DOLI Virginia Occupational Safety & Health VOSH

VOSH PROGRAM DIRECTIVE: **04-001F** **ISSUED: 24 February 2026**

Subject: **VOSH Whistleblower Investigation Manual**

Purpose

CHANGE I: This Directive sets forth and implements policy, procedures and other information on the handling by the VOSH**.** Investigator of employee complaints of employer discrimination or retaliation. Specifically, it deals with the rights of employees afforded under Virginia Code §40.1-51.2:1. The Virginia statute provides protections similar to those of section 11(c) of the federal Occupational Safety and Health Act which prohibits reprisals, in any form, against employees who exercise rights under the federal Act.

CHANGE II: This Change sets forth policy, procedures and other information relative to the handling of discrimination complaints under the various "whistleblower" statutes delegated to OSHA/VOSH.

CHANGE III: This Change acknowledges the new federal OSHA Whistleblower Investigations Manual and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to federal OSHA and to VOSH under the Code of Virginia.

CHANGE IV: This Change outlines procedures and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to federal OSHA and to VOSH under the Code of Virginia.

CHANGE V: This Change complies with the new federal OSHA Whistleblower Investigations Manual (2017) and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to federal OSHA and to VOSH under the Code of Virginia.

CHANGE VI: This Change contains specific instruction about the policies and to create, organize, maintain and archive whistleblower case files electronically under the various whistleblower statutes delegated to federal OSHA and to VOSH under the Code of Virginia.

CHANGE VII: This Change expands the forms in the appendices to include all the current forms in use by VOSH Whistleblower Investigator's' under the various whistleblower statutes delegated to federal OSHA and to VOSH under the Code of Virginia.

*This program directive is an internal guideline not a statutory or regulatory rule and is intended to provide instructions to VOSH**.** personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.*

Scope This Program Directive applies VOSH**.**-wide and specifically to the VOSH Investigator. Although this manual includes whistleblower statutes, the VOSH program, however, only has authority to enforce the statute in Virginia under Section 11(c), Discrimination

Complaints to State Plan States.

NOTE: *The federal Office of the Whistleblower Protections Program (OWPP) has the responsibility of investigating retaliation allegations within federal occupational safety and health jurisdiction. In addition to federal OSHA jurisdiction, the OSHA Office of the Whistleblower Protection Program investigates whistleblower and retaliation allegations for more than twenty other federal statutes that protect employees who report violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health care reform nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.*

Due to the constant amendments and additional statutes being added to federal responsibility, VOSH. personnel should refer to the federal Whistleblower

Investigations Manual for a complete list of the statutes investigated. Additional information may also be available from OSHA's OWPP website. *http://www.whistleblowers.gov/index.html*

References

OSHA Instruction CPL 02-03-003 (September 20, 2011)
VOSH. Administrative Regulations Manual, §110 (September 21, 2006)
VOSH. Field Operations Manual (December 2001; latest revision - May 19, 2010)
29 CFR Part 1977
OSHA Instruction CPL 02-03-007 (28 January 2016)
ADR
ECF
OSHA WIM

Cancellation

VOSH Program Directive 04-001E (01 July 2016).

Effective Date

February 24, 2026

Action

Directors, Compliance Managers and the VOSH. Investigator shall assure that the policies and procedures established in this Directive are adhered to by VOSH in its discrimination investigations.

Expiration Date

This directive shall remain in effect until canceled or superseded.

James S. Frederick
Commissioner

Distribution: Commissioner of Labor and Industry
Deputy Commissioner – Regulatory Programs
VOSH/OWP Directors and Managers
VOSH Investigators
Division of Hearings and Legal Services
OSHA Region III and Norfolk Area Offices

VOSH. WHISTLEBLOWER
INVESTIGATION MANUAL

COMPLAINTS OF DISCRIMINATION
AGAINST EMPLOYEES EXERCISING RIGHTS
UNDER § 40.1-51.2:1 OF THE CODE OF VIRGINIA

FOR THE

VIRGINIA OCCUPATIONAL

SAFETY AND HEALTH PROGRAM

OF THE

VIRGINIA DEPARTMENT

OF LABOR AND INDUSTRY

REVISED: March 2011; 01 August 2012; 01 February 2015; 01 July 2016; February 24, 2026

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Table of Contents

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Chapter 1

Introduction

I. Introduction.

A. Discrimination Against Employees Who Exercise Their Safety and Health Rights. Workers in Virginia have the right to complain to VOSH**.** and seek a whistleblower investigation of alleged workplace safety and health discrimination. Virginia Code §§40.1-51.2:1 and -51.2:2 authorize VOSH to investigate employee complaints of employer discrimination against employees who are involved in safety and health activities protected under Virginia laws, standards, and regulations.

B. Examples of "Protected Activity." Some example of activities protected under Virginia law are: an employee lodging a complaint to his/her employer under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; cooperating with or providing information to VOSH**.** personnel during a worksite inspection; or exercising on your own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the *Code of Virginia*. (See VOSH Administrative Regulations Manual (ARM), *Virginia Administrative Code*, 16 VAC 25-60-110).

C. Examples of "Discrimination or Retaliation." Some examples of discrimination or retaliation are firing, demotion, transfer, layoff, losing opportunity for overtime or promotion, exclusion from normal overtime work, assignment to an undesirable shift, denial of benefits such as sick leave or vacation time, blacklisting with other employers (see Virginia Code §40.1-27.1, Discharge of employee for absence due to work-related injury prohibited), taking away company housing, damaging credit at banks or credit unions and reducing pay or hours.

II. Functional Responsibilities.

A. Responsibilities.

1. **Director.** The Director has overall responsibility for all whistleblower investigations and outreach activities. The Director may delegate these responsibilities or declare and approve settlement of complaints filed under Virginia Code §40.1-52.2:1. The Director is responsible for implementation of policies and procedures, and for the effective supervision of field investigations, including the following functions:

    a. Performs necessary and appropriate administrative and personnel actions such as performance evaluations.

b. Assures Investigator(s) are properly trained.

c. Assures Investigator(s) have adequate resources to conduct investigations.

d. May conduct settlement negotiations for cases that are unusual or of a difficult nature.

e. May delegate settlement negotiation responsibilities.

f. Provides guidance, assistance, supervision, and direction to the Investigator(s) during the conduct of investigations and settlement negotiations.

g. Reviews investigation reports for comprehensiveness and technical accuracy.

h. Develops outreach programs and activities.

2. **Discrimination Investigator (hereinafter "Investigator").** The Investigator carries out responsibilities under the direct guidance and supervision of the Director, or their designee, which includes, but is not limited to, the following functions:

a. Receives VOSH**.** whistleblower complaints from the online whistleblower complaint form, phone calls, fax, email, OSHA, the regional offices, investigators, or other persons.

b. Conducts initial screening of incoming complaints to determine whether the allegations warrant field investigation. Ensures that safety and health or environmental ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office or agency.

c. Reviews VOSH**.** case files in field offices for background information concerning any other proceedings which relate to a specific complaint.

d. Interviews complainants and witnesses and obtains **written** statements as necessary and obtains supporting documentary evidence as available.

e. Follows through on leads resulting from interviews and statements.

f. Interviews and obtains written statements from respondents' officials, reviews pertinent records, and obtains relevant supporting

documentary evidence.

g. Applies knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzes the evidence, writes an investigation report detailing the facts of the case, and recommends appropriate action to the Director or their designee.

h. Negotiates with the parties in cases to obtain a written settlement agreement which provides prompt resolution and satisfactory remedy.

i. Monitors implementation of agreements or court orders, as necessary, and sufficiency of action taken or proposed by the respondent. If necessary, recommends further legal proceedings to obtain compliance.

j. Assists and acts on behalf of the Director, or their designee, in whistleblower matters with other agencies, VOSH**.** Regional Offices, and the general public.

k. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings.

l. Outreach activities, as assigned.

m. Organizing and maintaining whistleblower investigation electronic case files.

3. **Regional Director (RD).** Each RD is responsible for receiving whistleblower complaints and promptly transmitting these complaints to the Discrimination Investigator. In every instance, the date of the initial contact must be recorded.

4. **Compliance Safety and Health Officer (CSHO).** Each CSHO is responsible for maintaining a general knowledge of the protections under Virginia Code §40.1-51.2:1. Using this knowledge, the CSHO may then advise employers and employees of their responsibilities and rights granted under the law, receive complaints and expeditiously notify the RD of the receipt of a whistleblower complaint. In every instance, the date of the initial contact must be recorded.

5. **Office of Whistleblower Protection Staff Attorney.** The Staff Attorney provides assistance to the Director, or their designee, gives advice to the Investigator(s), reviews cases for legal merits, provides recommendations regarding those merits, and litigates those cases deemed meritorious as appropriate, when appointed as a Special Assistant Commonwealth's Attorney.

B. Personal Conduct and Activities.

1. **Courtesy to the Public.** The Virginia Department of Labor and Industry (DOLI) emphasizes that the proper and courteous discharge of duties and responsibilities by CSHOs and Investigators is essential to the effective administration of the law. The success of the program depends upon their knowledge and understanding of the laws and regulations as well as upon their courtesy and tact in dealing with employers and employees. Investigators represent the Commonwealth of Virginia and must, at all times, conduct themselves in such a manner as to reflect that responsibility. They must never engage in conduct unbecoming their positions, even when such conduct is invited or incited by those with whom they are dealing.

2. **Correspondence with the Public.** Field personnel are the primary public relations representatives of the VOSH**.** Program. All written correspondence received by Investigators from the public must be responded to in a prompt and courteous manner. For correspondence which is directed to an Investigator but which the Investigator must forward (to a higher authority, other agency or person etc.), the Investigator must notify the writer that the original correspondence is being forwarded for action by the appropriate entity. Other inquiries received by Investigators which are outside the Investigator's scope of normal job activities must be forwarded to the appropriate entity for action.

3. **Subpoenas and Testimony.**

   a. An Investigator, upon being served with a subpoena, must immediately communicate with and forward all pertinent information to the Director, or their designee, for action.

   b. ***Testifying in Proceedings.*** The Investigator may be required to testify in proceedings on behalf of the Commonwealth. The Investigator should keep this fact in mind when conducting an investigation and recording observations. Notes and reports must reflect conditions accurately and must be included in the case file. If the Investigator is called upon to testify, the reports and notes will be invaluable as a tool for recalling actual conditions and statements and reinforcing the facts of the case.

4. **Release of Investigation Information**.

   a. Investigation materials may include notes, work papers, memoranda, records, text messages, emails, audio or video tapes and other forms of digital media received or prepared by an Investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties. Such original material and all copies must be included in the case file, where necessary, to support the investigative findings. These records are the property of DOLI and a part of the case file. Under no circumstances are investigation notes and work papers to be destroyed, retained, or used by an employee of DOLI for any private purpose.

b. The information and statements obtained may not be released under the Freedom of Information Act (FOIA) (See VOSH**.** ARM, 16 VAC25-60-90.G). Requests for the public release of any information must be directed to the FOIA Coordinator.

c. Any FOIA inquiry received by an Investigator concerning an investigation must be transmitted to the FOIA Coordinator.

d. If, during the course of an investigation, the employer identifies any materials obtained as a trade secret (see Virginia Code §40.1- 51.4:1) or confidential commercial or financial information, information obtained in such areas shall be protected in accordance with the requirements in the VOSH**.** Field Operations Manual (FOM) and the Virginia FOIA.

e. All interviews with non-management personnel and other statements by such persons will be kept confidential to the extent allowed by the law.

C. Languages

Investigators are encouraged to communicate with complainants, respondents, and witnesses in the language in which they understand, both orally and in writing. The state language line or an online translator may be used.

Chapter 2

Complaint Intake and Investigation Programming

I. Scope.

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

II. Receipt of Complaint.

Any applicant for employment, employee, former employee or their authorized representative is permitted to file complaints under Virginia Code §40.1-51.2:1 in writing or via the online complaint form on the Virginia Department of Labor and Industry website. Complaints may also be received at any DOLI office or on referral by other government agencies.

A. When a complaint is received at a Field or Regional Office, basic information about the complaint must be obtained by the receiving person and forwarded to the VOSH**.** Investigator immediately, accompanied by an email to the Investigator. In every case, the date of filing must promptly be recorded. Where possible, complainants should be encouraged to file a written complaint using the online complaint form on the Virginia Department of Labor and Industry website.

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

C. If a Complainant contacts the Office of Whistleblower Protection by phone, fax, letter, or email, a reasonable effort must be made to follow up with the Complainant and obtain the minimum information required for a complaint.

III. Screening and Docketing.

A. As soon as possible upon receipt of the complaint, the available information should be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may require preliminary contact with the complainant to obtain additional information or to explain to the complainant why the case cannot proceed to investigation. Complaints which pass this initial screening will be docketed for investigation. The term "docket"

means to formally notify both parties in writing of VOSH**.**'s receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the OIS (the OIS automatically assigns the local case number).

B. Complaints which do not allege a *prima facie* allegation or are not filed within statutory time limits will not be docketed if the complainant indicates concurrence with the decision to close the case administratively. When a complaint is thus "administratively closed", a screening interview is conducted and the details documented. A letter is sent to the complainant concerning the interview and explaining the reason for the "administrative closure". In those cases where contact information is not provided by the complainant, the screening is documented and the reason for the "administrative closure" is explained. All VOSH**.**-related allegations that are "administratively closed" shall be recorded in OIS.

C. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed. The complainant will receive a letter verifying administrative closure of the case.

1. If a complaint filed against an employer is solely under the jurisdiction of OSHA, *e.g.* the complainant is a federal government employee, the complaint will be referred to the appropriate federal investigator or supervisor, and a record of the referral shall be maintained with the "administrative closure" records. Such referrals will be entered into OIS as "Administrative Closing – Other, Federal Jurisdiction".

