other job registration fees, meals and lodging if travel away from home; bridge and highway tolls; moving expenses, etc.; and those incurred as a condition of accepting and retaining an interim job, e.g., special tools and equipment, safety clothing, union fees, employment agency payments, mileage for any increase in commuting distance from distance traveled to the discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc. Unemployment insurance is not deducted from gross back pay. Worker's compensation is not deducted from back pay, except for the portion which compensates for lost wages. Back pay is computed on a quarterly

basis because the interest rate for each quarter may be different. See paragraph F. on Interest.

**C. Compensatory Damages.**

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

**D. Punitive damages.**

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

1. Punitive damages are appropriate:

- a. when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before the adverse action occurred (unless the employer had a clear-cut, enforced policy against retaliation); or
- b. when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, when there has been a pattern or practice of retaliation in violation of the PEOSH Act, when there is a policy contrary to rights protected by these statute (for example, a policy requiring safety complaints to be made to management before filing them with the OPEOSH or restricting employee discussions with PEOSH compliance officers during inspections) and the retaliation relates to this policy, when a management official commits violence against the complainant, or when the adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.

2. Coordination with the Supervisor and NJLWD Legal and Regulatory Services as soon as possible is imperative when considering a punitive damages award. If the NJLWD Legal and Regulatory Services agrees that such damages may be appropriate, further development of evidence should be coordinated with the NJLWD Legal and Regulatory Services. When determining punitive damages, management and Investigators should review ARB, ALJ, and court

decisions, such as *Reich v. Skyline Terrace, Inc.*, 977 F.Supp. 1141 (N. D. Okl. 1997), for determining if punitive damages are appropriate and the appropriate amounts to award. Inflation in the time period after the issuance of the decision relied upon should be considered.

**E. Attorney's fees.**

In merit cases where the complainant has been represented by an attorney, the OPEOSH may award reasonable attorney's fees.

The complainant's attorney must be consulted to determine the hourly fee and the number of hours worked. This work would include, for example, the attorney's preparation of the complaint filed with OPEOSH and the submission of information to the Investigator.

**F. Interest**

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

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

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

**III. Settlement Policy**

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

**IV. Settlement Procedure.**

**A. Requirements.**

Requirements for settlement agreements are:

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

**B. Adequacy of Settlements.**

1. **Full Restitution.** Exactly what constitutes “full” restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the Investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but Investigators are not required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass and is not necessarily limited to any or all of the following:
  - a. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement. See Chapter 6 II.A. above.
  - b. “Front pay” in the context of settlement is a term referring to future wage losses, calculated from the time of discharge, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties wishes to avoid reinstatement and the other agrees. See Chapter 6 II.A. above.
  - c. Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant’s attempt to mitigate his or her losses are subtracted from the full back wages (NOTE: Unemployment compensation benefits may never be considered as an offset to back pay). See Chapter 6 II.B. above.
  - d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which have been placed in the complainant’s personnel file or other records.
  - e. The respondent’s agreement to provide a neutral reference to potential



employers of the complainant.

- f. Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting.
- g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, or property loss resulting from missed payments, compensation for mental distress caused by the adverse action, and out-of-pocket expenses for treatment by a mental health professional and medication related to that distress See Chapter 6 II.C.
- h. Attorneys' fees, if authorized. See Chapter 6 II.E.
- i. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.
- j. Punitive damages may be considered under certain circumstances. They may be awarded when a management official involved in the adverse action knew that the adverse action violated the PEOSH Act before the adverse action (unless the employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of the PEOSH Act. See Chapter 6 II.D above for more guidance, including other examples. However, coordination with the Supervisor and the NJLWD Legal and Regulatory Services as soon as possible is imperative when considering such action. If the NJLWD Legal and Regulatory Services agrees that such damages may be appropriate, further development of evidence should be provided. (See Chapter 6 II.D for most of this information.)

### **C. The Standard PEOSH Settlement Agreement.**

Whenever possible, the parties should be encouraged to utilize the OPEOSH's standard settlement agreement containing all of the core elements outlined below. This will ensure that all issues within the OPEOSH's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

- 1. It must be in writing.

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

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

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

In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Yet, posting of a settlement agreement, standard poster and/or notice to employees, while an important remedy, may also be an impediment to a settlement. Other efforts to address the chilling effect, such as company training, may be available and should be explored. The Investigator should try as much as possible to obtain a single payment of all monetary relief. This will ensure that complainant obtains all of the monetary relief.

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

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

- c. GENERAL POSTING
- d. NON-ADMISSION
- e. REINSTATEMENT (*this section may be omitted if adequate front pay is offered*)
  - i. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that complainant would have earned but for the alleged retaliation, which he has declined/accepted.
  - ii. Reinstatement is not an issue in this case. Respondent is not offering, and complainant is not seeking, reinstatement.

7. MONIES

- a. Respondent agrees to make complainant whole by payment of \$ (less normal payroll deductions).
- b. Respondent agrees to pay complainant a lump sum of \$. Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check(s) shall be made out to the complainant, but mailed to the OPEOSH.

