NORTH CAROLINA DEPARTMENT OF LABOR

EMPLOYMENT DISCRIMINATION BUREAU

OSH DISCRIMINATION MANUAL

LAST UPDATED: 11/15/16

This Whistleblower Investigations Manual is a Federal Program Change that establishes procedures for the investigation of whistleblower complaints. All State Plans are required to have statutory authority parallel to section 11(c) of the OSH Act. This manual supersedes the April 21, 2015 Instruction. States with OSHA-approved State Plans are required to establish, and include as part of their State Plan, policies and procedures for occupational safety and health discrimination protection (analogous to federal protections under section 11(c) in Chapters 3, 7 and 8 of this manual) that are at least as effective as the federal 11(c) implementing policies.

EDB OSHA Disclosures are handled in the Planning Statistics Information Management Bureau (PISM) of the North Carolina Department of Labor. For more detailed information please contact PISM at 919-807-2950. PISM will provide detailed instructions on how whistleblower-related documents may be publically disclosed or disclosed pursuant to OSHA's Non-Public Disclosure policy. Although it was not listed in the State Plan Impact section of the manual, State Plans are also required to maintain policies that are at least as effective as those at Federal OSHA.
Chapter 3 (Conducting the Investigation) has been updated to provide clarification on the investigative standard for whistleblower investigations.
Chapter 7 of the manual has been updated to provide improved and more detailed guidance regarding Remedies and Settlement agreements. The updated Chapter provides additional guidance and examples relating to, among other areas, calculating back wages, compensatory damages, and attorney's fees. Additional guidance also is provided relating to nonmonetary remedies and third party settlement agreements.
Chapter 8 (Alternate Dispute Resolution) establishes policies and procedures for the early resolution process, which is to be used as part of an Alternative Dispute Resolution (ADR) program in conjunction with the State Plans' investigation of whistleblower complaints under the State Plan equivalent to section 11(c) of the OSH Act. References to whistleblower provisions other than section 11(c) of the OSH Act are not applicable to State Plans.
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Chapter 1

OSH COMPLAINTS FILED UNDER THE RETALIATORY EMPLOYMENT DISCRIMINATION ACT

I. Introduction

This manual sets forth the procedures for the Employment Discrimination Bureau (EDB) of the North Carolina Department of Labor (NCDOL) in conducting and documenting retaliation investigations based on complaints from individuals who engaged in a protected activity related to safety and health in the workplace.

N.C. Gen. Stat. §95-240 et.seq. (REDA) generally provides protection for employees who engage in protected activity related to safety or health in the workplace. N.C. Gen. Stat. §95-241 mandates*: "No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following: File a claim or complaint, initiate an inquiry, investigation, inspection, proceeding, or other action, or testify or provide information to any person with respect to any of the following: …Article 16 [of Chapter 95 of the General Statutes, Occupational Safety and Health Act]...."*

This manual is an internal guideline, not a statutory or regulatory rule, and is only intended to provide instruction and guidance to Employment Discrimination Bureau Discrimination Investigators regarding REDA investigations.

II. Coverage

A. Any private sector employee of an employer who engages in business in the state of North Carolina.

B. Public sector employees (those employed by city, county, or state agencies) are covered.

Chapter 2

INTAKE AND EVALUATION OF COMPLAINTS

I. Scope

This chapter explains the general process for receipt of REDA complaints, screening and docketing of complaints, initial notification to Complainants and Respondents, and the scheduling of investigations.

II. Receipt of Complaints

Any *employee*, former *employee*, or his/her authorized representative alleging a violation under REDA may file a REDA complaint with the EDB. A complaint will be considered filed when a signed complaint form has been received by EDB.

A. Oral Complaints

A Discrimination Investigator (DI) will screen individuals who verbally report a retaliation complaint based on safety and health issues. The DI will conduct a preliminary screening of the complaint to determine if the Complainant engaged in a protected activity and that an adverse employment action occurred as a result of the protected activity. If it is determined that the prima facie elements of a claim have been met (see Chapter 3, V (R) for the elements) and that the complaint is timely, the DI will fill out and initial the Employment Discrimination Complaint Form (initial in the lower right hand corner of the form) and then mail the completed complaint form to the Complainant for signature and return. The DI will also send the Complainant an instruction letter and a questionnaire that is to be completed and returned to EDB. See Appendix L for the instruction letter.

1) At the time of the initial screening of the complaint, it may not be clear that all of the prima facie elements have been met. For example, it may not be apparent that the Respondent knew about the Complainant's protected activity. Therefore, a case file should be opened and an investigation should be conducted to clearly establish all the elements of proof. However, when no protected activity or adverse employment action is alleged, the DI shall not fill out a complaint form and no form will be mailed to the Complainant.

2) If the Complainant only speaks Spanish, the initial screening will be conducted by a Spanish speaking DI or an Information Specialist with the assistance of a DI.

3) If the DI receives a call from an attorney wanting to file an OSH complaint on behalf of his client, the DI will send the attorney the complaint form package which includes the questionnaire. The DI does not need to fill out the complaint form for the attorney.

The complaint form and questionnaire may be mailed to Complainant via regular mail channels and does not need to be certified. Also, the complaint form may instead be emailed to the Complainant, if the Complainant prefers this.

Prior to mailing the complaint form to the Complainant, the DI should make a copy of the filled-out and initialled complaint form for internal records. The copies will be maintained in a file in the central EDB office.

The DI must document the call in the OSH Call Log with required information, such as name, address, Respondent's name, date of call, date the DI mailed the complaint form, and date of the adverse event. The DI shall document all attorney contacts and screened out OSH calls in the log, as well.

In order for the complaint to be officially opened and investigated, the Complainant **MUST** sign and date the complaint form and return it to EDB. A signature on the complaint form is required per 13 NCAC 19.0301(a)(6). The file date will be the date that the signed complaint is *received* by EDB. Once the signed complaint form is received, the complaint processor will docket the complaint for investigation by assigning a file number and forwarding the file to the DI assigned to the case.

B. Written Complaints

When a written and signed complaint is received by EDB by fax, email, hand delivery, or mail, the complaint will be forwarded to a Raleigh DI or the Bureau Chief to conduct a screening of the complaint for timeliness and the prima facie elements (see Chapter 3, V (R) for the elements). If the screening of the complaint fails to establish that the prima facie elements are present or shows that the complaint is untimely, the Complainant will be notified that the complaint is not being accepted for investigation. No right-to-sue letter will be issued. However, if the complaint is timely and has the prima facie elements, the complaint will be forwarded to the complaint processor for docketing and assignment.

All written complaints must be date stamped upon receipt; the date of receipt will be considered as the date the complaint was filed. However, all other materials indicating the date the complaint was mailed or received must be retained for case record. Such materials include envelopes bearing postmarks or FedEx tracking information, emails, and fax cover sheets.

Written complaints that are not accepted for investigation must be filed in the Screened-Out file maintained in the EDB office.

C. Complaints Received From Other Governmental Units

Complaints received from other governmental units will be forwarded to the EDB Bureau Chief or his/her designee for a determination on the appropriate action to be taken. If deemed necessary, the potential Complainant will be interviewed to obtain additional information regarding the complaint. For example, a complaint received from a legislative official on behalf of a Complainant would be reviewed and the Complainant would be contacted for screening. If it appears that a violation has occurred, the complaint will be docketed and assigned for investigation. The actual date of filing will be determined on a case by case basis with the coordination of the EDB Bureau Chief.

D. Referrals

The DI will be responsible for determining if a statute under the jurisdiction of the NCDOL is involved or if the Complainant should be referred to another agency, such as the United States Department of Labor (USDOL) or the Equal Employment Opportunity Commission (EEOC). For example, a complaint falling under the jurisdiction of the Surface Transportation Assistance Act would be referred to the USDOL.

Note: The Directorate of Whistleblower Protection Programs (DWPP) has the responsibility of investigating retaliation allegations that are considered to be within exclusive federal jurisdiction. Therefore, due to the constant amendments and additional statutes being added to federal responsibility, EDB personnel should refer to the federal Whistleblower Investigation's manual for a complete list of the statutes investigated by the DWPP. Additional information may also be available from DWPP's website: http://www.whistleblowers.gov/index.html.

E. Dual Filing

A Complainant may also file an 11c complaint with the USDOL if the complaint is filed within 30 days of the adverse employment action. The NCDOL will conduct the investigation, and after a final determination has been made, and the Complainant has exhausted all review procedures within the NCDOL, the Complainant may then request a review of the case by the USDOL. The request for review must be made to the USDOL within 15 calendar days of the date the Complainant receives notice of the final determination. The Complainant will be informed of the right to dual file in the complaint instruction letter that is mailed to the Complainant (See Appendix L) and/or in the Complainant notice letter.

III. Complaint Processing

A. Docketing

To docket means to assign a file number to the complaint and to enter the complaint into Oracle (the EDB Database) as well as the Integrated Management Information System (IMIS). Cases involving multiple Complainants or multiple Respondents will be assigned individual complaint numbers.

B. Complainant Notification

As part of the docketing procedure, the complaint processor will send an acknowledgement letter notifying the Complainant that the complaint has been received and docketed. The name, address, and telephone number of the DI conducting the investigation will be included in the letter. If an OSH questionnaire was not provided when the complaint form was received, the Complainant should also be provided with a questionnaire to be completed and returned within a specified period of time. In the event that a work-related injury was involved in the complaint, the medical records release on the complaint form will need to be signed by Complainant. If the DI wishes to do so, a workers' compensation questionnaire may also be provided for combination workers' compensation / OSH cases.

C. Initial Contact with OSH

Prior to the case being forwarded to the DI, the complaint processor will send an email to the Occupational Safety and Health Division of North Carolina (OSHNC) complaint desk to determine if an OSHNC complaint has been filed.

IV. Timeliness of Filing

A. Timeliness

REDA complaints must be *received* by EDB within 180 days of the adverse employment action. The first date of the time period is the *day after* the alleged adverse employment action occurred. If the last day of the statutory filing period falls on a weekend or a State or Federal holiday, then the next business day will count as the final day.

B. Dismissal of Untimely Complaints

Complaints filed after the 180-day deadline will be closed without further investigation, and the Complainant will not be issued a right-to-sue letter. In accordance with North Carolina law, there will be no tolling of the 180-day deadline.

V. Scheduling the Investigation

A. Assignment

The EDB Bureau Chief or complaint processor will assign the case for investigation. Ordinarily the case will be assigned to a DI on a rotational basis; however, the EDB Bureau Chief may take into consideration such factors as the DI's current caseload or geographic location. Additionally, cases involving complex issues or unusual circumstances may be assigned to a team of DIs.

B. Transmittal of Complaint Materials

The EDB Bureau Chief or complaint processor will transmit the complaint materials to the DI who must prepare and maintain a case file that will include the original complaint and the evidentiary materials obtained during the investigation.

C. Performing the Investigation

The DI should generally schedule investigations in chronological order of the date filed, taking into consideration the economy of time and travel unless otherwise directed by the EDB Bureau Chief.

D. Case Transfer

Case transfer should be avoided; however, it should be recognized that circumstances may require such a transfer. The EDB Bureau Chief is the **only** person authorized to transfer cases among DIs. Any such transfer should be documented in the case file and IMIS. Upon transfer, all parties concerned should receive prompt notification of the name, telephone number, and address of the newly assigned DI.

Chapter 3

CONDUCTING THE INVESTIGATION

I. Scope

This chapter sets forth the policies and procedures DIs must follow during the course of an investigation. It does not attempt to cover all aspects of a thorough investigation, and it must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies.

II. General Principles

The DI should make clear to all parties that the NCDOL does not represent either the Complainant or Respondent, and that both the Complainant's allegation(s) and the Respondent's proffered legal, non-retaliatory reason (LNR) for the alleged adverse action must be tested. Relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case.

The DI must bear in mind during all phases of the investigation that he or she, not the Complainant or Respondent, is the expert regarding the information required to satisfy the elements of a violation of REDA. If after having interviewed the parties and relevant witnesses and having examined all relevant documentary evidence, the Complainant is unable to establish the elements of a prima facie allegation, then the case should be closed and a right-to-sue letter may be issued, when appropriate.

III. Case File

The DI must prepare a standard case file containing all documents received or created during the intake and evaluation process, copies of all required opening letters, and any evidentiary material supplied by the Complainant and Respondent. All evidence, records, administrative material, photos, recordings, and notes collected or created during an investigation must be maintained in a case file. Detailed guidance regarding proper case file organization may be found in Chapter 5 of this manual.

IV. Investigative Records

Investigative materials or records include interview notes, work papers, memoranda, emails, documents, and audio or video recordings received or prepared by a DI concerning or relating to an investigation or in the performance of any official duties related to an investigation. Such original materials are the

property of the NCDOL and must be included in the case file. Under no circumstance are investigation notes, work papers, and evidence to be destroyed or retained for use by an employee of the state for any private purpose. In addition, files must be maintained and destroyed in accordance with the NCDOL EDB Retention Policy. DIs may retain copies of case file records for work-related reference only.

V. Investigation Procedures

A. Coordination with OSH

Before contacting the Respondent as required within 20 days, the DI **must** coordinate with the OSH complaint desk to determine if an OSH complaint was filed. If a complaint was filed with OSHNC, the DI must determine if the OSH inspection has already been initiated. The DI may contact the OSH district supervisor or Compliance Safety & Health Officer (CSHO) over the phone to discuss the OSH complaint and details of the case for background information. If the OSH inspection has not been initiated, the DI must coordinate with the OSH district supervisor to schedule the initiation of the discrimination investigation to ensure that the OSH inspection is not compromised and that EDB is able to notify the Respondent of the complaint filing within 20 days from when the complaint was filed. Though the DI may speak with OSH personnel to obtain verbal information regarding a case file, the DI may not obtain any documentation directly from the OSH district supervisor or a CSHO. Rather, if the DI wishes to review any OSH inspection documentation, including the OSH complaint, a written request must be submitted to Planning, Statistics & Information Management (PSIM) for that documentation.

B. Interview of Complainant / Opening Conference

1) As soon as practicable after receiving a case file, the DI will conduct a detailed interview with the Complainant to obtain details of the alleged violations. When deemed appropriate, this interview should be conducted in person. Regardless of whether the interview is conducted in person or via phone, the DI should prepare detailed notes, a written statement to be signed and dated by the Complainant, or a detailed memorandum of the interview in order to preserve the Complainant's account of the facts and to determine whether a prima facie allegation exists.

2) Any contact with the Complainant must be documented in the activity log or a memo to file.

3) As previously established, the DI should ensure that the complaint has been filed within 180-days of the adverse action. Any complaint that is not filed within 180-days will be administratively closed without further investigation being conducted. The Complainant will not be issued a right-to-sue letter.

4) The DI should also determine the economic loss sustained by the Complainant as of the date of the interview. This may be beneficial during later attempts at settlement. If discharged or laid off by the Respondent, the Complainant should be advised of his or her obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of the back pay to which the Complainant might be entitled in the event of settlement, issuance of merit findings, or litigation. The Complainant should be advised that the Respondent's back pay liability ordinarily ceases when the Complainant refuses a bona fide, unconditional offer of employment or reinstatement, or when the Complainant finds a new job that pays as much or more as they were making with Respondent. The Complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills due to loss of insurance. See Chapter 7 for a discussion on available remedies.

5) The DI should determine the Complainant's willingness to participate in early resolution of the case.

6) The Complainant may have an attorney present during the interview. The DI should request a letter of representation or other documentation for the case record.

7) The DI must obtain copies of, if relevant and available:

    a. any termination notices, reprimands, warnings, or personnel actions
    b. performance appraisals
    c. pay statements
    d. grievances
    e. Division of Employment Security (DES) determinations
    f. job descriptions
    g. company employee and policy handbooks
    h. charges or claims filed with other agencies
    i. collective bargaining agreements

j. arbitration agreements

k. medical records (Only request if necessary for investigation and only request those records that pertain to the specific allegations of the complaint.)

Note Complainants should be advised NOT to provide original documents because they become a permanent part of the case file and will not be returned.

Note EDB DIs must be familiar with 13 NCAC 07A .0901 - .0905 regarding the release and handling of medical records AND Chapter 4 of this manual.

C. Contact with Respondent / Opening Conference

1) The DI assigned to the case is responsible for notifying the Respondent within 20 days of the complaint filing that the complaint has been received and docketed. (Note: The DI must determine the status of any OSHNC investigation prior to making contact with the Respondent. See Chapter 3, Paragraph V (A)). The DI will notify the Respondent via phone regarding the existence of the complaint and provide a copy of the complaint form to Respondent via fax, email, or mail. The DI will also request that a written response / position statement from the Respondent be submitted within 30 days. All documentation regarding contact with the Respondent shall be maintained in the case file.

2) Any contact with Respondent should be documented in the activity log or a memo to file.

3) In addition to the Respondent's position statement, the DI must contact the Respondent to review records, obtain documentary evidence, or to further test the Respondent's stated defense. The DI should contact the person who signed the position statement as the primary point of contact to obtain information. Copies of relevant documents and records should be requested, including disciplinary records if the response involves a disciplinary action. The DI should also obtain evidence when deemed appropriate about how Respondent treated other employees who engaged in conduct similar to the conduct of the Complainant. A review of personnel files may be appropriate to obtain this information.

