



U.S. DEPARTMENT OF LABOR

OSHA DIRECTION

Occupational Safety and Health Administration

DIRECTIVE NUMBER: 2017-WB-001

EFFECTIVE DATE: 3-1-2017

SUBJECT: Non-Public Disclosure Pilot – 11(c) Complaints Only

Regional Identifier: Regions V and X

ABSTRACT

Purpose: The purpose of this directive is to establish a twelve-month pilot in Regions V and X to eliminate the requirement that OSHA provide the parties with copies of all submissions they have made to OSHA that are pertinent to a complaint filed under Section 11(c) of the OSH Act as required in Chapter 23 of the Whistleblower Investigations Manual.

Scope: This Notice applies to 11(c) Investigations in Regions V and X.

References: OSHA Instruction: CP: 02-03-007, January 28, 2016 – Whistleblower Investigations Manual.

Cancellations: None.

State Impact: None.

Action

Offices: All Area Offices in Regions V and X.

Originating

Office: Chicago Regional Office

Contact: Assistant Regional Administrator for Whistleblower Protection Programs
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By and Under the Authority of

Ken Nishiyama Atha
Regional Administrator

Eric Harbin
Regional Administrator

Executive Summary

The purpose of this Notice is to establish a twelve-month Regional Whistleblower Protection Pilot Program that will allow Regions V and X to eliminate the requirement that OSHA provide the parties with copies of all submissions they have made to OSHA that are pertinent to a complaint. This pilot applies to 11(c) complaints filed with OSHA's Chicago Regional Office and Seattle Regional Office.

Significant Changes: Eliminates the requirement that OSHA share with the parties, all submissions received in response to complaints filed under Section 11(c) of the OSH Act.

- I. **Subject:** This Notice implements a Pilot for Regions V and X Whistleblower Protection Programs to suspend the non-public disclosure requirement for all complaints filed under Section 11(c) of the OSH Act. It applies to complaints filed under the jurisdiction of OSHA's Chicago Regional Office and Seattle Regional Office.
- II. **Purpose:** The purpose of this Notice is to outline and implement the procedures to follow during this pilot program.
- III. **Scope:** This Notice applies to Regions V and X Whistleblower Protection Programs.
- IV. **References:** OSHA Instruction CP: 02-03-007, January 28, 2016, – Whistleblower Investigations Manual (WIM).
- V. **Expiration:** This Notice expires on _____, 2017.
- VI. **Action:** OSHA personnel must follow the procedures contained in this Notice.
- VII. **Background:** While a Section 11(c) complaint is under investigation or appeal, information contained in the case file may be disclosed to the parties in order to resolve the complaint; we refer to these as non-public disclosures. While a case is under investigation, disclosure is at OSHA's discretion, although OSHA encourages the parties to copy one another on all information sent to OSHA, provided that information doesn't violate the privacy of any third parties. Once a final decision by OSHA is made to decline litigation in a Section 11(c) case, records not otherwise protected from disclosure may be disclosed to the parties, upon their request, through the Freedom of Information Act.

Currently, under the WIM, OSHA will provide to the complainant (or the complainant's legal counsel) the substance of the respondent's response. OSHA generally will accomplish this disclosure by providing the complainant with a copy of the respondent's response and any additional information provided by the respondent that is related to the complaint. If supplying the actual documents with redactions would be inadvisable (e.g., there is a risk of workplace violence), OSHA may provide a summary. See WIM 23-6. Similarly, OSHA will provide the respondent with the complainant's allegations and substance of the evidence supporting the complaint. If supplying the actual complainant documents with redactions would be inadvisable (e.g., there is a risk of identifying a confidential employee or retaliation against an employee), OSHA will provide a summary. Non-Public Disclosure under the WIM and under the Pilot will still be redacted pursuant to the same rules as applicable under the Freedom of Information Act (FOIA) without mentioning FOIA exemptions. See Id.

VIII. Procedures During the Pilot

A. Disclosures to the Complainant.

1. During a Section 11(c) investigation under the Pilot, disclosure must be made to the complainant of at least a summary of the respondent's response.
2. Other evidence submitted by the respondent (or summary of it) may also be disclosed, so that the complainant can fully respond to the respondent's position and the investigation can proceed to a final resolution.
3. The term "summary" of the respondent's response for purposes of this Pilot shall mean either an accurate written account or a disclosure interview of the specific times, locations, events, tone, and details contained in the respondent's response.
4. Prior to the sharing of information to the complainant, the Regional Supervisory Investigator (RSI) or the Assistant Regional Administrator for the Whistleblower Protection Program (ARA/WPP) will briefly review all summaries provided to the complainant to determine if the summary of the respondent's position statement was an accurate written account. If disclosure is made through an interview, the RSI or ARA/WPP will ensure that the disclosure was accurately documented.

B. Disclosures to the Respondent.

1. During a Section 11(c) investigation under the Pilot, disclosures to the respondent of the complainant's allegation(s) will continue as specified under WIM 23-6.
2. Other evidence submitted by the complainant (or summary of it) may also be disclosed if it relates to the complaint, so that the respondent can fully respond to the complainant's complaint and the investigation can proceed to a final resolution.

3. The term “summary” of the complainant’s evidence for purposes of this Pilot shall mean either an accurate written account or a disclosure interview of the specific times, locations, events, tone, and details contained in the complainant’s submissions.
4. Prior to the sharing of information to the respondent, the RSI or ARA/WPP will briefly review all summaries provided to the respondent to determine if the summary of the complainant’s evidence in support of the complaint was an accurate written account. If disclosure is made through an interview, the RSI or ARA/WPP will ensure that the disclosure was accurately documented.

C. The Case File

1. The investigator will be mindful that the Privacy Act must not be violated when conducting disclosure interviews. Personal, identifiable information about individuals, other than the complainant and management officials representing the respondent, 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 more difficult for OSHA to collect similar information from others.
2. Disclosure interviews will be fully documented in the case file via memorandum to file or audio recording.

IX. Regional Office Evaluation: Forty-Five (45) days after the Pilot has concluded, the Assistant Regional Administrator shall submit to the Regional Administrator an evaluation. This will include an analysis of the effectiveness of the Pilot in meeting its goals.

Data and information used to support the conclusions stated above will include:

1. An estimate of time saved for investigators based on the number of case files that required redactions by OSHA during the 12 months of the pilot program compared to the 12 months prior to the establishment of the pilot.
2. A comparison of the rate of administrative review requests for Section 11(c) during the 12 months of the pilot program compared to the 12 months prior to the establishment of the pilot.
3. The effect on the merit/settlement rate during the 12 months of the pilot program compared to the 12 months prior to the establishment of the pilot.
4. Identify the number of times complainant requests an original copy of the respondent’s position statement.

5. Identify the number of times respondent requests an original copy of the complainant's allegation and evidence.
 6. Identify the instances in which a summary took a significant amount of time to prepare and the number of times a summary had to be revised or rewritten.
 7. Statement and rationale of whether the Pilot program should be continued and/or rolled out in other Regions.
 8. Any other comments or recommendations received during the Pilot.
- X. National Office Evaluation: Ninety (90) days after the Pilot has concluded, the Regional Administrator shall submit to the Director of the Directorate of Whistleblower Protection Programs an evaluation. This will include an analysis of the effectiveness of the Pilot in meeting its goals and a determination regarding implementation of the Pilot procedures on a permanent basis.