

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE DESIGNEES

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN, Director
Directorate of Whistleblower Protection Program

SUBJECT: Interim Investigation Procedures for Section 29 C.F.R.
1904.35(b)(1)(iv)

I. Overview of New Regulation and Procedures

On May 12, 2016, OSHA published a final rule that, among other things, amended 29 C.F.R. 1904.35 to add a new provision, section 1904.35(b)(1)(iv), which incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c). Section 1904.35(b)(1)(iv) gives OSHA another mechanism to ensure accurate recordkeeping by enabling OSHA to address retaliation against workers who report work-related injuries or illnesses (conduct that has always been unlawful under section 11(c)) even when an employee has not filed a timely 11(c) complaint.

To issue a citation under section 1904.35(b)(1)(iv), OSHA must have reasonable cause to believe that a violation occurred—in other words, that an employer retaliated against an employee for reporting a work-related injury or illness.¹ To make this showing, OSHA must have evidence to support the well-established elements of retaliation. In this context, those elements are:

1. The employee reported a work-related injury or illness;
2. The employer took adverse action against the employee (that is, action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and
3. The employer took the adverse action because the employee reported a work-related injury or illness.

¹ For an explanation of the reasonable cause standard, please see OSHA Memorandum re: [Clarification of the Investigative Standard for Whistleblower Investigations](#) (Apr. 20, 2015).

Note that disciplining or drug testing an employee or denying an employee a benefit under an incentive program simply because the employee reported an injury or illness could constitute a violation of both sections 1904.35(b)(1)(iv) and 11(c).² Determining whether a violation occurred and whether there is enough evidence to substantiate the violation in a particular case will be a fact-intensive inquiry.

The Whistleblower Protection Program (WPP) in the Regions has the expertise necessary to investigate and determine the merits of a claim of retaliation. The Directorate of Whistleblower Protection Programs (DWPP) has established these Special Interim Investigation Procedures, in coordination with the Directorate of Enforcement Programs, to ensure that allegations of retaliation under section 1904.35(b)(1)(iv) are properly investigated and that the WPP and the Area Offices coordinate efforts involved in investigating and issuing citations under the new provision. These investigation procedures are interim and will be evaluated and adjusted after the new provision is in effect.

Concurrent with these Special Interim Investigation Procedures, the Directorate of Enforcement Programs has established Interim Enforcement Procedures to ensure that Area Offices are prepared for the receipt of complaints related to the new provisions. *See* Appendix A - Interim Enforcement Procedure for New Recordkeeping Requirements under 29 C. F. R. 1904.35. Those procedures provide guidance to the Area Offices for opening inspections, referring retaliation investigations to the WPP, issuing citations for violations of section 1904.35(b)(1)(iv) in consultation with the WPP, and conducting informal settlement conferences.

Collectively, the two interim procedures set out the separate and shared responsibilities of the WPP and the Area Offices for enforcement of the new anti-retaliation provision. Among other things, the Area Offices have responsibility for following the FOM in determining when an inspection is opened, entering data into OIS, and preparing the citation package. The WPP has responsibility for investigating the retaliation complaints, recommending merit or non-merit findings, and determining make-whole remedies when appropriate. The procedures provide for coordination between Area Offices and the WPP on matters such as sharing relevant information and resolving citations through informal settlements.

II. Referrals from Area Office to WPP to Investigate and Referrals from WPP to Area Office to Open Inspection of Potential Violations of Section 1904.35(b)(1)(iv)

A. Referrals from Area Office to WPP for Investigations

1. Complaint from Current Employee

The Area Office will notify the WPP when it receives an allegation from a current employee (or representative) that he or she reported, or attempted to report, a work-related injury or illness and that as a result he or she was disciplined or

² *See* OSHA Memorandum re: [Interpretation of 1904.35\(b\)\(1\)\(i\) and \(iv\)](#) (Oct. 19, 2016); OSHA Memorandum re: [Employer Safety Incentive and Disincentive Policies and Practices](#) (Mar. 12, 2012).

otherwise received an adverse action. The Area Office will transmit, by use of the OSHA 7, the following information:

- Name of employee making the allegation, including all contact information, home address, phone numbers;
- Name and address of employer;
- Report of injury or illness: What did the employee report; describe injury or illness that employee reported; how did the injury occur; when (date) did employee report, or attempt to report, the injury or illness; name of person to whom employee reported injury or illness;
- Adverse Action: What action did the employer take as a result of the report of the injury or illness; describe in detail the action; when (date) did the employer take that action (for purposes of calculation of the six-month statute of limitations it is important to have as exact a date as possible of when the adverse action occurred);
- Statute of limitations: Identification of the date by which a citation must be issued.