D. As part of the docketing procedures, when a case is opened for investigation, the investigator will send a letter to the complainant notifying them that their complaint has been reviewed, given an official designation (i.e. case name and number), and opened for investigation. The <u>name, address, telephone number and email address</u> of the Investigator will be included in the docketing letter.

E. Also, at the time of docketing, or as soon as appropriate, the investigator will send a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit written position statement. Failure to promptly send the respondent letter could adversely impact the timely completion of the investigation. The investigator may send a Request for Information to the Respondent at this time.

NOTE: It is within the discretion of the VOSH**.** Investigator to conduct an unannounced investigation by delivering the Respondent letter (prepared in advance) in person and immediately initiating the onsite investigation, including interviews with the respondent, supervisors and employees, and the review and collection of applicable evidentiary material.

1. The respondent notification will be sent by certified mail, return receipt requested, or by personal service to provide a record of receipt. The tracking number will be identified in the file. If certified mail is returned commercial delivery services may be utilized with signed and dated acknowledgment of delivery.

2. Prior to sending the notification letter in a case where the complainant has made a VOSH**.** complaint, the Investigator must first determine if a VOSH compliance inspection is pending. If such an inspection is pending, and the Agency requests a short delay, the notification letter will not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.

F. During periods of heavy caseloads, it may be appropriate to send the complainant a questionnaire to complete and return to the Investigator. The questionnaire must include any information already submitted by the complainant and be used only to obtain supplemental data. Questionnaires may not be used in lieu of signed statements. A sample questionnaire is in the appendix.

G. If the respondent retains legal counsel, the Designation of Representative Form will be forwarded to the respondent to designate an attorney or other official representative. A sample designation of representative form is in the appendix.

IV. Timeliness of Filing.

A. Whistleblower complaints must be filed within the specified statutory time frame of sixty (60) calendar days from the date when the adverse action takes place. If the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. The first day of the time-period is the day after the alleged adverse action. Generally, the date a complaint is considered filed is the day the complainant submits an online complaint form, visits, emails, faxes, or telephones a DOLI official. For complaints sent by mail, the date filed is the date of the post mark. If the post mark 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, federal holiday, or if DOLI offices are closed, the next business day will count as the final day.

B. Complaints filed after the sixty (60) calendar day deadline will normally be closed without further investigation. However, there are certain extenuating circumstances which could justify tolling the statutory filing period for equitable principles. The general policy is outlined below, but each case must be considered individually.

C. An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following. (These circumstances are not to be considered all inclusive, and the reader should refer to 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 discriminatory grounds for the adverse action.

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 natural disaster, such as a snowstorm 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.

D. Conditions which will **not** justify extension of the filing period are, among others:

1. Ignorance of the statutory filing period,
2. Filing of unemployment compensation claims,
3. Filing a workers' compensation claim,
4. Filing a private negligence or damage suit,
5. Filing a grievance or arbitration action, or
6. Filing a whistleblower complaint with another state plan or any other agency that has the authority to grant the requested relief.

V. Scheduling the Investigation.

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

B. The Investigator will generally schedule investigations according to the date filed, taking into consideration whether the Complainant is currently employed or has been terminated, and economy of time and travel costs, unless otherwise directed by the Director or their designee.

Chapter 3

Conduct of the Investigation

I. Scope.

This chapter sets forth the policies and procedures Investigators must follow during the course of a whistleblower 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. The Investigator should consult with the Director or their designee when additional guidance is needed.

From §16VAC25-60-110.A of the VOSH**.** Administrative Regulations Manual:

A. In carrying out his duties under § 40.1-51.2:2 of the Code of Virginia, the commissioner shall consider case law, regulations, and formal policies of federal OSHA. An employee's engagement in activities protected by Title 40.1 does not automatically render him immune from discharge or discipline for legitimate reasons. Termination or other disciplinary action may be taken for a combination of reasons, involving both discriminatory and nondiscriminatory motivations. In such a case, a violation of § 40.1-51.2:1 of the Code of Virginia has occurred if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity.

II. Case File.

A. Evidentiary Material. The Investigator will compile a standard case file containing the intake document and notes, copies of initial correspondence to the complainant and respondent, and any other evidentiary material initially supplied by the complainant. Electronic copies are sufficient to meet this requirement.

III. Preliminary Investigation.

A. When initially receiving the whistleblower case, it is important to confirm that the complaint is valid and is covered under Title 40.1 of the *Code of Virginia*. This initial review should confirm that the complaint is timely filed, that a *prima facie* allegation is present under the statute, and that the case has been properly docketed with notification to both parties.

B. **The Investigator may also check on prior or current** whistleblower or safety and health cases related to either the complainant or employer. Such information normally will be available from OIS or the Regional Office, and can best be obtained by email, telephone, or other means of communication. This enables the Investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand.

Examples of information to be sought during the preliminary investigation research phase are:

1. Copies of safety and health or environmental complaints filed with VOSH./OSHA or other agencies.

2. Safety and health or environmental enforcement actions, including inspection reports, which were recently taken against the employer.

3. Copies of the safety and health or environmental inspector's notes.

4. Interviews and signed statement of the inspector.

5. Information on previous discrimination complaints.

C. **Coordination with Other Agencies.** If information received during the investigation indicates that the complainant has filed a concurrent discrimination charge or a safety and health or environmental complaint with another government agency (such as OSHA, DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the Investigator may wish to contact such agency to determine the nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the whistleblower complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

IV. The Field Investigation.

Efficient use of time and resources demand that investigations be carefully planned in advance.

A Burden of Proof. In the course of any investigation, it is important to bear in mind the elements of a violation and the burden of proof required of each party as if the case were being heard before a judge. It is on this basis that relevant and sufficient evidence should be identified and developed to reach an appropriate determination of the case. The standard that applies to VOSH**.** whistleblower investigations is whether VOSH has reasonable cause to believe a violation occurred. This standard applies to all elements of a violation. During all phases of the investigation, the Investigator must bear in mind and look for evidence dealing with the following elements of a violation:

1. **Protected Activity.** It must be established that the complainant engaged in activity protected by the statute under which the complaint was filed.

2. **Employer Knowledge.** The respondent must be shown to have been aware, or suspect, that the complainant engaged in protected activity.

3. **Adverse Action.** The evidence must demonstrate that the complainant suffered some form of adverse action, including but not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire, or failure to promote.

4. **Nexus.** A causal link between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited animosity) toward the protected activity or safety and health; temporal proximity in time between the protected activity and the adverse action (timing); disparate treatment of the complainant compared to other similarly situated employees; false testimony or manufactured evidence; and pre-textual defenses by the respondent, *etc*.

5. **Employer Defense.** After the *prima facie* case is established, the respondent must in order to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason, *e.g.,* poor work, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, VOSH**.** or the complainant must show by a preponderance of the evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pre-textual, *e.g.*, the non-safety related misconduct did not occur; other employees engaged in similar misconduct known to management were not similarly punished (disparate treatment); the misconduct played no role in the adverse action, "but for" the protected activity the adverse action would not have occurred; or the misconduct was minor in nature.

6. **Dual Motive.** If it is determined that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. The dual motive analysis may be based on either direct or circumstantial evidence of a link between an improper motive and the challenged employment decision. Direct evidence is evidence which does not require any deductions or inferences to establish the conclusion, which is to be proven, such as statements by management that express hostility towards the complainant's protected activity.

"Circumstantial evidence" is not based on personal knowledge, but on

other facts from which deductions are drawn which show indirectly the facts sought to be proved. An example of circumstantial evidence would be a respondent's statement which is shown to be false in a manner that supports the allegations of the complainant. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision despite the protected activity.

7. **As a general rule,** to successfully develop the essential elements of the case, the Investigator will:

a. Determine the complainant's allegations,

b. Corroborate the allegations through witnesses and other evidence,

c. Determine the respondent's answer to the allegations and defenses,

d. Corroborate the respondent's response,

e. Determine the complainant's answer to the respondent's defense, and

f. Corroborate the complainant's answer to resolve all discrepancies.

B. **Initial Contact with Complainant.** The initial contact with the complainant should be made as soon as possible after receipt of the case assignment. Contact should be made even if the Investigator's caseload is such that actual field investigation will be delayed.

1. **Activity Log.** All communications (including telephone calls, voicemails, and emails) made during the course of an investigation must be accurately documented in the activity 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 content of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance, the telephone log may simply show the nature and date of the contact, the number called, and the comment "See Memo."

In addition to any communication, the activity log must, at a minimum, note the

key steps taken during the investigation. For example, investigative research and interviews conducted, notifications sent, and documents received from the parties should be noted in the activity log.

A. Early Dismissal. If the Investigator determines that the complainant does not have allegations which are appropriate for investigation under the statute but may have a *prima facie* case under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance.

B. Unable 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 different hours during normal work hours and in the evening.

b. Mail a certified, return-receipt-requested letter to the complainant's last known address requesting that the Investigator 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, the Director or their designee may terminate the investigation and dismiss the complaint.

c. If the complainant does not contact the Investigator within 10 days, a follow-up letter or alternate means of communication (such as email or telephone call) will be used to contact the complainant requesting that the Investigator be contacted within 30 days of receipt, or the case will be dismissed.

C. Field Investigation. If, after the initial telephone contact with the complainant, it appears that the complainant has presented a *prima facie* allegation, the Investigator will proceed with a field investigation. Personal interviews and on-site collection of documentary evidence will be conducted when practical. Investigations should be planned in such a manner to personally interview all appropriate witnesses during a single site visit. Testimony and evidence may also be obtained by telephone, mail, or electronically. If a conversation is recorded electronically, the Investigator must be a party to the conversation, and the witness must have given prior consent to the recording. The consent should be acknowledged at the beginning of the recording. This does not apply to other tape recordings supplied by the complainant or witnesses; however, all electronically recorded interviews or other voice recordings must be transcribed if they are to be used as evidence.

D. Complainant Interview. The Investigator will arrange to meet with the complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations. Such a record is highly desirable and useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in testimony, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present at any time.

1. If, at this point or at any later stage in the investigation, it can be conclusively shown that a *prima facie* case cannot be developed, the investigation will be terminated.

2. The complainant's side of the investigation must be developed as thoroughly as possible. When writing the complainant's statement, it is usually practical to organize the testimony in a chronological order, outlining pertinent data and events from the time of the employee's hiring through the date of the adverse action, as well as subsequent developments. While much care should be taken to cover the essential elements of a discrimination case as outlined above, the complainant should be encouraged to talk freely about their concerns and experiences on the job, as important information may be revealed that might be missed in a generic "investigative outline" style of interview. An interview is an interactive process of questions and answers. A complainant or witness should not be instructed to submit a statement or fill out a questionnaire without engaging in this process, except as otherwise specified in this manual.

3. The complainant should be encouraged to identify as many witnesses as possible, including names, home addresses, email addresses, and phone numbers if available, as well as a summary of specifically what each witness might be able to testify to in support of the complainant's allegations.

4. The complainant must be requested to furnish all documentation in their possession relevant to the case. Such documentation might include:

    a. Copies of any discharge 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 or personal attorneys,

i. medical records, or,

j. Collective bargaining agreements.

5. It should be ascertained during the interview what remedy the complainant is seeking. If terminated or laid off by the respondent, the complainant should be advised of his/her obligation to search for work and to keep records of interim earnings. Failure to do so might result in a reduction of any back pay to which the complainant might be entitled in the event of future settlement or litigation, should the case be found meritorious. The complainant should be advised that the respondent's back pay liability ordinarily ceases when the complainant refuses a *bona fide*, unconditional offer of reinstatement. The complainant should also be advised to retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

   NOTE: Undocumented workers may not be entitled to all remedies.

6. In situations where the complainant is not personally interviewed and their statement is taken the telephone or electronic audio communication, a detailed "Memo to File" will be prepared relating the complainant's testimony. If necessary, this information may be transferred to an official statement form and mailed to the complainant with instructions to review the document carefully, make any necessary corrections or additions, sign and return. In-person interviews of the complainant and pertinent witnesses are helpful but not required in order to assess credibility and demeanor, and to ensure availability and willingness of witnesses to testify. The OWP Senior Staff Attorney may choose to conduct interviews prior to filing the complaint in Circuit Court.

E. Contact Respondent.

1. Oftentimes, after receiving the notification letter that a complaint has been filed, the respondent may contact the Investigator to discuss the allegation or inquire about the investigative procedure. The communication should be noted in the activity log, and if pertinent information is conveyed during this conversation, the Investigator should document such in the activity log or in a "Memo to File".

2. In many cases, following receipt of the notification letter, a respondent

will forward a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. Generally, assertions made in the respondent's position statement do not constitute evidence, and normally, the Investigator will still need to contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test respondent's stated defense.

3. If the respondent requests time to consult legal counsel, the Investigator will advise that future contact in the matter will be through such representative. The Designation of Representative form should be completed by counsel to document their involvement.

   NOTE: the Designation of Representative form is in Appendix A.

4. In the absence of a signed Designation of Representative form, 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) with the exception of legal counsel, as noted above. If a position letter was received from the respondent, the Investigator will contact the person who signed the letter.

5. The Investigator should interview all company officials who are known to have direct involvement in the case. The Investigator should attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually to obtain the best testimony.

   a. In this regard, if the respondent has designated an attorney to represent the company, interviews with management and supervisory officials should ordinarily be scheduled through the attorney, who may be present during any interviews of the management and supervisory witnesses, unless the individual requests a private interview in accordance with Virginia Code §40.1-49.8.

   b. However, the respondent's attorney shall not be present during interviews of non-management or non-supervisory employees. If the attorney attempts to interfere with interviews of such personnel, the Investigator should immediately contact the OWP Senior Staff Attorney. If necessary, an administrative search warrant will be pursued in accordance with Virginia Code §40.1-49.9.

   c. The respondent may, of course, have a personal representative or attorney present at any time.

