

**OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**

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**PROGRAM DIRECTIVE**

Program Directive A-288  
Issued March 12, 2013  
Revised February 29, 2024

**SUBJECT:** 11(c) Whistleblower Investigations Manual

**PURPOSE:** This instruction implements the OSHA Whistleblower Investigations Manual, and supersedes the January 28, 2016 instruction. This directive outlines procedures, and other information relative to the handling of retaliation complaints under the whistleblower provisions in 11(c) of the Occupational Safety and Health Act of 1970 and ORS 654.062(5) of the OSEA.

**REFERENCE:** [CPL 02-03-011](#) (4/29/2022) – Whistleblower Investigations Manual

[TED 01-00-020](#) (10/08/2015) – Mandatory Training for OSHA Whistleblower Investigators

**BACKGROUND:** ORS 654.062(5) prohibits discrimination by an employer against an employee for exercising employee rights provided by the Oregon Safe Employment Act (ORS 654) and ORS 659A. These rights include filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, participating in protected work refusal, and raising a safety or health complaint with the employer.

The Department of Consumer and Business Services (DCBS), Oregon Occupational Safety and Health Division (Oregon OSHA), administers the Oregon Safe Employment Act (ORS 654) and enforces the Oregon Occupational Safety and Health Rules that establish minimum safety and health standards for all industries.

ORS 654.062(6)(a) authorizes the Commissioner of the Bureau of Labor and Industries, (BOLI), Civil Rights Division (CRD) to investigate and enforce anti-discrimination provisions contained in ORS Chapter 659A Unlawful Discrimination in Employment. BOLI CRD has substantial expertise in such enforcement.

Oregon OSHA contracts with BOLI CRD to provide enforcement of complaints filed under ORS 654.062(5). This includes enforcement of

claims filed against DCBS as well. Oregon OSHA will provide BOLI CRD with safety and health technical assistance, provide referrals to the Ombuds Office for Oregon Workers, audit BOLI CRD files, and initiate enforcement activities where safety and health violations may have occurred.

The Oregon Safe Employment Act (ORS 654) prohibits employers from retaliating against their employees for exercising their rights under the Act. If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with BOLI CRD within one year of the alleged adverse action. Protection from discrimination ([OAR 839-005-0010](#)) means that an employer cannot retaliate by taking "adverse action" against workers, including, but not limited to:

- 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 clears out their desk or return company property). Also, particularly after a protected refusal to work, an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, may nonetheless constitute a discharge. If it is ambiguous whether the action was a quit, discharge, or even possibly protected work refusal in accordance with ORS 654.062(5)(e), consultation with a BOLI CRD supervisor or Oregon OSHA may be appropriate.
- Constructive discharge – The employee quitting after the employer has deliberately, in response to protected activity, created working conditions that were so intolerable that a reasonable person in similar circumstances would have felt compelled to resign. (See [OAR 839-005-0011](#)).
- Demotion
- Suspension
- Reprimand or other discipline
- Harassment - Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. It also includes isolating, ostracizing, or mocking conduct. This type of conduct generally becomes unlawful when it is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. An employer is liable for harassment when the employer knew or should have known of the unwelcomed conduct, unless the employer took immediate and appropriate corrective action (See OAR 839-005-0010(4)).

- 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 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.
- Lay-off
- Failure to hire
- Failure to promote
- Blacklisting - Notifying other potential employers that an applicant should not be hired or making derogatory comments about Complainant to potential employers to discourage them from hiring Complainant.
- Failure to recall
- Transfer to different job – Placing an employee in an objectively less desirable assignment following protected activity may be an adverse action and should be investigated. Indications that the transfer may constitute an adverse action include circumstances in which the transfer results in a reduction in pay, a lengthier commute, less interesting work, a harsher physical environment, and reduced opportunities for promotion and training. In such cases, it is important to gather evidence indicating what positions Respondent(s) had available at the time of the transfer and whether any of Complainant’s similarly situated coworkers were transferred. Although involuntary transfers are not unique to temporary employees, employees of staffing firms and other temporary employees may be required to frequently change assignments.
- Change in duties or responsibilities
- Denial of overtime
- Reduction in pay or hours
- Denial of benefits
- Making a threat
- Intimidation
- Application of workplace policies, such as incentive programs, that may discourage protected activity, for example: in certain circumstances incentive programs that discourage injury reporting.
- Reporting or threatening to report an employee to the police or immigration authorities.

When complainants allege unlawful employment retaliation for whistleblowing relating to any federal laws other than 11(c), ORS 659A.199 gives BOLI CRD jurisdiction to investigate those claims: “It is an unlawful employment practice for

an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.”

**ACTION:**    **Definitions**

**Adverse Action** – Any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, or disciplining the employee. The evidence must demonstrate that Complainant suffered some form of adverse action. Typically, an adverse action will relate to employment, but there may be circumstances where the adverse action is not directly related to employment such as filing a false criminal charge against a former employee.

**Alternative Dispute Resolution (ADR)** – A consensual process that utilizes a neutral third-party to assist parties in resolving their conflict.

**Complaints About State Program Administration (CASPA)** – Complaints filed with OSHA Regional Offices about State Plan agencies regarding the operation of their programs. They are designed to alert State Plan agencies about program deficiencies. They are not designed to afford individual relief to section 11(c) complainants.

**Complainant or Employee** (terms used interchangeably) – Any person who believes that they have suffered an adverse action in violation of an Oregon OSHA whistleblower statute and who has filed, with or without a representative, a whistleblower complaint with BOLI. When this program directive discusses investigatory communication and coordination, the term “Complainant” also includes the Complainant’s designated representative.

**Designated Representative** – A person designated by the Complainant or the Respondent to represent the Complainant or the Respondent in BOLI’s investigation of a whistleblower complaint. If a representative has been designated, BOLI typically communicates with the Complainant or the Respondent through the designated representative, although BOLI may occasionally communicate directly with a Complainant or Respondent if it believes that communication through the designated representative is impracticable or inadvisable. BOLI Commissioner’s Findings are sent to both the parties and their representatives.

**Dual Jurisdiction** – There may be instances when federal OSHA and Oregon OSHA can have dual jurisdiction. Federal OSHA whistleblower claims must be filed with federal OSHA within 30 days of adverse action. Oregon OSHA whistleblower claims must be filed within one year of adverse action.

**Dually Filed Complaint** – Whistleblower complaints have the right to dually file with BOLI Civil Rights Division (CRD) and federal OSHA concurrently. Complainants will be notified automatically of their right to dual file their

complaint via a Perfected Charge OSHA (PCOSHA) notification letter. Federal OSHA will defer to BOLI CRD for the investigation. Once BOLI's CRD investigation is complete, a complainant who has dually filed may request that federal OSHA review BOLI CRD's investigation. Dual filing preserves the Complainant's right to seek a federal remedy should the state not grant appropriate relief.