All agreements utilizing the OPEOSH's standard settlement agreement must be recorded in the federal IMIS as "Settled." PEOSH settlements should generally not be altered beyond the options outlined above. Any changes to the standard PEOSH settlement agreement language, beyond the few options noted above, must be approved in a pre-settlement discussion with the Supervisor. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity. Settlement agreements must not contain provisions which prohibit the OPEOSH's release of the agreement to the general public.

**D. Settlements to which the OPEOSH is not a Party.**

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without the OPEOSH's participation in settlement negotiations. Because voluntary resolution of disputes is desirable in many discrimination cases, the OPEOSH's policy is to defer to adequate privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved by the Supervisor to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the PEOSH Act in the public interest (See E. below). Approval of the settlement demonstrates the Commissioner's consent and achieves the consent of all three parties. However, the OPEOSH's authority over settlement agreements is limited to the PEOSH Act. Therefore, the OPEOSH's approval only relates to the terms of the agreement pertaining to the PEOSH Act under which the complaint was filed.

Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand the OPEOSH's involvement in any resolution reached after a complaint has been initiated.

1. In most circumstances, issues are better addressed through a PEOSH agreement, and if the parties are amenable to signing one as well, the PEOSH settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the PEOSH agreement. This is achieved by inserting the following paragraph in the PEOSH agreement: "Respondent and complainant have signed a separate agreement encompassing matters not within the OPEOSH's authority. The OPEOSH's authority over that agreement is limited to the PEOSH Act. Therefore, the OPEOSH approves and incorporates in this agreement only the terms of the other agreement pertaining to the PEOSH Act under which the complaint was filed [You may also modify the sentence to identify the specific sections or paragraph numbers of the agreement that are under the authority of the PEOSH Act.]" These cases must be recorded in the federal IMIS as "Settled."
2. If the OPEOSH approves a settlement agreement, it constitutes the final determination of the Commissioner and may be enforced according to the provisions of the PEOSH Act.
3. The approval letter must include the following statement: "The OPEOSH's authority over this agreement is limited to the PEOSH Act Therefore, the OPEOSH only approves the terms of the agreement pertaining to the PEOSH Act." (the sentence may identify the specific sections or paragraph numbers of the agreement that are relevant, that is, under the OPEOSH's authority). These cases must be recorded in the federal IMIS as "Settled-Other."

A copy of the reviewed agreement must be retained in the case file and the parties should be notified that the OPEOSH will disclose settlement agreements in accordance with the Open Public Records Act (OPRA), unless one of the OPRA exemptions applies.

4. If the parties do not submit their agreement to the OPEOSH or if the OPEOSH does not approve the agreement signed, then the OPEOSH must deny the withdrawal, inform the parties that the investigation will proceed, and issue the Commissioner's determination on the merits of the case. The determination must include the statement that the parties reached a settlement that was either not submitted for review by the OPEOSH or not approved by the OPEOSH.

#### **E. Criteria by which to Review Private Settlements.**

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

1. The OPEOSH will not approve a provision that states or implies that the

OPEOSH is party to a confidentiality agreement.

2. The OPEOSH will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to or shall prevent or interfere with Complainant’s non-waiveable right to engage in any future activities protected under the PEOSH Act.”
3. The OPEOSH will not approve a “gag” provision that restricts the complainant’s ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant’s providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.”
4. The OPEOSH must ensure that the complainant’s decision to settle is voluntary.
5. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file.
  - a. **The breadth of the waiver.** Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides?

The Investigator must ask the complainant, “Do you feel that, by entering this agreement, your ability to work in your field is restricted?” If the answer is yes, then the follow-up question must be asked, “Do you feel that the monetary payment fairly compensates you for that?” The complainant also should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the monetary payment, fairly compensates for the waiver of employment. The case file must document the complainant’s replies and any discussion thereof.

- b. **The amount of the remuneration.** Does the complainant receive adequate consideration in exchange for the waiver of future employment?
- c. **The strength of the complainant’s case.** How strong is the complainant’s retaliation case, and what are the corresponding risks of a dismissal/non-merit determination? The stronger the case and the more

likely a finding of merit, the less acceptable a waiver is, unless very well remunerated. Consultation with the NJLWD Legal and Regulatory Services may be advisable.

- d. Complainant's consent.** The OPEOSH must ensure that the complainant's consent to the waiver is knowing and voluntary. The case file must document the complainant's replies and any discussion thereof. If the complainant is represented by counsel, the Investigator must ask the attorney if he or she has discussed this provision with the complainant.

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

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

## **V. Bilateral Agreements (Formerly Called Unilateral Agreements).**

- A. A *bilateral settlement* is one between the OPEOSH and a respondent – *without the complainant's consent* – to resolve a complaint filed under the PEOSH Act. It is an acceptable remedy to be used only under the following conditions:
  1. The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
  2. The complainant refuses to accept the settlement offer. (The case file should fully set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by management.)
  3. If the complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses), attempts to resolve these demands fail, and the final offer from the respondent is reasonable to the OPEOSH.