6. While at the respondent's establishment, the Investigator should make every effort to obtain copies of, or at least review and make notes on, all pertinent data and documentary evidence which the respondent offers and which the Investigator construes as being relevant to the case.

7. If at any time during the initial (or subsequent) meeting any parties to the case suggest 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.

8. If necessary, interrogatories may be issued for information or records when conducting an investigation in accordance with Virginia Code §40.1-6(4). The Commissioner also has the authority under the same section to take and preserve testimony, examine witnesses and administer oaths in the form of an administrative subpoena (see 16VAC25-60-245). The investigator shall consult the OWP Senior Staff Attorney for guidance.

9. If the respondent fails to cooperate or refuses to respond, the Investigator will evaluate the case and make a determination based on the information gathered during the investigation.

F. **Early Joint Review with the OWP Attorney.** If in the early stages of the investigation, where the Investigator and the Director, or their designee, believe there is evidence that the complainant's allegation has merit and may not be easily settled, the OWP Senior Staff Attorney should be contacted and briefed on the case.

1. Early involvement will help direct the course of the investigation and ensure that proper documentation is gathered to assist in subsequent litigation.

2. Upon the OWP Staff Attorney’s review the Investigator may take a stronger position with the respondent during investigative meetings or the closing conference and negotiate a better settlement.

3. Of equal importance in this "pipeline" procedure are those cases which the Investigator or Director, or their designee, thinks are worthy, but which the OWP Senior Staff Attorney believes are not suitable for litigation. Early discussion may resolve the differences and prevent needless review of the case. This may also obviate the need for further investigative efforts if the case is considered inappropriate for litigation, thus precluding unnecessary expenditure of government resources and a speedier conclusion of the investigation.

G. Further Interviews and Documentation. It is the Investigator's responsibility to fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both 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 obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion, 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 a private attorney or other personal representative present at any time, provided that they have no ties to the respondent.

2. In the event that a witness refuses to sign a statement, interview notes shall be taken. The witness shall be asked to review the notes and verbally acknowledge the accuracy of the notes and be given the opportunity to make any corrections. When the witness acknowledges the accuracy of the final notes, this fact shall be confirmed in writing by the Investigator on the document.

3. The Investigator will attempt to obtain copies of appropriate records and other pertinent documentary materials as required. If this is not possible, the Investigator will review the documents, take photographs of the documents or notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during litigation.

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

5. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should explain the extent of confidentiality permitted by law. Non-management and non-supervisory employee statements shall be considered confidential. The Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if the case is brought to court, a judge may order the statement to be disclosed.

H. **Resolve Discrepancies.** After completing the respondent's side of the investigation, the investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent**.**

I. **Analysis.** After having gathered all relevant evidence available, the Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A. above.

J. **Document File.** 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 become unclear. To aid clarity, documentation should be arranged chronologically where feasible.

Chapter 4

Case Disposition

I. Scope.

This chapter sets forth the policies, procedures, and format for writing the Report of Investigation (ROI). It includes procedures for arriving at a determination on the merits of a discrimination case; policies regarding withdrawal, settlement, dismissal, and litigation; adequacy of remedies; and tracking procedures for timely completion of cases.

II. Preparation.

A. Investigator Reviews the File. After completing the investigation, the Investigator must thoroughly review the file and its contents to collate and organize all pertinent data in preparation for writing the ROI. When appropriate, the Investigator may wish to discuss the case with the Director, or their designee, prior to writing the ROI.

III. Report of Investigation.

The Investigator will report the results of the investigation by means of the ROI following the policies and format described in Chapter 5 of this Manual.

IV. Case Review and Recommendation by the Director, or their Designee.

A. Review. Upon receipt of the completed investigation case file from the Investigator, the Director, or their designee, will review the file to ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case.

If legal action is being considered, the Director, or their designee, will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practical after receipt of the file.

B. Recommendation. If the Director, or their designee, concurs with the analysis and recommendation of the Investigator, the concurrence will be documented by a concurrence block at the end of the ROI, and appropriate determination letters will be prepared for the Director's, or their designee's, signature.

1. **Withdrawal.** For recommendations to approve withdrawal, the Director, or their designee, will approve by signature on the withdrawal form. In cases where the complainant has failed to return a signed withdrawal form, the disposition letter to the complainant must clearly indicate that the disposition of the case is based on the complainant's verbal request for withdrawal.

2. **Dismissal.** For recommendations to dismiss, the Director, or their designee, will prepare letters of dismissal to the complainant with a copy to the respondent. The letters must include the necessary information regarding the parties' rights to pursue the matter in circuit court without VOSH**.** involvement, pursuant to Virginia Code §40.1-51.2:2.B.

3. **Settlement.** For recommendations to approve settlement, the Director, or their designee, will approve by signature on the settlement agreement. The Director, or their designee, will also ensure that signed closure letters are sent to the complainant and respondent along with copies of the settlement agreement, the Notice to Employees, the back paycheck, etc.

4. **Deferral.** For recommendations to defer to another agency decision or private settlement, the Director, or their designee, will prepare letters of deferral to the complainant, sending a copy to the respondent.

5. **Merit Finding.** For recommendations of merit, the OWP Senior Staff Attorney will review the file to determine the appropriateness of litigation.

6. **Further Investigation Warranted.** If, for any reason, the Director, or their designee, does not concur with the Investigator's analysis and recommendation or finds that additional investigation is warranted, the Director, or their designee, will return the file for follow-up work.

V. Determination.

All letters of determination to both the complainant and respondent must be sent by certified mail, return receipt requested, or an equivalent service.

Complainants may appeal a non-meritorious finding by the Director, or their designee, to the Assistant Commissioner for Labor and Industry, whose decision will be final.

VI. Approval for Litigation.

Cases recommending litigation will be forwarded to the OWP Staff Attorney for review. If the OWP Staff Attorney determines that additional investigation is required,

the Director, or their designee, will assign such further investigation to the original Investigator.

Chapter 5

Report Writing and Case File Documentation

I. Scope.

This chapter sets forth the policies, procedures, and format for writing the Report of Investigation (ROI) and for properly organizing and documenting the investigative case file.

II. Screened Complaints.

The case file organization outlined below does not apply in cases which are not docketed after the initial screening. For cases that are not docketed, a memorandum will be prepared documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation. The memorandum will be maintained with the "screen-out" log, and an 'intake screening record' will be entered into OIS. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed. Initial letters will be prepared and sent to both parties and they should include an explanation for the dismissal and inform the complainant of their rights to pursue a private right of action pursuant to Virginia Code §40.1- 51.2:2.B.

III. Case File Organization.

A. As part of the case docketing process, the Investigator will prepare an original case file for each docketed case.

B. Upon assignment, the Investigator normally compiles a standard electronic case file containing the intake screening sheet, screening notes, transmittal documents, assignment memorandum, copies of correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The Director or their designee shall determine the appropriate manner in which case files shall be organized. A Table of Contents identifying all the evidentiary material will be maintained in the file to aid in the review of the case.

IV. Report of Investigation (ROI).

A. **Effective Communication.** One of the primary skills required of an Investigator is the ability to present the investigative findings in a clear and succinct manner that effectively communicates the results of the investigation to the reader of the report. The general format of the ROI should be logical, and all of the information listed below shall be included, where appropriate. It shall be a memorandum addressed to the Director or their designee.

B. **ROI Format.** Information to be included in the ROI is as follows:

1. **Date Complaint Filed.** Indicate the actual date that the complaint was filed.

2. **Complainant.** Include full name, mailing and street address, telephone number, fax number, and e-mail address of the complainant.

3. **Represented by.** Identify the complainant's attorney or other designated representative, mailing address, telephone number, fax number, and e-mail address, if applicable.

4. **Respondent.** Include the full name, mailing and street address, telephone number, fax number, and e-mail address of the respondent.

5. **Represented by.** Identify the respondent's attorney or other designated representative. Include name, title, mailing address, telephone number, fax number, and e-mail address, if applicable.

6. **Allegation.** Give a brief account of the complainant's allegations, *e.g.*, "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."

7. **Defense.** Give a brief account of the respondent's defense, *e.g.*, "Respondent claims the complainant was discharged for excessive absenteeism."

8. **Coverage Data.** Give a description of the company to include location of main offices, nature of primary business.

9. **List of Witnesses.** List name, occupation, mailing and street address and telephone number of all witnesses interviewed, and list other known potential witnesses who were not interviewed.

10. **Investigative Findings.** The Investigative Findings section should begin with descriptive background information on the work site and history of VOSH./OSHA safety and health activity, if any, and flow from there

through the events relating to the alleged discrimination. The findings should be written in a narrative, "storytelling" format. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary); e.g. "see Initial Complaint, Exhibit I". References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned.

11. **Analysis/Conclusions.** Evaluate the facts presented in the Investigative Findings as they relate to the four elements of a violation. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented. In cases recommending litigation, a discussion of the strengths and weaknesses of the case *vis-à-vis* respondent's possible defense should also be presented, as appropriate. Discuss the adequacy of the facts, legal principles involved, and anticipated trial problems.

12. **Recommendation.** Give the Investigator's recommendations for disposition of the case.

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

1

V. Electronic Case File (ECF) System Procedures

A. Whistleblower complaints are now documented using electronic case files in lieu of paper files. Procedures regarding the organization, file naming conventions and requirements for investigative case files is outlined below.

B. The Office of Whistleblower Protection (OWP) has a shared SharePoint with sufficient storage capacity to maintain and store whistleblower case records. The standards for integrity and format of information remain the same as with printed case files.

VI. Whistleblower SharePoint

A. Within the SharePoint, case files are organized into separate folders divided by calendar years, as displayed below. The folder to which each case belongs is determined by the date complaints were filed, since the case file is created upon receipt of the complaint.

A folder for Preliminary Investigation Files is provided where recently received cases will be stored until the case file is created, contingent upon a *prima facie* determination and the timeliness of the allegation.

Case files should be updated and maintained throughout the course of the investigation.

NOTE: *There is also an Alternative Dispute Resolution (ADR) Program folder which has limited access*.

B. Organization of Files

1. **Case Folder**

Within each calendar year's folder, case files should be divided into separate folders based on the stage of the investigation process the case is currently in.

Within each of the aforementioned folders, the cases are organized by month of ongoing action and then further divided by Case File Names.

The case file should be maintained and updated as appropriate based on the stage of the investigation.

2. Naming Protocol

1. Case Files should be named using the following naming conventions:

[Complainant] v. [Respondent],[Year] [Docket Number] [Investigator Initials]

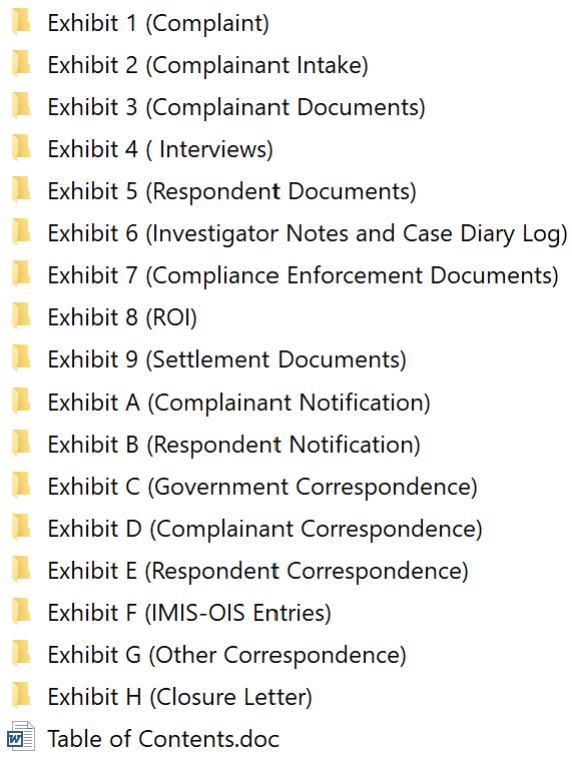
2. If a case enters Alternative Dispute Resolution "ADR" should be added after Investigator's initials.

3. Case File Structure

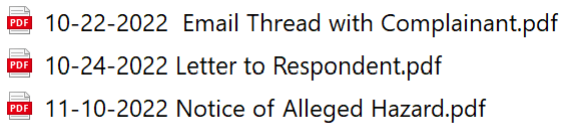
Case file materials should be organized within each case file by exhibit. The exhibit folders are organized, first, by numerical exhibits, which correspond to the evidentiary exhibits traditionally stored on the right side of paper case files followed-by, alphabetical exhibits, which correspond to the evidentiary exhibits traditionally stored on the left side of paper case files.

These Exhibits should include any internal communication within the Agency pertaining to the case, any communication with the complainant and respondent and any notes the investigator makes. Unused folders should not be deleted but should display an 'X' at the end.

A table of contents should be created in a Word document listing all the files in each exhibit folder. A template Table of Content is attached to the end of this section.



4. **Exhibit Naming Protocol**
   Individual documents within each Exhibit folder should be saved in Adobe PDF format. Document names consist of the date received as well as a one to four word description of the document or file.

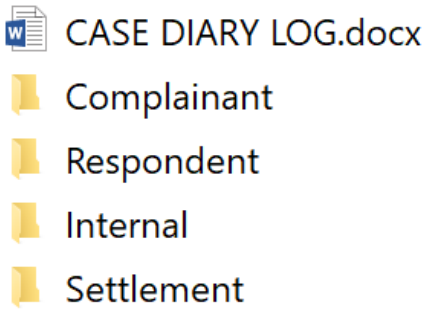


5. **Alternative Dispute Resolution (ADR) Case Files**
   The ADR process is subject to strict confidentiality between the parties involved and the representatives of the VOSH**.** OWP ADR program. Additionally, the case files for the ADR program are separate from the investigation files. Therefore, the ADR folder in the shared MS Teams Group is only accessible to the ADR Coordinator and any DOLI personnel involved in the review of the ADR portion of the case.

   a. ADR files are organized by case name as follows:

   [Complainant] v [Respondent] [Year] [Docket Number]

   b. Within each ADR case file, the subdirectories' structure is:



- Each case folder will contain a **Case Diary Log**, recording the interactions the ADR Coordinator has with the parties involved.