4) The DI should obtain copies of documentation deemed pertinent to the investigation such as:

   a. any termination notices, reprimands, warnings, or personnel actions

b. performance appraisals

c. pay statements

d. grievances

e. DES determinations

f. job descriptions

g. company employee and policy handbooks

h. charges or claims filed with other agencies

i. collective bargaining agreements

j. arbitration agreements

k. medical records (Only request if necessary for investigation and only request those records that pertain to the specific allegations of the complaint.)

Note Complainants should be advised NOT to provide original documents because they become a permanent part of the case file and will not be returned.

Note EDB DIs must be familiar with 13 NCAC 07A .0901 - .0905 regarding the release and handling of medical records AND Chapter 4 of this manual.

5) The DI should interview company officials, when deemed appropriate, who had direct involvement in the alleged protected activity or retaliation and attempt to identify other persons (witnesses) at the Respondent's facility who may have knowledge of the situation. Refer to O. later in this Chapter for a discussion of interviewing witnesses. The DI should prepare detailed notes, a written statement to be signed and dated by the Respondent, or a detailed memorandum of all interviews in order to preserve the Respondent's account of the facts.

6) If the Respondent has designated an attorney to represent the company, interviews with *management officials* should be scheduled through the attorney, who will be afforded the right to be present during any interviews of management officials. Refer to O. later in this Chapter for a discussion of attorney representation of witnesses.

7) If the Respondent requests time to consult legal counsel, the DI should obtain a letter of representation or other documentation and set a deadline for the Respondent to get in touch with the DI.

8) If at any time during the initial or subsequent meetings with Respondent officials or counsel, Respondent suggests the possibility of an early resolution to the matter, the DI should immediately and

thoroughly explore how an appropriate settlement may be negotiated and the case concluded.

D. Early Resolution

The DI should make an effort to facilitate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. At any point during the investigation, the DI may explore how an appropriate settlement may be negotiated and the case concluded. Settlement techniques and adequate agreement procedures will be covered later in Chapter 7. An early resolution is often beneficial to all parties, since potential losses are at their minimum when the complaint is first filed. Consequently, if the DI believes that an early resolution may be possible, he or she is encouraged to contact the Respondent immediately after completing the initial interview. Additionally, any resolution reached must be memorialized in a written settlement agreement that complies with the requirements set forth later in Chapter 7.

E. Early Involvement of Legal Affairs Division

When needed, consult with the Legal Affairs Division. This may be appropriate in the early stages of an investigation where it appears the potential for litigation or other complicated legal issues are present.

F. Amending Complaints

After filing a retaliation complaint with EDB, a Complainant may wish to amend the complaint to add additional allegations, adverse employment actions, and/or additional Respondents. It is EDB's policy to permit the liberal amendment of complaints, provided that the original complaint was timely, and the investigation has not yet concluded.

1) Form of Amendment. No particular form of amendment is required. A complaint may be amended orally or in writing. Oral amendments will be reduced to writing by EDB—the DI will send a letter or amended complaint to the Respondent regarding the amended allegations. EDB will accept an oral amendment in English or Spanish and will make best efforts to translate written amendments in other foreign languages.

2) Amendments Filed within Statute of Limitations. At any time prior to the expiration of the statutory filing period for the original complaint, a Complainant may amend the complaint to add additional timely allegations and/or additional Respondents.

3) Amendments Filed After Statute of Limitations Has Expired. Amendments are generally not accepted after the statute of limitations for the original complaint has expired. The DI must evaluate whether

the proposed amendment reasonably falls within the scope of the original complaint before allowing amendment.

4) Processing of Amended Complaints. The Respondent must be notified of the amendment and given time to respond to the new allegations. The amended complaint must also be documented in the case file.

G. Pre-Investigative Research

If he or she has not already done so, the DI should determine whether there are prior or current retaliation, safety and health, or other regulatory cases related to either the Complainant or Respondent. Such information normally will be available in Oracle, from the OSH complaint desk, and from coordination with OSH district supervisors or compliance officers. This enables the DI to coordinate related investigations and obtain additional background data pertinent to the case at hand. Examples of information that may be sought during this pre-investigation research phase are:

1) Copies of complaints filed with OSHNC or other agencies.
2) Copies of the result of any enforcement actions, including inspection reports, which were recently taken against the employer.
3) Copies of all relevant documents, including inspector's notes, from regulatory files administered by OSHNC or other agencies.
4) Information on any previous whistleblower complaints filed by the Complainant or against the Respondent.

H. Coordination with Other Agencies

If information received during the investigation indicates that the Complainant has filed a concurrent retaliation complaint, safety and health complaint, or any other complaint with another government agency (such as the DES, DOT, NLRB, NCIC, and EEOC, etc.), the DI may, when deemed appropriate, contact such agency to determine the nature, status, or results of that complaint. This coordination may result in the discovery of valuable information pertinent to the REDA complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts. **Note:** The DI should be aware, however, that a Division of Employment Security (DES) determination should not be solely relied upon in making a final determination.

I. Other Legal Proceedings

The DI should also gather information concerning any other current or pending legal actions involving the Respondent AND Complainant, such as lawsuits, arbitrations, or grievances.

Additionally, the DI should gather information as to whether the Respondent has filed for bankruptcy. Determining that a Respondent has filed for bankruptcy will result in the case being closed and a bankruptcy right-to-sue letter being issued. See Appendix C-2 for a sample letter.

J. Activity/Telephone Log

All telephone calls, messages received, certified mailings, contact with PSIM, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the DI 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 substantive and includes pertinent information, the DI should document the substance of this contact in a "Memo to File," a written statement, or detailed notes to be included in the case file. In this instance or when written correspondence is noted, the activity/telephone log may simply indicate the nature and date of the contact with a comment such as "See Memo/Document - Exhibit #."

K. On-Site Investigation

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

If an interview is recorded electronically, the DI must be a party to the conversation, and it is EDB's policy to have the witness acknowledge at the beginning of the recording that they understand that the interview is being recorded. This does not apply to other audio or video recordings supplied by the parties. It may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are public records and need to be included in the case file.

L. Inability to Locate Complainant

In situations where a DI is having difficulty locating the Complainant to initiate or continue the investigation, the following steps must be taken:

1) Telephone the Complainant at various times and leave messages if possible with instructions for Complainant to contact the DI immediately.

2) If Complainant's email address is known, email the Complainant with instructions to contact the DI by a specified date.

3) Mail a letter via certified mail to the Complainant's last known address, stating that the DI must be contacted within 10 days or the case will be closed and an uncooperative right-to-sue letter will be issued. All correspondence to the Complainant should be retained in the file. See Appendix A-1 for a sample letter.

M. Uncooperative Respondent

1) When dealing with an uncooperative Respondent, the DI will mail a letter informing the Respondent of the possible consequences of failing to provide the requested information in a timely manner. See Appendix A-2 for a sample letter. Specifically, the Respondent may be advised that its continued failure to cooperate with the investigation may lead EDB to reach a determination without the Respondent's input. Additionally, the Respondent may be advised that EDB may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

2) When conducting an investigation under N.C. Gen. Stat. § 95-240 et.seq, DIs have authority to issue subpoenas in order to obtain documentation from an employer who is unwilling to cooperate with the investigation. Subpoenas should only be issued following coordination with the Legal Affairs Division and the Attorney General's office. Two types of subpoenas can be issued: Subpoena Ad Testificandum, used to obtain an interview from a reluctant witness, and Subpoena Duces Tecum, used to obtain documentary evidence. When drafting subpoenas, the party should be given a short timeframe in which to comply and broad language like "any and all documents" or "including but not limited to," should be used. Delivery of the subpoena can be made by the DI or local law enforcement officials. If the Respondent decides to cooperate, the DI can choose to lift the subpoena requirements. See Appendix B for a sample subpoena. If the Respondent fails to cooperate or refuses to respond to the subpoena, the DI will consult with the EDB Bureau Chief regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The other option is to request that the Attorney General's office enforce the subpoena.

N. Exchange of Information During the Investigation

While a case is under investigation, pertinent documentation should be exchanged between the parties as non-public disclosures. At the very least, a copy of the Respondent's Position Statement must be provided to the Complainant[1] and a copy of the complaint form shall be given to the Respondent. Any additional information exchanged shall be exchanged at the discretion of the DI. The procedures for non-public disclosures are as follows:

1) For Raleigh Based DI's: As soon as practically possible, the DI should make a copy of the pertinent documents to be exchanged and provide the documents to PSIM for redaction. Original documentation will remain with the DI in the file at all times. The copies being sent to PSIM for redaction must be bound and prefaced by a cover form noting the 90-day date of the case and explaining that the file redaction is for non-public disclosure. See Appendix K for a sample cover form. The DI should document in the Activity Log the date the case documentation was sent to PSIM for redaction and disclosure, the date the copies are returned to the DI, as well as a brief description of what was sent to PSIM for redaction. The redacted documents should be mailed, faxed, or emailed (with confirmation) to the parties as soon as practically possible from receipt of the redacted copy from PSIM[1] Any documents mailed to Complainants must be mailed via certified mail.

2) For Field DIs: When a new OSH complaint is received in the Raleigh office, a copy of any documentation submitted by the Complainant should be copied by Raleigh office personnel and sent to PSIM for redaction. PSIM will then send the redacted documents directly to the field DI who will then send the documentation to the appropriate party. The field DI will then be responsible for copying and sending any future documentation received during the course of the investigation to PSIM for redaction. As with Raleigh-based DIs, redaction requests should be made to PSIM as soon as practically possible and the redacted documents must then be mailed, faxed, or emailed (with confirmation) to the parties as soon as practically possible from receipt from PSIM.[2]. Any documents mailed to Complainants must be mailed via certified mail.

Note: Medical records are NOT to be disclosed.

[1] An exception to this required exchange would be in an administrative closure case, where the case is being closed for lack of jurisdiction or for being untimely. The Respondent's position statement may not be relevant in all administrative closures. If the position statement is relevant in the determination of timeliness or jurisdiction, then it should be provided to the Complainant.

Note: The complaint form *does not* need to be redacted when submitting a copy to the Respondent during this exchange of information process.

See Chapter 9 for additional information regarding non-public disclosures, such as how DIs and PSIM handle disclosures involving trade secrets, confidential statements, personal, identifiable information, etc.

O. Gathering Supporting Evidence from Witnesses

It is the DI's responsibility to pursue all appropriate investigative leads deemed pertinent to the investigation, with respect to the Complainant's and the Respondent's positions. Contact should be made whenever possible with relevant witnesses and the DI must attempt to gather pertinent data and materials.[2]

1) The DI must attempt to interview relevant witnesses for both parties. Witnesses must be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. If witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the DI 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.

2) As stated previously in this chapter, Respondent's attorney has the right to be present for Respondent management interviews. If a management employee seeks a private conversation outside the presence of the attorney, the DI should consult with NCDOL Legal Affairs Division prior to conducting the interview.

   However, Respondent's attorney should not be permitted to be present, during interviews of *non-management* or non-supervisory employees. If the Respondent's attorney requests to be present during the interview of a non-management witness, then the DI should consult with the Legal Affairs Division. (Legal Affairs will consider whether the witness's statement could legally bind the Respondent, and if so, legal counsel may then be permitted to be present for the interview.) Also, for the record, the DI should ask Respondent's attorney who he/she represents and specifically ask Respondent's attorney if he/she represents the non-management witness in the matter. If the Legal Affairs Division determines that Respondent's attorney has no right to be present for the interview but the non-management witness wishes

[2] If the DI has a written statement from the witness and does not need additional information, the DI is not required to contact the witness for interview. In any circumstance where the DI chooses not to interview a witness for whatever reason, the DI should document the decision and supporting rationale in the activity log.

the Respondent's attorney to be present, then the DI should make it clear to the witness that:

a. Respondent's attorney represents Respondent and not the witness; and

b. The witness has the right to be interviewed privately.

Once these facts are clear to the non-management witness, if the witness still requests that Respondent's attorney be present, the interview may proceed. If Respondent's attorney indicates that he/she represents the non-management witness, a signed representative form or letter should be provided by Respondent's attorney to document that he/she represents the non-management witness.

Any witness may, of course, have a personal representative or private attorney present at any time.

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

4) Witnesses must be asked whether they wish to remain confidential. When a witness requests confidentiality, the DI should explain to the witness that his/her identity will be kept in confidence to the extent allowed by law, but that if he/she is going to testify in a proceeding, his/her statement and identity may be disclosed. In addition, all confidential interview statements obtained must be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement. The DI should stamp confidential witness statements and/or interview notes with a "Confidential" stamp. To avoid mixing confidential and non-confidential material, confidential interviews may not be discussed in detail in the activity log, but rather, must be thoroughly noted on a separate sheet of paper in the file.

5) Regardless of whether confidentiality is requested, it is unnecessary and improper to reveal the identity of witnesses to either party during the course of the investigation.

P. Resolution of Discrepancies

After obtaining the Respondent's version of the facts, the DI will again contact the Complainant and other witnesses as necessary to resolve any discrepancies in the facts.

Q. Weighing the Evidence

N.C. Gen. Stat. §95-241(b) states, “It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.”

Under REDA, the Complainant has the initial burden of establishing a prima facie case showing that (i) he/she engaged in a protected activity, such as filing a safety and health complaint; (ii) the Respondent was aware of the protected activity; (iii) an adverse employment action occurred, such as termination; and (iv) a causal relationship exists between the protected activity and the adverse employment action. After the Complainant has met the burden of establishing a prima facie case, the burden then shifts to the Respondent to produce evidence of a legitimate, non-discriminatory reason (LNR) for its actions against the Complainant. At this point in the process the burden shifts back to the Complainant to show an inference of discrimination. The Complainant may do so by showing that Respondent’s explanation is insufficient and only a pretext for discrimination.

The DI will review the case to determine if there is sufficient evidence for each element by applying the greater weight of the evidence standard. If there is insufficient evidence to establish one of the elements, (including that the Complainant engaged in a protected activity or that an adverse employment action occurred), then a no-merit right-to-sue letter will typically be issued. If for some reason, the DI believes that the case should be administratively closed instead, the DI may coordinate with the EDB Bureau Chief and NCDOL Legal Affairs Division, when necessary.

The possible outcomes of an investigation under the greater weight of the evidence are:

1) If the greater weight of the evidence indicates Respondent’s reason for the retaliation was a pretext, then the complaint is meritorious;

2) If the greater weight of the evidence indicates Respondent acted for both prohibited and legitimate reasons (“mixed motive”), and *absent* the greater weight of the evidence indicating the Respondent would have made the same decision even if the Complainant had not engaged in a protected activity then the complaint is meritorious;

3) If the Respondent acted for both prohibited and legitimate reasons, but the greater weight of the evidence indicates the Respondent would have reached the same decision even in the absence of any protected activity, then the complaint must be closed and a no-merit right-to-sue letter issued; or

4) If the greater weight of the evidence indicates the Respondent was not motivated in whole or in part by protected activity, then the complaint must be closed and a no-merit right-to-sue letter issued.

R. Proving Elements of a Violation

1) Protected Activity

N.C. Gen. Stat. § 95-241(a) states that "No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following: (1) File a claim or complaint, initiate an inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to…Article 16 of this Chapter…. (2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee' behalf. (3) Exercise any right on behalf of the employee or any other employee afforded by…Article 16 of this Chapter."

The evidence must establish that the Complainant engaged in activity protected by REDA. In instances where the DI is uncertain whether a protected activity occurred, the DI should coordinate with the EDB Bureau Chief and NCDOL Legal Affairs Division, if necessary.

Protected activity generally falls into the following categories:

a. Providing information to a government agency (such as OSHA) a supervisor (the employer), a union representative, health department, fire department, or the General Assembly. An employee has the right to participate in an OSHA inspection. He or she has the right to communicate with an OSHA compliance officer, orally or in writing.

b. Filing a complaint or instituting a proceeding provided for by law, such as filing an OSHA complaint.

c. Testifying in proceedings such as trials, hearings before the OSHNC Review Commission, or Congressional hearings. Participating in inspections or investigations by agencies including, but not limited to OSHA.

d. Initiating any inquiry or investigation regarding a safety matter.

e. Refusal to perform an assigned task due to safety concerns. Generally, a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthy, and he or she does not receive an adequate explanation from a responsible official that

the conditions are safe. In order for an employee to refuse to perform a job, the following conditions must be met:

i) Has a reasonable apprehension of death or serious injury, ***and***

ii) Refuses in good faith, ***and***

iii) Has no reasonable alternative, ***and***

iv) There is insufficient time to eliminate the condition through regular statutory enforcement channels, ***and***

v) The employee, where possible, sought from his employer, and was unable to obtain, a correction of the dangerous condition.