The Area Office will identify the referral as a potential violation of section 1904.35(b)(1)(iv). The WPP will follow normal procedures for screening the allegation for timeliness under 11(c) and opening an 11(c) investigation where appropriate. The WPP will not begin the investigation—under 1904.35(b)(1)(iv) or 11(c)—until it has received notification from the Area Office that the Area Office has opened the inspection and notified the employer of the complaint.³

2. Complaint from Former Employee

The Area Office will notify the WPP when it receives an allegation that a former employee was terminated or forced to quit because he or she reported a work-related injury or illness. The Area Office will provide the same information on the OSHA 7 as above. The WPP will handle the complaint consistent with current practice as a potential 11(c) violation. Additionally, the WPP will determine (within two days if possible) whether a reasonable basis exists to believe a violation of 1904.35(b)(1)(iv) could have occurred. If so, the WPP will refer the complaint to the Area Office to open an inspection pursuant to the FOM, Chapter 9, Section I.C.8. If the WPP determines that the alleged adverse action took place outside the six-month statute of limitations to enforce Part 1904 or no reasonable basis exists for believing a violation of 1904.35(b)(1)(iv) could have occurred, the Whistleblower (WB) Manager will so inform the Area Office via email.

³ Based on Regional Administrator (RA) discretion, the WPP may be present for the opening conference.

The WPP will not begin the investigation—under 1904.35(b)(1)(iv) or 11(c)—until it has received notification from the Area Office that the Area Office has opened the inspection and notified the employer of the complaint.

B. Referral from WPP to Area Office to Open Inspection

When the WPP receives an allegation directly from a complainant that he or she was retaliated against for reporting a work-related injury or illness, the WPP will refer the complaint to the Area Office (within two days, if possible) to open an inspection for a potential violation of section 1904.35(b)(1)(iv). The WPP will refer all 1904.35(b)(1)(iv) allegations whether or not they are also timely 11(c) complaints. The WPP referral is pursuant to the FOM, Chapter 9, Section I.C.8, and the WPP will follow current referral procedures.

The referral will include the same information as currently obtained by the WPP when conducting a screening of a complaint:

- Name of employee making the allegation; including all contact information, home address, phone numbers;
- Name and address of employer;
- Report of injury or illness: What did the employee report; description of injury or illness that employee reported; how the injury occurred; when (date) the employee reported, or attempted to report, the injury or illness; name of person to whom employee reported injury or illness;
- Adverse Action: What action the employer took as a result of the report of the injury or illness; when (date) the employer took that action.

The WPP will follow normal procedures for screening the allegation for timeliness under 11(c) and opening an 11(c) investigation where appropriate. The WPP will not begin the investigation—under 1904.35(b)(1)(iv) or 11(c)—until it has received notification from the Area Office that the Area Office has opened the inspection and notified the employer of the complaint.

III. Investigation Procedures

A. Assessment and Assignment of Referral

Because section 1904.35(b)(1)(iv) citations must be issued within six months of the adverse action, the WPP will follow the expedited procedures in this memorandum for investigating potential violations of section 1904.35(b)(1)(iv) within the six-month statute of limitations period.

If the WPP receives a new allegation under a docketed whistleblower complaint that meets the requirements under this memorandum, the WPP will follow the expedited procedures in this memorandum for investigating the new complaint under section

1904.35(b)(1)(iv) (including waiting to investigate the complaint until the Area Office has opened the inspection). The WPP will continue to follow the Whistleblower Investigations Manual for the previously docketed whistleblower complaint.

B. Expedited Investigation

After the Area Office opens the inspection (within one business day when possible), the Area Office will notify the WPP, provide copies of the OSHA 300 logs and any other relevant documentation, and provide the name of a point of contact in the Area Office for future coordination. The RA, or RA's designee, should notify the RSOL, as soon as practicable, after a potential 1904.35(b)(1)(iv) violation has been identified for an expedited investigation.