- B. When presenting the proposed agreement to the complainant, the Investigator should explain that there are significant delays and potential risks associated with a full formal investigation, i.e. dismissal/non-merit determinations, and appeal, and that the OPEOSH may settle the case without the complainant's participation. This is also the time to explain that, once settled, the case cannot be appealed, as the settlement resolves the case.
- C. All potential bilateral settlement agreements must be reviewed and approved in writing by the Commissioner or his designee. The bilateral settlement is then signed by both the respondent and the Commissioner/designee. Once settled, the case is entered in the federal IMIS as "settled."
- D. Documentation and implementation
  - 1. Although each agreement will, by necessity, be unique in its details, in settlements negotiated by the OPEOSH, the general format and wording of the standard PEOSH agreement should be used.
  - 2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.
  - 3. Back pay computations must be included in the case file, with explanations of calculating methods and relevant circumstances, as necessary.
  - 4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. §6621 and will be compounded daily. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function. See Chapter 6 II.F.
  - 5. Any check from the employer must be sent to the complainant even if he or she did not agree with the settlement. If the complainant returns the check to the OPEOSH, the OPEOSH shall record this fact and return it to the employer.

## **VI. Enforcement of Settlements.**

If an employer fails to comply with a settlement in a PEOSH discrimination case, the case will resume under the normal investigation procedures and the complainant shall be so informed.

## **Chapter 7**

### **N.J.S.A. 34:6A-45; Discriminatory Acts Against Employees**

#### **I. Introduction.**

N.J.S.A. 34:6A-45(a) of the PEOSH Act mandates: *“No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this section.”*

N.J.S.A. 34:6A-45(a) generally provides protection for New Jersey public employees who engage in protected activity related to safety or health in the workplace.

#### **II. Regulations.**

Regulations pertaining to the administration of N.J.S.A. 34:6A-45 of the PEOSH Act are contained in the Occupational Safety and Health Procedural Standards for Public Employees, N.J.A.C. 12:110, SUBCHAPTER 7 Discrimination Against Employees.

#### **III. Coverage**

A. Any New Jersey public employee in accordance with N.J.S.A. 34:6A-27(d): “Employee” means any public employee, any person holding a position by appointment or employment in the service of an “employer” as that term is used in this act and shall include any individual whose work has ceased as a consequence of, or in connection with, any administrative or judicial action instituted under this act; provided, however, that elected officials, members of boards and commissions, and managerial executives as defined in the “New Jersey Employer-Employee Relations Act,” N.J.S.A. 34:13A-1 et seq. shall be excluded from the coverage of this act.

#### **IV. Protected Activity.**

Activities protected by N.J.S.A. 34:6A-45 include, but are not limited to, the following:

A. Occupational safety or health complaints filed orally or in writing with Federal OSHA, PEOSHA (a state agency operating under an OSHA-approved state plan-state OSHA), the National Institute of Occupational Safety and Health (NIOSH), or a State or local government agency that deals with hazards that can confront employees, even where the agency deals with public safety or health, such as a fire department or health department. The time of the filing of the safety or health complaint in relation to the alleged retaliation and employer knowledge are often the focus of investigations involving this protected activity. The employee filing a signed complaint with the OPEOSH has a right to request review of a determination not to conduct an inspection determined to be non-valid.



- B. Filing oral or written complaints about occupational safety or health with the employee's Supervisor or other management personnel.
- C. Instituting or causing to be instituted any proceeding under or related to the PEOSH Act. Examples of such proceedings include, but are not limited to, workplace inspections, review sought by a complainant of a determination not to issue a citation, employee contests of abatement dates, employee initiation of proceedings for the promulgation of PEOSH standards, employee application for modification or revocation of a variance, employee judicial challenge to a PEOSH standard, and employee petition for judicial review of an order of the Public Employees Occupational Safety and Health Review Commission. Filing an occupational safety or health grievance under a collective bargaining agreement would also fall into this category. Communicating with the media about an unsafe or unhealthful workplace condition is also in this category.
- D. Providing testimony or being about to provide testimony relating to occupational safety or health in the course of a judicial, quasi-judicial, or administrative proceeding, including, but not limited to, depositions during inspections and investigations.
- E. Exercising any right afforded by the PEOSH Act. The following is not an exhaustive list. This broad category includes communicating orally or in writing with the employee's Supervisor or other management personnel about occupational safety or health matters, including asking questions; expressing concerns; reporting a work-related injury or illness; requesting a material safety data sheet (MSDS); and requesting access to records, copies of the PEOSH Act, PEOSH/OSHA regulations, applicable PEOSH/OSHA standards, or plans for compliance (such as the hazard communication program or the blood borne pathogens exposure control plan), as allowed by the standards and regulations. This right is derived both from the employer's obligation to comply with the PEOSH Act (N.J.S.A. 34:6A-25 et seq.), PEOSH Standards (N.J.A.C.12:100) and PEOSH regulations (N.J.A.C. 12:110) and to keep the workplace free from recognized hazards causing or likely to cause death or serious physical harm (N.J.A.C. 34:6a-33 (general duty clause)), as well as the employee's obligation to comply with PEOSH standards and regulations (N.J.A.C. 34:6A-34). Such communication is essential to the effectuation of these provisions. This communication also carries out methods noted by the PEOSH Act to implement its goal of assuring safe and healthful working conditions; i.e. "...encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards arising from undesirable, inappropriate, or unnecessarily hazardous or unhealthful working conditions at the workplace and of stimulating employers and employees to institute new and to perfect existing, programs for providing safe and healthful working conditions", providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions..., [and] ...encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

Similarly, an employee has a right to communicate orally or in writing about occupational safety or health matters with union officials or co-workers. This right

is derived from the employer and employee obligations. Such communication is vital to the fulfillment of those provisions.