**Dual Filing Notification** – BOLI CRD notifies complainants in writing of their right to dual file a complaint with federal OSHA under 11(c). During the complaint intake process, BOLI sends a notice to prospective Complainants informing them of their right to concurrently file a complaint under section 11(c) with federal OSHA within 30 calendar days of the alleged retaliatory action.

**Equitable Tolling** – also described as extending the complaint filing deadline, is a feature of federal OSHA's whistleblower investigation process that allows an untimely complaint to be investigated under unique circumstances. In Oregon, equitable tolling is not an established feature in BOLI CRD investigations. This is due to long filing timelines provided to whistleblower complaints. For example, federal OSHA requires 11(c) complaints to be filed within 30 days, whereas the filing time for similar complaints is 365 days in Oregon. However, in unique circumstances, BOLI CRD may review an untimely complaint and assess whether it may be accepted for investigation in accordance with Oregon's whistleblower statutes and rules.

**Federal Review** – Complainants who have concerns about a State Plan's investigation of their dually filed section 11(c) whistleblower complaints may request a review by federal OSHA of the State Plan investigation in order to afford them the opportunity for reconsideration of the state's dismissal determination and, in merit cases, to possibly have the Secretary of Labor file suit in federal district court. Complainants are notified by BOLI CRD in writing on their right to appeal to federal OSHA the state's determination if the complaint was dual filed timely with federal OSHA.

**Non-Public Disclosure** – A disclosure of information from the investigative case file made to Complainant or Respondent during the investigation in order to resolve the complaint.

**Personal Identifiable Information (PII)** – Information about an individual which may identify the individual, such as a Social Security number or a medical record.

**Protected Activity** – Protected activities fall into several general categories:

- Reporting potential violations or hazards to management, a supervisor, or someone with the authority to take corrective action.
- Reporting a work-related injury or illness to management, a supervisor, or someone with the authority to take corrective action.

- Providing information to a government agency (such as Federal OSHA, Oregon OSHA or BOLI), a supervisor (the employer), a union, health department, fire department, or elected official.
- Filing a complaint with federal OSHA, Oregon OSHA or BOLI or instituting a proceeding provided for by a formal Oregon OSHA complaint.
- Testifying in proceedings such as trials, hearings or appeals provided for by a formal Federal OSHA or Oregon OSHA complaint, and for participating in inspections or investigations therein.
- Assisting, participating, or testifying in proceedings, such as hearings before the Oregon Workers' Compensation Board or an Administrative Law Judge, or legislative hearings.
- Assisting or participating in inspections or investigations by agencies such as Oregon OSHA or BOLI CRD.
- Communicating opposition to practices prohibited by OSEA, or which the individual in good faith believes are prohibited by OSEA, to anyone, including but not limited to: (a) Coworkers; (b) Employers; and (c) Newspapers and other media.
- Work refusal – 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. (See OAR 437-001-0295(1)(b) and OAR 839-004-0016(3))

**Respondent or Employer** (terms used interchangeably) – Any employer or person against whom a whistleblower complaint has been filed. When this manual discusses investigatory communication and coordination, the term “Respondent” also includes Respondent’s designated representative.

**Unlawful Practice** – Any employment practice that is designated unlawful in the rules adopted by BOLI for the enforcement of the conditions in ORS 659A.

**Withdrawal** – If the complainant chooses to withdraw the whistleblower complaint case to file with state or federal court, or withdraw for any other matter, the complainant forfeits all rights to appeal or object, and the case will not be reopened.

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

## **SECTION 1: 11(c) LEGAL PRINCIPLES**

This section explains the legal principles applicable to investigations under Oregon OSHA’s whistleblower protection laws (i.e. 11(c) protections) that BOLI CRD enforces, including:

- the requirement to determine whether there is substantial evidence to believe that unlawful retaliation occurred;
- the *prima facie* elements of a violation of the whistleblower protection laws;
- the standards of causation relevant to whistleblower protection law;
- the types of evidence that may be relevant to determine causation and to detect pretext (a.k.a. “pretext testing”) in whistleblower retaliation cases; and
- other applicable legal principles.

The BOLI-enforced whistleblower protection laws (ORS 654.062) prohibit a covered entity or individual from retaliating against an employee for the employee engaging in activity protected by the relevant whistleblower protection law. In general terms, a whistleblower investigation focuses on determining whether there is reasonable cause to believe that retaliation in violation of Oregon OSHA’s 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., motivating action).

### **Gatekeeping**

Upon receipt, an incoming whistleblower complaint is screened to determine whether the *prima facie* elements of unlawful retaliation (a “*prima facie* allegation”) and other applicable requirements are met, such as coverage and timeliness of the complaint. In other words, based on the complaint and – as appropriate – the interview(s) of Complainant, are there allegations relevant to each element of a retaliation claim that, if true, would raise the inference that Complainant had suffered retaliation in violation of Oregon OSHA’s whistleblower laws?

### **Reasonable Cause**

A reasonable cause determination requires substantial 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. BOLI CRD does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to determine that unlawful retaliation occurred. Since BOLI CRD makes its substantial evidence determination prior to hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies at a hearing.

### **Substantial Evidence**

If the case proceeds beyond the screening phase, BOLI CRD investigates the case by gathering evidence to determine whether there is “substantial evidence” as described in ORS 659A.835 and OAR 839-003-0005 to believe that retaliation in violation of the whistleblower statute(s) occurred. Substantial evidence means proof that a reasonable person would accept as sufficient to support the allegations of the complaint. If, based on analysis of the evidence gathered during the investigation, there is reasonable cause to believe that unlawful retaliation occurred, BOLI CRD will issue a Notice of Substantial Evidence Determination (SED) in accordance with ORS

659A.835(4). If the investigation does not establish that there is reasonable cause to believe that a violation occurred, the case should be dismissed.

### **Elements of a Violation**

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

**A. Protected Activity** - The evidence must establish that Complainant engaged in activity protected under ORS 654.062(5). Protected activity generally falls into a few broad categories. The following are general descriptions of protected activities.

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

- Reporting a work-related injury or illness to management personnel.
- Providing information to federal OSHA or Oregon OSHA
- Filing a complaint – Filing a complaint or instituting a proceeding provided for by law, for example, a formal complaint to Oregon OSHA.
- Instituting or causing to be instituted any proceeding under or related to the relevant act – 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.
- Assisting, participating, or testifying in proceedings, such as hearings before an administrative law judge, a court, or legislative hearings.
- Work refusal as described in OAR 437-001-0295(1)(b) and OAR 839-004-0016(3).