- The **Complainant folder** will hold all the ADR correspondence the Neutral has with the Complainant. This will include a copy of the original whistleblower discrimination complaint as well as the ADR Request Form that the Complainant has signed.

- The **Respondent folder** will hold all the ADR correspondence the Neutral has with the Respondent. This will include the ADR Request Form that the Respondent has signed.

- The **Internal folder** will hold all the ADR correspondence the Neutral has with DOLI or OSHA officials when it is necessary for administrative and supervisory purposes, or to seek legal or policy guidance on novel or complex questions that arise during the ADR proceeding.

- The **Settlement folder** will hold all the ADR documents related to the outcome of the ADR process. This will include a copy of any payments and/or proof of mailing. This may include the settlement agreement, a notice that the ADR process has been suspended, or a notice that the ADR process did not yield a resolution and the stay has been lifted on the investigation.

Chapter 6

Settlement Agreements

I. **Scope.** This section covers policy and procedures for the effective negotiation and documentation of settlement of meritorious cases at the regional level.

II. **Settlement Agreement Policy.** It is VOSH**.** policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Further, although VOSH will not, itself, seek settlement of cases in which a merit finding has not been reached, VOSH will make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation.

The VOSH**.** whistleblower statute is designed to compensate complainants for the losses caused by the unlawful conduct and restore them to the terms, conditions, and privileges of their employment or former employment (if the complainant was fired) as they existed prior to the respondent's adverse actions. The complainant's remedies may also include non-monetary remedies, such as reinstatement to a position from which the complainant was terminated, receipt of a promotion that the complainant was denied, expungement of adverse references in the employment record, a neutral employment reference, and other remedies that would make the complainant whole.

III. Early Voluntary Resolution.

A. Ideally, as with safety and health issues, employer/employee disputes should be resolved between the principals themselves to their mutual benefit without third-party involvement. The Commissioner favors voluntary resolution of disputes through alternative dispute resolution processes. It is also VOSH**.** policy to defer to adequate privately negotiated settlement of such disputes, although such settlements must still be reviewed and approved by the Director, or their designee, to ensure that the terms of the settlement are consistent with the purpose and intent of the Labor Laws of Virginia.

1. If the complainant and respondent settle the dispute between themselves or if settlement is reached through the grievance-arbitration process or other means prior to VOSH**.** reaching a determination, the case may be concluded in one of two ways.

a. The complainant may wish to withdraw the complaint.

b. The Director, or their designee, may issue a determination letter deferring to the outcome reached among the parties.

2. In either event, the case will be recorded in the OIS as “Settled - Other”.

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

4. Criteria for Reviewing Private Settlements. 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. The criteria below provide examples of the types of terms that VOSH**.** will not approve in a private settlement agreement:

a. VOSH**.** will not approve a provision that states or implies that VOSH is party to a confidentiality agreement.

b. VOSH**.** will not approve a provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity in the future. This includes a complainant’s right to file a future complaint related to an occupational injury or exposure of which he or she was unaware at the time of entering into the settlement agreement.

c. VOSH**.** will not recognize agreements in which a complainant waives the right to file a complaint based on a respondent’s past or future conduct. 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 prevent or interfere with Complainant’s non-waivable right to engage in any future

activities protected under the whistleblower statutes administered by VOSH."

d. VOSH**.** 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 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."

e. VOSH**.** must ensure that the complainant's decision to settle is knowing and voluntary.

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

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

(2) **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 following question must be asked: "Do you feel that the monetary payment fairly compensates you for that?" The complainant also should be asked whether they believe that there are any other concessions made by the respondent in the settlement that, taken together with the monetary payment, fairly compensate for the waiver of employment.

The case file must document the complainant's replies and any discussion thereof.

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

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

(5) **Complainant's consent.** VOSH**.** 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 not represented, the Investigator must ask the complainant if they understand the waiver and if they accepted it voluntarily. Particular attention should be paid to whether there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, threats made to persuade the complainant to agree, or additional monies or forgiveness of debt promised as an additional incentive.

(6) **Other relevant factors.** Any other relevant factors in the particular case also must be considered. For example, does the complainant intend to leave their profession, to relocate, to pursue other employment opportunities, or to retire? Have they already found other employment that is not affected by the waiver? In such circumstances, the complainant may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

B. On the other hand, VOSH**.** should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

IV. Settlement Agreement Procedure.

A. Requirements. Requirements for all settlement agreements are:

1. The investigative case file must address all elements of a *prima facie* allegation.

2. The file must list all appropriate relief at that juncture of the process and the relief obtained.

3. The settlement must contain all of the following core elements of a settlement agreement:

   a. It must be in writing.

   b. The employer must agree to comply with the relevant statute(s).

   c. It must address alleged retaliation.

   d. It must specify the relief obtained.

   e. It must address a constructive effort to alleviate the chilling effect, such as the posting of the agreement or an equivalent notice or fully explain why notice to remaining employees is not necessary.

4. Adherence to these "core" elements should not create a barrier to getting an early settlement and adequate remedy for the complainant, and concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the Director, or their desginee.

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

   b. 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 had on co-workers. Posting of the settlement agreement or a notice to employees may be a remedy but may also be an impediment to a settlement. A respondent's refusal to post such a notice should not be allowed to prevent the achievement of an otherwise satisfactory agreement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

B. Adequacy of Settlements.

1. **Full Restitution.** Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual meritorious case must be carefully explored and documented by the Investigator. One hundred percent relief should be sought during settlement negotiations wherever possible. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass any or all of the following, and is not necessarily limited to:

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

   b. Wages lost due to the adverse action. (*NOTE*: *Unemployment compensation benefits may not be considered as a back pay offset.*)

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

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

      (2) Reinstatement. A respondent’s cumulative liability for back pay ceases when a complainant rejects a bona fide offer of

reinstatement. The respondent's offer must afford the complainant reinstatement to a job substantially equivalent to the former position.

(3) Interim Earnings. Interim earnings obtained by the complainant will be deducted from a back pay award. Interim earnings are the total earnings (before taxes and other reductions) that the complainant earned from interim employment subsequent to his termination and before assessment of the damages award. Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job, assuming the expenses would not have been incurred at the former job. Such expenses may include special tools and equipment, necessary safety clothing, union fees, mileage at the applicable IRS rate per driving mile for any increase in commuting distance from the distance travelled to the respondent's location, special subscriptions, mandated special training and education costs, special lodging costs, and other related expenses.

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

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

(5) Mitigation. Complainants have a duty to mitigate their damages incurred as a result of the adverse employment action. To be

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

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

c. "Front pay" is a term covering wage losses from the last date at which back wages are calculated to an agreed future date. Front pay may be used in lieu of reinstatement where an employer wishes to avoid reinstatement, and the employee agrees (or the reverse). Absent the agreement of the employer, an employee typically is only entitled to front pay where the employment relationship is so poisoned that no reasonable person could return to work (like constructive discharge).

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

In cases where front pay may be a remedy, the investigator should set proper limitations. For example, the front pay should be awarded for a set amount of time and should be reasonable, based on factors like the length

of time the complainant expects to be out of work and the complainant's compensation prior to the retaliation, adjusted for any income the complainant is earning. The Director or their designee should be consulted when considering an award of front pay.

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

e. Respondent's agreement to provide to the complainant a neutral reference to potential employers.

f. Posting of a notice to employees indicating that the respondent agreed to comply with the statute and that the complainant has been awarded appropriate relief.

g. Compensatory damages may include, but are not limited to, pecuniary losses resulting from the respondent's adverse employment action, such as out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy as well as medical expenses for treatment of symptoms directly related to the retaliation (e.g., post-traumatic stress, depression, etc.), vested fund or profit-sharing losses (vested fund or profit sharing losses include both company contributions and investment gains and losses), credit card interest and other property loss resulting from missed payments, or annuity losses. Complainants may also recover expenses incurred as a result of searching for interim employment. Such expenses may include, but are not limited to, mileage at the current IRS rate per driving mile, employment agencies' fees, meals and lodging when traveling for interviews, bridge and highway tolls, moving expenses, and other documented expenses. Investigators should support awards of these types of damages with documentary evidence.

h. Pain and suffering damages need some factual support, such as medical bills, the loss of a home, etc.

Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for emotional distress, pain and suffering, loss of reputation, personal humiliation, and mental anguish resulting from the respondent's adverse employment action. Courts may award compensatory damages for demonstrated mental anguish or pain and suffering in winning employment retaliation and discrimination cases. The Investigator, with guidance from the Director or their designee

and the OWP Senior Staff Attorney, will evaluate whether compensation for emotional distress is appropriate.

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

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

Evidence from a healthcare provider is required if a complainant seeks to prove a specific and diagnosable medical condition. Investigators should contact Division of Hearing and Legal Services to explore the possibility of obtaining a written waiver from a complainant to communicate with their doctor to ensure compliance with HIPAA and a complainant's privacy rights. To comply with privacy laws, any medical evidence must be marked as confidential in the case file and should not be disclosed except in accordance with Virginia's FOIA and privacy statutes.

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

(2) **Factors to Consider.** Investigators should consider a number of factors when determining the amount of an award for emotional and mental distress. Investigators should seek guidance from Division of Hearing and Legal Services. The factors to consider include:

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

i. One lump sum payment to be made at the time of the signing of the settlement agreement as agreed by the parties.

2. Punitive Damages.

a. Punitive damages are not awarded in the Commonwealth of Virginia. There is a Virginia Supreme Court decision that says that punitive damages are not permitted in Virginia Whistleblower cases. Case: Property Damage Specialists, Inc. v Aaron Rechichar, Record No. 151214, Decided: September 08, 2016.

3. **Unilateral Settlement Agreements**. When the complainant does not agree to become a party to a settlement which, in the Director, or their designees, opinion, is a fair and equitable settlement of all matters at issue and would effectuate the requirements of Title 40.1 of the *Code of Virginia*, settlement agreements may be effected between VOSH**.** and respondents without the consent of the complainant. All unilateral settlement agreements must be personally reviewed and approved in writing by the Commissioner of the Virginia Department of Labor and Industry.

C. Front Pay. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.

D. Documentation.

1. Although each agreement will, by necessity, be different in detail, the general format and wording of the sample agreements will be used.

2. Investigators will document in the file, and reference in the ROI, justification for the restitution obtained. If the settlement falls short of a full remedy, reasons for such must be explained, along with an explanation that the complainant is aware of their entitlement and has chosen to accept a lesser amount.

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

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

E. Enforcement. In all cases where there has been a settlement, either before or after the issuance of findings, and the employer fails to comply with the settlement, this failure may be treated as a new instance of retaliation and require the opening of a new case or it may be appropriate to confer with the OWP Senior Staff Attorney to consider the possibility of issuing findings in the original case or direct enforcement of the settlement agreement, itself, in court. Depending on the nature of the case, one or the other option might be preferable.

F. Undocumented Workers. Undocumented workers are not entitled to reinstatement, front pay, or back pay. Cf. Hoffman Plastic Compound, Inc. v. NLRB, 535 U.S. 137 (2002) (under National Labor Relations Act, undocumented workers are not entitled to reinstatement or back pay). Other remedies, including compensatory damages, [2] may be awarded, as appropriate.

Chapter 7

Alternative Dispute Resolution

I. Background.

The Virginia Occupational Safety and Health's (VOSH**.**) ADR Program can assist complainants and respondents to resolve their whistleblower complaints in a cooperative and voluntary manner. When ADR is successful. It can provide timely relief and finality to both parties when they are seeking an amiable resolution.

The alternative dispute resolution processes for whistleblower programs provide parties the opportunity to resolve their disputes with a confidential VOSH**.** representative (the ADR Coordinator) who has subject-matter expertise in whistleblower investigations.

I. Definitions.

Alternative Dispute Resolution – is an approach to the resolution of whistleblower complaints by means other than litigation. As a general matter, ADR is broadly understood to involve the use of negotiation, mediation, conciliation, or arbitration. These techniques are not mutually exclusive in any particular conflict, but can be used sequentially or in combination with other methods for resolving whistleblower complaints. ADR is a consensual process that involves the intervention of an ADR Coordinator to assist parties in resolving their conflict.[3]

ADR Communication - is any oral or written communication made for the purposes of an ADR proceeding by a party, a non-party participant, or the ADR Coordinator. However, a written agreement to enter into ADR or a final written settlement agreement is not an ADR communication.[4]

ADR Program - is a voluntary program in which the parties to a VOSH**.** whistleblower complaint agree to attempt to resolve the whistleblower complaint with the assistance of the ADR Coordinator. ADR can take place once a case has been docketed but before an investigation begins, or at any point while an investigation is ongoing. The focus of VOSH's ADR Program is to achieve a quick and voluntary resolution of the whistleblower complaint instead of an investigation to determine the validity of the charge and potential statutory violations. Should the parties elect to pursue ADR but fail to enter into a

settlement agreement within a reasonable time frame, the case will be transferred to an Investigator to start or resume investigation of the complaint.[5]

Investigation – is a process in which a VOSH**.** official (the Investigator) investigates the whistleblower complaint and provides a written recommendation to the Director of Hearing and Legal Services based on the evidence and the law. The Director, or their designee, then reviews the file and makes a determination or referral for litigation to the Director of Hearing and Legal Services.

ADR Coordinator - an individual who is trained or experienced in conducting confidential dispute resolution proceedings and in providing dispute resolution services.

Settlement - is a written and signed agreement between parties to reach a mutually agreeable resolution of the whistleblower complaint.