This category (exercising any right afforded by the Act), also includes refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury. The PEOSH regulation regarding work refusals can be found at N.J.A.C. 12:110-7.9. An employee has the right to refuse to perform an assigned task if he or she:

1. Has a reasonable apprehension of death or serious injury, and
2. Refuses in good faith, and
3. Has no reasonable alternative, and
4. Has insufficient time to eliminate the condition through regular statutory enforcement channels, i.e., contacting the OPEOSH, and
5. Where possible, sought from his or her employer, and was unable to obtain, a correction of the dangerous condition.

A public employee also has the right to comply with, and to obtain the benefits of, PEOSH standards and rules, regulations, and orders applicable to his or her own actions or conduct. This right is derived from N.J.A.C. 12:110-3.3 Duties of Employer, which requires employers to comply with PEOSH standards and from N.J.A.C. 12:110-3.4(a), which provides: "Every public employee shall comply with the occupational safety and health standards and all regulations promulgated under the Act which are applicable to his or her own actions and conduct." Thus, for example, an employee has the right to wear personal protective equipment (PPE) required by an OSHA standard, to refuse to purchase PPE (except as provided by the standards), and to engage in a work practice required by a standard. However, this right does not include a right to refuse to work. See N.J.A.C. 12:110-7.9. To be protected activity a refusal to work must meet the criteria set forth in N.J.A.C. 12:110-7.9(c), as explained above.

An employee has the right to participate in a PEOSH inspection. He or she has the right to communicate with a PEOSH compliance officer, orally or in writing. In accordance with N.J.A.C. 12:110-4.2(c) and 4.6: An authorized representative of employees has a right to accompany the PEOSH compliance officer during the walk-around inspection. He or she must not suffer retaliation because of the exercise of this right. An employee representative has the right to participate in an informal conference.

## **V. Relationship to State Plan States**

### **A. General.**

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §667, provides that any State, i.e., States as defined by 29 U.S.C. §652(7), that desires to assume responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a state plan

under Section 18 does not affect the Secretary of Labor’s authority to investigate and enforce Section 11(c) of the Act in any state, although 29 CFR 1977.23 and 1902.4(c)(2)(v) require that each state plan include whistleblower protections that are as effective as OSHA’s Section 11(c). Therefore, in state plan states that cover the private sector, such employees may file occupational safety and health whistleblower complaints with Federal OSHA, the state, or both.

**B. State Plan State Coverage.**

All state plans extend coverage, including occupational safety and health whistleblower protections, to non-federal public employees; and the majority of the state plans also extend this coverage to private-sector employees in the state. There are currently five jurisdictions operating state plans (Connecticut, Illinois, **New Jersey**, New York, and the Virgin Islands) that cover non-federal public employees only. In these five states, all private-sector coverage remains solely under the authority of Federal OSHA.

**C. Overview of the 11(c) Referral Policy (PEOSH non-federal public employee coverage).**

The regulation at 29 CFR §1977.23 provides that OSHA may refer complaints of employees protected by state plans to the appropriate state agency. In the case of the New Jersey state plan noted above, there is no private sector coverage and remains under the authority of Federal OSHA.

**D. Procedures for Referring Complaints to PEOSH State Plan/Federal OSHA**

- 1. PEOSH Referral of Private-Sector Complaints.** Any private-sector employee whistleblower complaint that is filed with the OPEOSH will be referred to Federal OSHA immediately. Since there are 21 enforceable whistleblower statutes that Federal OSHA enforces with varying statute of limitations filing deadlines, the complaint must be forwarded to the federal Region 2 regional office. Also, the OPEOSH must contact the complainant and inform them of the referral action and the varying time requirements for filing eligibility.
- 2. Federal OSHA Referral of Public Sector Complaints.** Any occupational safety and health whistleblower complaint from a non-federal public employee will be referred, without screening, to the OPEOSH state plan.

**E. PEOSH Non-Jurisdiction of Dually Filed 11(c) Complaints VS. Overlapping Coverage**

- 1. Dually Filed Complaints.** For state plans that provide coverage for private sector employees, a complainant may request a federal review of a dually filed complaint under Section 11(c) (“a dually filed complaint”). After receiving a state determination, the dually filed complaint would be evaluated (if properly filed) to determine if the state plan had processed, investigated, and appropriately determined. Because the New Jersey PEOSH state plan

only covers non-federal public sector employees, there are no provisions for dually filed 11(c) complaints between Federal OSHA and the OPEOSH.

2. **Complainant's Request for Federal Review.** A public employee complainant who filed a discrimination complaint with PEOSH and has exhausted the hearing appeal process through the NJ Office of Administrative Law, may file a Complaint Against a State Plan Administration (CASPA). (See F below)
3. **Overlapping Coverage.** There may be instances where overlapping coverage between the PEOSH Act and certain federal statutes could occur. There are two federal acts where overlapping jurisdiction can occur as follows: 1) the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109 (See Chapter 8); and 2) the National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142 (See Chapter 9). In these instances, the complainant must choose one election of remedy. There is no provision for a public employee to file under both federal and state statutes.