**B. Employer Knowledge** – The investigation must show that a person involved in or influencing the decision to take the adverse action was aware or at least suspected that Complainant or someone closely associated with Complainant, such as a spouse or coworker, engaged in protected activity. For example, one of Respondent's managers need not know that Complainant contacted a regulatory agency if their previous internal complaints would cause Respondent to suspect Complainant initiated a regulatory action. If Respondent does not have actual knowledge, but could reasonably deduce that Complainant engaged in protected activity, it is called inferred knowledge. Examples of evidence that could support inferred knowledge include:

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



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

- C. Adverse Action** – An adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, and disciplining the employee. The evidence must demonstrate that Complainant suffered some form of adverse action. It may not always be clear whether Complainant suffered an adverse action. In order to establish an adverse action, the evidence must show that the action at issue might have dissuaded a reasonable employee from engaging in protected activity. The investigator can interview coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.
- D. Nexus** – There must be reasonable cause to believe that the protected activity caused the adverse action at least in part (i.e., that a nexus exists). As explained below, the protected activity must have been a “motivating factor” as described in OAR 839-005-0010(1)(d)(B)(i)(II) in the Respondent's decision to take adverse action.

Nexus can be demonstrated by direct or circumstantial evidence. Direct evidence is evidence that directly proves the fact without any need for inference or presumption. For example, if the manager who fired the employee wrote in the termination letter that the employee was fired for engaging in the protected activity, there would be direct evidence of nexus. Circumstantial evidence is indirect evidence of the circumstances surrounding the adverse action that allow the investigator to infer that protected activity played a role in the decision to take the adverse action. Examples of circumstantial evidence that may support nexus include, but are not limited to:

- **Temporal Proximity** – A short time between the protected activity (or when the employer became aware of the protected activity or the agency action related to the protected activity, such as the issuance of an OSHA citation) and the decision to take adverse action may support a conclusion of nexus, especially where there is no intervening event that would independently justify the adverse action. Pursuant to ORS 654.062(7)(a), there is a rebuttable presumption that a violation has occurred if a person bars or discharges an employee or prospective employee from employment or otherwise discriminates against an employee or prospective employee within 60 days after the employee or prospective employee has engaged in a protected activity. A respondent may overcome the presumption by a demonstration of a preponderance of the evidence. ORS 654.062(7)(a) requires BOLI CRD investigators to obtain evidence from respondents that might otherwise not be necessary (such as when a complainant has not provided any evidence in support of their allegation of a causal connection);
- **Animus** – Evidence of animus toward the protected activity – evidence of antagonism or hostility towards the protected activity, such as manager statements belittling the protected activity or a change in a manager's attitude towards Complainant following the protected activity, can be important circumstantial evidence of nexus;

- Disparate Treatment – Evidence of inconsistent application of an employer’s policies or rules against the employee as compared to similarly situated employees who did not engage in protected activity or in comparison to how Complainant was treated prior to engaging in protected activity can support a finding of nexus;
- Pretext – Shifting explanations for the employer’s actions, disparate treatment of the employee as described above, evidence that Complainant did not engage in the misconduct alleged as the basis for the adverse action, and employer explanations that seem false or inconsistent with the factual circumstances surrounding the adverse action may provide circumstantial evidence that the employer’s explanation for taking adverse action against the employee is pretext and that the employer’s true motive for taking the adverse action was to retaliate against the employee for the protected activity.

Whether these types of circumstantial evidence support a finding of nexus in a particular case will depend on BOLI CRD’s evaluation of the facts and the strength of the evidence supporting both the employer and the employee through “pretext testing.”

### **Testing Respondent’s Defense (a.k.a. Pretext Testing)**

Testing the evidence supporting and refuting Respondent’s defense is a critical part of a whistleblower investigation. Oregon OSHA refers to this testing loosely as “pretext testing.” Investigators are required to conduct pretext testing of Respondent’s defense when there is a factual dispute.

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

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

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

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

and how other employees engaged in similar misconduct or with similar performance were treated.

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

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

In circumstances in which witnesses or relevant documents are not available, the investigator should consult with the supervisor. In cases decided based on the nexus element of the *prima facie* case, a description of the investigator's pretext testing (or reason(s) it was not performed) should be included in the dismissal memorandum or Notice of Substantial Evidence Determination (SED).

## **SECTION 2: INTAKE AND INITIAL PROCESSING OF COMPLAINTS**

This section explains the general process for receipt of whistleblower complaints, screening and filing of complaints, initial notification to Complainants and Respondents. The procedures outlined in this section are designed to ensure that cases are efficiently evaluated to determine whether an investigation is appropriate; that BOLI CRD achieves a reasonable balance between accuracy in screening decisions and timeliness of screening; and to determine when it is appropriate to investigate complaints in which unlawful retaliation may have occurred.

### **Incoming Complaints Flexible Filing Options**

#### **A. Flexible Filing Options**

1. Who may file – Any employee or other individual covered by Oregon OSHA's whistleblower statute, including any applicant for employment or former employee, is permitted to file a whistleblower complaint with BOLI CRD.
2. How to file – No particular form of complaint is required. BOLI CRD will accept the complaint in any language. A perfected complaint under any statute must be filed in writing per ORS 659A.820(2). A perfected complaint is distinguished from the initial complaint intake, which may be submitted to BOLI CRD in any form including, but not limited to email, letter, phone, in person, online questionnaire, or fax. BOLI CRD can assist complainants with converting their initial complaint, which may have been submitted via a phone call into the written format required for perfected complaints.

## **B. Receiving Complaints**

All ORS 654.062 complaints received by BOLI CRD must be logged in BOLI CRD's case management database (IMPACT) to ensure delivery and receipt by the investigative unit. Even those complaints that on their face are untimely or have been wrongly filed (e.g., a complaint alleging environmental pollution) must be logged. Also, materials indicating the date the complaint was filed must be retained for investigative use. Such materials include envelopes bearing postmarks or private carrier tracking information, emails, and fax cover sheets. Per government recordkeeping rules, electronically scanned copies of these documents are acceptable. Upon receipt of a complaint, a ledger card documenting all contact with Complainant is initiated and maintained in the case management database.

## **C. Complaints Forwarded by Partner Agencies**

When BOLI CRD receives a complaint alleging retaliation in violation of an Oregon OSHA whistleblower statute that an employee originally filed with another agency (i.e., the partner agency has sent OSHA a referral rather than a courtesy notification), BOLI CRD must contact the employee to verify whether the employee wishes to pursue a retaliation complaint with BOLI CRD. In determining whether such a complaint is timely, OSHA will first evaluate whether the partner agency or BOLI CRD has received the complaint within the applicable filing. If BOLI CRD has received the complaint within the filing period, the complaint is timely and will be handled normally. If the partner agency received the complaint within the applicable filing period but BOLI CRD did not (i.e., the complaint would be untimely based on the date BOLI CRD received it), BOLI CRD will consider whether the agency that originally received the complaint has authority to provide personal remedies to the employee for the retaliation.