III. Roles and Responsibilities.

A. Director of the Office of Whistleblower Support (or their designee).

The Director is responsible for:

1. Ensuring that information about the ADR Program and processes is provided to interested parties;
2. Ensuring that VOSH**.**'s ADR Program is carried out consistently with the policies and procedures, including ensuring that the ADR Program is separate from the investigative process;
3. Ensuring that ADR Program activity is appropriately tracked, and that ADR Program activity data and information are shared with Office of Whistleblower Protection (OWP) for reporting purposes;
4. Ensuring that settlement agreements reached under the ADR Program are properly reviewed and approved consistently with VOSH**.**'s Whistleblower Investigations Manual (WIM);
5. Collecting and evaluating feedback on the ADR Program for reporting purposes; and
7. Tracking, monitoring, and reporting on the overall outcomes of the ADR Program.

B. Alternative Dispute Resolution Settlement Reviewer.

This position will be held by an attorney, who is not regularly engaged in whistleblower casework.

The Reviewer is responsible for:

1. Coordinating the delivery of appropriate training and guidance materials to VOSH**.** OWP's ADR Program; and
2. Reviewing a settlement agreement, prior to being signed by all parties, to determine VOSH**.** approval and not repugnant to the Act.

IV. VOSH.'s ADR Program

A. Overview.

1. The ADR Program is a valuable alternative to the expensive and time-consuming process of an investigation and litigation.
2. The ADR Program is a voluntary process in which the parties agree to use a confidential VOSH**.** OWP representative (the ADR Coordinator) to assist them in resolving a whistleblower complaint by mutual agreement. The ADR Coordinator has no authority to impose settlement on the parties.
3. VOSH**.** OWP encourages parties to use the ADR Program, where available, as early as possible, but parties may request ADR at any point during an investigation. Once a case is docketed but before an investigation begins, VOSH OWP will offer the parties the option of submitting their dispute to ADR. However, if parties choose not to engage in ADR before an investigation begins, they may still seek ADR at any point while the investigation is ongoing. The VOSH OWP will stay the investigation while ADR is taking place.
4. The ADR Program is separate from the OWP investigative process. Information obtained by the ADR Coordinator during ADR is confidential and will not be disclosed to VOSH**.** OWP's investigative staff, except in limited circumstances as provided below (see Section V. "Confidentiality").
5. During ADR, the ADR Coordinator may not offer a determination on whether a complaint has merit or the amount of damages that a complainant should seek. The ADR Coordinator may suggest how the parties might reach an agreement and may give the parties an objective perspective on the strengths and weaknesses of their positions, but the ADR Coordinator may not offer judgment on the merits of the complaint.
6. The ADR Coordinator may share documents between the parties during ADR at the parties' request, but the ADR Coordinator must not share those documents or otherwise discuss their contents with VOSH**.** OWP's investigative staff or any other individual not involved in ADR, except in limited circumstances as provided below (see Section V. "Confidentiality"). Documents collected during ADR should be

retained by the OWP in accordance with applicable file retention requirements, which include ensuring that ADR files are kept separate from the whistleblower investigative files.

7. If the complaint is not resolved during ADR, a party is free to provide its own documents and evidence that it submitted during ADR to the assigned Investigator for consideration in the investigation. In addition, the assigned Investigator may request documents and information from a party as part of the investigation even though the party submitted this same information during ADR.

8. The ADR Coordinator will not discuss any information obtained during ADR, or the ADR Coordinator's conclusions, with other staff.

B. Process.

1. Upon receiving a timely complaint that contains a *prima facie* allegation of retaliation, the Investigator will send opening letters to both the respondent(s) and the complainant(s) informing the parties about the ADR Program and the option to submit their dispute to ADR. The opening letter will include a copy of the "ADR Request Form" (see Appendix C) and a copy of the "Frequently Asked Questions (FAQ) Document" (see Appendix D).

2. If both parties request ADR at any point during the investigation, any investigative work will be stayed, and the case will be submitted to the ADR Coordinator. Both parties will be required to complete an ADR Request Form (see Appendix C) to acknowledge their agreement to pursue ADR prior to the ADR Coordinator's contact.

3. If only one party agrees to ADR prior to the commencement of an investigation, both parties will be notified that the investigation will proceed according to the procedures identified in the WIM.

4. Even if both parties request ADR, the ADR Coordinator may recommend to their supervisor, or their designee, that the case is not suitable for ADR. For example, VOSH**.** OWP may decline to accept a case for ADR if it has reasonable cause to believe that one or both of the parties do not intend to participate in good faith.

5. If VOSH**.** OWP accepts the case for ADR, VOSH OWP will assign the case to the ADR Coordinator. The ADR Coordinator will inform the parties of the ground rules for participating in the process, including the ADR Coordinator's role in the process, the applicable confidentiality rules, and VOSH OWP's requirements for the approval of settlement agreements, as set forth in the WIM.

6. During ADR, the ADR Coordinator will work with the parties to explore whether there is common ground for settlement. The ADR Coordinator may provide general information about the whistleblower law and procedures to the parties and may give the parties an objective perspective on the strengths and weaknesses of their respective positions, but the ADR Coordinator will not offer judgment on the merits of the complaint. It is important for the settlement agreement to be adequate, according to guidelines set out in the WIM.[6]

7. VOSH**.** OWP may terminate ADR under certain circumstances and/or at the discretion of the Director, or their designee. For example, VOSH OWP may terminate the process if either party violates the ground rules for participation, including engaging in abusive behavior or failing to participate in good faith. VOSH OWP may also terminate the process if the parties reach an impasse and cannot come to an agreement within a reasonable amount of time. Because ADR is a voluntary process, VOSH OWP must terminate the process if one or both of the parties decide to end the process for any reason.

8. If the process ends without an agreement, the ADR Coordinator will transfer the case to the assigned investigator for investigation. The ADR Coordinator will use the ADR Outcome Form (see Appendix F) for this purpose. When transferring the case for investigation, the ADR Coordinator will not comment on the positions of the parties or the communications that occurred during ADR. VOSH**.** OWP will then resume the investigation following the appropriate procedures outlined in the WIM.

9. If the parties can agree upon a framework for settlement, the case will be considered "settled-in-principle." The ADR Coordinator may draft a proposed settlement agreement following the procedures outlined in the WIM. Alternatively, the parties may draft and submit an agreement for VOSH**.** OWP's approval following the procedures outlined in the WIM. Whenever possible, the parties should be encouraged to use VOSH OWP's standard settlement agreement.

10. Settlement agreements reached between the parties must be reviewed and approved by the ADR Settlement Reviewer to ensure that the settlement agreement is knowing and voluntary, provides appropriate relief to the Complainant, and is consistent with public policy, i.e., the settlement agreement must not be repugnant to the relevant whistleblower statute and not undermine the protection that the relevant whistleblower statute provides. If VOSH**.** OWP – through the Alternative Dispute Resolution Settlement Reviewer–approves the settlement agreement by verifying the terms of the settlement agreement, the ADR Coordinator will return the agreement to the parties for signature.

11. If both parties sign, and return, a VOSH**.** OWP-approved settlement agreement, the ADR Coordinator will notify their supervisor that the case has resolved. The ADR

Coordinator will use the ADR Outcome Form (see Attachment X) for this purpose. The ADR Coordinator will also provide the Supervisor with the original, signed digital copy(s) of the settlement agreement for preservation in the investigative case file. When notifying the supervisor of the settlement, the ADR Coordinator will not comment on the positions of the parties or the communications that occurred during ADR. The Supervisor will send out a closing letter to the parties and assures that a copy is included in the digital investigative file. Separate signed identical copies are acceptable.

12. Regardless of the outcome of ADR, the ADR electronic case file will contain all documents collected during ADR in accord with applicable file retention requirements. ADR documents will be maintained separately from whistleblower investigation case files and their contents will not be shared or discussed with VOSH**.** OWP's investigative staff or any other individual who was not involved in the ADR process, except in limited circumstances as discussed below in Section V.D.3. ADR communications may also be disclosed if both parties consent to disclosure in writing or if disclosure is otherwise required by law. However, note that final settlement agreements approved by VOSH OWP are not confidential ADR communications and must be included in the investigation case file.

13. VOSH**.** OWP will not reimburse the parties for any travel expenses. ADR conferences can take place by telephone or video conference if travel would be costly or create a hardship for any party.

V. CORE ADR PRINCIPLES AND CONCEPTS

A. Voluntary.

ADR is a voluntary process. The parties must mutually agree to pursue ADR as an alternative to an investigation, and either party may choose to terminate the process at any time and return the case to investigation for any reason. Participating in ADR will not affect the parties' right to receive a full and fair investigation of the complaint if ADR does not resolve the dispute.

B. Good Faith.

The ADR process is only effective when the parties participate in good faith. "Good faith" participation means that the parties engage in the process with openness to resolving the whistleblower complaint and treat each other, the process, and the ADR Coordinator with respect. Parties should come to the process fully prepared to discuss resolution of the whistleblower complaint and must have full authority to settle the dispute. The ADR Coordinator may decide to end the ADR process if they have reasonable cause to believe the parties are not participating in good faith.

C. Neutrality.

1. The ADR Coordinator has no decision-making authority over the outcome of any investigation into the complaint, and does not represent either party.

2. While the ADR Coordinator may give the parties an objective perspective on the strengths and weaknesses of their positions, he/she may not offer judgment on the merits of the case.

D. Confidentiality.

1. Preserving the confidentiality of party statements and submissions during ADR, to the extent permitted under the law, allows parties to explore settlement without fear that their discussions will be used against them.

2. ADR case files generally consist of communications between the parties and the ADR Coordinator. These files must be segregated from whistleblower investigative case files. ADR case files are generally exempt from disclosure under Freedom of Information Act (FOIA).[7]

3. The ADR Coordinator will keep confidential any communications made and/or documents submitted during ADR, including any settlement offers made, to the extent permitted by law, except that such communications and/or documents may be shared with other DOLI officials when it is necessary for administrative and supervisory purposes, or to seek legal or policy guidance on novel or complex questions that arise during the ADR proceeding.

4. However, the ADR Coordinator will not share ADR communications, including any settlement offers made or documents submitted during ADR, or discuss the merits of the complaint, with any DOLI official who will be involved in any further investigations or proceedings related to the whistleblower complaint if a settlement is not reached through ADR. The ADR Coordinator may only communicate the outcome of the ADR process to such persons. If a settlement is not reached through ADR, the parties may share any of their own communications made during ADR with the VOSH**.** OWP Investigator.

5. At the conclusion of ADR, all information or materials provided to, or created by, the ADR Coordinator —including all notes, records, or documents generated during the course of ADR—will be maintained in accord with applicable file retention requirements, which includes keeping these records separate from the VOSH**.** investigation case file and inaccessible to VOSH's investigative staff. Parties and/or their representatives are permitted to retain their own notes.

6. Any settlement agreement reached must be approved by the Alternative Dispute Resolution Settlement Reviewer. VOSH**.** OWP will maintain a copy of the approved settlement agreement in the investigative case file.

E. Conflict of Interest.

1. In general, the ADR Coordinator should avoid conducting an ADR where there is an actual or potential conflict of interest between the ADR Coordinator and one or more parties.

2. However, the parties may waive a conflict after the ADR Coordinator fully discloses it to them. If the parties wish to waive a conflict, the ADR Coordinator must note the conflict and both parties must waive it in writing.

3. Otherwise, where a conflict exists, the ADR Coordinator will recuse him/herself and an alternative, confidential VOSH**.** OWP representative will be appointed to carry out ADR.

VI. Parties' Ability to Settle during the VOSH. OWP Investigation.

Nothing in VOSH**.** OWP's ADR Program precludes or restricts the parties' ability to settle the whistleblower complaint independently through a private right-of-action or with the assistance of other ADR services, such as mediation with a third party, during a VOSH OWP investigation. However, any settlement agreement in an open whistleblower case that the parties reach prior to the close of VOSH OWP's investigation must be submitted to VOSH OWP for approval when provided for in the WIM.

Chapter 8

VOSH. Relationship with OSHA

I. Relationship to OSHA.

A. Section 18 of the OSH Act provides that any state which desires to assume responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a state plan under Section 18 does not affect the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any state. However, 29 CFR 1977.23 and 29 CFR 1902.4(c)(2)(v) require that each state plan include an anti-discrimination provision as effective as OSHA's Section 11(c). Therefore, in state plan states, employees may file occupational safety and health discrimination complaints with either federal OSHA or the state or both.

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

1. Complaints received by VOSH**.** which are not under state plan jurisdiction will be referred to OSHA by means of a referral letter, email, or documented telephone call. The complainant will also be advised of the referral in the same manner.

2. These referrals will be documented on the administrative closure log and maintained for reference.

3. VOSH**.** must advise complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent federal protection. This will be accomplished in the initial letter to the complainant.

C. Joint Jurisdiction

Sometimes we have both 11(c) and OSHA statute complaints, in these cases there might be joint jurisdiction with federal OSHA and what will be covered will be delineated. This may result in one or the other party taking over both aspects of the investigation.

Chapter 9

Legal Principles

I. Scope

This Chapter explains the legal principles applicable to investigations under the whistleblower protection laws that VOSH**.** enforces, including:

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

II. Introduction

The VOSH**.**-enforced whistleblower protection laws prohibit a covered entity or individual from retaliating against an employee for the employee's engaging in activity protected by the whistleblower statute, i.e. for submitting a safety or health complaint. In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of the whistleblower statute has occurred by analyzing whether the facts of the case meet the required elements of a violation and the required standard for causation (i.e., but-for factor).

III. Gatekeeping

Upon receipt, an incoming whistleblower complaint is screened to determine whether the *prima facie* elements of unlawful retaliation (a "*prima facie* allegation"[8]) and other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and – as appropriate – the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of the whistleblower law? The elements of a retaliation claim are described below and the procedures for screening whistleblower complaints are described in detail in Chapter 2[9] and Section V of this Chapter.