#### **F. Complaints About State Program Administration (CASPA's)**

1. OSHA state plan monitoring policies and procedures provide that anyone alleging inadequacies or other problems in the administration of a state's program may file a Complaint About State Program Administration (CASPA) with the appropriate Regional Administrator (RA). (See: 29 CFR 1954.20; CSP 01-00-002/STP 2-0.22B, Chap. 11.)
2. A CASPA is an oral or written complaint about some aspect of the operation or administration of a state plan made to OSHA by any person or group. The CASPA process provides a mechanism for employers, employees, and the public to notify Federal OSHA of specific issues, systemic problems, or concerns about a state program. A CASPA may reflect a generic criticism of the state program administration or it may relate to a specific investigation.
3. Because properly dually-filed 11(c) complaints (for state plans that cover private sector employees) undergo federal review under the Section 11(c) procedures outlined in Paragraph E of this chapter, no duplicative CASPA investigation is required for such complaints. Complaints about the handling of state whistleblower investigation from non-federal public sector employees, and from private-sector employees who have not properly dually-filed their complaint, will be considered under CASPA procedures.
4. Upon receipt of a CASPA complaint relating to a state's handling of a whistleblower case, OSHA at the regional level will review the state's investigative file and conduct other investigation as necessary to determine if the state's investigation was adequate and that the determination was supported by appropriate available evidence. A review of the state's file will be completed to determine if the investigation met the basic requirements outlined in the policies and procedures of the Whistleblower Protection Program.

5. A CASPA investigation of a whistleblower complaint may result in recommendations with regard to specific findings in the case as well as future state investigations techniques, policies and procedures. A review under CASPA procedures is not an appeal and a review under CASPA procedures will not be reviewed by the Appeals Committee; however, it should always be possible to reopen a discrimination case for corrective action. If the Region finds that the outcome in a specific state whistleblower investigation is not appropriate (i.e., final state action is contrary to federal practice and is less protective than if investigated federally; does not follow state policies and procedures; relied on state policies and procedures that are not at least as effective as OSHA's policies and procedures), the Region should require the state to take appropriate action to reopen the case or in some manner correct the outcome, whenever possible, as well as make procedural changes to prevent recurrence.

## Chapter 8

**Note: Overlapping Coverage** There may be instances where overlapping coverage between the PEOSH Act and the following federal statute could occur. In these instances, the complainant must choose one election of remedy. There is no provision for a public employee to file under both federal and state statutes.

### **THE WHISTLEBLOWER PROVISION OF THE FEDERAL RAILROAD SAFETY ACT (FRSA)**

49 U.S.C. §20109

#### **I. Introduction**

49 U.S.C. §20109 provides:

- (a) *“IN GENERAL. – A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done – (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by – (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452); (B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security; (3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding; (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee; (5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; (6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or (7) to accurately report hours on duty pursuant to chapter 211.*

(b) **HAZARDOUS SAFETY OR SECURITY CONDITIONS.** – (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for – (A) reporting, in good faith, a hazardous safety or security condition; (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist; or (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist. (2) A refusal is protected under paragraph (1)(B) and (C) if – (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; (B) a reasonable individual in the circumstances then confronting the employee would conclude that – (i) the hazardous condition presents an imminent danger of death or serious injury; and (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced. (3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.”

(c) **PROMPT MEDICAL ATTENTION.**

(1) **PROHIBITION.** – A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) **DISCIPLINE.** – A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty. For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

## II. Regulations

Regulations pertaining to the administration of 49 U.S.C. §20109 are contained at 29 CFR Part 1982.

## III. Coverage

The general provisions of FRSA are administered by the Department of Transportation, Federal Railroad Administration (FRA). FRA is the federal agency charged with promulgating and enforcing rail safety regulations.

- A. Under §20109(a) and (b) of FRSA, a covered respondent is defined as: “A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier.” For certain protected activities, it also includes “a contractor or a subcontractor of such a railroad carrier.” §20109(a).
- B. “Railroad carrier” is defined in 49 U.S.C. §20102(3) as “a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary [of Transportation] determines is operating within the United States as a single, integrated rail system, the Secretary [of Transportation] may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of this title and implementing regulations and order, subject to any appropriate conditions that the Secretary [of Transportation] may impose.”
- C. In deciding whether a railroad carrier is covered under FRSA, OSHA must determine whether the entity meets the statutory definition of “railroad.” “Railroad” is defined in 49 U.S.C. §20102(2) as: “(A) ...any form of non-highway ground transportation that runs on rails or electromagnetic guide ways, including – (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.”
- D. The “general railroad system” is the network of standard gauge track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas. A railroad may lack a physical connection but still be part of the general system, by virtue of the nature of operations that take place there. The boundaries of the general system are not fixed. Thus, for example, the Alaska Railroad is considered part of the general railroad system and is therefore covered under FRSA. In general, the types of covered railroad carriers under FRSA include, but are not limited to: freight operations; commuter operations; intercity passenger operations; short-haul passenger service; and urban rapid transit operations if connected to the general railroad system. Generally, the types of railroad carriers that will not be covered under FRSA include: plant railroads and urban rapid transit operations if not connected to the



general railroad system. (See the subparagraphs below for additional explanation.)