1. If the other agency cannot award personal remedies for the retaliation alleged in the complaint, BOLI CRD will regard the complaint as mistakenly filed in the wrong forum and consider if equitable tolling principles apply in accordance with Oregon statute and BOLI CRD authority. If an extension is permissible, for example, BOLI CRD may regard the date of filing with the other agency as the date of filing.
2. If the other agency can award personal remedies to the employee for the retaliation alleged in the complaint, BOLI CRD will regard the complaint as untimely (unless there is some other basis for equitable tolling in accordance with Oregon statute and BOLI CRD authority). The NLRB is an example of an agency that in some circumstances may be able to provide personal remedies for unlawful retaliation alleged in a whistleblower complaint.

## **D. Complaint Requirements**

The complaint, supplemented as appropriate with information obtained in the screening interview (described below) and any additional information, should ultimately contain the following:

1. Complainant's name and contact information, and if applicable, name and contact information of Complainant's representative. If represented, BOLI CRD should facilitate scheduling the interview with the representative rather than directly with Complainant unless the representative authorizes direct access to Complainant.
2. Respondents' name(s) and contact information (if multiple Respondents, then all contact information should be present).
3. Worksite address (if different from employer address).

4. The current or final job Complainant performed for Respondent(s).
5. An allegation of retaliation for having engaged in activity that is at least potentially protected by Oregon OSHA's whistleblower protection statute (i.e., a *prima facie* allegation). That is, the complaint, supplemented as appropriate by the screening interview and any additional information, should contain an allegation of:
  - a. Some details that could constitute protected activity under Oregon OSHA's whistleblower statute;
  - b. Some details indicating that the employer knew or suspected that Complainant engaged in protected activity;
  - c. Some details indicating that an adverse action occurred and the date of the action; and
  - d. Some details indicating that the adverse action was taken at least in part because of the protected activity.

If any necessary information is missing after the screening interview (or after reasonable attempts to contact Complainant for a screening interview), BOLI CRD will inform Complainant that Complainant needs to provide the missing information (BOLI CRD should be specific as to what is missing).

#### **E. Complaint Deadlines (including weekends and holidays)**

ORS 659A.820 provides that a civil rights complaint must be filed no later than one year after the alleged unlawful practice. ORS 174.120 provides that "the time within which an act is to be done, as provided in the civil and criminal procedure statutes, is computed by excluding the first day and including the last day, unless the last day falls upon any legal holiday or on Saturday, in which case the last day is also excluded." Accordingly, when a complaint filing deadline falls on a day when the BOLI CRD office is closed, the complaint may be accepted and filed on the following business day.

#### **Initial Contact/Screening Interviews**

As soon as possible upon receipt of a complaint, the available information should be reviewed for appropriate coverage requirements, timeliness of filing, and the presence of a *prima facie* allegation. BOLI CRD must contact Complainant to confirm the information stated in the complaint and, if needed, to conduct a screening interview to obtain additional information. Screening interviews will typically be conducted by phone or video conference.

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

#### **Evaluating Whether a *Prima Facie* Allegation Exists and Other Threshold Issues**

As noted above, the primary purpose of the screening interview is to ensure that (a) a *prima facie* allegation of unlawful retaliation exists and (b) that the complaint is timely and that coverage requirements have been met. During the complaint screening process, it is important to confirm that the complaint was filed timely and that a *prima facie* allegation has been made under one or more of the statutes enforced by BOLI CRD. Other threshold issues may also need to be verified depending on the statute and circumstances.

## **Referral of 11(c) Complaints to NLRB**

If an employee files a section 11(c) complaint with BOLI CRD and the safety or health activity appears to have been undertaken in concert with or on behalf of co-workers, including, but not limited to, the filing of a grievance under a collective bargaining agreement, the complainant may be protected under the National Labor Relations Board as long as the complaint is a concerted effort. Complaint can be filed at: <https://www.nlr.gov/>. When appropriate, BOLI CRD should provide Complainant the NLRB's toll-free number, 1-844-762-NLRB (1-844-762-6572).

## **Named Respondents**

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

## **Notification Letters**

- A. Complainant** – As part of the requisite filing procedures when a case is opened for investigation, a notification letter will be sent notifying Complainant of the complaint's case number and the assigned investigator. The contact information of an investigator will be included in the notification letter. The letter packet will include a copy of the whistleblower complaint, supplemented as appropriate by a summary of allegations added during the screening interview.

Complainant will be notified using email or U.S. mail.

- B. Respondent** - Within 30 days from the date of filing, a notification letter will be sent notifying Respondent(s) that a complaint alleging unlawful retaliation has been filed by Complainant and requesting that Respondent submit a written position statement. ORS 659A.820(6). The letter packet will include a copy of the whistleblower complaint, redacted as appropriate.

Respondent will be notified using email or U.S. mail. Prior to sending the notification letter, the supervisor should determine whether it appears from the complaint and/or the initial contact with Complainant that an inspection/ investigation may be pending with Oregon OSHA or federal OSHA. If it appears that an inspection/investigation may be pending, the supervisor or investigator should contact the appropriate office/agency to inquire about the status of the inspection or investigation and inform them that notice of the retaliation complaint is imminent, to give the office/agency the opportunity to initiate their inspection before Respondent receives the notification letter, in order to avoid giving advance notice of the inspection/investigation to be conducted.

## **Early Resolution**

BOLI CRD will work to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. Consequently, the investigator is

encouraged to contact Respondent soon after the complaint is filed if they believe an early resolution may be possible.

### **Case Transfer**

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

## **SECTION 3: CONDUCT OF INVESTIGATIONS**

This section sets forth the policies and procedures investigators must follow during the course of a whistleblower investigation. The policies and procedures are designed to ensure that complaints are efficiently investigated and that the investigation is well documented. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. If there is a conflict between the relevant statutes or regulations and the procedures set out in this section, the statutory and/or regulatory provisions take precedence. Investigators should consult with their supervisor when additional guidance is needed.

