

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: LOREN SWEATT
Acting Assistant Secretary

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FROM: FRANCIS YEBESI, Acting Director
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SUBJECT: Expanded Administrative Closure Guidance: Updated Procedures
to Close Administrative Law Judge (ALJ) Cases that OSHA Lacks
Authority to Investigate

This memorandum expands OSHA’s administrative closure guidance issued on January 12, 2017, (“*Clarification of Streamlined Procedures to Close Cases that OSHA Lacks Authority to Investigate*”) by allowing complaints that are filed under ALJ statutes,¹ and that are not subject to a full field investigation, to be administratively closed with the consent of the complainant. All other streamlined case closure clarifications contained in the January 12, 2017, memorandum remain in effect.

I. BACKGROUND

Under the 2011 Whistleblower Investigations Manual (WIM), only complaints filed under Section 11(c) of the Occupational Safety and Health Act of 1970 (Section 11(c)), the Asbestos Hazard Emergency Response Act (AHERA), and the International Safe Container Act (ISCA) (District Court statutes) that are either untimely or do not set forth a prima facie allegation may be administratively closed without being docketed. Complaints filed under the ALJ statutes under the same conditions may not be “screened out” or administratively closed. Rather, these

¹ *i.e.* STAA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, ERA, AIR21, SOX, PSIA, NTSSA, FRSA, CPSIA, ACA, SPA, CFP, FSMA or MAP-21.

complaints must be docketed and dismissed with appeal rights, unless the complainant, having received an explanation of the situation, withdraws the complaint.²

A January 12, 2017, memorandum, entitled “*Clarification of Streamlined Procedures to Close Cases that OSHA Lacks Authority to Investigate*,” addressed the appropriate procedures for closing complaints that were not subject to a full field investigation because the complaint was either docketed and dismissed, or administratively closed. The memo clarified that two distinctive steps described in the WIM for corresponding with the parties - sending a notification letter of docketing and sending a Secretary’s Findings letter dismissing the case - could be done simultaneously. In addition, the memo clarified that two staff persons, including at least one supervisor, must review OSHA’s decision to administratively close or to docket and dismiss a complaint before the complainant is notified in a letter of the reasons that the complaint will not be investigated. At times, past practice consisted of a supervisor completing the screening process and closing a complaint with no further review of the case closure decision. The memo did not alter the administrative closure procedures detailed in the WIM that disallowed the administrative closure of complaints filed under the ALJ statutes that were either untimely or did not set forth a prima facie allegation.

This new memo serves to expand only OSHA’s administrative closure guidance specified in the January 12, 2017, memo. All other case closure procedures remain in effect. This expanded procedure allows complaints that are filed under ALJ statutes and that are not subject to a full field investigation to be administratively closed with the consent of the complainant, aligning the procedures for ALJ statute filings with the long-standing OSHA procedures used for cases under the District Court statutes. Under this expanded guidance, administrative closures for complaints filed under ALJ statutes will require only a letter to the complainant explaining the reason(s) the complaint is not going to be investigated, provided OSHA obtains the complainant’s consent and the closure is approved by a supervisor. The new guidance is intended to streamline procedures and increase efficiency.

II. INSTRUCTION (Expanded Procedures)

A. Procedure for cases filed under all statutes. Effective October 1, 2017, all complaints, including those filed under ALJ statutes, that are either untimely or do not present a prima facie allegation, based on the complaint supplemented as appropriate through interviews of the complainant, may be administratively closed, i.e., not docketed. As noted above, such cases may be administratively closed only if the complainant consents. If the complainant does not consent, the case is docketed and dismissed with the complainant being informed about his or her right to object to OSHA’s dismissal and request a hearing before an ALJ in ALJ statute cases or to seek review by OSHA in cases under Section 11(c), AHERA, or ISCA.

Chapter 2, Section III.A.2.b (WIM at 2-3) now applies to all cases that are either untimely or do not present a prima facie allegation. Chapter 2, Section III.A.3 (WIM at 2-4) should be disregarded.

² Chapter 2, Section III.A.3 (WIM at 2-4)

Note: Where a complainant consents to administrative closure of the complaint or elects to withdraw the complaint before docketing, the complaint should not be forwarded to the named respondent. OSHA will follow the applicable guidance on forwarding the complaint to other government agencies. Currently, based on OSHA's October 12, 2016, "*Updated Guidelines on Sharing Complaints and Findings with Partner Agencies*," OSHA should request permission from the complainant to forward the complaint to the relevant partner agency(s). If the complainant does not give consent to forward the complaint, then the regional whistleblower manager should review the underlying substantive allegation (e.g. defective wings on an aircraft) and consider the gravity of the impact to the workforce and the public. Should the manager believe that serious harm would result if the complaint goes unaddressed, the regional manager has the discretion to notify the relevant partner agency(s) of the substance of the allegation without revealing the identity of the complainant. The regional manager will notify the complainant of such action.

If the Complainant elects to withdraw his or her complaint, it must be confirmed in writing by a withdrawal confirmation e-mail or letter to the complainant.

- B. Supervisory review of administratively closed complaints. The WIM states that both administrative closures and determinations in docketed cases must be reviewed by the supervisor. Thus, two staff persons, including at least one supervisor, must review OSHA's decision to administratively close or to docket and dismiss a complaint before the complainant is notified in a letter of the reasons that the complaint will not be investigated. Administratively closed ALJ complaints are now subject to these same procedures.

III. EFFECTIVE DATE

The effective date for implementation of this updated procedure is October 1, 2017.