1. **Commuter Railroads.** Commuter railroads may be operated by state, local, or regional authorities, corporations, or other entities established to provide commuter service. An entity may be a commuter railroad if: 1) it serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area; 2) its primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function; and 3) the vast bulk of the system's trains are operated in the morning and evening peak periods with few trains at other hours.
  - a. Commuter railroads operated by public transit agencies are also covered under NTSSA.
  - b. Examples of commuter railroads include, but are not limited to: Metra and the Northern Indiana Commuter Transportation District in the Chicago area, Virginia Railway Express and MARC in the Washington area; and Metro-North, the Long Island Railroad, New Jersey Transit, and the Port Authority Trans Hudson (PATH) in the New York area, as well as commuter authorities, as cited in 45 U.S.C. §1104(3), which include, but are not limited to: Metropolitan Transportation Authority, Connecticut Department of Transportation, Maryland Department of Transportation, Southeastern Pennsylvania Transportation Authority, New Jersey Transit Corporation, Massachusetts Bay Transportation Authority, and Port Authority Trans-Hudson Corporation.
2. **Intercity Passenger Operations.** All intercity passenger operations are covered under FRSA, including Amtrak (also known as the National Railroad Passenger Corporation) and, for example, intercity high speed rail with its own right of way but that is not physically connected to the general railroad system.
3. **Short-Haul Passenger Operations.** Short-haul passenger operations are generally covered under FRSA. A short-haul passenger system, for example, could be a railroad designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area. When a short-haul passenger railroad is operated by a public transit agency, it is also covered under NTSSA.
4. **Tourist, Scenic and Excursion Operations.** Tourist, scenic and excursion operations are generally covered under FRSA, with two exceptions. These operations are not covered if they run either: (1) on smaller than 24-inch gauge (which, historically, have never been considered railroads under the Federal Railroad Safety Laws); or (2) off the general system and are considered "insular."
  - a. **Insularity.** Insularity is only an issue with regard to tourist operations

over tracks outside of the general system used exclusively for such operations. An operation is insular if it is limited to a separate enclave in such a way that there is no reasonable expectation that public safety, except safety of a business guest, a licensee of the tourist operations, or a trespasser, would be affected by the operation.

5. **Plant Railroads.** Under FRSA, there is no coverage of railroads whose entire operations are confined to an industrial installation. However, when a railroad operating in the general system, on occasion, enters the plant's property via its railroad tracks to pick up or deliver, the railroad that is part of the general system remains part of that system while inside the installation, thus, all of its activities are covered during that period. The plant railroad, itself, however, does not get swept into the general system by virtue of the other railroad's activity.
6. **Urban Rapid Transit Operations (URTs).** Under the FRSA, an URT that is connected to the general railroad system is covered; an URT that is not connected to the general railroad system is not covered. An operation is an URT not connected to the general railroad system and therefore not covered if it is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area, and moves passengers from station to station within the urban area as one of its major functions. If an operation does not meet these criteria, it is nonetheless likely to be an URT that is not connected to the general railroad system and therefore not covered under FRSA if it serves an urban area (and may also serve its suburbs); moves passengers from station to station within the urban boundaries as a major function of the system, and there are multiple station stops within the city for that purpose (even if transportation of commuters is also a major function); and provides frequent train service even outside the morning and evening peak periods. Examples of URTs not connected to the general railroad system and therefore not covered under the FRSA include: Metro in the Washington, D.C. metropolitan area; CTA in Chicago; and the subway systems in Boston, New York and Philadelphia. URTs operated by public transit agencies have coverage under NTSSA, regardless of whether they are connected or unconnected to the general railroad system.

#### **E. Correspondence with FRA Jurisdiction.**

Railroad carriers covered under the FRSA are generally the same as those that are subject to the FRA's statutory jurisdiction, which extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guide ways, and will extend to future railroads using other technologies not yet in use. However, the FRA sometimes elects not to exercise the full extent of its jurisdiction. For more information about the FRA's statutory authority and enforcement policy, Investigators may refer to 49 CFR Part 209, Appendix A, "Statement of Agency Concerning Enforcement of the Federal Railroad Safety Laws," and the section within this statement titled "FRA's Policy On Jurisdiction Over Passenger Operations." Investigators must bear in

mind that OSHA's jurisdiction to investigate FRSA whistleblower complaints is not affected by whether the FRA has chosen to exercise its jurisdiction over a particular railroad operation.

**F. Overlap Between FRSA and NTSSA.**

If respondent is a public transportation agency operating a commuter railroad, an urban rapid transit system connected to the general railroad system, or a short-haul passenger service, or a contractor or subcontractor of such entities, there may be overlap in respondent coverage between FRSA and NTSSA.

**G. State Plan Coordination.**

All of the OSHA-approved state plans extend coverage to non-federal public sector employers and employees; most also cover private-sector employees and employers in the state. Thus, in a state plan state, 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 state plan's 11(c)-equivalent law. In these types of circumstances, OSHA and the state plan must coordinate to ensure that complainants are informed of their rights under the various whistleblower protection provisions administered by OSHA and the state plan, including informing them of how the election of remedies provision may affect those rights, and that proper referrals are made.