### **General Principles**

- **Reasonable Balance** - The investigative procedures described in this section are designed to ensure that a reasonable balance is achieved between the quality and timeliness of investigations. The procedures outlined in this section will help investigators complete investigations as expeditiously as possible while ensuring that each investigation meets BOLI CRD's and Oregon OSHA's quality standards. Reasonable balance is achieved when further evidence is not likely to change the outcome.
- **Investigator as Neutral Party** - The investigator should make clear to all parties that BOLI CRD does not represent either Complainant or Respondent. Rather, the investigator acts as a neutral party in order to ensure that both the Complainant's allegation(s) and the Respondent's positions are adequately investigated. On this basis, relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination in the case.
- **Investigator's Expertise** - The investigator, not Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation of Oregon OSHA's whistleblower protection statute. The investigator will review all relevant documents and interview relevant witnesses in order to resolve discrepancies in the case. Framing the issues and obtaining information relevant to the investigation are the responsibility of the investigator, although the investigator will need the cooperation of Complainant, Respondent, and witnesses.
- **Reasonable Cause to Believe a Violation Occurred** - BOLI CRD will issue substantial evidence findings when there is reasonable cause to believe that a violation of ORS 654.062 has occurred.
- **Supervisor Review is Required** - Supervisory review and approval are required before case files can be closed. If a supervisor has conducted the investigation, a second BOLI

CRD manager must agree that closure is appropriate and the second manager's agreement should be documented in the case file.

## **Case File**

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

- Documenting the Investigation - With respect to all activities associated with the investigation of a case, investigators must fully document the case file to support their findings. A well-documented case file assists the reviewer of the file.
- Casefile Contact Log - All substantive telephone calls made and voicemails received during the course of an investigation, other than those with BOLI CRD personnel, must be accurately documented and notation of calls and voicemails must be typed in the case management database (IMPACT) Contact Log. If a telephone conversation with one of the parties or witnesses is lengthy and includes a significant amount of pertinent information, the investigator should document the substance of this contact in a "Note to File" to be included as an exhibit in the case file. In addition to the Contact Log, a case ledger card will, 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 ledger card.
- Investigative Research - It is important that investigators adequately plan for each investigation. The investigator should research whether there are prior or current retaliation and/or safety and health cases related to either Complainant or Respondent. Such information can normally be obtained by contacting Oregon OSHA directly. Examples of information sought during this investigation may include copies of safety and health complaints filed with Oregon OSHA, inspection reports, and citations. Research results must be documented in the case file. When research reveals no relevant results, the investigator should still note in the case activity log the pre-investigation research that was performed and that no relevant results were found.

## **Referrals and Notifications**

Allegations of safety and health hazards, or other regulatory violations, will be referred promptly to the appropriate office or agency through established channels. This includes new allegations that arise during witness interviews. Allegations of occupational safety and health hazards covered by the Oregon Safe Employment Act (ORS 654), for example, will be referred to the appropriate Oregon OSHA field office as soon as possible.

## **Amended Complaints**

After filing a retaliation complaint with BOLI CRD, a Complainant may wish to amend their complaint to add additional Respondents.



BOLI CRD may amend a complaint to correct technical defects and to add additional persons as respondents. The division may amend a complaint on its own initiative or at the aggrieved person's request (with the division's agreement) at any time prior to the issuance of formal charges, except that respondents may only be added during the course of investigation. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute or rule citation errors. A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the aggrieved person must file a new complaint meeting the standards provided in OAR 839-003-0005(5). Amended complaints need not be verified or signed by the aggrieved person. The division will send a copy of the amended complaint to the aggrieved person and all respondents. (See [OAR 839-003-0040](#))

### **Lack of Cooperation/Unresponsiveness**

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

- Failure to be reasonably available for an interview;
- Failure to respond to repeated correspondence or telephone calls from BOLI CRD;
- Failure to attend scheduled meetings;
- Other conduct making it impossible for BOLI CRD to continue the investigation, such as excessive requests for extending deadlines;
- Harassment, inappropriate behavior, or threats of violence may also justify dismissal for LOC;
- When Complainant fails to provide requested documents in Complainant's possession or a reasonable explanation for not providing such documents, BOLI CRD may draw an adverse inference against Complainant based on this failure unless the documents may be acquired from Respondent. If the documents cannot be acquired from Respondent, then Complainant's failure to provide requested documents or a reasonable explanation for not doing so may be included as a consideration with the factors listed above when considering whether a case should be dismissed for LOC.

### **Dismissal Procedures for Lack of Cooperation/Unresponsiveness**

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

1. Telephone Complainant during normal work hours and contact Complainant by email. Notify Complainant that they are expected to respond within 48 hours of receiving this phone message or email.
2. If Complainant fails to contact the investigator within 48 hours, BOLI CRD will notify Complainant in writing that it has unsuccessfully attempted to contact Complainant to obtain information needed for the investigation and that Complainant must contact the investigator within 30 days of delivery of the correspondence. Complainant will be notified using a method such as email or U.S. mail, or hand delivery. The notification will specify direct contact information for the investigator including telephone number and email address. If no response is received within 30

days, the supervisor may approve the termination of the investigation and dismiss the complaint.

3. Complainant has an obligation to provide BOLI CRD with all available methods of contact, including a working telephone number, email address, or mailing address of record. Complainant also has an obligation to update BOLI CRD when contact information changes. BOLI CRD may dismiss a complaint for lack of cooperation if BOLI CRD is unable to contact Complainant due to the absence of up-to-date contact information.
4. When BOLI CRD dismisses a case for lack of cooperation, the Complainant will be notified of any options to request review by Oregon OSHA within 15 days of delivery of the dismissal letter to Complainant. BOLI CRD has discretion to reopen the investigation within one year from the filing date if Oregon OSHA notifies BOLI CRD that it has received a reasonable explanation from the Complainant for the failure to maintain contact with BOLI CRD.

### **Complainant Interview and Contact**

The investigator must attempt to interview the Complainant in all cases. This interview may be conducted as part of the screening process. If a full Complainant interview is not conducted as part of the complaint screening process, BOLI CRD will endeavor to interview Complainant within 30 days of receiving Respondent's position statement or two months from the filing of the complaint, whichever is sooner. The investigator must attempt to obtain from Complainant all documentation legally in their possession that is relevant to the case. Relevant records may include:

- Copies of any termination notices, reprimands, warnings, or other personnel actions
- Performance appraisals
- Earnings and benefits statements
- Grievances
- Unemployment or worker's compensation benefits, claims, and determinations
- Job position descriptions
- Company employee policy handbooks
- Copies of any charges or claims filed with other agencies
- Collective bargaining agreements
- Arbitration agreements
- Emails, voicemails, phone records, texts, and other relevant correspondence related to Complainant's employment, as well as relevant social media posts.

Most often medical records should not be obtained until it is determined that those records are needed to proceed with the investigation. Because medical records require special handling, BOLI CRD follows ORS 192.355 and ORS 192.398 for the storage of medical records in whistleblower case files. Any requests for case-related records are processed by BOLI's Public Records Manager. The investigator should assess whether conciliation is feasible in accordance with ORS 659A and OAR 839-003-0055. BOLI CRD will facilitate settlement negotiations between the complainant and respondent, at any time during the investigation (See OAR 839-003-0055).