When all of the above conditions have been met, then the Complainant must have taken the following steps:

i) Asked the employer to correct the hazard, **and**

ii) Asked the employer for other work, **and**

iii) Told the employer that he/she won't perform the work unless and until the hazard is corrected, **and**

iv) Remained at the worksite until ordered to leave by the employer.

2) Employer Knowledge

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

If the Respondent does not have actual knowledge, but could reasonably deduce that the Complainant filed a complaint, it is referred to as constructive knowledge. Examples of constructive knowledge include, but are not limited to:

a. An OSHA complaint is about the only lathe in a plant, and the Complainant is the only lathe operator.

b. A complaint is about unguarded machinery and the Complainant was recently injured on an unguarded machine.

c. A union grievance is filed over a lack of fall protection and the Complainant had recently insisted that his foreman provide him with a safety harness.

d. Under the small plant doctrine, in a small company or small work group where everyone knows each other, knowledge can also be attributed to the employer.

3) Adverse Employment Action

The evidence must demonstrate that the Complainant suffered some form of adverse "retaliatory" action initiated by the employer. N.C. Gen. Stat. § 95-240 defines retaliatory action as "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment." An adverse action may occur at work or, in certain circumstances, outside of work. Some examples of adverse actions may include, but are not limited to:

a) Discharge

b) Demotion

c) Retaliatory Relocation

d) Reprimand

e) Lay-off

f) Failure to promote

g) Transfer to different job

h) Change in duties or responsibilities

i) Reduction in pay

j) Denial of benefits

k) Reduction in hours

Note that constructive discharge and harassment are not included as adverse actions.

4) Nexus

A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence. *The causal link must be more than speculation.* Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited ill will) toward the Complainant, timing (proximity in time between the protected activity and the adverse action), disparate treatment of the Complainant in comparison to other similarly situated employees (or in comparison to how the Complainant was treated prior to engaging in protected activity), false testimony, or manufactured evidence.

Questions that will assist the DI in testing the Respondent's position include:

1) Did the Respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?

2) Did the Complainant's productivity, attitude, or actions change after the protected activity?

3) Did the Respondent discipline other employees for the same infraction and to the same degree?

S. Report of Investigation

Upon completion of the investigation, the DI will draft and submit the Report of Investigation (ROI) to the EDB Bureau Chief for approval of the determination. See Chapter 5, Section IV for a discussion of the ROI. Upon approval, the DI will proceed with closing conferences.

T. Closing Conference for No-merit Cases

After receiving the Bureau Chief's approval of the ROI, the DI will hold a closing conference with both parties prior to sending out the Notice of Intent (The Notice of Intent starts the review process and is now sent before the right-to-sue letter can be issued or the case can be administratively closed. Refer to Chapter 6, Section III.). During the closing conference, the DI should explain the rationale for the decision that has been made and provide an opportunity to ask questions. The DI shall also explain that a Notice of Intent will be mailed via certified mail (or email with confirmation), and that the Notice is a formal statement that sets forth the DI's intention to either issue a right-to-sue letter or administratively close the case.

This closing conference may be conducted in person or by telephone.

In some instances, the Complainant may not be available for a closing conference. When possible, a detailed email may be sent to the Complainant or a detailed phone message may be left. If the Complainant cannot be reached to discuss the investigative findings, then the DI may go ahead and send the Notice of Intent (Again, refer to Chapter 6, Section III for a more thorough discussion of the Notice.).

If a Respondent could not be reached for the closing conference, the DI may leave a detailed phone message or send a detailed email to explain the findings and review process, etc.

As during any conversation with the parties, it is unnecessary and improper to reveal the identity of witnesses interviewed during the closing conference.

If the Complainant attempts to offer any new evidence or witnesses during the closing conference, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination, and if so, what further investigation might be necessary prior to the final closing of the case. Should the DI decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the Complainant along with an explanation of why additional investigation does not appear to be warranted.

The closing conferences must be thoroughly documented in the case file in the telephone activity log or via a memo to file.

U. Closing Conference for Merit Determinations

The closing conference is conducted in the same manner as the closing for a no-merit determination. However, in a merit case, while approving the ROI, the DI and Bureau Chief should decide whether the Legal Affairs Division will conduct a litigation review or whether a merit right-to-sue letter should be issued. After a decision is made and approved by the Bureau Chief, the closing conference is then held. Since the Complainant may not request review of a merit determination, there will be no discussion of the Notice of Intent, as no Notice will be mailed. Rather, the DI will explain the reasons for the merit finding and discuss the next steps—either that the file is being forwarded to the Legal Affairs Division for litigation review or that a merit right-to-sue letter is being issued (via certified mail). The DI should make additional efforts to settle the case at this time.

Chapter 4
MEDICAL RECORDS

I. Scope

During the course of an investigation, it may be necessary for a DI to obtain and review medical records. 13 NCAC 07A .0901 - .0905 requires special handling of all medical records in order to protect privacy. This chapter sets forth the policies and procedures DIs must follow during the course of an investigation regarding the requesting, receiving, handling, and reporting of medical records.

II. General Principals

As a general rule, only relevant medical records should be kept on file. When a DI receives medical records in the course of an investigation, the DI must review the records to determine the documents' relevancy to the investigation. If the medical records are not relevant, they should be returned via certified mail to the individual who provided the records.

Medical records shall only be used for the purpose of investigating a REDA complaint.

III. Definition of Medical Record

The term "medical record" is defined as the following:

> a record concerning the health status of an employee which is made or maintained by the employer, a physician, nurse, or health care personnel, or technician, including: (1) medical and employment questionnaires or histories (including job description and occupational exposures); (2) the results of medical examinations (pre-employment, pre-assignment, periodic, or episodic) and laboratory tests (including chest and other x-ray examinations taken for the purposes of establishing a baseline or detecting occupational illness, and all biological monitoring not defined as an "employee exposure record" per 29 CFR 1910.1020); (3) medical opinions, diagnosis, progress notes, and recommendations; (4) first aid records; (5) description of treatments

and prescriptions; (6) employee medical complaint; (7) EMS reports; and (8) Photographs or videos of autopsies. (See Chapter XVI NC-OSH Field Operations Manual (FOM)).

If a document is questionable as to whether it should be treated as a medical record, the DI should consult with the EDB Bureau Chief and if necessary, the Legal Affairs Division, or err on the side of treating the document as a medical record.

IV. Responsibilities

A. Medical Records Coordinator

The EDB Bureau Chief will serve as the medical records coordinator and oversee the security procedures established by the rules in this section.

B. Medical Records Administrator

The EDB Bureau Chief shall designate an EDB employee to act as the Medical Records Administrator. The Medical Records Administrator will maintain a chain of custody form for recording access and transfers of medical records for each file, including the name of each person accessing the information. The Medical Records Administrator shall also have primary control of the locked cabinet where such records are stored and shall not allow access to the information contained in the cabinet to any unauthorized personnel.

C. Principal EDB DI

The Principal EDB DI shall be the DI assigned to investigate a specific complaint, and he / she is responsible for ensuring that the examination and use of the medical information is performed in the manner prescribed by the rules in this section.

V. Intra-Agency Use and Transfer

Medical records shall not be transferred to Department employees outside of EDB unless authorized by the Bureau Chief or his/her designee. In some instances, it may be necessary to share medical records with the Department of Labor Legal Affairs Division. In such instances, all medical

records must be hand delivered to Legal Affairs or mailed via certified mail or the equivalent (e.g. UPS or FedEx).

VI. Inter-Agency Transfer

A. Medical information shall not be transferred to another agency, except as noted in paragraph B below, or disclosed to the public (other than the affected employee or the original record holder) except when required by law or approved by the Commissioner or his/her designee.

B. Upon approval of the Commissioner or her designee, medical information may be transferred to the NC Attorney General's office for review and/or litigation.

VII. Requesting & Reviewing Medical Records

Only the Principal EDB DI may request, review, or use medical records unless authorized by the EDB Bureau Chief or his/her designee. For investigations involving multiple Complainants but one employer, where multiple DIs are involved in the cases, each DI may access the medical records when necessary.

VIII. Receiving Medical Records

When a DI requests medical records during an investigation, the DI shall request that the information be hand delivered or sent via certified mail or the equivalent (e.g. UPS or FedEx). If the providing party wishes to transmit the records via fax, the DI shall request that party to inform the DI when the records will be faxed in order to help prevent the information being left unsecured at the fax machine.

If medical records are received prior to case file assignment, the records should be secured by being locked up in the EDB Bureau Chief or Complaint Processor's office until the case can be assigned to a DI.

Once the assigned DI receives the medical records and case file, all medical records must be separated and secured as required in section IX of this chapter.

IX. Securing Medical Records

A. Raleigh-Based DIs

Upon receipt, the DI will separate medical records that are still under review and/or already determined to be necessary to the investigation and stamp the document as “Medical Records – Confidential.” The records will be enclosed in a separate manila envelope and each envelope will be labeled “Medical Records - Confidential" with the medical record identifier and the DI’s first initial and last name. This includes all medical records associated with open investigation files.

Medical records will then be transferred immediately to the locked cabinet controlled by the Medical Records Administrator in the Raleigh EDB office. DIs who are out of town for extended periods will transfer the medical records to the medical records cabinet on the day they return to the office. The records shall remain in the locked cabinet when not being reviewed by the Principal EDB DI. When the Principal EDB DI wishes to review a medical record, he/she must follow the chain of custody procedures established below in section XIII in order to sign out the documents for review. Records should be returned promptly to the locked cabinet.

B. Field DIs

Field DIs will secure medical records for open investigations at home in a box secured with a combination lock. The combination shall be known only to the Principal EDB DI and the Medical Records Administrator. After the DI has closed the case file, the medical records must be sent to the Raleigh EDB office within 5 business days of the closing of the investigation. Transfers of medical records shall be by hand delivery, certified mail, or other equally protected means.

C. Copies

All medical record **copies** are to be secured in accordance with these guidelines. The photocopying or other duplication of medical information shall be limited to what is absolutely necessary to accomplish the purposes for which the information was obtained.

X. Securing Medical Records During Travel

If medical records are transported during a site visit, the records must be separated from any other case file materials and placed in a medical records folder. During travel or when the DI is away from his / her vehicle during the day, the medical records must be locked in the vehicle's trunk. If the site visit requires an overnight stay, the medical records must be kept with the DI in the hotel room. Medical records shall not be left in hotel rooms during the day. Once the DI returns to their home or Raleigh Office, the medical records must be secured as mandated in section IX of this chapter.

XI. Retention of Medical Records

Once an investigation is closed, the medical records will remain in the locked cabinet for three years or for the typical document retention period under the Department's retention policy.

XII. Medical Record Identifier

The medical record identifier will be created by the DI as follows:

Case file number – Complainant's initials – Respondent's Name

For example, case file 100-12 for Complainant John Doe and Respondent XYZ Inc. would result in the medical record identifier number 100-12—JD—XYZ Inc.

XIII. Medical Records Chain of Custody Form

After the medical records are placed in the manila envelope and labeled as stated above, the DI will complete a "Medical Records Chain of Custody Form" for each record/medical record identifier. See Appendix J. This form will be maintained by the Medical Records Administrator and initialed by both the Medical Records Administrator and the Principal EDB DI each time the medical records are transferred to or removed from the locked file cabinet. The form will be affixed to the manila envelope for record keeping purposes.

Note: Principal DIs who work in the field must maintain the chain of custody form for each medical record identifier. The form need not be initialed by the Medical Records Administrator every time the DI accesses the records in his/her locked box. The form must be affixed to the envelope and as such, mailed in with the medical records. The Medical Records Administrator will sign for the records upon receipt when they are locked in the medical records cabinet.

XIV. Use of Medical Records in Report of Investigation and Case Notes

A. Mixed Documents

In some instances, such as mixed Workers' Compensation / OSH complaints, the DI may receive a document from one of the parties that contains OSH and safety complaint information mixed with medical information. Completely separating the document from the file and locking it up in accordance with this chapter could inhibit the DI's investigation and would result in non-medical / OSH information not being exchanged between the parties. Therefore, a non-redacted copy of the document may be kept in the file for investigative purposes.

When a DI receives such a mixed document, the DI shall follow the normal 'Exchange of Information' procedures set forth in Chapter III. PSIM will make any necessary redactions in the mixed document prior to a copy being mailed to the other party for non-public disclosure.

PSIM will also ensure that all necessary redactions have been made prior to any public disclosure request after the close of the investigation.

B. Case Notes

During interviews, the DI may sometimes discuss the Complainant's medical information, especially in the circumstances of a mixed OSH / Workers' Compensation complaint as stated above. For thoroughness of the investigation it will be necessary for the DI to document the complete discussion, including any mention of medical condition and physician orders, in a memo of record, case notes, or the activity log. Such notes may be kept in the file in un-redacted form. If the records are to be disclosed after the investigation closes, PSIM will make any necessary redactions in the notes. These case notes are never disclosed during the Exchange of Information process during the investigation.

C. Report of Investigation

In some instances, it may be necessary to reference a Complainant's medical information in the Report of Investigation. Because these reports may be disclosed to the public, however, all references to the medical information should be as non-specific as possible, and the DI should avoid revealing detailed medical particulars. To protect a Complainant's privacy, EDB DIs must exercise caution when referencing any medical information in a Report of Investigation. If a DI is uncertain how to best reference the information while protecting the Complainant's privacy, the DI must consult with the EDB Bureau Chief or the Legal Affairs Division for appropriate guidance. PSIM will make any necessary redactions if a disclosure request is made at the close of the case.

XV. Activity Log

The DI should notate that medical records have been separated from the file.

Chapter 5

CASE FILE MANAGEMENT AND REPORT OF INVESTIGATION

I. Scope

This Chapter sets forth policies and procedures and format requirements for preparation of the Report of Investigation (ROI) and the investigative case file.

II. General Principles

The DI must maintain all original records received by the Complainant and Respondent throughout the course of the investigation and keep those records in the case file. This includes audio and video recordings. All correspondences from the DI to the parties, including emails, must also be preserved in the file. No records may be destroyed or removed from the case file (with the exception of the separation of medical records). The DI is also responsible for thorough documentation in the Activity Log of all communications with the parties to establish a time-line of communications.

III. Case File Organization

Upon assignment, the DI will receive a case file that is broken into four sections and will likely contain a copy of the letter to Complainant indicating that the complaint has been received and docketed, the letter of notice to be provided to the Respondent regarding the complaint filing, and an intake worksheet. As the investigation progresses, the case should be organized as follows:

A. First Left Section

The first left section of the case file should contain correspondences to or from the Complainant and Respondent. This will also contain certified mail cards.

B. First Right Section

The first right section should contain internal documentation, such as an email from EDB to the OSH complaint desk and the REDA Case History form.

C. Second Left Section

The second left section should contain the file activity log.

D. Second Right Section

The second right section should contain the complaint form, the Report of Investigation, all notes / interview records, and supporting documentation provided by the parties (such as the Complainant's Questionnaire and the Respondent's Position Statement). A detailed table of contents shall precede the documents in this section and should identify the Report of Investigation / Memo, complaint form, Complainant's Questionnaire and evidence / exhibits, Respondent's Position Statement and evidence / exhibits, OSHA information, and any interview statements and / or notes. If OSH documents are contained in the file, they will be partitioned from other supporting documentation via a separate OSH tab. OSH documents may not be disclosed, so it is important to separate them from the other documentation.

IV. Report of Investigation

The ROI is EDB's final determination of the case and must contain information regarding the findings of the investigation. The Report of Investigation shall identify the sources / specific supporting documentation used to make the determination by referencing the location of the documents via tabs identified in the table of contents. See Appendix H for a sample ROI.

The first page of the ROI must set forth the statute and the parties and their attorneys (addresses and phone numbers). The ROI must address the following areas in some manner and format:

A. Timeliness

Indicate the date the complaint was filed, the date of the adverse employment action and whether the complaint was timely.

B. Elements of a Violation

Evaluate the facts as they relate to the four elements of a violation. Credibility and reliability of evidence should be resolved, and a detailed discussion of the essential elements of the violation should be presented.

1) Protected Activity
2) Respondent Knowledge
3) Adverse Employment Action
4) Nexus

C. Defense

Give an account of Respondent's defense. For example, the Respondent may offer a legitimate, non-discriminatory reason for termination, such as firing Complainant for attendance violations. The ROI should address the Respondent's policy for this type of conduct and if other employees who engaged in similar misconduct were treated in a similar manner.

D. Remedy

In *merit cases,* this section should discuss all appropriate relief due to the Complainant as determined using the guidelines set forth in Chapter 7. Any cost that will continue to accrue until payment, such as back wages, insurance, etc., should be stated as formulas (for example, back wages in the amount of $13.90 per hour for 40 hours per week from January 2, 2007 – date of payment).

E. Recommended Disposition

This is a concise statement of the DI's recommendation for the disposition for the case.

F. EDB Bureau Chief Signature Block

The ROI must contain a space for the EDB Bureau Chief's signature upon approval of the determination.

NOTE: The DI must take care not to compromise an open OSH investigation. Thus, ROI's may not contain a reference to OSH documentation or details of the OSH investigation as long as the OSH investigation is still open.