IV. Reasonable Cause

If the case proceeds beyond the initial screening phase, Investigators gather evidence to determine whether there is reasonable cause to believe that retaliation in violation of the whistleblower statute occurred. Reasonable cause means that the evidence gathered in the investigation would lead VOSH**.** to believe that unlawful retaliation against the complainant occurred – i.e. that there could be success in proving a violation in a court hearing based on the elements described in more detail below.

A. **A reasonable cause determination** requires evidence supporting each element of a violation and consideration of the evidence provided by both Complainant and Respondent but does not generally require as much evidence as would be required at trial. Although VOSH**.** will need to make some credibility determinations to evaluate whether it is reasonable to believe that unlawful retaliation occurred, VOSH does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that unlawful retaliation occurred[10]. Because VOSH makes its reasonable cause determination prior to a hearing, the *reasonable cause* standard is somewhat lower than the *preponderance of the evidence* standard that applies at a hearing.

   If, based on analysis of the evidence gathered in the investigation, there is reasonable cause to believe that unlawful retaliation occurred, the Director or their designee, will issue merit findings (under the whistleblower statute) or consult with the Investigator to ensure that the investigation captures as much relevant information as possible so that the OWP Senior Staff Attorney can evaluate whether the case is appropriate for litigation. If the investigation **does not** establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed. Procedures for conducting the investigation, requirements for issuing merit and non-merit (dismissal) findings in whistleblower cases, the requirement to consult with the OWP Senior Staff Attorney in cases that the Investigator believes are potentially meritorious, and the standards for determining appropriate remedies in potentially meritorious whistleblower cases are discussed in Chapters 4 through 7.

V. Elements of a Violation

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

A. Protected Activity

The evidence must establish that Complainant engaged in activity protected under the specific statute(s) relating to occupational safety or health matters. Protected activity

generally falls into a few broad categories. The following are general descriptions of protected activities.

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

2. **Reporting a work-related injury or illness** – Reporting a work-related injury or illness to management personnel. These injury-reporting cases may be covered through VOSH**.** Compliance enforcement under § 40.1-51.2[11] of the *Code of Virginia*.

3. **Providing information to a government agency** – Providing information to a government entity such as OSHA, VOSH**.**, OSHA State Plans, health department, police department, fire department, the General Assembly, or the Governor etc.

4. **Filing a complaint** – Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to OSHA or VOSH[12].

5. **Instituting or causing to be instituted any proceeding under or related to the whistleblower statute** – Examples include filing under a collective bargaining agreement a grievance related to an occupational safety and health issue, and communicating with the media about an unsafe or unhealthful workplace condition. Communicating such complaints through social media may also be considered protected activity, in which case, the VOSH**.** investigator should consult with the Director or their designee.

6. **Assisting, participating, or testifying in proceedings** – Testifying in proceedings, such as informal fact-finding conferences before DOLI and, hearings before the circuit court or governmental agencies. Assisting or participating in inspections or investigations by agencies such as DOLI and/or OSHA[13].

7. **Work Refusal** – Whistleblower statutes generally protect employees from retaliation for refusing to work under specified conditions. Generally, the work refusal must meet several elements to be valid (i.e., protected). If the work refusal is determined to be invalid, the Investigator must still investigate any other protected activities alleged in the complaint[14]. If the protected work refusal includes ambiguous action by Complainant that Respondent interpreted as a voluntary resignation, without having first sought clarification from the employee, Complainant's subsequent lack of employment may constitute a discharge. If it is unclear/ambiguous whether the Complainant

quit or was discharged, the investigator must consult with the Director or their designee to make a determination.

Generally, the Complainant only needs a good faith, reasonable belief that the conduct about which they initially complained - for example, broken machine guards on table saws – violated or would have violated the non-whistleblower (i.e. substantive) provisions of the referenced VOSH**.** or OSHA Standard. As long as the Complainant had reasonable belief that there was a violation or hazard this element has been satisfied. The investigator should review the complaint and interview statement for protected activity beyond the protected activity identified by Complainant. For example, while Complainant may reference only the protected activity of reporting a workplace injury, the Complainant might also mention in passing during the screening interview, that they had complained to the employer about the unsafe condition or had refused to work before the injury occurred. That hazard complaint/work refusal should be included in the list of the Complainant's protected activities.

B. Employer Knowledge

The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that the Complainant or someone closely associated with the Complainant, such as a spouse or coworker, engaged in a protected activity[15]. For example, the Respondent need not know that the Complainant contacted a regulatory agency if their previous internal complaints would cause the Respondent to suspect that the Complainant initiated the complaint.

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

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

If the Respondent/decision-maker takes action based on the recommendation of a lower-level supervisor who knew of and was motivated by the protected activity to recommend

action against the Complainant, employer knowledge and motive are imputed to the decision-maker.

C. Adverse Action

An adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the employee. The evidence must demonstrate that the Complainant suffered some form of adverse action. An adverse action usually may relate to employment but does not have to specifically affect the terms or conditions of employment[17].

It may not always be clear whether the Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the actions taken against the Complainant might have dissuaded a reasonable employee from engaging in a protected activity, such as filing a complaint. The Investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in any protected activity.

Some examples of adverse actions are:

1. Discharge – Discharges include not only straightforward firings, but also situations in which the words or conduct of a supervisor would lead a reasonable employee to believe that they had been terminated (e.g., a supervisor's demand that the employee clear out their desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge. If it is ambiguous whether the action was a voluntary resignation or a discharge, the Investigator should consult with the OWP Senior Staff Attorney for a determination.
    a. Constructive discharge – The employee quitting after the employer has *deliberately*, in response to protected activity, created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.
2. Demotion
3. Suspension
4. Reprimand or other discipline
5. Harassment – Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when the employer participates in the harassment or knowingly or

recklessly allows the harassment to occur and the harassment is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive such that it would dissuade a reasonable person from engaging in protected activity.

6. Hostile work environment – Separate adverse actions that occur over a period of time may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. A hostile work environment typically involves ongoing severe and pervasive conduct, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.
7. Lay-off
8. Failure to hire or rehire – especially if the employer offers the only available employment in an area
9. Failure to promote
10. Blacklisting – Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.
11. Transfer to a different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and should be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, or reduced opportunities for promotion and training. In such cases, it is important for the Investigator to gather evidence indicating what positions the Respondent(s) had available at the time of the transfer and whether any of the Complainant's similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments[18].
12. Change in duties or responsibilities – this may be a change in Complainant's duties to less desirable tasks
13. Denial of overtime
14. Reduction in pay or hours
15. Denial of benefits
16. Making a threat

17. Intimidation

18. Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.

19. Reporting or threatening to report an employee to the police or immigration authorities.

D. Nexus

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

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

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

1. **Temporal Proximity** – A short time between the protected activity (or when the employer became aware of the protected activity or the agency action related to the protected activity, such as the issuance of a VOSH**.** citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action;

2. **Animus** – Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager's attitude towards the Complainant following the protected activity, can be important circumstantial evidence of nexus;

3. **Disparate Treatment** – Evidence of inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how the Complainant was treated prior to engaging in protected activity can support a finding of nexus;

4. **Pretext** – Shifting explanations for the employer's actions, disparate treatment of the employee as described above, evidence that the Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer's explanation for taking adverse action against the employee is pretext and that the employer's true motive for taking the adverse action was to retaliate against the employee for the protected activity. Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on the VOSH**.** Investigator's evaluation of the facts and the strength of the evidence supporting both the employer and the employee through "pretext testing" described below (See Chapter 9.VII, Testing Respondent's Defense).

VI. Causation Standards

The causation standard is the type of causal link (a.k.a. nexus) between the protected activity and the adverse action. That causal link for whistleblower investigations will be that the adverse action would not have occurred ***but-for*** the protected activity.

The statute simply use the word "because" to express the causation element. The Supreme Court has found that similar language requires the plaintiff to show that the employer would not have taken the adverse action 'but-for' the protected activity. As the Supreme Court ruled, ***but-for*** causation analysis directs the courts to change one thing at a time and see if the outcome changes; if it does, there is ***but-for*** causation[19].

VII. Testing Respondent's Defense (a.k.a Pre-text Testing)

Testing the evidence supporting and refuting the Respondent's defense is a critical part of a whistleblower investigation. VOSH**.** refers to this testing loosely as "pre-text testing". Investigators are required to conduct pre-text testing of the Respondent's defense.

A. A **pre-textual position** or argument is a statement that is put forward to conceal a true purpose for an adverse action.

B. Thus, **pre-text testing** evaluates whether the employer took the adverse action against the employee for the legitimate business reason that the employer asserts or whether the action against the employee was in fact retaliation for the employee engaging in a protected activity.

Proper pre-text testing requires the investigator to look at any direct evidence of retaliation (such as statements of managers that action is being taken because of the Complainant's protected activity) and the circumstantial evidence that may shed light on what role, if any, the protected activity played in the employer's decision to take adverse

action. As noted above, relevant circumstantial evidence can include a wide variety of evidence, such as:

- An employer's shifting explanations for their actions;
- The falsity of an employer's explanation for the adverse action taken;
- Temporal proximity between the protected activity and the adverse action;
- Inconsistent application of an employer's policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity;
- A change in the employer's behavior toward the Complainant after they engaged (or were suspected of engaging) in protected activity; and
- Other evidence of antagonism or hostility toward protected activity.

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

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

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

In circumstances where witnesses or relevant documents are not available, the Investigator should consult with the Director or their designee. Consultation with the Director or their designee may also be appropriate in order to determine how to resolve the complaint. In cases decided based on the nexus element of the *prima facie* case, a description of the investigator's pre-text testing (or reason(s) it was not performed) must be included in the ROI. See Chapter 3.IV.A.4-5, *Nexus and Employer Defense.*

VIII. Policies and Practices that Discourage Injury Reporting

There are several types of workplace policies and practices that could discourage injury reporting and thus violate § 40.1-51.2 of *the Code of Virginia*[20]. The most common potentially discriminatory policies are detailed below. Also, the potential for unlawful retaliation under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

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

Testing only the injured employees involved in an incident, and not the uninjured ones as well, is a discriminatory policy[21].

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

Reporting an injury is a protected activity. This includes filing a report of injury under a worker's compensation statute. Disciplining all employees who are injured, regardless of fault, is a discriminatory policy. Discipline imposed under such a policy against an employee for reporting an injury is therefore a direct violation of § 40.1-51.2 of *the Code of Virginia*[22]. In addition, such a policy is inconsistent with the employer's obligations under the OSHA Recordkeeping Standard 29 CFR 1904.35(b)[23], and where it is encountered in a VOSH**.** case, a referral for a recordkeeping investigation will be made.

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

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

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

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

  Where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, not only may application of the employer's reporting rules be a pretext for unlawful retaliation, but also the reporting rules may have a chilling effect on injury reporting that may result in inaccurate injury records, and a referral for a recordkeeping investigation of a possible 29 CFR 1904.35(b)(1)[24] violation.

D. Discipline for Violating Safety Rule

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

Several circumstances are relevant:

- Does the employer monitor for compliance with the work rule in the absence of an injury?
- Does the employer consistently impose equivalent discipline on employees who violate the work rule in the absence of an injury?

The nature of the rule cited by the employer should also be considered. Vague and subjective rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination.

Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Analysis of the employer's treatment of similarly situated employees (employees who have engaged in the same or a similar alleged violation but have not been injured) is critical. This inquiry is essential to determining whether such a workplace rule is indeed a neutral rule of general applicability, because enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination.

VIII. Handling related Code of Virginia Statutes

A. Statutes enforced by the Labor and Employment Law Division concerning violative practices. The following statutes concerning employer practices are mostly enforced by the labor and employment law division. If during the course of the investigation, the Investigator discovers that the statutes below were violated, contact the Director or their designee as it may be appropriate to make a formal referral to the relevant division to handle the issue.

1. § 40.1-27. Preventing employment by others of former employee.
2. § 40.1-28. Unlawful to require payment for medical examination as condition of employment.

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APPENDICES:

OTHER DOCUMENTS

COMMONWEALTH of VIRGINIA

Department of Labor and Industry

Designation of Representative

Complainant v. Respondent	Case Number:

TO: [VOSH. WHISTLEBLOWER INVESTIGATOR NAME]
6606 West Broad St
Suite 500
Richmond, VA 23231
(757) 455-0891, Ext. 131

Party The undersigned hereby enters his appearance as representative of:

Complainant v. Respondent In the above matter:

_____ Signature of Representative	Representative's Address and ZIP Code
_____ Type or Print Name	
_____ Title	_____ Telephone Number
_____ Date	_____ e-mail address

Initial Contact – Untimely

Name:

Email:

Date:

I am an Investigator for the Virginia Department of Labor and Industry (DOLI), specifically the Virginia Occupational Safety and Health (VOSH**.**) Officer of Whistleblower Protection (OWP). I am in receipt of a complaint you filed with Federal OSHA Online Whistleblowers, and am aware that you have been provided the contact information for this office by Federal OSHA. Before any actions can be taken by VOSH OWP, you need to be aware of protocol and procedures involving an investigation with this agency.

Under Virginia State Code **§40.1-51.2:2 Remedy for discrimination**, you have sixty (60) days to file a complaint alleging discharge or discrimination from the date of adverse action. *Adverse actions* are measures taken by an employer that are motivated by the employee engaging in protected activities. The state code further states: "The employee shall be prohibited from seeking relief under this section if he fails to file such compliant within the 60-day time period."

Based on the compliant you have submitted, the adverse action date you have provided is outside of the sixty (60) day requirement.

Virginia State Code **§40.1-27.3 Retaliatory action against employee prohibited** states you may seek relief by pursuing civil action against your employer if you so wish.