The Investigator must also inform Complainant that Complainant should preserve all records that relate to the whistleblower complaint, such as documents, emails, texts (including preserving texts, photographs, and other documentation from a prior cell phone if Complainant replaces it), photographs, social media posts, etc. that relate to the alleged protected activity, the alleged adverse action, and any remedies Complainant seeks. Thus, for instance, Complainant should retain documentation supporting Complainant's compensation with Respondent, efforts to find work and earnings from any new employment, and any other claimed losses resulting from the adverse action, such as medical bills, pension plan losses and fees, repossessed property, moving or job search expenses, etc. After obtaining Respondent's position statement, the investigator should contact the Complainant to conduct a rebuttal interview if there are any discrepancies between Complainant's allegations and Respondent's defenses. In cases where the investigator has already conducted the complainant interview, the Complainant may decide to submit a written rebuttal in lieu of the rebuttal interview.

### **Contact with Respondent**

- A.** In many cases, following receipt of BOLI CRD's notification letter, Respondent forwards a written position statement, which may or may not include supporting documentation. If a position statement with no supporting documentation contains assertions disputed by the Complainant, the investigator should ask the Respondent to provide any available evidence, including witnesses and/or documents, supporting the disputed claim(s). The investigator should not rely on assertions in Respondent's position statement unless they are supported by evidence or are undisputed.

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

- B.** If Respondent requests time to consult legal counsel, the investigator must advise Respondent that future contact in the matter will be through such representative and that this does not alter the 14-day time to respond to the complaint. A reasonable extension to the deadline may be granted, but the investigator must be mindful that for any leeway given to Respondent, substantially equivalent leeway should also be granted to Complainant for the rebuttal if needed.

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

- C.** If a position statement was received from Respondent, the investigator's initial contact should be the person who signed the letter unless otherwise specified in the letter.
- D.** The investigator may, in accordance with the reasonable balance standard, interview any relevant Respondent witnesses who can provide information relevant to the case. The investigator should attempt to identify other witnesses who may have relevant

knowledge. Witnesses should be interviewed individually, in private, to avoid confusion and biased testimony.

Witnesses must be advised of their rights regarding protection under the applicable whistleblower statute(s), and advised that they may contact BOLI CRD if they believe that they have been subjected to retaliation because they participated in an OSHA or BOLI CRD investigation.

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

- E. The investigator should make every effort to obtain copies of, or at least review and document in the case file, all pertinent data and documentary evidence which Respondent offers and which the investigator believes is relevant to the case.
- F. If a telephone conversation with Respondent or its representative includes a significant amount of pertinent information, the investigator should document the substance of this contact in a Note to File to be included in the case file.

### **Unresponsive/Uncooperative Respondent**

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

- Respondent Bankruptcy – When investigating a Respondent that has filed for bankruptcy, the investigator should promptly consult with their BOLI CRD supervisor. Otherwise, complainants and BOLI CRD may lose their rights to obtain any remedies.
- Respondent Out-of-Business – When investigating a Respondent that has gone out of business, the investigator should consult with their supervisor, as appropriate. BOLI CRD should determine whether there are legal grounds to continue the investigation against successors in interest of the original Respondent.
- Uncooperative Respondent – When conducting an investigation, subpoenas may be issued for witness interviews or records. When dealing with a nonresponsive or uncooperative Respondent, it will frequently be appropriate for the investigator, in consultation with the supervisor, to draft a letter informing Respondent of the possible consequences of failing to provide the requested information in a timely manner. Specifically, Respondent may be advised that its continued failure to cooperate with the investigation may lead BOLI CRD to reach a determination without Respondent's input. Additionally, Respondent may be advised that BOLI CRD may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests (See OAR 839-003-0065(9)).
- Uncooperative Respondent Representative – When a Respondent is cooperating with an investigation but their representative is not, the investigator should send a letter or email to both Respondent and the representative requesting them to affirm the designation of

representation in the case file. If the designation of representation is not affirmed within 10 business days, the investigator may treat Respondent as unrepresented. BOLI CRD should not decline to accept written information received directly from a represented Respondent.

### **Party Representation at Witness Interviews**

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

### **Records Collection**

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

### **Resolve Discrepancies**

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

## **SECTION 4: CASE DISPOSITION**

This section sets forth the policies and procedures for arriving at a determination on the merits of a whistleblower case; policies regarding withdrawal, dismissal, postponement, deferrals, reviews, and litigation; and agency tracking procedures for timely completion of cases. These policies and procedures are designed to ensure that BOLI CRD arrives at the appropriate determination for each whistleblower complaint by achieving a reasonable balance between an investigation's timeliness and quality. Attention to the proper balance between quality and timeliness will ensure that each investigation receives the appropriate level of supervisory review, and that a final determination is reached as expeditiously as possible while ensuring that each investigation meets BOLI CRD's standards for quality and thoroughness.

### **Review of Investigative File and Consultation Between the Investigator and Supervisor**

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

## **Investigative File**

The investigator must report the results of the investigation in either a Dismissal Memorandum or a Notice of Substantial Evidence Determination (SED). The dismissal memorandum or SED is BOLI CRD's summary of the investigative findings. The first page of the document must note the names and titles of the investigator and the reviewing supervisor, and the statute(s) implicated by the complaint.

The investigative file may include, as needed, a witness log and any other information required by the supervisor. All exhibits will be saved electronically and organized by source. If a witness log is included in the file, any witnesses who were suggested by the Complainant or Respondent but who BOLI CRD did not interview should be identified with contact information (if it exists) and the reason for not interviewing. The dismissal memorandum or SED must be signed by the investigator. It must be reviewed and approved in writing by the supervisor before the findings are issued.

## **Required Elements of the Investigative File**

The dismissal memorandum or SED must include, as applicable,<sup>1</sup> analysis of the following issues:

- 1. Coverage** – Give a brief statement of the basis for coverage. This statement includes information about Respondent and Complainant relevant to the implicated statute. Delineate the information that brings the case under Oregon OSHA's statute. Also explain the coverage of Complainant. If coverage was disputed, this is where BOLI CRD's determination on the issue should be addressed. If it is determined that there is no coverage, then no further discussion of the elements is required. In addition, this section should note the location of the company and the nature of the business, if not already addressed.
- 2. Timeliness** – Indicate the actual date that the complaint was filed and whether or not the filing was timely under Oregon OSHA's statute. Include whether or not the alleged adverse action occurred within 60 days of the alleged protected activity, and assess whether rebuttable presumption under ORS 654.062(7)(a) is applicable. If it is determined that the complaint is untimely, then no further discussion of the elements is required.

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<sup>1</sup> For example, if no protected activity is found after analysis of Complainant's alleged protected activity, the investigator may proceed to the recommended disposition and need not analyze the remaining elements of the case (knowledge, adverse action, and nexus).

