

VOSH PROGRAM DIRECTIVE: 04-001E

ISSUED: 01 July 2016

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.

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)

Cancellation

VOSH Program Directive 04-001D (01 February 2015).

Effective Date

01 July 2016

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

Not Applicable.

C. Ray Davenport
Commissioner

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VOSH Investigator
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

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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 examples of activities protected under Virginia law are an employee's 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 of the Division of Legal Support, VPP, ORA, OPP and OWP (hereinafter Director).** The Director has overall responsibility for all whistleblower investigations and outreach activities. The Director is authorized to issue determinations 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. **May delegate settlement negotiation responsibilities to other DLS personnel.**
- e. Provides guidance, assistance, supervision, and direction to the Investigator(s) during the conduct of investigations and settlement negotiations.
- f. Reviews investigation reports for comprehensiveness and technical accuracy.
- g. Develops outreach programs and activities.

2. VOSH Investigator. The Investigator carries out responsibilities under the direct guidance and supervision of the Director which includes, but is not limited to, the following functions:

- a. Receives VOSH whistleblower complaints from OSHA, the regional offices, investigators, or other persons. Conducts 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.
- b. Reviews VOSH case files in field offices for background information concerning any other proceedings which relate to a specific complaint.
- c. Interviews complainants and witnesses and obtains written statements as necessary and obtains supporting documentary evidence as available.
- d. Follows through on leads resulting from interviews and statements.
- e. Interviews and obtains written statements from respondents' officials, reviews pertinent records, and obtains relevant supporting documentary evidence.
- f. Applies knowledge of the legal elements and evaluates the evidence revealed, writes an investigation report detailing the facts of the case, analyzing the evidence, and recommending appropriate action to the Director.
- g. Negotiates with the respondent in merit cases to obtain a settlement agreement which provides prompt resolution and satisfactory remedy.
- h. 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.
- i. Assists and acts on behalf of the Director in whistleblower matters with other agencies, VOSH Regional Offices, and the general public.

- j. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings.
 - k. Performs outreach activities.
3. **Regional Safety or Health Director (RD).** Each RD is responsible for receiving whistleblower complaints and promptly transmitting these complaints to the VOSH Investigator.
 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.
 5. **Division of Legal Support (DLS).** DLS provides assistance to the Director, gives advice to the Investigator(s), reviews cases submitted by the Director 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 emphasizes that the proper and courteous discharge of duties and responsibilities by CSHOs and VOSH 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 indulge 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 VOSH 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, the Investigator must notify the writer that the original correspondence is being forwarded for action by the authority, agency or person. Other inquiries received by Investigators which are outside the Investigator's scope of normal job activities must be forwarded to the appropriate representative or agency for action.
3. **Subpoenas and Testimony.**
 - a. A VOSH Investigator, upon being served with a subpoena, must immediately communicate with and forward all pertinent information to the Director and DLS 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 include notes, work papers, memoranda, records, and audio or video tapes received or prepared by a VOSH 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 the Virginia Department of Labor and Industry and a part of the case file. Under no circumstances are investigation notes and work papers to be destroyed or 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 DLS.
- c. Any FOIA inquiry received by an Investigator concerning an investigation must be transmitted to DLS.
- 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.

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 OSHA's Integrated Management Information System (IMIS)/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 either orally or in writing with any official of the Virginia Department of Labor and Industry. Complaints may 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.
 - 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.

- 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 IMIS/OIS (the IMIS/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 "screened out", the VOSH Investigator must document the screening interview and the Director will send a letter to the complainant concerning the interview and explaining the reason for the "screen out". In those cases where contact information is not provided by the complainant, the VOSH Investigator will document the screening and explain the reason for the "screen out". All VOSH-related allegations that are "screened out" for administrative reasons shall be recorded in IMIS/OIS.