V. Documentation in the Activity Log and File

The closing conference will be documented in the case file, either by entry in the telephone activity log or a separate memo to file.

All interviews of Complainants, Respondents, and witnesses must also be thoroughly documented. All communications must be properly noted in the activity log, and when necessary, the communication may be documented in more detail in an additional notes section or statement that will be contained for reference in the Second Right Tab.

The DI should also document any explanation for *not conducting a logical investigative step* during the course of the investigation. The DI should make an entry in the activity log, for example, when a decision is made not to interview a particular witness, and the DI should include the rationale for

that decision. Furthermore, if the DI was unable to obtain information concerning *"similarly situated"* employees, this should be documented in the activity log along with an explanation as to why the DI did not gather the information.

Chapter 6
CASE DISPOSITION

I. Scope

This chapter sets forth the types of case dispositions that can occur as the result of an investigation. Additionally, this chapter addresses the supervisory role and approval process.

II. Disposition Types

A. No-merit right-to-sue

When the DI has not found merit in the allegations and is intending to issue a no-merit right-to-sue letter, the DI will provide the completed case file and Report of Investigation to the EDB Bureau Chief. Upon receipt of the completed case file, the EDB Bureau Chief will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, completeness of the Report of Investigation, and merits of the case.

If, for any reason, the EDB Bureau Chief does not concur with the DI's analysis and recommendation or finds that additional investigation is warranted, the file must be returned to the DI for follow-up work.

If the EDB Bureau Chief concurs with the analysis and recommendation of the DI that the case should be dismissed and that a no-merit right-to-sue letter should be issued, he or she will sign on the signature block on the last page of the ROI and record the date the review was completed. The EDB Bureau Chief's signature on the ROI serves as approval of the recommended determination. Per Chapter 6, Section III, a Notice of Intent letter will be mailed upon approval by the EDB Bureau Chief via certified mail (or email with confirmation) to Complainant. A right-to-sue letter will only be issued via certified mail pursuant to Chapter 6, Section III after all review rights have expired. See Appendix C-1 for a sample no-merit right-to-sue letter. Respondent will receive a copy of the right-to-sue letter.

B. Merit Finding

All merit decisions will be coordinated with the EDB Bureau Chief for a determination of investigation sufficiency and potential for litigation. The DI will provide the completed case file and a memorandum of recommendation / ROI to the EDB Bureau Chief, suggesting further conciliation efforts and/or possible litigation. The EDB Bureau Chief will sign the ROI if he or she concurs with the finding. Additionally, the EDB

Bureau Chief will, as necessary, coordinate with the Legal Affairs Division in making a decision to either litigate or issue a merit right-to-sue letter, which will be sent via certified mail, to the Complainant. See Appendix D for a sample merit letter.

If, for any reason, the EDB Bureau Chief does not concur with the DI's analysis and recommendation or finds that additional investigation is warranted, the file must be returned for follow-up work.

C. Settlement

Voluntary resolution of disputes is desirable, and DIs are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached through the use of EDB's standard settlement agreement. The language of this agreement generally should not be altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation. The DI should use his/her judgment as to when to involve the EDB Bureau Chief in settlement discussions. To document a settlement, the DI must prepare a memorandum discussing the resolution of the case. A formal Report of Investigation is not required.

D. Withdrawal

A Complainant may withdraw his or her complaint at any time during EDB's investigation of the complaint. However, it should be made clear to the Complainant that by requesting a withdrawal of the complaint, the complaint will not be able to be reopened or re-filed if more than 180 days have lapsed since the adverse employment action. Withdrawals must be requested in writing or email. A letter must be sent to the Complainant confirming closure of the investigation. See Appendix E-1 for a sample letter and Appendix E-2 for a sample Withdrawal form. Withdrawal of a complaint does not need to be reviewed by the EDB Bureau Chief. To document a withdrawal, the DI must prepare a memorandum to file setting forth the reason for withdrawal. A formal Report of Investigation is not required.

E. Postponement

EDB may decide to delay an investigation pending the outcome of an active proceeding, such as a grievance hearing under a collective bargaining agreement or another law. The rights asserted in the other proceeding must be substantially the same as the rights afforded the Complainant under the provisions of REDA. The factual issues to be addressed by such proceedings must be substantially the same as those raised by the complaint under REDA. The forum hearing the matter must have the power to determine the ultimate issue of retaliation. Therefore, it

would be inappropriate to postpone when the other proceeding typically does not deal with retaliation, such as an unemployment compensation hearing. To postpone the REDA case, both parties must be notified that the investigation is being postponed in deference to the other proceeding and that the EDB must be notified of the results of that proceeding immediately upon its conclusion.

The case must remain open during the postponement and the "postponed" status should be entered into IMIS. When EDB is notified of the outcome of the proceeding, the results must be recorded in IMIS. The case should be closed following normal procedures when the closing letter is issued.

F. Collective Bargaining

If a collective bargaining agreement requires the employee to participate in a collective bargaining process to resolve the statutorily covered retaliation, then the EDB investigation will be administratively closed in Oracle and IMIS. If there is no such provision in the collective bargaining agreement, EDB will retain jurisdiction. When determining whether to administratively close a case because of a collective bargaining agreement, coordinate with the EDB Bureau Chief and NCDOL Legal Affairs Division prior to closing the case. To document a closure, the DI must prepare a memorandum to file setting forth the reason for closure. A formal ROI is not required and no right-to-sue letter will be issued.

G. Referral

If it is determined during the investigation that another agency, such as the USDOL, has investigative jurisdiction, EDB will close the investigation and refer the Complainant to the appropriate agency. The DI should use his/her judgment as to when to involve the EDB Bureau Chief in referral matters. To document a referral closure, the DI must prepare a memorandum to file setting forth the reason for referral. A formal Report of Investigation is not required and a right-to-sue letter should not be issued. The DI should consult with the Legal Affairs Division if he/she believes that a right-to-sue letter may be appropriate in some instance.

H. Administrative Closure

Whenever it is determined that EDB does not have investigative jurisdiction (such as in a USDOL or EEOC matter), the case will be administratively closed. (Note: Closure for failure to prove all elements of the case will be treated as a no-merit right-to-sue closure.) To document an administrative closure, the DI must prepare a memorandum to file setting forth the reason for closure, and the memo must be given to the EDB Bureau Chief for review and approval. Once the DI receives approval and holds the closing conference, he/she will issue a Notice of

Intent. See Chapter 6, Section III for a discussion of the Notice of Intent. If the case is to be administratively closed, a right-to-sue letter will not be issued.

I. Lack of Cooperation

For cases being dismissed due to a lack of cooperation on the part of the Complainant, the DI must prepare a detailed memorandum to file indicating the lack of cooperation. The Complainant will be issued an "uncooperative" right-to-sue letter. See Appendix F for a sample letter. No Notice of Intent will be issued, and no review rights will be granted.

J. Untimely Complaints

Any complaint that is determined to be untimely filed, will result in administrative closure of the investigation and no issuance of a right-to-sue letter. To document closure due to an untimely filing, the DI must prepare a memorandum to file setting forth the date of the adverse employment action and the date of the filing of the complaint. A Notice of Intent shall be issued, per Section III below.

K. 90-Day Right to Sue

In accordance with N.C. Gen. Stat. §95-242(b), the Complainant can request to be issued a right-to-sue letter if more than 90 days have passed since the date the complaint was filed and the Commissioner of Labor has not issued a notice of conciliation failure and has not commenced an action on Complainant's behalf. No Notice of Intent will be issued. See Appendix G for a sample letter.

L. Bankruptcy

When a Respondent is determined to be bankrupt, the DI shall close the case and issue a bankruptcy right-to-sue letter. See Appendix C-2 for sample letter. For purposes of documentation of the closure in Oracle, the DI shall enter "Adm Cls" as the investigative finding, as there is no option in the dropdown menu for "bankruptcy." However, a bankruptcy closure shall not be treated as an administrative closure for any purpose other than this Oracle entry. As opposed to a true administrative closure, the Complainant shall receive a right-to-sue letter in the case of a bankruptcy finding and no Notice of Intent will be issued.

III. Review of Determination

A. Implementation

All docketed complaints filed under N.C. Gen. Stat. §95-241(a)(1)(b) with respect to Article 16 of Chapter 95, the Occupational Safety and Health Act of North Carolina, will be reviewed pursuant to this instruction *prior to the issuance of a right-to-sue letter*. See Appendix M for overview.

B. Completion of the Investigation by EDB Investigator

1) When a DI completes an investigation of a complaint filed involving the Occupational Safety and Health Act, and the matter cannot be resolved through conciliation, the investigator will make one of the following recommendations in a Report of Investigation or memorandum: administratively close without issuing a right-to-sue letter; issue a no-merit right-to-sue letter; issue a merit right-to-sue letter; refer to the Legal Affairs Division for possible litigation.

2) The completed file along with the recommendation will be forwarded to the EDB Bureau Chief for review. After reviewing the file and recommendation, the Bureau Chief will return the file to the investigator with directions on the next steps to take.

3) If after reviewing the file and the investigator's recommendation the Bureau Chief directs the investigator to conduct further investigation, the investigator shall do so and then the file will be returned to the Bureau Chief upon completion of the investigation in accordance with paragraph 2 above.

4) If the Bureau Chief directs the investigator to administratively close without issuing a right-to-sue letter, or to issue a no-merit right-to-sue letter, the investigator will conduct the closing conference and send a Notice of Intent letter in accordance with paragraph C below.

5) If the Bureau Chief directs the investigator to issue a merit right-to-sue letter, the investigator will conduct the closing conference and send the Complainant a merit right-to-sue letter. If a merit right-to-sue letter is issued, no further review is necessary.

6) If the Bureau Chief directs that the file be referred to the Legal Affairs Division for possible litigation, the closing conference will be held and then the entire file will be forwarded to the Legal Affairs Division for review.

C. Issuance of Notice of Intent Letter

1) Prior to administratively closing a case without issuing a right-to-sue letter or prior to issuing a no-merit right-to-sue letter, the investigator will send the Complainant a Notice of Intent Letter via certified mail or email with confirmation (If emailed and the investigator does not receive notification via email that the letter was received, then a certified letter shall be mailed.) See Appendix N for sample Notice of Intent Letter. The letter will specifically inform the Complainant that:

    i. All evidence received from Complainant and Respondent has been evaluated.

    ii. Based upon the evidence received, it is the intent of the investigator to dismiss the complaint for one or more of the following reasons: the complaint was not timely, and/or the allegations in the complaint are not within the jurisdiction of REDA, and/or that the allegations of Complainant were unable to be substantiated.

    iii. The Complainant may request a review of the file. It should be noted in the letter that the Complainant should submit any additional evidence that was not previously submitted for consideration by the investigator.

    iv. Any review request must be submitted in writing to the Bureau Chief within 15 calendar days from *receipt* of the Notice of Intent letter.

D. Requests for Review

1) Requests for review may be made by mail, e-mail, or facsimile. The date of the postmark, e-mail transmittal, or facsimile transmittal will be considered the date of the request for review.

2) Upon receipt of a Complainant's letter requesting review, EDB will date stamp the letter. To maintain accountability, proof of receipt must be preserved in the file with copies of the letters.

3) Requests for review must be timely filed within 15 days of *receipt* of the Notice of Intent. The date on the certified mail return receipt (or date of email confirmation) will serve as Complainant's date of receipt of the Notice of Intent. If the Complainant does not pick up the certified mail as required by the postal service, then the Complainant will have 30 days from the first delivery attempt to file a request for review. (The attempted delivery date can be found by entering the "article number" on the USPS website.) If the return receipt is returned to EDB without

a signature date, then the DI shall calculate 15 days from the date of delivery posted on the USPS website.

4) If the request for review is filed within the 15 day timeframe, the request will be treated as timely, and the Bureau Chief shall notify Complainant via letter, email, or phone that the review request has been granted. This notification should be documented in the activity log.

5) If the request has not been made within the 15 day timeframe, the Bureau Chief will mail a letter informing the Complainant that the request for review was untimely and that the decision rendered by the investigator is final.

6) If additional information received could change the initial determination of the Investigator, the Bureau Chief shall forward the case file back to the investigator for additional investigation, which shall be completed promptly.

7) If after additional investigation is completed the initial determination is not changed, the complete file and all additional information provided will be forwarded to the Review Committee for a determination.

8) If the review request does not contain additional evidence, the Bureau Chief will forward the file to the Review Committee for a determination.

9) At any time the Complainant may withdraw his/her review request. Upon notification by the Complainant of his/her intent to withdraw, the EDB Bureau Chief will send the letters to both the Complainant and Respondent in accordance with the initial recommendation made by the Bureau Chief.

10) If no request for review is made by Complainant, the investigator will either administratively close without issuing a right-to-sue letter or issue a no-merit right-to-sue letter, whichever is the appropriate course of action for the closing of the investigation. This letter should not be mailed until the DI has proof of receipt for the Notice of Intent letter, and the 15 day period has lapsed.

E. Review and Determination by the Review Committee

1) The Review Committee shall receive the complete investigative case file, the request for review, and all new evidence submitted by the Complainant.

2) This review is not de novo, but will include a review and evaluation of the investigative case file and any additional information that is provided by the Complainant.

3) The Review Committee will be comprised of the Bureau Chief for Wage and Hour and the Assistant Bureau Chief for Wage and Hour.

4) The Review Committee will meet within 30 days of receipt of the request for review to discuss the case.

5) Where both reviewers conclude that the evidence supports administrative closure or a no-merit finding, an instruction will be submitted to the EDB Bureau Chief to uphold the original determination, close the case, and issue either an administrative closure or right-to-sue letter.

6) Where both reviewers conclude that the evidence supports a merit finding, an instruction will be submitted to the investigator to issue a merit right–to-sue letter or to refer the case to the Legal Affairs Division for litigation review. Upon request, the Review Committee will hold a meeting or a teleconference with the EDB Bureau Chief and the investigator to discuss the determination.

7) When the reviewers on the Review Committee find that additional investigation is warranted, the case will be remanded to the DI for further investigation. The Investigator will have 45 days in which to complete its investigation and return the file to the Review Committee. Upon return, the case will be given top priority for re-submission to the Review Committee. Cases that have been resubmitted to the Review Committee will be completed within 14 days.

8) Where the two reviewers cannot reach consensus as to a final determination, the reviewers shall consult with the Deputy Commissioner for Standards and Inspections. A determination will be made based on majority opinion and submitted to the EDB Bureau Chief and Investigator.

9) A summary of the outcome of the Review Committee meeting will be recorded and preserved with the review case file. The summary will note the names of the attendees who will sign the Review Committee decision on the Review and Evaluation form. See Appendix O.

10) If the Complainant has submitted the same facts for resolution in a different forum that has the authority to grant the same relief to the Complainant, such as a union arbitration procedure, the review process may be postponed pending a determination in the other forum, after which the Review Committee must either recommend deferring to the other determination, if it appears fair and equitable, or proceed with reviewing the case.

11) The Complainant will be notified of the determination of the Review Committee in writing within 10 days of the determination by the Review Committee. See Appendix P.

12) All requests for review filed with the Bureau Chief shall be completed, e.g., denied or reversed, within 60 days from receipt of the request for review unless the Review Committee directs that further investigation is needed by the investigator.

IV. Reopening Investigation for Good Cause Shown

Furthermore, in accordance with N.C. Gen. Stat. § 95-242(b1), "The Commissioner may reopen an investigation under this Article for good cause shown within 30 days of receipt of a right-to-sue letter. If an investigation is reopened pursuant to this section, the 90-day limit set forth in N.C. Gen. Stat. § 95-243(b) shall not commence until the new investigation is complete and either a new right-to-sue letter is issued or the Commissioner notifies the parties in writing that conciliation efforts have failed."

Chapter 7

REMEDIES AND SETTLEMENT AGREEMENTS

I. Scope

This Chapter provides guidance on gathering evidence and determining appropriate remedies in EDB cases where a violation has been found. Damage awards should result from a fact-specific evaluation of the evidence developed in the investigation. Investigators should consult with the Bureau Chief in designing the appropriate remedy. Legal Affairs should be involved in determining potential remedies in any case that EDB anticipates referring for litigation. This Chapter also provides guidance for the effective negotiation of settlements and their documentation.

II. Remedies

The REDA statutes are 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. Reinstatement

A. Reinstatement and Preliminary Reinstatement.

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

IV. Back Pay

Back pay is available under all whistleblower statutes enforced by REDA.

A. Lost Wages

Lost wages generally comprise the bulk of the back pay award. EDB Discrimination 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 EDB Discrimination Investigator should ask the complainant for evidence of such increases or raises and keep the evidence in the case file.

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.

B. Bonuses, Overtime and Benefits

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

C. Interim Earnings

Unemployment benefits received are deducted from gross back pay. Workers’ compensation benefits that replace lost wages during a period in which back pay is owed will also be deducted from gross back

pay. EDB Discrimination Investigators should support back pay awards with documentary evidence.

D. Mitigation Considerations

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 EDB Discrimination 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.

V. Compensatory Damages

A. Pecuniary Losses

Compensatory damages may be awarded under all REDA statutes. Compensatory damages 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.