**IV. Protected Activity**

Protected activity includes:

- A. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation (or being perceived by the employer to have done or to be about to do any of these activities) regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by – (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452)); (B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;
- B. Refusing to violate or assist in the violation (or being perceived by the employer to have done or to be about to do either of these activities) of any Federal law, rule, or regulation relating to railroad safety or security;
- C. Filing a complaint, directly causing to be brought a proceeding, or testifying in a proceeding (or being perceived by the employer to have done or to be about to do

any of these activities) related to the enforcement of:

1. 49 U.S.C. Subtitle V, "Rail Programs," Part A, "Safety";
  2. 49 U.S.C. Chapter 51, "Transportation of Hazardous Material," as applicable to railroad safety or security;
  3. 49 U.S.C. Chapter 57, "Sanitary Food Transportation," as applicable to railroad safety or security, which covers:
    - a. Food in violation of regulations promulgated under section 416 of the Federal Food, Drug, and Cosmetic Act;
    - b. Carcasses, parts of a carcass, meat, meat food product, or animals subject to detention under 402 of the Federal Meat Inspection Act (21 U.S.C. §672); and
    - c. Poultry products or poultry subject to detention under section 19 of the Poultry Products Inspection Act (21 U.S.C. §467a).
- D. Notifying, or attempting to notify (or being perceived by the employer to have done or to be about to do either of these activities), the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;
- E. Cooperating (or being perceived by the employer to have cooperated, or to be about to cooperate) with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;
- F. Furnishing (or being perceived by the employer to have furnished, or to be about to furnish) information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation;
- G. Accurately reporting (or being perceived by the employer to have accurately reported, or to be about to accurately report) hours on duty pursuant to 49 U.S.C. Chapter 211, "Hours of Service";
- H. Reporting, in good faith, a hazardous safety [including occupational safety] or security condition;
- I. Refusing to work when confronted by a hazardous safety [including occupational safety] or security condition related to the performance of the employee's duties, or refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are

in a hazardous safety or security condition, if the following conditions exist:

1. The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
  2. A reasonable individual in the circumstances then confronting the employee would conclude that:
    - a. The hazardous condition presents an imminent danger of death or serious injury; and
    - b. The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
  3. The employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.
  4. Work Refusal Exception – Security Personnel. Under FRSA, security personnel employed by a railroad carrier to protect individuals and property transported by railroad are not considered to have engaged in a protected activity when they refuse to work due to a hazardous safety or security condition related to their duties, or refuse to authorize the use of any safety-related equipment, track, or structures, if they are responsible for the inspection or repair of the equipment, track, or structures. However, security personnel are protected for reporting, in good faith, a hazardous safety or security condition.
- J. Requesting medical or first aid treatment or following orders or a treatment plan of a treating physician.
1. Specifically, railroad carriers are prohibited from disciplining or threatening to discipline employees for engaging in this protected activity, and the term “discipline” is defined as bringing charges against a person in a disciplinary proceeding, suspending, terminating, placing on probation, or making note of reprimand on an employee’s record.
  2. A railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty.

**V. “Kick-out” Provision**

Complainants have the right to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 210 days of the filing of the

complaint, and there is no delay due to the complainant's bad faith. Either party may request a jury trial.

**VI. "Election of Remedies"**

FRSA provides at 49 U.S.C. §20109(f): "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." OSHA takes the position that this provision does not preclude a FRSA complaint where an employee has pursued a grievance and/or arbitration pursuant to the employee's collective bargaining agreement. However, election of remedies is an evolving area of law. Investigators should consult with their Supervisor, who may wish to consult with Regional Solicitor of Labor (RSOL) or Office of Whistleblower Protection Program (OWPP), on questions involving election of remedies.

**VII. "No Preemption"**

FRSA provides at 49 U.S.C. §20109(g): "Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law."

**VIII. "Rights Retained by Employee."**

FRSA provides at 49 U.S.C. §20109(h): "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."

## Chapter 9

**Note: Overlapping Coverage** There may be instances where overlapping coverage between the PEOSH Act and the following federal statute could occur. In these instances, the complainant must choose one election of remedy. There is no provision for a public employee to file under both federal and state statutes.

### THE WHISTLEBLOWER PROVISION OF THE NATIONAL TRANSIT SYSTEMS SECURITY ACT (NTSSA)

6 U.S.C. §1142

#### I. Introduction.

6 U.S.C. §1142 provides:

- (a) *IN GENERAL.* – A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done – (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by – (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452); (B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security; (3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding; (4) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or (5) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.
- (b) *HAZARDOUS SAFETY OR SECURITY CONDITIONS.* – (1) A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend,

*reprimand, or in any other way discriminate against an employee for – (A) reporting a hazardous safety or security condition; (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist; or (C) refusing to authorize the use of any safety or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) of this subsection exist. (2) A refusal is protected under paragraph (1)(B) and (C) if – (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; (B) a reasonable individual in the circumstances then confronting the employee would conclude that – (i) the hazardous condition presents an imminent danger of death or serious injury; and (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and (C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced. (3) In this subsection, only subsection (b)(1)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities.*

## **II. Regulations.**

Regulations pertaining to the administration of 6 U.S.C. §1142 are contained at 29 CFR Part 1982.