- C. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed. The Director will send the complainant 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 "screen out" records. Such referrals will be entered into IMIS/OIS as "Administrative Closing – Other, Federal Jurisdiction".
- D. As part of the docketing procedures, when a case is opened for investigation, the VOSH Investigator will send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and opened for investigation. The name, address, telephone number and email address of the Investigator will be included in the docketing letter.
- E. Also at the time of docketing, or as soon as appropriate, the Director will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the timely completion of the investigation.
- NOTE: It is within the discretion of the VOSH Investigator to conduct an unannounced investigation by delivering the Respondent letter (prepared in advance by the Director) 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 an equivalent service to provide a record of receipt. The tracking number will be identified in the file.
 2. Prior to the Director 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 VOSH Investigator. Questionnaires may only be used with the explicit approval of the Director. 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 attached.
- 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.

IV. Timeliness of Filing.

- A. Whistleblower complaints must be filed within the specified statutory time frame of sixty (60) 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 visits, emails, faxes or telephones a Virginia Department of Labor and Industry 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 or a 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) 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 snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
- 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 a state plan state or another agency that has the authority to grant the requested relief.

V. Scheduling the Investigation.

- A. The VOSH 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.

Chapter 3

Conduct of the Investigation

- I. **Scope.** This chapter sets forth the policies and procedures VOSH 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 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. **Original Evidentiary Material.** The VOSH 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.

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 VOSH 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 IMIS/OIS or the Regional Office, and can best be obtained by telephone or a personal visit. 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 VOSH 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 VOSH 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 VOSH Investigator's caseload is such that actual field investigation will be delayed.

1. **Activity/Telephone Log.** All telephone calls made during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology

and reference for the Investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the Investigator should document the 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."

2. **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.
 3. **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 may terminate the investigation and dismiss the complaint.
- C. Field Investigation.** If, after the initial telephone contact with the complainant, it appears that the complainant has presented a *prima facie* allegation, the VOSH 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, but in-person collections of evidence is preferred. 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. DLS will arrange for such transcription.
- D. Complainant Interview.** The VOSH 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 his/her 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, 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 his/her 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 restitution 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.
6. In situations where the complainant is not personally interviewed and his/her statement is taken telephonically, 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 DLS Attorney assigned the case 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 call the VOSH Investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the case diary log, and if pertinent information is conveyed during this conversation, the Investigator should document such in the telephone 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 his/her involvement.
4. In the absence of a signed Designation of Representative, the Investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director) 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 have known direct involvement in the case and 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. The respondent's attorney does not, however, have the right to be present, and 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 DLS. 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 respondent offers and which the Investigator construes as being relevant to the case.
7. If at any time during the initial (or subsequent) meeting with respondent, management officials, or counsel, respondent suggests the possibility of an early resolution to the matter, the Investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded.
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 DLS 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 DLS. If in the early stages of the investigation, where the VOSH Investigator and the Director believe there is evidence that the complainant's allegation has merit and may not be easily settled, DLS should be contacted and briefed on the case.

1. Early DLS involvement will help direct the course of the investigation, and ensure that proper documentation is gathered to help the DLS in a successful litigation.
2. With DLS assurance that the case will likely go forward, 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 thinks are worthy, but which DLS 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 VOSH 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 and biased testimony,

and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be "rehearsed," intimidated, or reluctant to speak in the workplace, the Investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have 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, taking 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 VOSH 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. VOSH 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 prior to writing the ROI.

III. Report of Investigation.

The VOSH 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 VOSH Director.

A. Review. Upon receipt of the completed investigation case file from the VOSH Investigator, the Director 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 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 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 signature.

1. **Withdrawal.** For recommendations to approve withdrawal, the Director 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 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 will approve by signature on the settlement agreement. The Director 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 pay check, etc.
4. **Deferral.** For recommendations to defer to another agency decision or private settlement, the Director will prepare letters of deferral to the complainant, sending a copy to the respondent.
5. **Merit Finding.** For recommendations of merit, the Director will draft a memorandum to DLS recommending litigation.
6. **Further Investigation Warranted.** If, for any reason, the Director does not concur with the Investigator's analysis and recommendation or finds that additional investigation is warranted, the Director 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 to the Assistant Commissioner for Labor and Industry, whose decision will be final.