VI. Interest

Interest on back pay may be computed at the legal rate of 8% per annum per NC Gen. Stat 24-1.

VII. Evidence of Damages

EDB Discrimination Investigators must collect and document evidence in the case file to support any calculation of damages. It is especially important to adequately support calculation of compensatory (including pain and suffering). Types of evidence include bills, receipts, bank statements, credit card statements, or any other documentary evidence of damages. In addition to collecting evidence of damages, it is important to have a clear record of total damages calculated and itemized compensatory damages.

VIII. Non-monetary Remedies

EDB may request non-monetary remedies which may include:

Expungement of warnings, reprimands, and derogatory references (such as references to the complainant's termination) which may have been placed in the complainant's personnel file as a result of the protected activity.

Providing the complainant with a neutral reference for future employers.

Requiring the respondent to provide employee or manager training regarding the rights afforded by EDB statutes. Training may be appropriate particularly where the respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation.

Other non-monetary remedies may be appropriate in particular circumstances. Investigators should contact the Bureau Chief and Legal Affairs Division for guidance on these and other non-monetary remedies.

IX. Settlement Policy

Voluntary resolution of disputes is preferable and EDB investigators are required to conciliate when appropriate. It is EDB policy to seek settlement of all cases determined to be meritorious prior to referring the case for

litigation. Furthermore, at any point prior to the completion of the investigation, EDB will make every effort to accommodate an early resolution of complaints in which both parties seek it.

X. Settlement Procedure

A. Requirements

Requirements for settlement agreements are:

1. The file must contain documentation of all appropriate relief at the time the case settled and the relief was obtained.

2. The settlement should contain all of the core elements of a settlement agreement (See C. below), unless it creates a barrier to achieving an early resolution.

To be finalized, every settlement must be signed by the respondent(s).

B. Adequacy of Settlements

1. Full Restitution Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each case must be carefully explored and documented by the investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not required to obtain all possible relief if the complainant accepts less than full restitution to resolve the case more quickly. As noted above, concessions by both the complainant and respondent may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass, but is not necessarily limited to, any or all of the following:

a. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation.

Wages lost due to the adverse action, offset by interim earnings, i.e., any wages earned in the complainant's attempt to mitigate his or her losses, which are subtracted from the full back wages.

2. Other Remedies

Other remedies include, but are not limited to:

a. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the complainant's personnel file or other records.

b. The respondent's agreement to provide a neutral reference (e.g., title, dates of employment and pay rate) to potential employers of the complainant.

c. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.

d. Other possible alternatives may be considered, including flexible work schedules and management training.

3. Tax Treatment of Amounts Recovered in a Settlement

The complainant and respondent are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with the Internal Revenue Code, case law, and IRS guidance.[1] EDB is not responsible for advising the parties on the proper tax treatment and IRS reporting of payments made to resolve all REDA cases.

C. The Standard OSH Settlement Agreement

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

a. It must be in writing.

b. It must stipulate that the respondent agrees to comply with the relevant statute(s).

c. It must specify the relief obtained.

2. Specific Requirements

[1]For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to *IRS Counsel Memorandum*, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at: http://www.irs.gov/pub/lanoa/pmta2009-035.pdf. However, EDB notes that this guidance is not precedential and may change in the future.

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

b. All appropriate relief to which the complainant is entitled, and its justification, must be documented in the file and the complainant's concurrence must be noted.

c. The EDB Discrimination Investigator should try as much as possible to obtain a single payment of all monetary relief. The settlement should require that payment(s) be made by certified or cashier's check, and be made payable to the complainant. Documentation should be given to the EDB investigator. In the event the check is given to EDB, the investigator will promptly note receipt of any check, copy the check for inclusion in the case file and mail the check to the complainant.

3. Provisions of the Agreement In general, much of the language of the standard agreement should not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Sections that may be optional are:

a. NON-ADMISSION. A provision stating that, by signing the agreement, the respondent does not admit to violating any law, standard or regulation administered by EDB.

b. REINSTATEMENT *(this section may be omitted if the parties agree to a monetary settlement in lieu of reinstatement.)*

   i. The Respondent has offered the complainant reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the alleged retaliation, which he has declined or accepted.

   ii. Reinstatement is not an issue in the case. The Respondent is not offering reinstatement and the complainant is not seeking it.

c. The Respondent agrees to make the complainant whole by payment of back pay less normal payroll deductions. Checks will

be made out to the complainant and given to complainant or Investigator and documentation of payment.

d. The Respondent agrees to pay the complainant a lump sum of money. The Complainant agrees to comply with applicable tax laws requiring the reporting of income. Checks will be made out to the complainant and given to complainant or Investigator.

4. All agreements will be recorded in the IMIS as "Settled."

5. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the respondent belongs. Settlement agreements must not contain provisions that prohibit NCDOL's release of the agreement to the general public, except as provided in this manual.

D. Private Settlements

1. Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, even in cases in which EDB does not take an active role in the settlement negotiations. Because voluntary resolution of disputes is desirable, EDB's policy is to defer to adequate privately-negotiated settlements.

2. A copy of the reviewed agreement must be retained in the case file and the parties should be notified that EDB will disclose settlement agreements in accordance with the North Carolina Public Records Act, unless an exemptions applies.

Chapter 8

ALTERNATE DISPUTE RESOLUTION

I. Purpose

The purpose of this Instruction is to establish policies and procedures for the early resolution process, which is to be used as part of a regional Alternative Dispute Resolution (ADR) program, in conjunction with EDB's investigation of whistleblower complaints.

II. Scope

OSHA-Wide. Implementation of ADR processes is at the discretion of Regional Administrators.

III. References

OSHA Instruction: CPL 02-03-003, September 20, 2011 – Whistleblower Investigations Manual ("the Manual"); the Occupational Safety and Health Act (the OSH Act), 29 U.S.C. § 660(c); the Surface Transportation Assistance Act, 49 U.S.C. § 31105; the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651; the International Safe Container Act, 46 U.S.C. § 80507; the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Clean Air Act, 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; the Energy Reorganization Act, 42 U.S.C. § 5851; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; the Sarbanes-Oxley Act, 18 U.S.C. § 1514A; the Pipeline Safety Improvement Act, 49 U.S.C. § 60129; the Federal Railroad Safety Act, 49 U.S.C. § 20109; the National Transit Systems Security Act, 6 U.S.C. § 1142; the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; the Affordable Care Act, 29 U.S.C. § 218C; the Consumer Financial Protection Act of 2010, 12 U.S.C § 5567; the Seaman's Protection Act, 46 U.S.C. § 2114; the FDA Food Safety Modernization Act, 21 U.S.C. § 399d; and the Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. §30171.

IV. Significant Changes

None.

V. Action Offices

A. Responsible Offices

Directorate of Whistleblower Protection Programs (DWPP); OSHA Regional Offices. *See* "Roles and Responsibilities" for further information.

B. Action Offices

C. Directorate of Whistleblower Protection Programs (DWPP); OSHA Regional Offices. *See* "Roles and Responsibilities" for further information.

D. Information Offices

Directorate of Cooperative and State Programs.

VI. Federal Program Change

Federal Program Change, Notice of Intent Required, Adoption Encouraged.

This Instruction describes a Federal Program Change which establishes policies and procedures for the early resolution process, which is to be used as part of an Alternative Dispute Resolution (ADR) program in conjunction with the State Plans' investigation of whistleblower complaints under the State Plan equivalent to section 11(c) of the OSH Act. References to whistleblower provisions other than section 11(c) of the OSH Act are not applicable to State Plans. States are strongly encouraged to adopt this Instruction and should utilize it in an "at least as effective" manner.

States are required to notify OSHA within 60 days whether they intend to adopt policies and procedures identical to those in this Instruction or adopt or maintain different policies and procedures. If a state adopts or maintains policies and procedures that differ from Federal policies and procedures, the state must identify the differences and may either post its new or existing policies and procedures on its website and provide the link to OSHA, or submit an electronic copy to OSHA with information on how the public may obtain a copy. If a state adopts identical policies and procedures, the state must provide the date of adoption to OSHA. State adoption must be accomplished within six months, with posting or submission of documentation within 60 days of adoption. OSHA will

post summary information on the State Plan responses to this Instruction on its website.

VII. Background

This Instruction articulates the policies and procedures that the Employment Discrimination Bureau (EDB) will use when administering the "early resolution" process, which is part of a regional Alternative Dispute Resolution (ADR) program, to attempt to resolve complaints filed under the whistleblower provisions of the OSH Act. Each year, OSHA receives and dockets several thousand whistleblower complaints for investigation. ADR processes can assist complainants and respondents to resolve their whistleblower complaints in a cooperative and voluntary manner. When ADR processes are successful, they can provide timely relief and finality to both parties.

Federal ADR processes are authorized by the Alternative Dispute Resolution Act (ADRA), 5 U.S.C. 571 *et seq.* An agency may use an alternative dispute resolution procedure to resolve an issue in controversy that relates to an administrative program if the parties agree to such proceeding. 5 U.S.C. 572(a). The ADRA defines an "administrative program" to include a "Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation . . . ." 5 U.S.C. 571(2).

Offered as an alternative to the investigative process, the early resolution process provides parties with the opportunity to explore settlement of their dispute with the assistance of a neutral, confidential EDB representative who has subject-matter expertise in whistleblower investigations. The purpose of this Instruction is to articulate the principles and procedures that apply to the early resolution process. This Instruction does not preclude OSHA's regional offices from offering additional ADR processes (*e.g.*, third-party mediations) to parties.

VIII. Definitions

The following terms are defined for the purposes of this Instruction:

Alternative Dispute Resolution (ADR) – is an approach to the settlement of whistleblower complaints by means other than litigation. As a general matter, ADR is broadly understood to involve the use of negotiation, mediation, conciliation, or arbitration. These techniques are not mutually exclusive in any particular conflict, but can be used sequentially or in combination with other methods for resolving whistleblower complaints. ADR is typically a consensual

process that involves the intervention of a third-party neutral to assist parties in resolving their conflict.

Early Resolution – is an ADR process in which the parties to a whistleblower complaint agree to attempt to resolve the whistleblower complaint with the assistance of a neutral, confidential EDB representative. The early resolution process can be launched either before the case has been assigned for an investigation, or at any point while an investigation is ongoing. The focus of early resolution is to achieve quick and voluntary resolution of the whistleblower complaint instead of an investigation to determine the validity of the charge and potential statutory violations. Should the parties elect to pursue early resolution but fail to enter into a settlement agreement within a reasonable time frame, the case will be transferred to an Employment Discrimination Bureau (EDB) Investigator to start or resume investigation of the complaint.

Investigation – is a process in which the EDB Discrimination Investigator investigates the whistleblower complaint and provides a Report of Investigation to the Bureau Chief based on the evidence and the law. The Bureau Chief then reviews the file and concurs with the determination or sends the file back to the Discrimination Investigation for further investigation.

Settlement – is an agreement between parties to mutually resolve a whistleblower complaint without resorting to legal proceedings. A settlement may be reached at any time after the filing of the complaint and prior to the issuance of a Right-to-Sue letter or filing a civil action.

IX. Roles and Responsibilities

A. Bureau Chief (BC)

The Bureau Chief or his/her designee is responsible for:

a. Ensuring that information about the ADR program and its processes is provided to interested parties;

b. Ensuring that the early resolution process is carried out in accord with the policies and procedures articulated in this Instruction, including ensuring that the ADR process is separate from the investigative process in accord with the ADRA;

c. Ensuring that ADR-program activity is appropriately tracked in either OSHA's WEBIMIS Whistleblower Database or an alternative data tracking system as identified by the Bureau

Chief, and ensuring that activity data and information are shared with DWPP for reporting purposes;

d. Ensuring that settlement agreements reached under ADR processes are properly reviewed and approved in accord with Chapter 8 of the EDB OSHA's Whistleblower Investigations Manual (the Manual).

B. Directorate of Whistleblower Protection Programs (DWPP)

DWPP is responsible for:

a. Providing technical assistance on ADR processes to EDB's staff;

b. Coordinating the delivery of appropriate training and guidance materials (*e.g.*, FAQs) to EDB staff on ADR processes, OSHA statutes, and applicable policies, which may include coordination with OSHA's Training Institute;

c. Collecting and evaluating feedback on the ADR process for reporting purposes;

d. Tracking, monitoring and reporting on the overall outcomes of the ADR program.

X. Early Resolution

A. Overview

1. Early resolution is a valuable alternative to the expensive and time-consuming process of an investigation and litigation. Early resolution is a voluntary process in which the parties agree to utilize a neutral, confidential EDB Bureau Chief or EDB Discrimination Investigator to assist them in resolving a whistleblower complaint by mutual agreement.

2. EDB encourages parties to utilize the early resolution process as early as possible, but parties may request early resolution at any point during an investigation. Before an investigation is initiated, EDB will offer the parties the option of submitting their dispute

through the early resolution process instead of assigning the case for investigation. But, if parties choose not to engage in early resolution before an investigation begins, they may still seek early resolution at any point while EDB's investigation is ongoing. EDB's early resolution process is separate from the investigative process.

3. During the early resolution process, the Bureau Chief or EDB Discrimination Investigator may not offer a determination on whether a complaint has merit or the amount of damages that a complainant should seek. The Bureau Chief or EDB Discrimination Investigator may suggest how the parties might reach an agreement, and may give the parties an objective perspective on the strengths and weaknesses of their positions, but the Bureau Chief or EDB Discrimination Investigator may not offer judgment on the merits of the complaint.

4. The Bureau Chief and EDB Discrimination Investigator may share documents between the parties during the early resolution process at the parties' request. Documents collected during the early resolution process should be retained by the Bureau Chief in accordance with applicable file retention requirements, which include ensuring that ADR files are kept separate from the whistleblower investigative files.

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

B. Process

1. Upon receiving a timely complaint that contains a *prima facie* allegation of retaliation, EDB will send opening letters to both the respondent(s) and the complainant(s) informing the parties about EDB's ADR program and the option to submit their dispute to early resolution. The opening letter will include a copy of the "ADR Request Form" (*see* Attachment A).

2. If both parties request early resolution at any point during the investigation, any investigative work will be stayed and the case will be submitted to the Bureau Chief. Both parties will be required to complete an ADR Request Form (*see* Attachment A) to acknowledge their agreement to pursue early resolution instead of an investigation.

3. If only one party agrees to early resolution, both parties will be notified that the early resolution process is not available and that the investigation will proceed according to the procedures identified in Chapter 3 of the Manual.

4. If both parties do not elect to pursue early resolution before an investigation, but both agree to pursue early resolution during the investigation, the EDB Discrimination Investigator will suspend the investigation and transfer the case to the Bureau Chief. Both parties will be required to complete an ADR Request Form (*see* Attachment A) to acknowledge their agreement to pursue early resolution.

5. Even if both parties request early resolution, the Bureau Chief may recommend to the EDB Discrimination Investigator, or his/her designee, as defined in this Chapter, that the case is not suitable for the early resolution process.

6. If EDB accepts the case for early resolution, the Bureau Chief will inform the parties of the ground rules for participating in the process, including the EDB Discrimination Investigator's role in the process, the applicable confidentiality rules, and OSHA's requirements for the approval of settlement agreements, as set forth in Chapter 7 of the Manual. Investigation deadlines may be adjusted (*e.g.*, the deadline for the employer's submission of a position statement) while the parties are engaged in the early resolution process.

7. During the early resolution process, the Bureau Chief will work with the parties to explore whether there is common ground for settlement. The Bureau Chief may provide general information about the whistleblower law and procedures to the parties, and may give the parties an objective perspective on the strengths and weaknesses of their respective positions, but the Bureau Chief will not offer judgment on the merits of the complaint.

8. EDB may terminate the early resolution process under certain

circumstances and/or at the discretion of the Bureau Chief or his/her designee. For example, EDB may terminate the process if either party violates the ground rules for participation, including engaging in abusive behavior and/or failing to participate in good faith. EDB may also terminate the process if the parties reach an impasse and cannot come to an agreement within a reasonable amount of time determined by the Discrimination Investigator and Bureau Chief. Because early resolution is a voluntary process, EDB must terminate the process if one or both of the parties decide to end the process for any reason.

9. If the process ends without an agreement, the Bureau Chief will transfer the case to the Discrimination Investigator and inform them that the early resolution process was not successful. The Bureau Chief will use the ADR Outcome Form (*see* Attachment B) for this purpose. When transferring the case back to the EDB Discrimination Investigator, the Bureau Chief will not comment on the positions of the parties or the communications that occurred during the early resolution process. EDB will then resume its investigation following the procedures outlined in Chapters 3 to 5 of the Manual, as appropriate.

10. If the parties can agree upon a framework for settlement, the Bureau Chief may draft a proposed settlement agreement following the procedures outlined in the Manual, Chapter 6, Remedies and Settlement Agreements. Alternatively, the parties may draft and submit an agreement for EDB's approval following the procedures outlined in the Manual, Chapter 6, Remedies and Settlement Agreements. If EDB – through the Bureau Chief or his/her designee, as defined in the Manual, Chapter 1, paragraph X.A.1. – approves the settlement agreement, the Bureau Chief will return the agreement to the parties for signature.