## **III. Coverage.**

The general provisions of NTSSA are administered by the Department of Transportation, Federal Transit Administration (FTA) and the Department of Homeland Security, Transportation Security Administration (TSA). FTA is the federal agency responsible for administering federal funding to support 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. As part of its mission, the FTA, Office of Safety and Security, is responsible for developing safety, security and emergency management policies and guidelines for public transit system oversight, and provides training and performs system safety analyses and reviews for public transit systems. The TSA is responsible for protecting the nation’s transportation systems to ensure freedom of movement for people and commerce. TSA’s coverage extends to air travel, highways, maritime, mass transit and railroads.

- A. Under NTSSA, a covered respondent is defined as: “A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency.”
- B. Under NTSSA, a covered public transportation agency is defined in 6 U.S.C.



§1131(5) as a “publicly owned operator of public transportation eligible to receive federal assistance under Chapter 53 [‘Mass Transportation’] of Title 49.”

1. A covered public transportation agency must be an “operator” of public transportation.
  2. A covered public transportation agency need not actually receive federal assistance under Chapter 53 to be covered. Rather, the public transportation agency must only be *eligible* to receive such assistance.
  3. The FTA National Transit Database is a useful resource to begin an evaluation of respondent coverage in NTSSA cases. (See: <http://www.ntdprogram.gov/ntdprogram/data.htm>) However, a public transportation agency not found in the database may still be covered. When questions regarding NTSSA coverage arise, the Investigator must advise the Supervisor, who may consult with Regional Solicitor of Labor (RSOL) or Office of Whistleblower Protection Program (OWPP).
- C. Chapter 53 of Title 49, 49 U.S.C. §5302, defines the term “public transportation” to mean “transportation by a conveyance that provides regular and continuous general or special transportation to the public, but does not include school bus, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 [Amtrak] (or a successor to such entity).” Therefore, the following are not covered under NTSSA.
1. School bus, charter or intercity bus transportation; or
  2. Intercity passenger rail transportation provided by Amtrak.

**D. Overlap Between FRSA and NTSSA.**

If respondent is a public transportation agency operating a commuter railroad, an urban rapid transit system connected to the general railroad system, or a short-haul passenger service, or a contractor or subcontractor to such entities, there may be overlap in respondent coverage between FRSA and NTSSA.

**E. State Plan Coordination.**

All of the OSHA-approved state plans extend coverage to non-federal public sector employers and employees; most also cover private-sector employees and employers in the state. Thus, in a state plan state, 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 state plan’s 11(c)-equivalent law. In these types of circumstances, OSHA and the state plan must coordinate to ensure that complainants are informed of their rights under the various whistleblower protection provisions administered by OSHA and the state plan, including informing them of how the election of remedies provision may affect those rights, and that proper referrals are made.

#### **IV. Protected Activity.**

Protected activity includes:

- A. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation (or being perceived by the employer to have done or to be about to do any of these activities) regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452)); (B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;
- B. Refusing to violate or assist in the violation (or being perceived by the employer to have done or to be about to do either of these activities) of any Federal law, rule, or regulation relating to public transportation safety or security;
- C. Filing a complaint, directly causing to be brought a proceeding, or testifying in that proceeding (or being perceived by the employer to have done or to be about to do any of these activities) related to the enforcement of this section;
- D. Cooperating (or being perceived by the employer to have cooperated, or to be about to cooperate) with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;
- E. Furnishing (or being perceived by the employer to have furnished, or to be about to furnish) information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any federal, state, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation;
- F. Reporting a hazardous safety [including occupational safety] or security condition;
- G. Refusing to work when confronted by a hazardous safety [including occupational safety] or security condition related to the performance of the employee's duties, or refusing to authorize the use of any safety or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the following conditions exist:

1. The refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; and
2. A reasonable individual in the circumstances then confronting the employee would conclude that:
  - a. The hazardous condition presents an imminent danger of death or serious injury; and
  - b. The urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
3. The employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.
4. Work Refusal Exception-Security Personnel. Under NTSSA, security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities, are not considered to have engaged in a protected activity when they refuse to work due to a hazardous safety or security condition related to their duties, or refuse to authorize the use of any safety-related equipment, track, or structures, if they are responsible for the inspection or repair of the equipment, track, or structures. However, security personnel are protected for reporting, in good faith, a hazardous safety or security condition.

**V. “Kick-out” Provision.**

Complainants have the right to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 210 days of the filing of the complaint, and there is no delay due to the complainant’s bad faith. Either party may request a jury trial.

**VI. “Election of Remedies.”**

NTSSA provides at 6 U.S.C. §1142(e): “An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency.” This provision does not preclude a NTSSA complaint where an employee has pursued a grievance and/or arbitration pursuant to the employee's collective bargaining agreement. However, election of remedies is an evolving area of law. Investigators should consult with the Supervisor, who may wish to consult with Regional Solicitor of Labor (RSOL) or Office of Whistleblower Protection Program (OWPP), on questions involving election of remedies.

**VII. “No Preemption.”**

NTSSA provides at 6 U.S.C. §1142(f): “Nothing in this section preempts or diminishes

any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.”

**VIII. “Rights Retained by Employee.”**

NTSSA provides at 6 U.S.C. §1142(g): “Nothing in this section shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.”