The WPP will conduct its expedited investigation using the following protocols:

The WB Investigator will interview the complainant/employee to obtain further details of the allegation, names of potential witnesses, identity and involvement of managers, and relevant information to determine make-whole remedies, including back wages, etc.

The WB Investigator will ask the Respondent to provide a response to the allegation in a reasonable amount of time, based upon the complexity of the allegation and breadth of the information sought. If Respondent proves uncooperative, the Area Office and the WPP will engage the RSOL and may issue a subpoena.

The WB Investigator will provide the complainant/employee an opportunity to rebut the response/defense given by the Respondent within a reasonable timeframe. If the complainant/employee does not provide a rebuttal within a reasonable time, the WB Investigator may complete the investigation and make a recommendation without the rebuttal.

The WB Investigator will interview available witnesses and make notations when pertinent witnesses could not be reached in a timely fashion (e.g., prior to the expiration of the allowable investigatory timeframe).

If the WPP has a request for additional documentation that may be maintained by the employer on-site, if practicable, the Area Office will assist in obtaining such documentation. If Respondent proves uncooperative, the Area Office and the WPP will engage the RSOL and may issue a subpoena.

There may be limited circumstances when it is both feasible and appropriate for the WB Investigator to go on-site with the CSHO conducting the safety and health

inspection to allow for expeditious interviews and evidentiary requests. It is not, however, intended that the investigation of the potential 1904.35(b)(1)(iv) violation will be a joint investigation. Also, there may be limited circumstances when it is feasible and appropriate for the WPP to attend the opening conference.

The WB Investigator and CSHO will share information obtained during the course of the investigations with each other when relevant to the other's investigation.

The WB Investigator will prepare a Memorandum of Investigation (MOI) containing the following information and submit it to the WB Manager, allowing enough time for the manager to review the MOI and forward it (along with the investigative file) to the RSOL no later than four weeks before the six-month deadline for cases in which the WPP recommends issuing a citation.

Contents of the MOI:

1. Name and Contact Information of Respondent(s) (name of representative, if any);
2. Name and Contact Information of complainant(s)/employee(s) (name of representative, if any);
3. Summary of the §1904.35(b)(1)(iv) complaint/allegation (including when and how the information was received by the WPP);
4. Respondent's response/position statement;
5. Complainant's rebuttal of Respondent's response/position statement (if any);
6. List of witnesses interviewed and either a summary of the information provided by the witness or a witness statement;
7. List of potential witnesses not interviewed and reason(s) why no interview (e.g., witness chose not to participate in the investigation, witness could not be located, etc.);
8. Documentary evidence obtained (e.g., employee handbook, company policies, attendance logs, injury logs, comparator data, disciplinary records, etc.);
9. WPP Recommended determination (e.g., whether reasonable cause exists to believe that §1904.35(b)(1)(iv) was violated);
10. Damages calculation (if applicable);
11. Case activity log detailing all investigative steps.

C. Findings of Investigation

After the WB Manager has reviewed and approved the MOI, one of the following protocols will apply:

For recommendations to issue a citation:

1. The WB Manager will submit the MOI and investigative file to the RSOL for review no later than four weeks before the six-month deadline for issuing the citation.
2. The RSOL will complete review within two weeks of receiving the MOI and investigative file and will inform the WB Manager whether the RSOL concurs with the MOI recommendation and whether the RSOL has any reservations about whether the case is likely to be suitable for litigation.
3. No later than two weeks after forwarding the MOI and investigative file to the RSOL, the WPP will update the MOI to note whether the RSOL concurs with the recommendation to issue a citation, and the Assistant Regional Administrator (ARA) or designee will send the MOI to the Area Office in accordance with these Interim Investigation Procedures.

For recommendations not to issue a citation: The ARA or designee will send the MOI to the Area Office in accordance with these Interim Investigation Procedures.