11. If both parties sign a settlement agreement, the Bureau Chief will notify the EDB Discrimination Investigator that the case has settled. The Bureau Chief will use the ADR Outcome Form (*see* Attachment B) for this purpose. The Bureau Chief will also provide them with the original, signed copy of the settlement agreement for preservation in the investigative case file. When notifying the EDB Discrimination Investigator of the settlement, the Bureau Chief will not comment on the positions of the parties or the communications that occurred during the early resolution process.

12. Regardless of the outcome of early resolution, the EDB Office will

retain documents collected during the early resolution process in accord with applicable file retention requirements. ADR documents will be maintained separately from whistleblower investigation case files and their contents will not be shared or discussed with EDB's investigative staff or any other individual who was not involved in the early resolution process unless both parties consent to disclosure or disclosure is otherwise required by law.

13. EDB will not reimburse the parties for any travel expenses. Early resolution conferences can take place via telephone, SKYPE or other methods if travel would be costly or create a hardship for any party.

XI. Core Early Resolution Principles and Concepts

A. Voluntary

Early resolution is a voluntary process. Both parties must mutually agree to pursue the early resolution process as an alternative to an investigation, and either party may choose to terminate the process and return the case to investigation for any reason. EDB is committed to providing quality investigations to all parties who seek them, and participating in early resolution will not affect the parties' right to receive a full and fair investigation into the merits of the complaint if early resolution does not resolve their dispute.

B. Good Faith

The early resolution process is only effective when the parties participate in good faith. "Good faith" participation means that the parties engage in the process with openness to resolving the whistleblower complaint and treat each other, the process, and any third-party neutrals with respect. Parties should come to the process fully prepared to discuss resolution of the whistleblower complaint and must have full authority to settle the dispute.

C. Neutrality

1. The Bureau Chief does not represent either party.

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

D. Confidentiality

1. ADR case files generally consist of communications between the parties and a neutral appointed by EDB and agreed upon by the parties. These files must be segregated from whistleblower investigative case files. ADR case files are generally exempt from disclosure under and should not be released in response to a FOIA request, in compliance with the ADRA. However, approved settlement agreements reached in the early resolution process must be placed in the investigative case file because they are not dispute resolution communications that are confidential under the ADRA. Settlement agreements are subject to FOIA, including possible protection from disclosure under FOIA Exemption 4 and the Executive Order 12600 process.

2. The Bureau Chief will assure the preserving the confidentiality of party statements and submissions during the early resolution process, to the extent permitted under the law, allows parties to explore settlement without fear that their discussions will be used against them.

3. The Bureau Chief will not discuss the merits of the complaint or the content of early resolution discussions with EDB's investigative staff. The Bureau Chief may only communicate the outcome of the early resolution process.

4. At the conclusion of the early resolution process, all information or materials provided to, or created by, the Bureau Chief – including all notes, records, or documents generated during the course of the early resolution process – will be maintained in accord with applicable file retention requirements, which includes keeping these records separate from the EDB investigation case file and inaccessible to EDB's investigative staff. Parties and/or their representatives are permitted to retain their own notes.

5. All parties to a dispute resolution proceeding, including the Bureau Chief, are not permitted to disclose and cannot be required to disclose through discovery or compulsory process any communication that is part of the early resolution process, unless an exception listed under 5 U.S.C. § 574 applies, or if required by another law.

6. Any settlement agreement reached must be approved by the Bureau Chief, EDB Discrimination Investigator or his/her designee,

as defined in Chapter 7 X.C. EDB will maintain a copy of the approved settlement agreement in the investigative case file.

7. The parties may waive confidentiality or agree to confidentiality requirements that are less restrictive than those in 5 U.S.C. § 574(a), but they must inform the Bureau Chief of such an agreement before the early resolution process begins.

8. EDB will follow all applicable rules and procedures under the Federal law and the Privacy Act if it receives a FOIA or Privacy Act request that covers the settlement agreement or ADR case file.

E. Conflict of Interest

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

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

3. Otherwise, where a conflict exists, the Bureau Chief will recuse him/herself and an alternative, neutral EDB representative will be appointed to carry out the early resolution.

XII. Parties' Ability to Settle during the EDB OSHA Investigation

Nothing in EDB's ADR program precludes or restricts the parties' ability to settle their whistleblower complaint independently or with the assistance of an EDB Discrimination Investigator, the Bureau Chief, or other ADR service during an EDB investigation. However, a settlement agreement in a whistleblower case that the parties reach prior to the close of EDB's investigation should be submitted to EDB prior to closing case file.

Attachment A

ADR Request Form

Case No. [Enter Number]

The Employment Discrimination Bureau (EDB) offers a voluntary program under which the Complainant and Respondent may resolve a whistleblower complaint outside of the investigative process, through early resolution. Early resolution is a process in which the parties attempt to negotiate a settlement with the assistance of a neutral EDB Discrimination Investigator. Communications during the early resolution process are kept confidential, to the extent permitted by law, and are not disclosed to the EDB Discrimination Investigator or any other Department of Labor employee who is involved in the agency's decision-making on the merits of the case. If EDB approves the parties' request for early resolution, the investigation will be stayed pending the outcome of the early resolution process.

If the complaint is not resolved during the early resolution process, either party may share information and documents that it disclosed during the early resolution process with the assigned EDB Discrimination Investigator.

If you are interested in participating in early resolution, please fax this form or call the EDB Discrimination Investigator at: Telephone: [INSERT] or Fax: [INSERT].

_____ I am interested in pursuing early resolution as an alternative to EDB's investigation.

Signature Date

Print Full Name Daytime Phone Number Email address

Attachment B

ADR OUTCOME FORM

Case Name and Number:
Date Complaint Filed:
RADRC:

Date submitted to ADR: _____
Date ADR concluded: _____
Total Days: _____

CASE DISPOSITION

_____ **Agreement**

_____ **No Agreement, return to investigation.**

_____
_____
Print Name (Bureau Chief) Signature Date

Chapter 9
DISCLOSURES

I. Scope

This Chapter explains the process for disclosing investigative information during the course of an investigation. The disclosure of information from investigative files is governed by the NC Public Records Act, N.C. Gen. Stat. § 132 and N.C. Gen. Stat. § 95-136. The guidelines below are intended to ensure that obligations are met under the State statutes.

II. Policy

Disclosures of case files and materials for all OSH related investigations **must** be made by the Planning, Statistics and Information Management Bureau (PSIM). **DIs may not handle document redactions for Non-Public or Public disclosures.**

III. Non-Public Disclosures

While a case is under investigation, information contained in the case file will be disclosed to both the Complainant and Respondent. Disclosure of information to the parties during the investigation was discussed in Chapter 3, V (N). To ensure that sensitive information is not disclosed, DIs should be aware of these procedures and must label documents as appropriate.

A. Personal, Identifiable Information

Personal, identifiable information about individuals other than the Complainant and management officials representing the Respondent, such as statements taken by EDB or information for use as comparative data--wages, bonuses, the substance of promotion recommendations, supervisor assessments of professional conduct and ability, or disciplinary actions--should generally be withheld when such information could violate those persons' privacy rights, cause intimidation or harassment to those persons, or impair future investigations by making it difficult for EDB to collect similar information from others.

DIs do not need to label such information as personal, identifiable information in the file and may not make redactions for such information. PSIM will make all necessary redactions for personal, identifiable information.

B. Confidentiality

In taking statements from witnesses, the DI should specifically ask if confidentiality is being requested, and must document all requests for confidentiality in the case file. Witnesses who request confidentiality will be advised that their identity and all of EDB's records of the interview (including interview statements, audio or video recordings, transcripts, and DI's notes) will be kept confidential to the fullest extent allowed by law, but that if they are going to testify in a proceeding, the statement and their identity may be disclosed. Furthermore, they should be advised that their identity and the content of their statement may be disclosed to another Federal agency, under a pledge of confidentiality from that agency.

DIs must clearly mark all confidential interview statements as CONFIDENTIAL in order to prevent the unintentional disclosure of the statement.

C. Disclosure to Other Agencies

Appropriate, relevant, necessary, and compatible investigative records may be disclosed to other Federal or State agencies. Such a request should be coordinated with the Legal Affairs Division. N.C. Gen. Stat. § 95-136(e1) states, "The Commissioner may permit the use of names and statements of witnesses and Complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties." Requests from federal OSHA may be made through PSIM and need not go through the Legal Affairs Division for disclosure approval.

D. Trade Secrets

N.C. Gen. Stat. § 95-152 provides for the protection of trade secrets: "All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article which contains or which might reveal a trade secret shall be considered confidential, as provided by section 1905 of Title 18 of U.S.C., except as to carrying out this Article or when it is relevant in any proceeding under this Article. In any such proceeding the Commissioner, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets." N.C. Gen. Stat. §66-152(3) defines trade secret as "business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable

through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons."

Although it is unlikely that trade secrets would become an issue in a REDA discrimination investigation, if, during the course of an investigation, a Respondent has clearly labeled and explained in writing why a document or some portion of a document submitted constitutes a trade secret, **the DI should place the document(s) under a separate tab clearly labeled "Trade Secret." PSIM shall redact trade secrets in accordance with the law.**

E. Confidential Business Information

The NC Public Records Act does not recognize confidential business information as an exemption from disclosure. Thus, EDB cannot provide confidentiality for information identified by a party as confidential business information.

F. Attorney Client Privilege

The NC Public Records Act does not allow for an exemption from disclosure documents that are marked as attorney-client privilege or work product. Thus, EDB cannot provide confidentiality for information provided by an attorney as evidence to a REDA complaint.

G. Medical Records

Medical records shall not be disclosed, except in accordance with the law. Medical records should not be sent to PSIM for redaction. See Chapter 4, VI for further discussion on medical record disclosure and the procedures for maintaining these documents.

IV. Public Disclosures

When an investigation is closed, anyone can request a copy of the investigation file in accordance with the NC Public Records Act. A case is considered to be closed when a final determination has been made and the right-to-sue letter has been issued or the case has been administratively closed. All disclosure requests must be directed to PSIM for processing.

Upon receipt of a written disclosure request for a partial or complete EDB file, which contains OSH Division documents or has reference to safety and health issues, the written request will be date stamped by EDB.

EDB will complete a cover sheet to include with the certified copy of the entire EDB file and the original written request from the requester for the file. The cover sheet will include the deadline date that the safety and health related EDB file should be forwarded by PSIM to the requester in order to meet any date requirements associated with EDB files. An EDB printout page may also be attached with the written request, which would indicate any deadline dates associated with the EDB file. The PSIM Bureau will be allowed a minimum of 10 working days to process these requests.

The EDB cover sheet, the written request from the requester, and a certified copy of the entire EDB file will then be immediately forwarded by EDB staff to the Planning, Statistics and Information Management Bureau. No original EDB file will be forwarded to the PSIM Bureau for processing, and EDB will not redact any documents within the certified copy. OSH file documents or safety and health related documents contained in EDB files will never be released un-expunged by EDB to a requester.

The PSIM Bureau will process EDB files for disclosure within the disclosure priority schedule utilizing the same policies and procedures applied to OSH Division, Compliance inspection files. If feasible, the PSIM Bureau will try to meet the deadline date provided. PSIM staff will, upon receipt of the written request, assume responsibility for the disclosure. PSIM Bureau staff will communicate directly with the requester and will forward the expunged file documents to the requester.

This procedure does not apply to non-public disclosure documents requested by the EDB complainant or company during the course of the EDB investigation.

Chapter 10

DATABASE ENTRY

I. IMIS (Integrated Management Information System)

Upon the initiation and closure of a REDA investigation pertaining to safety and health issues, DIs are responsible for entering all required information into IMIS regarding the complaint.

Any 3rd party settlement should be recorded in IMIS as "settled—other."

90-day right-to-sue and "Uncooperative" right-to-sue closures should be recorded in IMIS as "agency withdrawn."

Merit right-to-sue closures should be entered as "non-merit" in IMIS, with a note explaining that the case resulted in a merit right-to-sue letter being issued.

II. Oracle

Upon the initiation of a REDA investigation pertaining to safety and health issues, information shall be entered into Oracle regarding the opening of the complaint.

Upon closure of the investigation, the DI is responsible for entering the following information:

1) Date Received
2) Date Respondent Contacted
3) Date Complainant Contacted
4) If tolled, the beginning and ending dates for tolling
5) Date Completed (date complete ROI and send to Bureau Chief; if Chief does not approve it and sends it back for further investigation, then this date must be reset to date complete the additional investigation)
6) Disposition (which is entered in the Inv Finding drop down)
7) Date to Admin (date referred to the EDB Bureau Chief for review—usually same date as Date Completed)
8) Payment amount or other settlement action for settlements
9) Date of closure (if right-to-sue letter or admin closure, date right-to-sue or closure letter mailed; always date after all review rights have expired)

Appendix A-1

This is intended as an example only. Actual document may differ in format.

DATE

Mr. John Smith
123 ABC Road
Durham, NC 27713

Re: John Smith vs. Corporation, Inc.

Dear Mr. Smith:

The purpose of this letter is to inform you that I have been assigned to investigate the above captioned complaint which you filed with the North Carolina Department of Labor alleging a violation of the North Carolina Retaliatory Employment Discrimination Act (REDA). As part of my investigation, I need to speak with you to gather additional information. I have left messages for you at (919) 555-5555, but you have not returned my calls.

If you are still interested in pursuing your complaint, you must contact me by **(DATE)**, or your case will be dismissed due to lack of cooperation. If your case is dismissed, you will be issued a right-to-sue letter that will allow you to pursue this matter with a private attorney; however, the North Carolina Department of Labor will take no further action with regard to your complaint.

You can contact me by calling (919) 807-(your number) or 1-800-625-2267, and then ask to be transferred to me. I am normally in the office Monday thru Friday from 8:30 am to 5:30 pm. If I am unable to take your call, you will automatically be transferred to my voice mail. **Please leave a message** so that I will know you have attempted to contact me and to let me know the best time to call you. If you have already been in contact with me prior to receipt of this letter, please disregard this letter.

Sincerely,

Discrimination Investigator

cc: File

Appendix A-2

This is intended as an example only. Actual document may differ in format.

April 9, 2012

Mr. Robert E. Lee
President
Southern Eye Clinic
1234 South Main Street
Durham, NC 27415

Re: File No: 999-12 **Complainant: Martha Jones**
Respondent: Southern Eye Clinic

Dear Mr. Lee:

The Employment Discrimination Bureau of the North Carolina Department of Labor is currently conducting an investigation into a complaint filed by Martha Jones alleging she was terminated Southern Eye Clinic in retaliation for filing a wage & hour complaint. On February 16, 2011, you were notified by letter of this complaint and requested to provide a written response regarding the actions taken against Ms. Jones by March 15, 2012. Additionally, I personally spoke with you regarding this complaint and you informed me that you had no interest in trying to settle this matter. As of this date you have not submitted your written response.

Based on your failure to respond to this complaint, I can only assume that you do no dispute the allegation that has been made regarding the wrongful termination of Ms. Jones. Therefore, if I have not received your written response by *April 23, 2012*, I will make my determination on the merit of this complaint based on the information contained in the file. If you have any questions regarding this letter please contact me at (XXX)-XXX-XXXX.

Respectfully,

Discrimination Investigator

cc: File

Appendix B
This is intended as an example only. Actual document may differ in format.

NORTH CAROLINA DEPARTMENT OF LABOR
Employment Discrimination Bureau
ADDRESS

IN THE MATTER OF:	)	
	)	
(name of company)	)	**ADMINISTRATIVE**
	)	**SUBPOENA DUCES TECUM**
	)	
	)	

TO: Custodian of Records
or any other officer duly authorized by:
(legal name of company)
address
City, NC 27---
to produce records/documents

YOU ARE HEREBY ORDERED TO APPEAR for the production of documents and records before the North Carolina Department of Labor, Employment Discrimination Bureau, ADDRESS on (date) the following items:

(1)

(2)

by Overnight Mail (UPS or Federal Express) on the **(date)**, addressed to **(name of Investigator)** Discrimination Investigator, North Carolina Department of Labor, Employment Discrimination Bureau, ADDRESS, or some other time and location mutually agreed upon. In lieu of your appearance in person, you may simply produce the requested record and documentation by mailing them to the above listed address; make yourself available for telephonic interviews (at times mutually agreed upon by you and the Department of Labor), to continue from time to time until completed; to provide full and complete answers to written or printed interrogatories submitted pursuant to N.C.G.S. §95-242; and to return the interrogatories, under oath, within thirty (30) days of receipt.

This subpoena is issued upon application of X, Special Deputy Attorney

General, North Carolina Department of Justice, pursuant to N.C.G.S §§95-242(f), as a result

of an on-going retaliatory employment discrimination investigation of (name of company), to

enforce the provisions of the Retaliatory Employment Discrimination Act of North Carolina,

Article 21, Chapter 95 of the North Carolina General Statutes.