It is the mission of DOLI to make Virginia a better place in which to work, live and conduct business. DOLI achieves this goal by promoting safe, healthful workplaces. Since you are alleging that your employer is /was not complying with our mission, I highly recommend that you contact DOLI via our website to file an online safety and health complaint: https://www.doli.virginia.gov/vosh-complaint-form/

§40.1-51.4:2 Penalty for making false statements, etc.

Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan, or other document filed or required to be maintained under this title shall up on conviction be punished by a fine of not more than $10,000, or by imprisonment for not more than six months or by both.

INTAKE SCREENING SHEET

Date of Screening:	[DATE]
Intake Person:	[VOSH. WHISTLEBLOWER INVESTIGATORS NAME]
Allegation:	
Complainant's Name and Address:	
Complainant's Telephone:	
Respondent's Name:	
Respondent's Telephone:	
Mailing Address	
Site Address (if different)	
Highest Official in Company:	
Type of Business:	
SIC Code/ NAICS	
Hours of Operation:	
Number of Employees:	
Union/Non-Union:	
Grievance Filed w/Union:	
Complainant's Title:	
Complainant's Duties:	
Supervisor's Name:	
Supervisor's Title:	

Rate of Pay/Hours Per Week:	
Date of Hire:	
Date of Adverse Action:	
60th day from Adverse Act	
Reason Given for Adverse Action:	
Settlement Desired:	
Allegation Summary:	

Notes:

[DATE]

Certified Mail

[COMPLAINANT NAME]

[COMPLAINANT ADDRESS]

SUBJECT: Whistleblower Complaint Against [RESPONDENT NAME], [COMPLAINT NUMBER]

Dear [MR./MS] [COMPLAINANT NAME]:

We have received a response from [RESPONDENT NAME] in response to your allegation. [RESPONDENT CONTACT NAME] indicates in [HIS/HER] letter *(copy enclosed)* that [RESPONDENT EXPLANATION FOR ADVERSE ACTION].

I am including a copy of [RESPONDENT CONTACT NAME]'s response for your review and comment. If you wish to comment, please do so in writing by [DUE DATE]. If I do not receive any comments from you, I will submit the facts as I have received them for a decision on the matter.

Please be advised that under Virginia Code §40.1-51.2:1, an employer is prohibited from discharging or discriminating in any way against any employee who has filed a safety and health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of Virginia law.

To prove a case under this section, we must show that the employee engaged in some activity protected under this Title and that the employer knew of this protected activity. The employer must have then discharged or discriminated against the employee because of that activity.

Should you have any questions or require additional information, please feel free to contact me at [PHONE NUMBER], between 7:15 a.m. and 4:00 p.m.

Sincerely,

VOSH**.** Whistleblower Investigator

Attachment

CASE DIARY LOG

WHISTLEBLOWER INVESTIGATIONS

RESPONDENT:

COMPLAINANT:

COMPLAINT NUMBER:

Date/Time	Action	Initials

Date/Time	Action	Initials

CASE DIARY LOG

CASE DIARY LOG

ALTERNATIVE DISPUTE RESOLUTION

RESPONDENT:

COMPLAINANT:
COMPLAINT NUMBER:

Date/Time	Action	Initials

Date/Time	Action	Initials

Virginia Department of Labor and Industry

Virginia Occupational Safety & Health (VOSH.)

[VOSH. INVESTIGATOR NAME]

6606 West Broad Street

Suite 500

Richmond, VA 23231

(757) 455-0891, Ext. 131

Email: [VOSH. INVESTIGATORS E-MAIL ADDRESS]

COMPLAINANT FOLLOW-UP QUESTIONNAIRE

The following questionnaire needs to be filled out by all complainants alleging that discriminatory action has been taken against them. You may also submit copies of any documentation, such as: (1) discharge slips, (2) pay stubs, (3) performance evaluations, and/or any other evidence which you believe support your claim. Please note that failure to return this completed form to the address noted above may result in a delay of our investigation and closing of your file.

Please print in black or blue ink

1. Complainant Information: (Please notify this office immediately of any change)

Name:

_____

Address:

_____

_____

Contact Telephone:

_____

Number:

_____

Email Address:

_____

2. Respondent (Employer) Information:

Company Name:

_____

Address:

_____

_____

Company Representative:

_____

Contact Telephone Number:

_____

Email address:

_____

3. How many employees work at this company or job site: _____

4. What kind of business is this, e.g., manufacturer, construction, shipping, transportation, agriculture?

_____

5. Do you belong to a Union? If so, what is the Name, Local, and Representative name and telephone number?

_____

_____

6. What was the first date of your employment?

_____

7. What was your last date of employment, if applicable? _____

8. What was your job title?

_____

9. Briefly describe your job duties and responsibilities:

_____

_____

10. What type of adverse action was taken against you, e.g., termination, suspension, lay-off?

11. What was the date of this adverse action?

_____

12. In your opinion, why did your employer take adverse action against you? _____
_____

13. What was your final wage rate? $ _____ per (Circle one) Hour / Week / Month / Year

14. What was the average number of hours that you worked per week?_____

15. What is the name and job title of your immediate supervisor:

_____

16. Did VOSH**.** (or other agency) conduct an inspection at your work site? If so, what was the date of the inspection, and its outcome?

17. If you refused to do a work assignment, describe WHY you refused to do it, and what assignment did you refuse to do:

_____

_____

_____

18. Have you worked since leaving this employment? If so, where?

_____

19. Have you looked for another job since leaving this employment? Circle one: **YES NO**

20. What will the employer say is the reason the adverse action was taken against you?

_____
_____
_____

21. If your employment was terminated, are you interested in returning to work for your previous employer? Circle one: **YES** **NO**

22. In the box below, list names, telephone numbers and email addresses of witnesses who can support your claim. Be sure to print clearly or submit by email:

Witness Name	**Telephone Number with Area Code and Email address**

Attach additional sheets if more space is required

Sections of the *Code of Virginia* Applicable to VOSH. Whistleblower Investigations

§ 40.1-51.2:1. Discrimination against employee for exercising rights prohibited.

No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.

(1979, c. 354.)

§ 40.1-51.2:2. Remedy for discrimination.

A. Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of § 40.1-51.2:1 may, within 60 days after such violation occurs, file a complaint with the Commissioner alleging such discharge or discrimination. The employee shall be prohibited from seeking relief under this section if he fails to file such complaint within the 60-day time period. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he deems appropriate. If, upon such investigation, he determines that the provisions of § 40.1-51.2:1 have been violated, he shall attempt by conciliation to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, the Commissioner shall bring an action in a circuit court having jurisdiction over the person charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum.

1. Should the Commissioner, based on the results of his investigation of the complaint, refuse to issue a charge against the person that allegedly discriminated against the employee, the employee may bring action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief. (1979, c. 354; 2001, c. 332; 2005, cc. 743,789.)

Table of Contents

Four Section File Folder

SECTION 1 (List Order is Top to Bottom)

Table of Contents

Intake Sheet

IMIS Printout

VOSH**.** 7 [AS APPLICABLE]

OSHA Inspection Information [AS APPLICABLE]

VOSH**.** Inspection Documents [AS APPLICABLE]

Federal Online Whistleblower Complaint [AS APPLICABLE]

SECTION 2 (List Order is Top to Bottom)

Report of Investigation

Case Diary Log

Investigator Notes

Respondent Information

Personal Statement Summaries

Employee Interview Statements

Travel Documentation

CD of Case Documents

SECTION 3 (List Order is Top to Bottom)

Initial Notice to Respondent

Respondent Designation of Representative

Correspondence/Email records between Respondent and DOLI

Additional documents submitted by Respondent (Duplicates)

SECTION 4 (List Order is Top to Bottom)

Initial Notice to Complainant

Complainant Designation of Representative

Complainants of Response to Respondent Position

Respondent's Response Notification

Correspondence/Email records to Investigator

Additional documents submitted by Complainant

CASE Title and Number

Table of Contents

Exhibit 1

Complaint receipt information (Fed, correspondence from attorney, W/B notification etc. from OWP referral telephone line: **[DATE]** (See C correspondence Exhibit D)

Exhibit 2

Intake Form

Exhibit 3

Documents submitted by Complainant, received in OWP via email.

Exhibit 4

Memorandum to file: Complainant Interview

Exhibit 5

Respondent Designation of Representation

Exhibit 6

Exhibit 7

1-Email thread with Compliance re: VOSH**.** complaint

2- Additional email thread with Compliance re: VOSH**.** compliant

3- Letter to Respondent from VOSH**.** re: Complaint/UPA #

4- Notice of Alleged Hazard

Exhibit 8

Report of Investigation

Exhibit 9

Settlement documents

Exhibit A

Letter of Notification to Complainant

Exhibit B

1. UPS Letter of Notification to Respondent
2. Emailed Letter of Notification to Respondent
3. Read receipt of email from Respondent

Exhibit C

There are no Federal correspondence documents in this investigation

Exhibit D

1. Initial email contact with Complainant
2. Email response from Complainant with documents
3. Email response from Complainant with documents
4. Email response from Complainant with documents

Exhibit E

1. Voicemails from Respondent [**NAME]**
2. Email response from Respondent
3. Respondent's Designation of Representation form

4. Folder of Respondent's Attorney Correspondence (Exhibit E-4- [FOLDER NAME])

Exhibit F

Exhibit G

Director's designation of case number

Exhibit H

[DATE]

Certified Mail

[COMPLAINANT FIRST AND LAST NAME]

[COMPLAINANT ADDRESS]

SUBJECT: Whistleblower Complaint Filed by [EMPLOYEE NAME] [EMPLOYER NAME]

Case Number [COMPLAINT NUMBER]

Dear [MR./MS.] [COMPLAINANT LAST NAME]:

This letter is to acknowledge receipt of your complaint of discrimination under Virginia Code §40.1-51.2:1 (copy attached). Please save any evidence and prepare a list of names, addresses, and telephone numbers of potential witnesses. Provide this information and any documentation (notes, discharge slips, performance evaluations, etc.) to [INVESTIGATOR NAME], Investigator, by **[DUE DATE].**

You may email this information to [INVESTIGATOR E-MAIL ADDRESS]. Failure to provide this information by the requested date could result in our closing our files on this matter. **Please note that reminders will be sent to you and nothing will be accepted after the deadline.**

A preliminary inquiry will determine if there is a basis for further investigation. If further proceedings are warranted, we will conduct a formal investigation into your complaint. At the conclusion of the investigation, a determination will be made on the merits of your case. If your complaint is found meritorious, an attempt will be made to resolve the complaint with a voluntary settlement agreement. If we are unable to resolve the complaint voluntarily, Virginia Code § 40.1-51.2:2 (copy attached) provides that the Commissioner shall bring the case to court. The **burden of proof** to support a charge filed under §40.1-51.2:1 **is on the charging party.** If a charge cannot be supported, your complaint will be dismissed, and you will be informed of the reason.

Please be advised that you have dual filing rights with federal OSHA. If you wish to also file a complaint with federal OSHA, you will need to contact them within thirty (30) days from the date of the adverse action. Their telephone number in Philadelphia is (215) 861-4900.

Alternative Dispute Resolution

To assist the parties in a voluntary resolution of whistleblower complaints, we offer an Alternative Dispute Resolution (ADR) Program at no cost to the parties. The VOSH**.** ADR Program provides the services of a **confidential intermediary** allowing the parties to resolve concerns expeditiously and in a mutually satisfactory manner in lieu of an investigation. The process may also allow the parties to preserve or repair the employment relationship or part ways on a professional basis.

For more information or to request to participate in the VOSH**.** ADR Program, please complete and return the attached ADR Request Form **by [DATE] to Investigator [NAME]**.

If the parties request early resolution and the VOSH**.** Alternative Dispute Resolution Coordinator (ADRC) finds there is common ground for settlement, we will stay the investigation. Please be advised all parties must request ADR in order for the complaint to be moved to ADR.

If the parties do not elect to participate in or do not reach a voluntary resolution of the complaint through the ADR Program, we will follow the normal investigative process.

Should you have any questions or require additional information, please feel free to contact [INVESTIGATOR NAME] at [PHONE NUMBER], between 7:15 a.m. and 4:00 p.m.

Sincerely,

[INVESTIGATOR NAME],

Investigator, Office of Whistleblower Protection

Attachments:

(1) Virginia Code §§40.1-51.2:1 and 40.1-51.2:2

(2) Complaint Follow-up Questionnaire

(3) Request for Alternate Dispute Resolution

(4) ADR Frequently Asked Questions

[DATE]

Certified Mail

[RESPONDENT CONTACT NAME]

[RESPONDENT ADDRESS]

SUBJECT: Whistleblower Complaint Filed by [EMPLOYEE NAME]

[EMPLOYER NAME]

Case Number [COMPLAINT NUMBER]

Dear [MR./MS.] [RESPONDENT CONTACT LAST NAME]:

This is to inform you that a complaint was filed with this office on [DATE], by [COMPLAINANT NAME] alleging that a violation of Virginia Code **§40.1-51.2:1** (copy attached) has occurred.

The Complainant alleges [HE/SHE] was retaliated against by [DESCRIPTION OF ADVERSE ACTION].

This is not a decision by this office that a violation has occurred. We are acting as neutral fact finders and are required to investigate the allegation. Your cooperation with this office is invited so that all of the facts of the case may be considered.

Since it is in the best interest of all concerned to resolve such allegations as quickly as possible, please feel free to contact [INVESTIGATOR NAME], Investigator, to discuss the details and remedial options available to you in such cases. Voluntary adjustments of complaints may be affected by the way of a Predetermination Settlement Agreement.