Note: A respondent may overcome the presumption described in ORS 654.062(7)(a) by a demonstration of a preponderance of the evidence. This statute requires BOLI CRD investigators to obtain evidence from respondents that might otherwise not be necessary (such as when a complainant has not provided any evidence in support of their allegation of a causal connection).

- 3. The Elements of a Violation** – Discuss and evaluate the facts as they relate to the four elements of a violation:
- a. Protected Activity or Activities
  - b. Respondent Knowledge or Suspicion
  - c. Adverse Action(s)
  - d. Nexus

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

- 4. Employer Defense/Affirmative Defense and Pretext Testing** – Respondent must produce evidence to rebut Complainant’s allegations of retaliation in order for a case to be dismissed for lack of nexus. For example, if Respondent alleges that it discharged Complainant for excessive absenteeism, misconduct, or poor performance, Respondent must provide evidence to support its defense. The investigator must analyze such evidence and explain the reasoning supporting the investigator’s conclusion. Below is an example of a pretext evaluation (with pretext found), placed in the analysis section of an SED:

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

An example where pretext is not found is:

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

- 5. Other Relevant Information** – Any novel legal or other unusual issues, information about related complaints, or any other relevant consideration(s) in the case may be addressed in a note to the file. For instance, if the investigator is recommending that BOLI CRD defer to another proceeding, discussion of the other proceeding and why deferral is appropriate should be discussed in the dismissal memorandum.

## Case Review and Approval by the Supervisor

- A. Review** – The investigator will notify the supervisor when the completed case file, including draft case closing documents (such as approvals of withdrawal requests, settlements), is ready for review. The supervisor will review the file to ensure technical accuracy, the thoroughness and adequacy of the investigation, the correct application of law to the facts, and completeness of closing documents and letters. Such a review will be completed as soon as practicable after receipt of the file.
  
- B. Approval** – If the supervisor determines that appropriate issues have been explored and concurs with the analysis and recommendation of the investigator, the supervisor will sign on the signature block on the cover page of the dismissal memorandum or SED and record the date the review was completed. If the supervisor does not concur with the analysis and recommendation of the investigator, the supervisor will return the case file to the investigator for additional work. The supervisor’s signature serves as initial approval of the recommended determination. Depending on BOLI CRD’s policy and procedures, the supervisor’s approval may be the final approval in most cases.

## Withdrawal

Complainant may withdraw the complaint at any time during BOLI CRD’s processing of the complaint (See [OAR 839-003-0045](#)). However, it must be made clear to Complainant that by entering a withdrawal, they are forfeiting all rights to seek review or object, and the case will not be reopened. Withdrawals must be requested in writing.

Once the supervisor reviews and approves the request to withdraw the complaint, a letter will be sent to Complainant, clearly indicating that the case is being closed based on Complainant’s request for withdrawal and that Complainant has forfeited all rights to seek review or object. The withdrawal approval letter will be sent using email or U.S. mail.

## Settlement

Voluntary resolution of disputes is desirable and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is BOLI CRD policy to seek settlement of all cases determined to be meritorious prior to referring the case for issuance of formal charges unless the agency determines that the interest of justice requires that a hearing be held without first seeking settlement (See ORS 659A.840 and ORS 659A.845). Furthermore, at any point prior to the completion of the investigation, BOLI CRD will make every effort to accommodate an early resolution of complaints in which both parties seek it.

BOLI Civil Rights Division (CRD) encourages Complainants and Respondents to resolve complaints by mutual agreement at any time. BOLI CRD will notify both parties of this option in the notice of filing and during its initial contacts with them. BOLI CRD may facilitate settlement negotiations between Complainants and Respondents as provided in OAR 839-003-0055. BOLI CRD will not allow such negotiations to be so lengthy that they defeat the purposes of the statutes enforced by BOLI.



If, before an Administrative Determination is made, the parties agree upon settlement, BOLI CRD will draft a conciliation agreement. The agreement will state:

- That a “no-fault” settlement has been reached;
- That the Complainant and Respondent accept the terms of the agreement as a resolution of the complaint;
- The specific action(s) the Respondent and/or Complainant will take in settlement of the complaint and the time within which the action(s) will be taken; and
- That BOLI CRD may investigate any alleged breaches of the agreement.

The Complainant, Respondent, BOLI CRD investigator and the CRD administrator will sign the conciliation agreement. The BOLI CRD will not be a party to any third-party settlement agreements between the Complainant and Respondent except for mediation.

BOLI Civil Rights Division has provisions in place for a failed conciliation along with provisions to identify cases that might be well suited for mediation (ORS 36.220 and OAR 839-051-0100). These are outlined in the signed interagency agreement between BOLI and Oregon OSHA.

### **Significant or Novel Whistleblower Cases**

In order to ensure consistency among investigators and to alert Oregon OSHA about any significant or novel issues, BOLI CRD in all significant and novel merit cases must be reviewed by the BOLI CRD Administrator. BOLI CRD will alert Oregon OSHA in cases where Oregon OSHA's interpretation of a rule may be determinative, or where a case may highlight a potential ambiguity or inconsistency in the application of ORS 654.062.

## **SECTION 5: STATE PLAN POLICIES AND PROCEDURES**

**Appeal process** – A Substantial Evidence Determination or dismissal may not be appealed to the division, but a complainant may request a review by Oregon OSHA. The complainant must make this appeal in writing to Oregon OSHA within 15 days of the date of the case dismissal letter from BOLI in accordance with OAR 839-004-0021(4)(b). However, the BOLI CRD may reopen a case at its own discretion (See OAR 839-003-0065(13)(14)).

ORS 659A.880 provides complainant the right to file a civil suit in a state circuit court based on the allegation of discrimination within 90 days once the BOLI Civil Rights Division has closed the case.

**Referrals** – In addition to section 11(c) of the OSE Act, federal OSHA's Whistleblower Protection Program enforces protections for employees who suffer retaliation or discrimination for engaging in protected activities under more than 20 federal laws. When BOLI Civil Rights Division identifies allegations that may implicate these laws, BOLI CRD will make appropriate referrals to federal

OSHA. In the case of a referral to federal OSHA, BOLI Civil Rights Division (CRD) will contact federal OSHA through email and send the complaint to the designated federal OSHA contact. Oregon OSHA will be copied on the email. In the case of a federal OSHA referral complaint to BOLI CRD, federal OSHA will email the complaint to the [CRD.EMAIL@boli.oregon.gov](mailto:CRD.EMAIL@boli.oregon.gov). Oregon OSHA will be copied on the email.