Failure to comply with this subpoena will be viewed as a criminal violation of N.C.G.S. §95-242 (f), a copy of which is attached and subject you to contempt proceedings. To inquire into the possibility of arranging a different time or place, the investigator listed above can be contacted at (xxx) xxx-xxxx.

This the _____ day of **(date)**, 2003.

Administrator
Employment Discrimination Bureau
ADDRESS

NORTH CAROLINA DEPARTMENT OF LABOR

ADDRESS

IN THE MATTER OF: **)**
)
) **OFFICER'S RETURN**
)
)

_____ hereby certified that the following **SUBPOENA**

DUCES TECUM was received on the _____ day of _____ , 2007, and that on the

_____ day of _____ , 2003, he/she personally served a copy of the SUBPOENA

DUCES TECUM on **(name of company)** by personal delivery at **(address of company**)

(location).

This the _____ day of _____ , 2007.

AFTER SERVICE RETURN TO:

Administrator
Administrator
ADDRESS

SERVICE OF PROCESS BY:

(Name of Investigator)
Discrimination Investigator

Telephone: (xxx) xxx-xxxx

Appendix C-1

This is intended as an example only. Actual document may differ in format.

Date

Mr. John Smith
123 ABC Road
Durham, NC 27713

File: # Complainant: John Smith
Respondent: Corporation Inc.

Dear Mr. Smith:

Your complaint alleging a violation of the Retaliatory Employment Discrimination Act (REDA) has been investigated by the Employment Discrimination Bureau of the North Carolina Department of Labor. Based on the facts and documents reviewed during the investigation, it has been determined there was not enough evidence to substantiate a violation of the law. Therefore, your complaint file is being closed. By copy of this letter, the Respondent is being notified of this action. Section 95-242 of REDA requires us to notify you of the right to take your own legal action in this matter.

THIS IS YOUR RIGHT-TO-SUE LETTER. THIS IS THE ONLY OFFICIAL NOTICE YOU WILL RECEIVE FROM THE DEPARTMENT OF LABOR THAT YOUR COMPLAINT HAS BEEN INVESTIGATED AND THAT YOU HAVE A RIGHT TO FILE A LAWSUIT IN SUPERIOR COURT. IF YOU TAKE YOUR OWN ACTION, A LAWSUIT MUST BE FILED WITHIN NINETY (90) DAYS OF THE DATE AT THE TOP OF THIS LETTER.

You may want to talk with a private attorney to determine whether you should file a lawsuit in this matter. If you do not have an attorney, you could contact the North Carolina Lawyer Referral Service at 1-800- 662-7660. If you cannot afford an attorney, you can contact Legal Aid of North Carolina at (919) 856-2564. If you have further questions about this case, please call me at (phone number). If you only have general questions about REDA, you may also call our Information Officer at 1 (800) 625-2267.

Sincerely,

Discrimination Investigator

cc: File
Respondent

Appendix C-2

This is intended as an example only. Actual document may differ in format.

Date

Mr.

File:

Dear Mr. :

We received your complaint alleging a violation of the Retaliatory Employment Discrimination Act (REDA). However, on DATE, we were notified that the Respondent filed for bankruptcy protection pursuant to Chapter 11 of the U.S. Bankruptcy Code with the U.S. Bankruptcy Court in the District of __. The bankruptcy case number is (#). When an individual or company files for bankruptcy protection, an automatic stay immediately triggers an injunction which prohibits the initiation or continuance of any and all collection action by any creditor against the debtor(s). I am enclosing a copy of the official Notice of Bankruptcy for your records and reference.

As a result, the Employment Discrimination Bureau of the North Carolina Department of Labor is not able to complete its investigation of this case. Since this office is not able to complete the investigation, there is insufficient evidence for us to make a determination as to whether there was a violation of REDA, and your complaint file is being closed. By copy of this letter, the Respondent is being notified of this action. N.C. Gen. Stat. § 95-242(a) of REDA requires us to notify you of the right to take your own legal action in this matter.

THIS IS YOUR RIGHT-TO-SUE LETTER. THIS IS THE ONLY OFFICIAL NOTICE YOU WILL RECEIVE FROM THE DEPARTMENT OF LABOR THAT YOU HAVE A RIGHT TO TAKE ANY POTENTIAL LEGAL ACTION.

Under normal circumstances, REDA provides that a person who receives a right-to-sue letter may commence a civil action against the respondent employer in North Carolina Superior Court, and that any such action must be commenced within ninety (90) days of the date of the right-to-sue letter. However, since the Respondent is in bankruptcy, you may also be stayed from commencing any action against the employer in State court. Should you wish to pursue a claim against the Respondent in this case, you may be able to do so by filing a claim in the bankruptcy court. If you want to do that, you should contact the clerk of the bankruptcy court to obtain a form for filing such a claim. The clerk of the bankruptcy court may also be able to inform you about time limits for filing such a claim. The contact information for the bankruptcy court in question is as follows:

U.S. Bankruptcy Court
District of ____
ADDRESS
web address

Neither the U.S. Bankruptcy Court nor Trustee offices can provide you with legal advice regarding this matter. Additionally, any information received from our Department should not be construed as legal advice and is not a substitute for legal advice that can be obtained from a licensed attorney. You may want to talk with a private attorney to determine whether you should file a claim in this matter. If you do not have an attorney, you can receive a referral from The North Carolina Bar Association by calling 1-800-662-7660 and/or locate an attorney in your local yellow pages. Typically, bankruptcy consultations are free of charge, but you should be sure to address this issue when scheduling an appointment.

If you have further questions about this case please call me. If you have general questions about REDA, you should call our Information Officer at (919) 807-2831.

Sincerely,

Investigator Name

Appendix D

This is intended as an example only. Actual document may differ in format.

DATE

Mr. John Smith
123 ABC Road
Durham, NC 27713

File: # Complainant: John Smith
Respondent: Corporation, Inc.

Dear Mr. Smith :

Your complaint alleging a violation of the Retaliatory Employment Discrimination Act (REDA) has been investigated by the Employment Discrimination Bureau of the North Carolina Department of Labor. Based on the facts and documents reviewed during the investigation, it has been determined there is sufficient evidence to establish that a violation of the law may have occurred. Attempts to resolve this matter were unsuccessful. Therefore, your complaint file is being closed. Section 95-242 of REDA requires us to notify you of your right to take your own legal action in this matter.

THIS IS YOUR RIGHT-TO-SUE LETTER. THIS IS THE ONLY OFFICIAL NOTICE YOU WILL RECEIVE FROM THE DEPARTMENT OF LABOR THAT YOUR COMPLAINT HAS BEEN INVESTIGATED AND THAT YOU HAVE A RIGHT TO FILE A LAWSUIT IN SUPERIOR COURT. IF YOU TAKE YOUR OWN ACTION, A LAWSUIT MUST BE FILED WITHIN NINETY (90) DAYS OF THE DATE AT THE TOP OF THIS LETTER.

You may want to talk with a private attorney to determine whether you should file a lawsuit in this matter. If you do not have an attorney, you could contact the North Carolina Lawyer Referral Service at 1-800- 662-7660. If you cannot afford an attorney, you can contact Legal Aid of North Carolina at (919) 856-2564. If you have further questions about this case please call the Investigator who handled your complaint.

Sincerely,

Discrimination Investigator

cc: Respondent
File

Appendix E-1

This is intended as an example only. Actual document may differ in format.

Mr.

Re: File No: **Complainant:**
Respondent:

Dear Mr.:

The Employment Discrimination Bureau of the North Carolina Department of Labor has received and processed your written request on (date) asking to withdraw the complaint you filed in the above captioned matter. Your withdrawal request has been processed and this matter is now considered closed. The Respondent will receive a copy of this letter.

Respectfully,

Discrimination Investigator

cc: Respondent
File

Appendix E-2

This is intended as an example only. Actual document may differ in format.

NORTH CAROLINA DEPARTMENT OF LABOR
STANDARDS AND INSPECTIONS
EMPLOYMENT DISCRIMINATION BUREAU

REQUEST TO WITHDRAW COMPLAINT

RE: File No.:
Complainant:
Respondent:

I, , do hereby voluntarily withdraw the above referenced complaint which I filed with the Employment Discrimination Bureau of the North Carolina Department of Labor on *****.

I understand that I have the right to re-file my complaint within 180 days from the date of the alleged retaliatory or discriminatory action that caused me to file this complaint. I also understand that I can file a new complaint if some other retaliatory or discriminatory action is taken against me by Respondent that is covered under the provisions of the North Carolina Retaliatory Employment Discrimination Act.

I understand that the above named Respondent will be informed of my voluntary withdrawal of the above referenced complaint. Additionally, I understand that I will not be issued a right-to-sue letter that would allow me to file a private law suit.

Signature of Complainant Date

Printed Name of Complainant

Return this form with an ORIGINAL signature to:

North Carolina Department of Labor/EDB
Attn:
1101 Mail Service Center
Raleigh, NC 27699-1101

Appendix F

This is intended as an example only. Actual document may differ in format.

DATE

Mr. John Smith
123 ABC Road
Durham, NC 27713

File: # **Complainant: John Smith**
Respondent: Corporation, Inc.

Dear Mr. Smith:

This office has been attempting to investigate the complaint you filed under the North Carolina Retaliatory Employment Discrimination Act (REDA). The file shows that numerous unsuccessful attempts were made to consult with you regarding this matter. Therefore, this complaint is being dismissed due to a lack of cooperation. Section 242 of REDA requires us to notify you of this dismissal and to issue you a right-to-sue letter.

THIS LETTER IS YOUR RIGHT-TO-SUE LETTER. THIS IS THE ONLY OFFICIAL NOTICE YOU WILL RECEIVE FROM THE DEPARTMENT OF LABOR THAT YOUR COMPLAINT HAS BEEN DISMISSED AND THAT YOU HAVE A RIGHT TO FILE A LAWSUIT IN SUPERIOR COURT. North Carolina General Statute §95-243 states that once you have been issued this right-to-sue letter, you may file a civil lawsuit in superior court to attempt to prove that you have been discriminated against in violation of REDA . Such a lawsuit must be filed within ninety (90) days of the date at the top of this letter. **IF YOU DECIDE TO FILE A LAWSUIT IN SUPERIOR COURT, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE DATE OF THIS LETTER; OTHERWISE YOUR RIGHT-TO-SUE IS LOST.**

You may wish to talk with a private attorney to determine whether you should file a lawsuit in civil court. If you do not have an attorney, or cannot afford to hire an attorney, you may want to contact Legal Aid of North Carolina at (919) 832-2564.

If you should have any further questions regarding this case, please call me at (phone #). If you have general questions about REDA, you should call the Discrimination Bureau at 1-800-625-2267 and ask for the Information Officer. We regret that we were unable to pursue your case.

Sincerely,

Discrimination Investigator

cc: Respondent
File

Appendix G

This is intended as an example only. Actual document may differ in format.

January 31, 2012

Mr.

Re: File No: **Complainant:**
Respondent:

Dear Mr.:

By e-mail/letter dated ********, your attorney/you requested that you be issued with a right-to-sue letter pertaining to the above captioned matter. Your request meets the requirements set forth in the Retaliatory Employment Discrimination Act (REDA) in that more than 90 days have passed since the date you filed your complaint, the Commissioner of Labor has not issued a notice of conciliation failure and has not commenced an action pursuant to §G. S. 95-242.

Your request for a right-to-sue letter to be issued has been reviewed and approved. **This is your right-to-sue letter. It is issued at your request. If you intend to pursue a law suit, you must file a civil action within ninety (90) days of the date of this letter otherwise your right to sue under the provisions of REDA is lost. You may want to consult with a private attorney regarding the legal requirements for filing a civil action.** Please notify the Employment Discrimination Bureau (EDB) if you file a civil action in this matter.

With the issuance of the right-to-sue letter, the EDB ends it processing of your complaint and no further investigation will be conducted. Your case is closed as of the date of this letter. A copy of the right-to-sue letter has been provided to the Respondent.

Respectfully,

Discrimination Investigator

cc: Respondent
File

Appendix H

This is intended as an example only. Actual document may differ in format.

Report of Investigation

Memorandum For: XX
Administrator, Employment Discrimination Bureau

From: XX
Discrimination Investigator

Subject: X vs. Y

File No: 999-12

Statute: §95-241a)1)b of the Retaliatory Employment Discrimination Act

Complainant: Name
Address
Phone Number

Represented By: None

Respondent: Name
Address
Phone Number

Represented By:

PREDICATION:

This investigation was initiated on January 15, 2012 based on the filing of a complaint by Sally Sue (Complainant) alleging she was retaliated against by ABC Café (Respondent) because she engaged in the protected activity of filing a safety complaint with the Occupational Safety and Health Division of the North Carolina Department of Labor (NCDOL). Complainant alleged she was terminated on date which was two days after OSH conducted an inspection in response to her complaint about unsafe working conditions. Since this complaint was filed within 180 days of the adverse employment action, this complaint is considered timely filed with the NCDOL. However, since more than 30 days has passed between the occurrence of the alleged adverse employment action and the filing of this complaint, Complainant is not eligible for dual filing with the US Department of Labor. **(Note: If this complaint had been filed within 30 days of the alleged adverse employment action, the following information should be reflected in this section: "Since this complaint was filed within 30 days of the alleged adverse employment action, Complainant was notified in writing of her eligibility to dual file her complaint with the U. S. Department of Labor – OSHA.")**

INVESTIGATIVE FINDINGS:

A chronology of events is not mandatory but strongly recommended in this section.

Complainant Information: This section should contain information provided by Complainant with regard to his/her complaint.

Respondent's Defense: This section should contain information provided by Respondent with regard to their action against Complainant.

ANALYSIS OF ESSENTIAL ELEMENTS:

Protected Activity: This section should clearly set forth Complainant's protected activity. Reference should be made to any documentation supporting the protected activity such as a copy of the OSH complaint.

Respondent=s Knowledge: This section should clearly set forth any evidence of Respondent's knowledge of Complainant's protected activity. Reference should be made to any evidence supporting Respondent's knowledge of the protected activity.

Adverse Employment Action: Complainant was terminated effective October 17, 2011.

Causal Relationship: This section should contain a detailed analysis of the evidence and clearly set forth the basis for the determination that is being made.

Remedy/Economic Loss: (For Merit Cases Only)

DISPOSITION:

This Complainant is dismissed and Complainant issued a right-to-sue letter. Respondent notified accordingly.

Approved by:

_____
X, Administrator

_____
Date

Appendix I

This is intended as an example only. Actual document may differ in format.

NORTH CAROLINA DEPARTMENT OF LABOR
THE EMPLOYMENT DISCRIMINATION BUREAU

IN THE MATTER OF: v.

File No.

S E T T L E M E N T A G R E E M E N T

The undersigned Respondent and the undersigned Complainant, in settlement of the above captioned matter, HEREBY AGREE AS FOLLOWS:

The Respondent will not in any manner retaliate against or discriminate against any employee because such employee has filed any claim or complaint, initiated any inquiry, investigation, inspection, proceeding or other action or testified or provided information to any person, or has instituted or caused to be instituted any proceedings under or related to the Retaliatory Employment Discrimination Act of North Carolina, or is about to testify in any such proceeding(s), or because of the exercise by such employee on behalf of self or others of any right afforded by this Act.

[OPTIONAL:] PURGING OF RECORDS: If such records exist, Respondent agrees to purge any adverse references to the Complainant's involvement in protected activity and of all references to disciplinary action based on or related to the Complainant's involvement in protected activity.

[OPTIONAL:] REINSTATEMENT: Respondent has agreed to reinstate the Complainant to all the privileges and benefits of employment that the Complainant was entitled to prior to **, 2000. These benefits will be effective upon the date of reinstatement regardless of any waiting period or other conditions for effectiveness.

Respondent has also agreed to reinstate the Complainant to all the privileges and benefits of employment that the Complainant was entitled to prior to , 2000. These benefits will be effective upon the date of reinstatement regardless of any waiting period or other conditions for effectiveness."

[OPTIONAL:] HEALTH INSURANCE: Respondent agrees to reinstate Complainant's family health insurance policy with its insurance carrier effective **(date).** Respondent will provide and pay for such insurance coverage for Complainant as it does for all its covered employees. This health insurance coverage shall continue for as long as Complainant is an employee of Respondent and is otherwise eligible for insurance under Respondent's health insurance policy.

PAYMENT: Complainant will be paid the sum of * dollars (**$***) in consideration for Complainant agreeing to be bound by the terms of this Agreement. None of the payment of * dollars (**$***) for back pay, wages, benefits or other similar types of compensation.

A **CERTIFIED** check (or its equivalent) will be made payable to * and (**Option #1:** hand-delivered to (investigator's name), an authorized representative of the North Carolina Department of Labor. **or Option #2:** mailed to the attention of (investigator's name) at the North Carolina Department of Labor, Employment Discrimination Bureau , ADDRESS.