If a full investigation is completed and it is determined that **§40.1-51.2:1** has been violated, we would seek a remedy consistent to that provided in the enclosed sample Settlement Agreement. If the investigation revealed reasonable cause to believe that the Code has been violated and we are unable to resolve the complaint with a voluntary settlement agreement**, Virginia Code §40.1-51.2:2** (copy attached) provides that the Commissioner shall bring the case to court. On the other hand, if a full investigation revealed insufficient proof of a violation of **§40.1-51.2:1**, the complaint will be dismissed by this office. Please be advised that even though we may dismiss a complaint, **§40.1-51.2:1** of the Code gives an employee the right to take the case to court against you for appropriate relief. If you wish to discuss an early resolution (sample enclosed) to this, please contact [INVESTIGATOR NAME] by either of the following means:

- **By letter:** Department of Labor & Industry, [ADDRESS]
- **By telephone:** [TELEPHONE NUMBER], fax [FAX NUMBER]
- **By email:** [EMAIL ADDRESS]

If you are not interested in a no-fault resolution without an investigation, please provide a written summary of events involving the named complainant, including his/her job activities, and the events leading up to the adverse action which precipitated this complaint. This written response should be filed by [**DATE**].

If no response is received from you by that date, a determination on the merits of this complaint will be made based upon the information obtained from the complainant. You should include any documentation or affidavits relevant to this matter. Affidavits of non-management employees must be voluntarily given by such employees. This request does not preclude an investigator from conducting an on-site inquiry without notice.

Please be advised that the Department reserves the right under **Virginia Code §40.1-49.8** (copy attached) to conduct, without prior notice, an on-site investigation into the matter.

Although an effort has been made to be as comprehensive as possible, this request is not to be considered all-inclusive. We may seek additional information or pursue other avenues of inquiry as may be deemed appropriate.

Alternative Dispute Resolution

To assist the parties in voluntary resolution of whistleblower complaints, we offer an Alternative Dispute Resolution (ADR) Program at no cost to the parties. The VOSH**.** ADR Program provides the services of a **confidential intermediary** allowing the parties to resolve concerns expeditiously and in a mutually satisfactory manner in lieu of an investigation. The process may also allow the parties to preserve or repair the employment relationship or part ways on a professional basis.

For more information or to request to participate in the VOSH**.** ADR Program, please complete and return the attached ADR Request Form **at any time during the investigation to Investigator [NAME]**. Once an ADR request has been made by either party, the investigator will contact both parties to determine whether ADR is an option to resolve the complaint.

If the parties request early resolution and the VOSH**.** Alternative Dispute Resolution Coordinator (ADRC) finds there is common ground for settlement, VOSH will stay the investigation. Please be advised all parties must request ADR in order for the complaint to be moved to ADR.

If the parties do not elect to participate in or do not reach a voluntary resolution of the complaint through the ADR Program, we will follow the normal investigative process.

Your cooperation and assistance in this matter is sincerely appreciated.

Sincerely,

[INVESTIGATOR NAME]

Investigator, Office of Whistleblower Protection

Attachments:

(1) Virginia Code §§40.1-51.2:1, 40.1-51.2:2, 40.1-49-8

(2) Sample Pre-determination Settlement Agreement

(3) Sample Settlement Agreement

(4) Request for Alternate Dispute Resolution

(5) ADR Frequently Asked Questions

SUBJECT: Whistleblower Complaint Filed by [EMPLOYEE NAME] [EMPLOYER NAME]

Case Number [COMPLAINT NUMBER]

The Virginia Occupational Safety and Health's (VOSH**.**) ADR Program is a voluntary program that allows all involved parties to reach a mutually agreeable resolution for a whistleblower discrimination complaint outside of the investigative process. In ADR, the parties attempt to negotiate a settlement with the help of a confidential VOSH ADR Coordinator who is not involved in the investigation of the complaint. While ADR is ongoing, the investigation will be put on hold.

Communications during ADR are kept confidential to the extent permitted by law, except that the confidential VOSH ADR Coordinator may share ADR communications with Department of Labor and Industry (DOLI) officials when it is necessary for administrative and supervisory purposes, or to seek legal or policy guidance on novel or complex questions that arise during the ADR proceeding. However, the confidential VOSH OWP facilitator will not share ADR communications with any DOLI official who will be involved in any further investigations or proceedings related to the whistleblower complaint if a settlement is not reached through ADR. Additionally, if a settlement is not reached through ADR, the involved parties may share any of their own communications made during the ADR proceeding with the VOSH Investigator. However, such communications will be subject to release to the other party, as the OWP investigation, with limited exceptions, in an open process between the parties.

If the parties decline to pursue ADR, or if they pursue ADR but fail to reach a settlement, the Investigator identified in the opening letter will proceed with an investigation of the whistleblower complaint. *However, the parties, with or without the assistance of the Investigator, may still enter into a settlement agreement at any time during VOSH's investigation. Settlement agreements of whistleblower discrimination complaints reached through ADR or during VOSH OWP's investigation must be submitted to DOLI for its review and approval prior to signing.*

If you are interested in participating in the VOSH OWP ADR Program, please complete and return this form to the Whistleblower Investigator identified in your notification letter. The Whistleblower Investigator will facilitate the referral of this complaint to the Alternative Dispute Resolution Coordinator who serves as the confidential intermediary for the VOSH OWP ADR Program.

_____ I am interested in participating in the VOSH**.** OWP ADR Program.

Signature Date

Print Name Daytime Phone Number Email

Alternate Dispute Resolution (ADR) Outcome Form

ADR OUTCOME FORM

Case Name and Number:

Date Complaint Filed:

ADR Coordinator:

Date submitted to ADR:

Date ADR concluded:

Total Days:

CASE DISPOSITION

_____ Agreement

_____ No Agreement, return to investigation.

Print Name (ADR Coordinator) Signature Date

SETTLEMENT AGREEMENT

Complainant [Complainant Name]

Respondent [Respondent Name]

Case Number [Case Number]

The undersigned Respondent and the undersigned Complainant, in settlement of the above matter and subject to the approval of the Commissioner of Labor and Industry, HEREBY AGREE AS FOLLOWS:

PERSONNEL RECORD – The Respondent will purge their personnel record of any derogatory references to the Complainant because of the exercise of his/her rights pursuant to §40.1-51.2:1 of the Code of Virginia and 16 VAC25-220.

PERFORMANCE

- [OPTIONAL] The Respondent is to reinstate Complainant to his former position without loss in pay or seniority.

- [OPTIONAL] Respondent is to provide monetary compensation in the amount of $[DOLLARS] to the Complainant.

The Respondent will not harass, threaten, discharge, or in any manner intimidate or discriminate against Complainant for participating in any safety/health activity protected pursuant §40.1-51.2:1 of the Code of Virginia.

Performance by the Respondent with the terms and 16 VAC25-220 provisions of this Agreement shall commence immediately after the Agreement is approved.

Complainant agrees to accept this Agreement in full and complete settlement of any and all claims arising out of the filing of his discrimination complaint against the Respondent. Complainant understands and agrees that, upon his acceptance of this Agreement, the Department of Labor and Industry will not proceed further, and his discrimination complaint will cause the discrimination complaint to be administratively closed.

NOTIFICATION OF COMPLIANCE – The undersigned parties to this Agreement will each notify the Director of the Office of Whistleblower Protection, in writing of what steps the Respondent has taken to comply herewith. Such notification shall be given within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement.

_____ _____

RESPONDENT DATE

_____ _____

COMPLAINANT DATE

[Commissioner Name], Commissioner

Department of Labor and Industry

By: _____ _____

AGENT DATE

Alternate Dispute Resolution (ADR) Frequently Asked Questions

What is the ADR program?

ADR is a **voluntary** program that allows the parties to resolve a whistleblower retaliation complaint outside of the investigative process. The parties attempt to negotiate a settlement with the help of a confidential VOSH**.** OWP mediator who is not involved in the investigation of the complaint.

What are the benefits of ADR?

ADR allows the parties to reach a certain and final resolution of the complaint on their own terms rather than through the whistleblower investigative process. Successful ADR processes avoid potentially time-consuming, resource-intensive investigations and appeals to achieve prompt resolution of complaints. ADR may also allow the parties to repair the relationship or part ways on a professional basis.

Is ADR Confidential?

Yes. Communications during ADR are kept confidential to the extent permitted by law, and are not disclosed to anyone without the mutual consent of the parties except that the confidential VOSH**.** ADR Coordinator may share ADR communications with Department of Labor and Industry (DOLI) officials when it is necessary for administrative and supervisory purposes, or to seek legal or policy guidance on novel or complex questions that arise during the ADR proceeding.

However, the confidential VOSH**.** OWP facilitator will not share ADR communications with any DOLI official who will be involved in any further investigations or proceedings related to the whistleblower complaint if a settlement is not reached through ADR.

If the complaint is not resolved during ADR, the materials developed in ADR remain confidential and neither party may share any information disclosed by the other party during ADR with the assigned Investigator. The involved parties may share any of their own communications made during the ADR proceeding with the VOSH**.** Investigator. However, such communications will be subject to release to the other party, as the OWP investigation, with limited exceptions, in an open process between the parties.

All ADR case files are maintained electronically in a separate file system with access only available to the select DOLI personnel.

What happens to the investigation during ADR?

When a complaint is accepted into the ADR process, the investigation will be put on hold pending the outcome of the process.

Does attempting ADR delay the investigation?

Not necessarily. In most cases an investigation does not begin immediately whether or not the parties pursue ADR.

How do I sign up for ADR?

If you would like to pursue ADR, please complete the Request for ADR form and return to the assigned Investigator identified in the Notification letter within the time period referenced in the Notification letter to facilitate case processing. Requests made after 10 days will still be processed for possible approval.

How much does ADR cost?

There is no charge to participate in VOSH**.** OWP's ADR Program.

What happens if I want to pursue ADR but the other party does not agree?

ADR is voluntary. **All parties** must agree to participate. If either party does not wish to participate, we will proceed with an investigation.

What happens if both parties ask for ADR?

If both parties request ADR, the ADR Coordinator will contact each party separately to establish initial expectations and answer questions and will provide them a letter acknowledging the acceptance into the ADR process. The ADR Coordinator facilitates the ADR process through calls, email, conferences and mediation.

If the parties reach a settlement during the ADR process, the Coordinator will either draft or review a proposed settlement agreement following the procedures outlined in the Whistleblower Investigations Manual (WIM) available at the Virginia Townhall Website.

Who is the ADR Coordinator?

The Alternative Dispute Resolution Coordinator (ADRC) is a confidential intermediary, who is separate from the Whistleblower Protection investigative program. The ADRC is a Whistleblower Protection Programs subject matter expert with training, knowledge, skills and abilities in Whistleblower Protection and facilitating resolution of disputes.

What happens if ADR fails to produce an agreement?

If the parties fail to reach a settlement during ADR, the complaint will be referred back to the assigned Whistleblower Investigator for investigation. If the ADRC determines that the negotiations are unlikely to result in an agreement, they will notify the parties in advance of returning the complaint for investigation.

Is settlement possible outside ADR?

Yes. The parties may enter into a settlement agreement at any time during the course of the investigation, but before they are signed, settlements must be reviewed and approved by VOSH**.** OWP in accordance with the procedures outlined in the Whistleblower Investigations Manual (WIM) available at the Virginia Townhall Website.

OR

Can parties settle without engaging in OSHA's ADR process?

Yes. Please note that, in general, any settlement of a whistleblower complaint reached between the parties (either during ADR or outside of ADR) while a complaint is pending with VOSH**.** must be reviewed and approved by VOSH to ensure that the settlement is knowing and voluntary, provides appropriate relief to the complainant, and is consistent with VOSH policy.

How can I learn more about VOSH.'s ADR program?

Please contact the assigned Investigator identified in your Notification letter.

Can I designate a representative, such as an attorney, to sign up for me?

Yes. An attorney can sign for their clients to participate in the ADR process. Please have your representative request and complete a *Designation of Representative form* and submit it to the Investigator.

How do I prepare for ADR?

- Review relevant documents.
- Think about the basic things you need to benefit from this program.
- Be prepared to be open to alternative ideas offered at the mediation.

Statues References Concerning Discriminatory Practices

From the Code of Virginia

§ 40.1-27. Preventing employment by others of former employee.

No person doing business in this Commonwealth, or any agent or attorney of such person after having discharged any employee from the service of such person or after any employee shall have voluntarily left the service of such person shall willfully and maliciously prevent or attempt to prevent by word or writing, directly or indirectly, such discharged employee or such employee who has voluntarily left from obtaining employment with any other person. For violation of this section the offender shall be guilty of a misdemeanor and shall, on conviction thereof, be fined not less than $100 nor more than $500. But this section shall not be construed as prohibiting any person from giving on application for any other person a truthful statement of the reason for such discharge, or a truthful statement concerning the character, industry and ability of such person who has voluntarily left.

§ 40.1-28. Unlawful to require payment for medical examination as condition of employment.

It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as a condition of employment.

Any employer who violates the provisions of this section shall be subject to a civil penalty not to exceed $100 for each violation. The Commissioner shall notify any employer who he alleges has violated any provision of this section by certified mail or overnight delivery service. Such notice shall contain a description of the alleged violation. Within 21 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. If the employer fails to contest the violation by requesting such an informal conference within 21 days following its receipt of the notice of the alleged violation, the violation and proposed penalty will become a final order of the Commissioner and not subject to review by any court or agency except upon a showing of good cause. Such informal conference shall result in a decision by the Commissioner that will be appealable to the appropriate circuit court. The Department shall send a copy of the Commissioner's decision to the employer by certified mail or overnight delivery service. The employer may file a notice of an appeal only within 30 days from the receipt of the decision. The appeal shall be on the agency record. With respect to matters of law, the burden shall be on the party seeking review to designate and demonstrate an error of law subject to review by the court. With respect to issues of fact, the duty

of the court shall be limited to ascertaining whether there was substantial evidence in the record to reasonably support the Commissioner's findings of fact.

Civil penalties owed under this section shall be paid to the Commissioner for deposit into the general fund of the Treasury of the Commonwealth. The Commissioner shall prescribe procedures for the payment of proposed penalties which are not contested by employers.