If the investigation, including WB Manager review (and the RSOL determination if received), leads to a recommendation **not** to issue a citation under 1904.35(b)(1)(iv), the ARA or designee will notify the Area Office via the MOI that, “The WPP does not recommend issuing a citation under section 1904.35(b)(1)(iv).” If the WPP continues to investigate the matter under section 11(c), the notification will also state, “However, this recommendation should not be viewed or interpreted to mean that the WPP has made any determination regarding the merit of any corresponding section 11(c) matter. The WPP continues to investigate this matter under section 11(c).” The WB Manager will ensure that the 1904.35(b)(1)(iv) investigation is appropriately closed in IMIS and the Area Office will include the MOI in the enforcement file and take the necessary steps to record this finding in OIS. If the WPP continues to pursue the matter under 11(c), the WPP will retain a copy of any relevant material from the 1904.35(b)(1)(iv) investigation to include in the 11(c) investigation.

If the investigation, including WB Manager and RSOL review, leads to a determination that reasonable cause exists to believe that section 1904.35(b)(1)(iv) was violated and the WPP **does** recommend issuing a citation, the ARA or designee will notify the Area Office via the MOI that, “The WPP recommends issuing a citation under 1904.35(b)(1)(iv) because, based on the evidence gathered to date, reasonable cause exists to believe that Respondent violated §1904.35(b)(1)(iv).” The Area Office will include the MOI in the enforcement file and follow the steps in these Interim Investigation Procedures regarding issuing the citation.

After receipt of the MOI, the Area Office will hold a closing conference with the employer. The Area Office may ask the WPP to participate in the closing conference. This closing conference can be done by telephone.

IV. Issuance of Citation and Informal Conference/Settlement

A. Issuance of Citation and Notification of Penalties

If the Area Office determines, after consultation with the WPP, that a citation should be issued, the Area Office will prepare and issue the citation. The Area Office is responsible for ensuring the necessary information is entered into OIS and drafting/issuing any citations, with input from the WPP.

B. Informal Conference/Settlement

If an employer requests an Informal Conference regarding the citation issued for a violation of section 1904.35(b)(1)(iv), the Area Office will consult with the WPP regarding participation in the conference. WPP Participation can be in person or by telephone or video conference. Preparation for the informal conference should include a discussion on settlement parameters. Among other things, the Area Office/WPP should be prepared to discuss remedies including back wages and other make-whole remedies for the aggrieved employee. As necessary, consultation with the RSOL may be sought.

The Area Office/WPP should consult with the aggrieved employee before the informal conference to advise him or her that the employer has requested the conference and to discuss settlement parameters. The Area Office/WPP should tell the employee that if settlement within the discussed parameters seems likely, the Area Office/WPP will contact the employee to discuss before finalizing the settlement terms. If a settlement is reached, the Area Office, in consultation with the WPP, will prepare the Informal Settlement Agreement.

Memorandum of Investigation (Example)

From: Whistleblower Investigator
To: Regional Supervisory Investigator

Subj: §1904.35(b)(1)(iv) Investigation ICO (NAME OF RESPONDENT)

Respondent Information:

Name
Address
Telephone
Email
Representative Information

Complainant Information:

Name
Address
Telephone
Email
Representative Information

	Exhibit #
Complaint Received Date: Complaint Summary:	
Summary of Respondent Defense:	
Summary of Complainant Rebuttal (if any):	

<p>Witness Information</p> <ol style="list-style-type: none"> 1. Name/Contact Information 2. Name/Contact Information 3. Name/Contact Information <p>*Any witnesses that were unable to be interviewed and why</p>	
<p>Documentary Evidence</p> <ol style="list-style-type: none"> 1. Employee Handbook 2. Attendance Records 3. Injury Logs 4. Comparator Data 5. Other 	
<p>RSOL Feedback (if any)</p> <p>When MOI and file submitted to RSOL: When RSOL recommendation received:</p>	
<p>Recommended Determination Submitted on:</p> <p>For recommendations to issue under 1904.35(b)(1)(iv): The investigation established reasonable cause to believe that Respondent violated §1904.35(b)(1)(iv).</p> <p>For recommendations not to issue under 1904.35(b)(1)(iv): The WPP does not recommend issuing a citation under section 1904.35(b)(1)(iv). [If the WPP continues to investigate the matter under section 11(c), the notification will also state, “However, this recommendation should not be viewed or interpreted to mean that the WPP has made any determination regarding the merit of any corresponding section 11(c) matter. The WPP continues to investigate this matter under section 11(c).”]</p>	
<p>Damages Calculations (if applicable)</p>	
<p>Date submitted to Area Office:</p>	