(OR) Respondent will prepare a **CERTIFIED** check payable to * in the amount of * dollars(**$***) (which is calculated at hours X $/hour) less legally required withholdings. The check shall include an itemized statement of deductions made from the Complainant's gross wages. The check will be (**Option #1:** hand-delivered to (investigator's name), an authorized representative of the North Carolina Department of Labor. **or Option #2:** mailed to the attention of (investigator's name) at the North Carolina Department of Labor, Employment Discrimination Bureau , ADDRESS.

INQUIRIES CONCERNING COMPLAINANT: Should any third parties, to include prospective employers, inquire of Respondent as to the employment of the Complainant with the Respondent, the Respondent agrees to refrain from any mention of Complainant's protected activity or any disciplinary actions taken against the Complainant which have been purged from the Complainant's files as a result of this Agreement. Respondent agrees that nothing will be said or conveyed to any third party which could be construed as damaging the name, character, or employment opportunities of the Complainant because of, or in any way related to, Complainant's protected activity.

NON-ADMISSIONS CLAUSE: Respondent's agreement to take the proposed action(s) set forth herein and the signing of this Agreement is a compromise of a disputed claim and shall not in any way be deemed as an admission of liability by the Respondent of any violation of the Retaliatory Employment Discrimination Act, or any other law or regulation.
OR
COMPROMISE OF DISPUTED CLAIM: It is understood and agreed that this Agreement is the compromise of a disputed claim and is not to be construed as an admission of liability on the part of the Respondent of a violation of the North Carolina Retaliatory Employment Discrimination Act, or any other law or regulation.

[OPTIONAL:] NOTICE POSTING: Upon notice of the approval of this Agreement by the Employment Discrimination Bureau Administrator, the Respondent will immediately post in conspicuous places in and about its facility, including all places where notices to employees are customarily posted, and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice attached to this Settlement Agreement. The Notice which is attached to this Settlement Agreement shall constitute a part of this Settlement Agreement. The Notice referred to in this paragraph shall be signed by a responsible official of the Respondent and the date of posting shall be noted on the Notice. The Respondent will comply with all of the terms and conditions of the Notice.

PERFORMANCE: Respondent will begin to comply with the terms of this Agreement as soon as the approved copy of the Agreement is received from the Employment Discrimination Bureau Administrator. The Department of Labor may at any time enter Respondent's premises to determine compliance with the provisions of the settlement. This may include review of records and interview of witnesses and such other measures needed to determine compliance with this Agreement. Failure to perform in accordance with the terms of this Agreement may result in the re-opening of the above-captioned file by the Employment Discrimination Bureau.

REASSIGNMENT: On the date this Agreement is fully executed by both parties and if Respondent has not already done so, Respondent agrees to reassign Complainant's work responsibilities from her current "Final Sort" position so that a majority of her work time is spent in the "Packing" position similar to the position which Complainant held prior to her on-the-job injury which was reported to Respondent on or about May 4, 2004. Complainant understands and agrees that such assignment is contingent upon the business needs of Respondent and may be altered at a later date if Respondent's business needs require such an alteration. Respondent understands and agrees that any change in Complainant's work responsibilities will be made only with the knowledge and approval of Respondent's Vice-President of Human Resources.

WORKPLACE EXPECTATIONS: Respondent understands and agrees that Complainant will be treated the same as all other employees without regard to Complainant's activities protected under REDA. Respondent further understands and agrees that no adverse employment action, to include harassment, will be taken against Complainant because she has engaged in activities protected under REDA. Complainant understands and agrees that she must comply with all of Respondent's rules and regulations and that if she fails to do so, she will be subject to disciplinary action, the same as any other employee would be, in accordance with Respondent's rules and policies.

RELEASE OF FUTURE LIABILITY: Complainant, for and in consideration of the payment of ***** dollars (**$***), releases and forever discharges Respondent of and from any and all actions, cause or causes of action, suits, debts, dues and sums of money, judgments, demands and claims whatsoever pertaining to or growing out of the terms and provisions of the North Carolina Retaliatory Employment Discrimination Act as it pertains to *his/her termination of employment from Respondent on *. Complainant further agrees that *his/her Retaliatory Employment Discrimination Act complaint filed with the Employment Discrimination Bureau of the North Carolina Department of Labor on * shall be considered fully resolved as a condition of this Agreement.

CONFIDENTIALITY: Complainant agrees that s/he will not at any time or in any matter, either directly or indirectly, disclose, divulge, communicate, or otherwise reveal or allow to be revealed the terms, substance or content of this Agreement to anyone other than his/her attorney, accountant, or immediate family members, except as required by law. However, nothing in this provision is intended to prevent Complainant from providing

testimony and information in the course of an investigation or proceeding authorized by law.

ANTI-GAG REQUIREMENT: Nothing in this Agreement is intended to or must prevent, impede, or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.

NON-DISPARAGEMENT: Complainant agrees that he will not in any way make any statements, written or oral, or cause or encourage others to make such statements that defame, disparage, or in any way criticize the personal and/or business reputation, practice or conduct of Respondent and any of its officers. **Respondent agrees not to make any statement that defame, disparage, or in any way criticize the personal and/or professional reputation, practice or conduct of COMPLAINANT.**

KNOWING AND VOLUNTARY SETTLEMENT: Complainant states that s/he has carefully read this Agreement, that the terms are fully understood, and that s/he voluntarily accepts these terms and signs the same as his/her own free act.

CLOSING OF INVESTIGATION: The Employment Discrimination Bureau Administrator shall close the file as a condition of this Agreement after the Certified check for **** **($**)** is received from the Respondent and both parties have signed this settlement agreement.

Respondent's Signature	**Complainant's Signature**
Title	**Date**
Date	

Appendix J

Medical Records Chain of Custody Form

This form will be filled out for each Complainant whose medical records are collected. Each time a medical record for this Complainant is placed into or removed from the medical records cabinet, the Investigator will fill out the bottom of this form and the medical records administrator will initial that the records were placed into or removed from the cabinet.

Initial Date: _____

Investigator Name (first and last name):

_____

Medical Records Information:

Respondent: _____

Medical Record Identifier: _____

Date	Purpose	Investigator Signature*	Medical Record Administrator's Initials

Appendix K

REQUEST FOR NON-PUBLIC DISCLOSURE

1. **DATE DOCUMENTS REC'D BY INVESTIGATOR:**
2. **DATE FORWARDED TO PSIM:**
3. **EDB'S 90 DAY SUSPENSE:**
4. **COMPLAINANT'S NAME:**
5. **COMPANY NAME (RESPONDENT):**
6. **EDB FILE NUMBER:**
7. **EDB INVESTIGATOR & PHONE #:**
8. **OSH INSPECTION OR COMPLAINT #:**
9. **MANAGEMENT OFFICIAL(S):**
10. **ATTORNEY FOR COMPLAINANT:**
11. **ATTORNEY FOR EMPLOYER:**

Appendix L

Dear Potential Complainant:

You have contacted the Employment Discrimination Bureau (EDB) of the North Carolina Department of Labor (NCDOL) concerning a possible violation of the North Carolina Retaliatory Employment Discrimination Act (REDA). A copy of REDA is enclosed for your information. Based on our initial contact with you, a complaint form has been prepared and is enclosed for your review and signature. If you want the NCDOL to investigate your complaint, we must receive the ***signed* complaint form within 180 days of the most recent adverse employment action taken against you. An investigation will not be initiated until we receive your signed complaint form. Therefore, the sooner we receive your complaint the sooner our investigation can begin. If we do not receive the signed complaint form within the 180-day filing period, we *cannot* investigate your complaint.** If you are close to your 180-day filing deadline, we ***strongly*** suggest that you fax the complaint form (both sides) to us at the below-listed fax number and then immediately mail the original to our office.

Also attached is a questionnaire that needs to be filled out and returned to our office. **It is not mandatory that you return the questionnaire with the complaint form.** However, the questionnaire must be returned within 15 days. **If you do not return the completed questionnaire within 15 days, your complaint may be dismissed** and you may be issued a Right-to-Sue letter which gives you the right to pursue a private lawsuit against the employer.

It is *your* responsibility to notify us of any changes in your address or telephone number(s). If we are unable to contact you at the time we begin the investigation, **we will dismiss** your case and issue you a Right-to-Sue letter. If you have any questions about the enclosed complaint form or filling out the questionnaire, please call (xxx) xxx-xxxx. Additionally, if you are within 30 days of the alleged retaliatory action, you also have the right to file a complaint with the US Department of Labor.

Sincerely,

Bureau Chief

SEE THE ATTACHED INSTRUCTIONS

(revised 8/2/13)

INSTRUCTIONS FOR COMPLETING THE COMPLAINT FORM

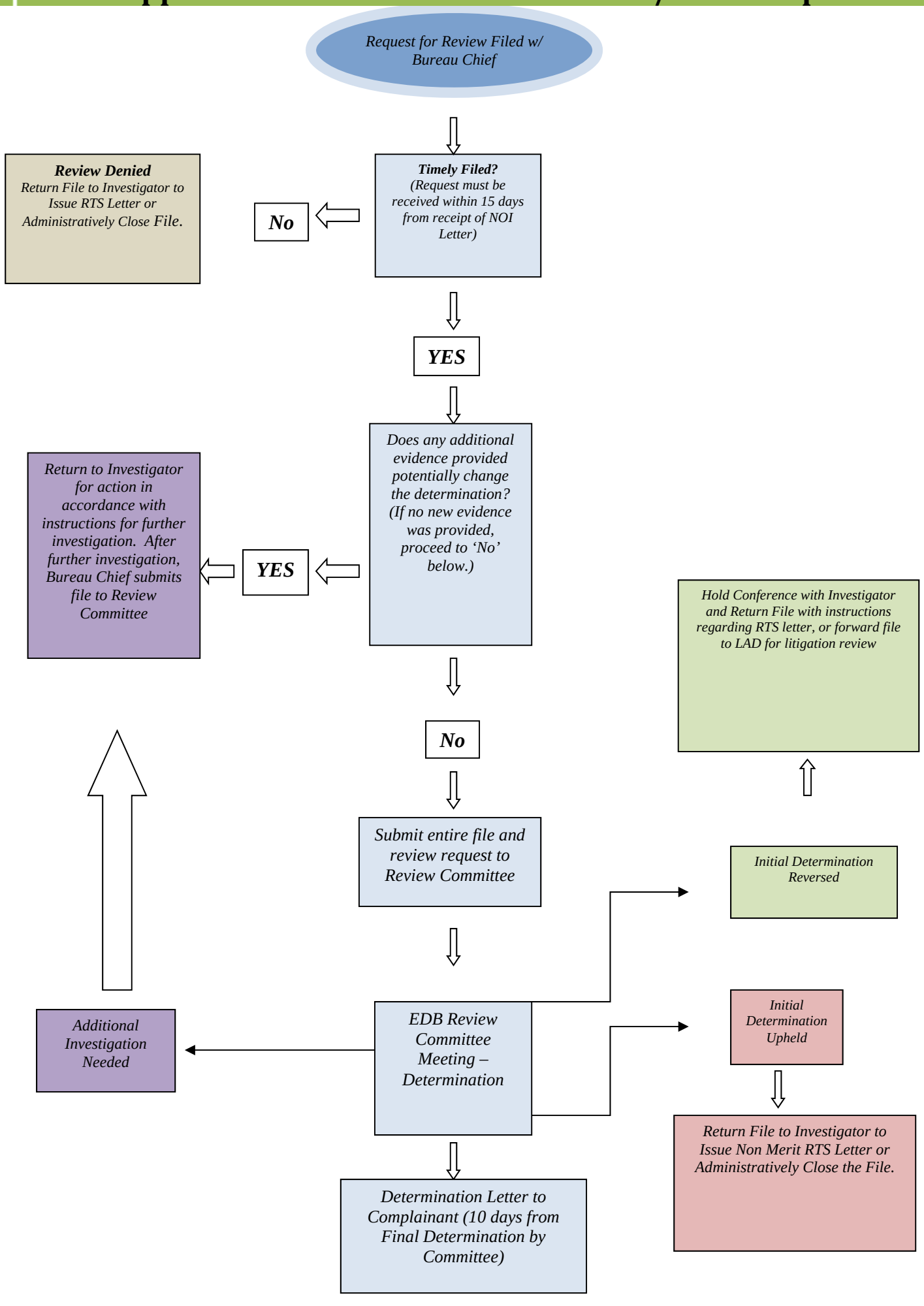
Carefully read all the questions and answers on the complaint form to make sure the information is correct. You should make any corrections that are necessary. When you are satisfied that all the information is correct then sign and date the form in Section 15.

If your complaint involves a workers' compensation claim as well as a safety and health complaint, then you need to sign the Medical Release in Section 16 of the complaint form. If no workers' compensation claim is involved with your complaint then you do not need to sign the Medical Release. Please do not send medical records unless specifically requested to do so by your investigator.

You can return the complaint form by fax or e-mail. If you submitted your complaint by fax or e-mail, you must submit the original complaint form within 10 days of when you faxed or e-mailed the complaint form. See the top of the complaint form for the mailing address and fax number. Our e-mail address is ask.edb@labor.nc.gov.

Upon receipt of the complaint form, your complaint will be docketed and assigned to an investigator. You will be contacted by the investigator to obtain additional details about your complaint. If you have any questions regarding the completion of the complaint form or questionnaire please call 1-(xxx) xxx-xxxx.

Appendix M--Review Process for OSH/EDB Complaints



Appendix N

This is intended as an example only. Actual document may differ in format.

NOTICE OF INTENT

Date

Mr./Ms.

Re:

Dear Mr./Ms.:

The purpose of this letter is to inform you that it is the intent of the Employment Discrimination Bureau (EDB) of the North Carolina Department of Labor to [**Investigators should select one of the following options: (1)** administratively close your complaint, which means you will not be issued a Right-to-Sue letter or **(2)** issue you a No-merit Right-to-Sue letter pertaining to the complaint you filed against **(Respondent)** on **(date filed)**.**]** As stated during the closing conference on **(date of closing conference)**, all the evidence you submitted has been evaluated and it was determined that **[Investigators should select one of the following options: (1)** your complaint was not timely filed; **(2)** your complaint did not come under the jurisdiction of the North Carolina Retaliatory Employment Discrimination Act (REDA); or **(3)** there was insufficient evidence to substantiate your complaint.**]**

You may request review of your case by the Employment Discrimination Review Committee. Any request for review must be made in writing and should specifically set forth the reasons that you are requesting review of your case. Submit your request to the following address: Name, Employment Discrimination Bureau, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101; email name@labor.nc.gov; or fax number (919) 807-2824. If you wish to submit additional evidence that was not previously submitted to the investigator at the time of investigation, you must do so along with your request for review. Your written request and any new evidence **must be submitted within 15 days from the date you receive this letter** or this office will take the appropriate action to close this investigation.

If you have any questions regarding this letter please call me at (xxx) xxx-xxxx.

Sincerely,

Name
Discrimination Investigator

Appendix O

This is intended as an example only. Actual document may differ in format.

EMPLOYMENT DISCRIMINATION BUREAU REVIEW COMMITTEE SUMMARY		
Case File No	Investigator	
Complainant		
Respondent		
Date NOI Received:	Date Review Request Received:	Date Review Committee Meeting:
Reason for Review:		
COMMITTEE MEMBERS		
Names:	Signatures:	
COMMITTEE DETERMINATION		
Based on the evidence, including the new evidence submitted by Complainant at the time of [his/her] review request, it is this Committee's determination that:	The Investigator's determination is UPHELD _____ The Investigator's determination is REVERSED _____	
Instructions to the Investigator:	_____ Refer back to investigator for further investigation _____ Refer to LAD for possible litigation _____ Issue Merit Right to Sue Letter _____ Issue No-merit Right to Sue Letter _____ Issue Administrative Closure	
Notes / Explanation (if required):		

EMPLOYMENT DISCRIMINATION BUREAU REVIEW COMMITTEE SUMMARY	
OSH DIRECTOR DETERMINATION (if required)	
Date Received:	
Determination:	_____ Refer back to investigator for further investigation _____ Refer to LAD for possible litigation _____ Issue Merit Right to Sue Letter _____ Issue No-merit Right to Sue Letter _____ Issue Administrative Closure
Instructions / Notes (if required):	
Director's Name:	
Director's Signature:	
Date of Determination:	

Appendix P

This is intended as an example only. Actual document may differ in format.

November , 2012

Address 1
Address 2
Address 3

Re File:

Dear Mr./Ms.:

Your request for review of the determination of your complaint and submission of additional evidence has been completed by the Employment Discrimination Bureau Review Committee. Based on the facts and documents reviewed, the Committee has determined that **[there was not enough evidence to substantiate your claim that a violation of the law occurred OR the evidence supports that a violation of the law has occurred OR your complaint should be administratively closed]**. Therefore, the Discrimination Investigator's determination is **[upheld OR reversed]**. **[You should expect to receive a Right-To-Sue letter via certified mail shortly. OR As an administrative closure, you will not receive a Right-to-Sue Letter; however, an administrative closure notice will be mailed to you via certified mail shortly. OR Your case is being forwarded to the Department of Labor's Legal Affairs Division for review for possible litigation.]**

Please contact your Discrimination Investigator if you have any questions.

Sincerely,

Name
EDB Review Committee

cc: File