**Reopening cases** – BOLI Civil Rights Division may reopen a case based on the discovery of new facts, the results of either a federal OSHA or Oregon OSHA review, a CASPA, or other circumstances relevant to the case within the jurisdictional time frame.

**Timeliness** – Whistleblower complaints must be filed within one year of adverse action.

**Case Documentation**

The format for documenting the investigation and for organizing the case file.

Case File Organization		
Left Side	Right Side	
Triage Sheet	TAB 1	Perfected Charge Release of Information Medical Releases MISC. intake documents
Case Routing Sheet	TAB 2	Notification Letters CP and RP
Contact Info	TAB 3	Intake Materials Questionnaire CP materials provided during intake Intake officer’s notes
Phone Log	TAB 4	RP legal identity SOS
	TAB 5	Evidence in Chronological Order
		OSHA Analysis
		Case Settlement
	TAB # Varies	Dismissal Determination
	TAB # Varies	Index

**Records**

ORS 654.120(1) states that The Department of Consumer and Business Services shall maintain records, for a reasonable time according to the DCBS retention schedule, of all inspections, investigations, employee complaints, employer reports, citations, hearings, proceedings, and any other matters necessary for achieving the purposes of ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780.

ORS 192.420 (1) states that the Bureau of Labor and Industries will make available any public record request by any person pursuant to ORS 192.420, unless the record requested is exempt from disclosure under the provisions of ORS chapter 192 or other applicable law.

A BOLI CRD complaint is a public record once it is filed. (See OAR 839-003-0080(2))

Public Records Requests can be made to Oregon OSHA <https://www.oregon.gov/dcbs/news-info/pages/public-records.aspx> or the Bureau of Labor and Industries <https://www.oregon.gov/boli/about/pages/public-records-request.aspx>

### **Formal Charges and Hearings**

If the Commissioner of the Bureau of Labor and Industries issues a finding of substantial evidence under ORS 659A.835 and the matter cannot be settled through conference, conciliation and persuasion, or if the commissioner determines that the interest of justice requires that a hearing be held without first seeking settlement, the commission will prepare formal charges. Formal charges must contain all information required under ORS 183.415 and must specify the allegations of the complaint to which the respondent will be required to respond. Formal charges will also set the time and place for hearing the formal charges.

ORS 659A.850 All proceedings before the Commissioner of the Bureau of Labor and Industries under this section will be conducted as contested case proceedings under the provisions of ORS chapter 183. The commissioner may affirm, reverse, modify or supplement the determinations, conclusions, or order of any special tribunal or hearing officer appointed. The scheduling of a hearing does not affect the ability of the commissioner and any respondent to settle the matters alleged in the complaint through conference, conciliation, and persuasion.

### **Civil Penalties and Settlements**

ORS 659A.855(1)(a) If the Commissioner of the Bureau of Labor and Industries files a complaint under ORS 659A.825 alleging an unlawful practice other than an unlawful employment practice, and the commissioner finds that the respondent engaged in unlawful practice under ORS 654.062, the commissioner may, in addition to other steps taken to eliminate the unlawful practice, pursue damages incurred by any aggrieved persons. Any such damages recovered are paid to the aggrieved persons.

- ORS 659A.860(1) The terms and conditions of any order issued by the Commissioner of the Bureau of Labor and Industries under this chapter, and of any settlement agreement entered into by a respondent under this chapter and signed by a representative of the commissioner, are binding on the agents and successors in interest of the respondent.

- (2) The commissioner may relax any terms or conditions of a settlement agreement or of a cease and desist order issued by the commissioner under this chapter, if the performance of those terms and conditions would cause undue hardship on the respondent or another person and those terms and conditions are not essential to protecting the complainant's rights.
- (3) Any person aggrieved by the violation of the terms and conditions of a cease and desist order, or of any settlement agreement signed by a representative of the commissioner, whether by a respondent or by any agent or successor in interest of the respondent, may bring a civil action in the manner provided by ORS 659A.885(3) and recover the same relief as provided by ORS 659A.885(3) for unlawful practices.

## **Remedies**

Unlike federal OSHA whistleblower investigators, BOLI CRD investigators are not responsible for designing appropriate remedies in merit/cause cases. BOLI's Administrative Prosecution Unit determines what remedies may be sought in a contested case hearing before an administrative law judge. (See OAR 839-050-0060).

In general, Oregon whistleblower statutes are designed to compensate complainants for the losses caused by unlawful retaliation and to provide all appropriate relief including rehiring or reinstatement to the employee's former position with back pay. The remedies available under the whistleblower statutes are also designed to mitigate the deterrent or "chilling" effect that retaliation has on employees other than the Complainant, who may be unwilling to report violations or hazards if they believe the employer will retaliate against whistleblowers.

Where appropriate, Complainant's remedies may include reinstatement, front pay, back pay (lost wages including bonuses, overtime, and benefits), and compensatory damages for pecuniary losses and non-pecuniary damages. Other remedies designed to make a Complainant whole, can include the receipt of a promotion that Complainant was denied, expungement of adverse references in their employment record, or a neutral employment reference.

## **BOLI CRD Investigator Training**

It is essential that BOLI CRD investigators have the requisite knowledge, skills, and abilities to accomplish the Division's mission of promoting discrimination-free workplaces and protecting Oregon workers against unlawful discrimination practices. This instruction outlines the three-year training expectations for each BOLI CRD investigator who conducts discrimination investigations under ORS 654.062(5):

- A. **Year One** – Each investigator will complete the Whistleblower Investigation Fundamentals Course #1420 offered by federal OSHA Training Institute (OTI) or its equivalent during the first year of conducting 11(c) investigations, where possible.

**B. Years Two and Three** – Before the end of their third year of conducting 11(c) investigations, each investigator must complete at least four additional OTI technical courses or the equivalent as approved by BOLI CRD and Oregon OSHA management, where possible. These technical courses may include, but are not limited to:

- OTI Course #1610: Interviewing Techniques for Whistleblower Investigators
- OTI Course #1630: Written Communication and Report Writing for Whistleblower Investigators
- OTI Course #2710: Legal Concepts for Whistleblower Investigators
- OTI Course #2720: Whistleblower Complaint Resolution and Settlement Negotiations

Each BOLI CRD investigator has the responsibility to perform to the best of their ability in all training programs and discuss their training progression with their supervisor through regular Performance Accountability and Feedback (PAF) meetings or its successor. BOLI CRD management will coordinate with Oregon OSHA regarding the registration of investigators for appropriate training courses.

**EFFECTIVE**

**DATE:** This directive is effective immediately and will remain in effect until canceled or superseded.

**History:** Issued 3-12-2013 Revised 8-27-2014, 08-11-2015, 5-6-2016, 7-26-2016, 8-10-2017, 11-4-2019, 4-3-2020, 9-20-2023, and 2-29-2024.