VI. Approval for Litigation.

Cases recommending litigation will be forwarded to DLS for review. If DLS determines that additional investigation is required, the Director will assign such further investigation to the original VOSH 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.

In cases which are not docketed after the initial screening, the file arrangement of materials, as outlined below, need not be followed. Rather, 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 IMIS/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 VOSH Investigator will prepare an original case file for each docketed case.
- B. Upon assignment, the Investigator normally compiles a standard 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 file will be organized and maintained in a four-section folder. The Director shall determine the appropriate manner in which case files shall be organized. A Table of Contents, identifying all the evidentiary material, must be placed on top to aid review of the case file.

IV. Report of Investigation (ROI).

- A. **Effective Communication.** One of the primary skills required of a VOSH 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.
- 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). 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. Please see the example ROI at the end of this chapter.
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.

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 interference. 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 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 may issue a determination letter deferring to the outcome reached among the parties.
 2. In either event, the case will be recorded in the IMIS/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 IMIS 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 his or her chosen field in the locality where he or she resides? 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 VOSH 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 he or she believes 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 DLS 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 he or she understands the waiver and if he or she 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 his or her profession, to relocate, to pursue other employment opportunities, or to retire? Has he or she already found other employment that is not affected by the waiver? In such circumstances, the 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.
- 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 VOSH 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 VOSH 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. DLS 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 DLS, 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 DLS to explore the possibility of obtaining a written waiver from a complainant to communicate with his or her 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 DLS. 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 may be considered whenever a management official involved in the adverse action knew about the statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, *e.g.*, when a discharge is accompanied by previous harassment or subsequent blacklisting, or when there has been a pattern or practice of retaliation in violation of the laws protecting employees from discrimination within VOSH scope of authority. Examples of egregious conduct include, but are not limited to:

- (1) A discharge accompanied by previous or simultaneous harassment or subsequent blacklisting.
- (2) A complainant has been discharged because of his or her association with a whistleblower.
- (3) A group of whistleblowers has been discharged.
- (4) There has been a pattern or practice of retaliation in violation of the statutes that VOSH administers and the case fits the pattern.

- (5) There is a policy contrary to rights protected by the statute (for example, a policy requiring safety complaints to be made to management before filing them with VOSH or restricting employee discussions with VOSH compliance officers during inspections) and the retaliation relates to this policy.
- (6) A manager commits violence against the complainant.
- (7) The adverse action is accompanied by public humiliation, threats of violence or other retribution against the complainant, or by violence, other retribution, or threats thereof against the complainant's family, co-workers, or friends.
- (8) The retaliation is accompanied by extensive or serious violations of the substantive statute, e.g., serious violations of VOSH standards

b. When an investigation uncovers evidence which could lead to a recommendation for punitive damages, the VOSH Investigator should advise the Director as soon as possible in order to alert DLS of the egregious nature of the potential violation. If DLS agrees that such damages may be appropriate, further development of evidence should be coordinated with the DLS.

c. Respondent's Good Faith Defense. A respondent may be able to successfully defend against punitive damages if it can demonstrate good faith; in other words, the managers were acting on their own and the respondent had a clear and effectively-enforced policy against retaliation. Punitive damages may not be appropriate if the respondent had a clear-cut policy against retaliation which was subsequently used to mitigate the retaliatory act.

d. Calculating the Punitive Damages Award. Once it is determined that the respondent's conduct warrants a punitive damages award, investigators should consider a number of factors in assessing the final amount of the award. Any award of punitive damages must always recite evidence supporting the determination that punitive damages are warranted and explain the basis for determining the amount awarded.

e. Relevant Factors. A number of factors should be considered in calculating a punitive damages award, including:

- (1) Degree of the respondent's awareness that its conduct was illegal (see discussion above).
- (2) Egregiousness of the conduct (many of the factors are discussed above).
- (3) Duration and frequency of the adverse action.
- (4) Respondent's response to the complaint and investigation: for example, whether the respondent admitted wrongdoing, cooperated in the investigation, offered remedies to the complainant on its own, or disciplined managers who were at fault. On the other hand, it is appropriate to consider whether the respondent was uncooperative during the investigation, covered up retaliation, falsified evidence, or misled the investigator.
- (5) Financial condition of the respondent.
- (6) Evidence that the respondent attempted to conceal or provide pretextual reasons for the adverse action.
- (7) Evidence that the respondent tolerated or created a workplace culture that discouraged or punished whistleblowing; in other words, whistleblowers were chilled from engaging in protected activity.

- (8) Deliberate nature of the retaliation or actual threats to the complainant for his/her complaints to management.
- (9) Whether VOSH has found merit in whistleblower complaints in past cases against the same respondent involving the same type of conduct at issue in the complaint, so as to suggest a pattern of retaliatory conduct.
- (10) Other mitigating or aggravating factors.

3. **Unilateral Settlement Agreements.** When the complainant does not agree to become a party to a settlement which, in the Director's 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 his or her entitlement and has chosen to accept a lesser amount.

It is especially important to adequately support calculation of compensatory (including pain and suffering) and punitive damages. Types of evidence include bills, receipts, bank statements, credit card statements, or any other documentary evidence of damages. Witness and expert statements also may be appropriate in cases involving 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 DLS 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.

Chapter 7

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 screen-out 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.

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APPENDICES: OTHER DOCUMENTS

COMMONWEALTH of VIRGINIA
Department of Labor and Industry

Designation of Representative

Complainant	
v.	Case Number:
Respondent	

TO: [VOSH INVESTIGATOR NAME]
Interstate Corporate Center, Bldg. 6
6363 Center Drive, Suite 101
Norfolk, Virginia 23502-4102
(757) 455-0891, Ext. 131

The undersigned hereby enters his appearance as representative of:

In the above matter:

<hr/> <p>Signature of Representative</p> <hr/> <p>Type or Print Name</p> <hr/> <p>Title</p> <hr/> <p>Date</p>	<p>Representative's Address and ZIP Code</p> <hr/> <p>Telephone Number</p> <hr/> <p>e-mail address</p>
---	--

[DATE]

UPS Delivery

[COMPLAINANT FIRST AND LAST NAME]

[COMPLAINANT ADDRESS]

SUBJECT: Whistleblower Complaint Against [EMPLOYER NAME], [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.

[COMPLAINANT NAME]

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[DATE]

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.

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,

[DIRECTOR NAME], Director

Division of Legal Support, VPP, ORA, OPP and OWP

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

(2) Complaint Follow-up Questionnaire

[DATE]

UPS Delivery

[RESPONDENT CONTACT NAME]

[RESPONDENT ADDRESS]

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

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

This is to inform you that a complaint was filed with this office on December 19, 2014, by [COMPLAINANT NAME] alleging that a violation of **Virginia Code §40.1-51.2:1** (copy attached) has occurred. [MR./MS.] [COMPLAINANT LAST NAME] alleged [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

[COMPLAINANT NAME]

Page 2

[DATE]

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.

Your cooperation and assistance in this matter is sincerely appreciated.

Sincerely,

[DIRECTOR NAME], Director
Division of Legal Support, VPP,ORA, OPP and OWP

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

INTAKE SCREENING SHEET

Date of Screening:	[DATE]
Intake Person:	[VOSH 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]

UPS Delivery

[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 Investigator

Attachment

Virginia Department of Labor and Industry
Virginia Occupational Safety & Health (VOSH)
[VOSH INVESTIGATOR NAME]
Interstate Corporate Center, Bldg. 6
6363 Center Drive, Suite 101
Norfolk, Virginia 23502-4102
(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:

<u>Witness Name</u>	<u>Telephone Number with Area Code and Email address</u>

****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.
- B. 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.)

[COMPLAINANT NAME] v. [RESPONDENT NAME]

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