

Appendix B

Management Response to Draft Report

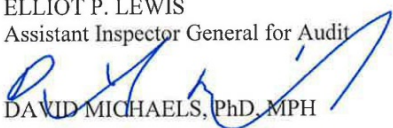
U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



SEP 28 2015

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: 
DAVID MICHAELS, PhD, MPH

SUBJECT: Response to OIG's Draft Report No. 02-15-202-10-105, "OSHA Needs to Continue to Strengthen Its Whistleblower Protection Programs"

This memorandum is in response to your September 8, 2015, transmittal of the Office of the Inspector General (OIG) Audit Report No. 02-15-202-10-105, "OSHA Needs to Continue to Strengthen Its Whistleblower Protection Programs." OSHA appreciates this opportunity to provide comments on the findings and recommendations in your draft report.

Strengthening the Whistleblower Protection Program continues to be one of OSHA's top priorities, and OSHA appreciates the OIG's recognition that significant improvements have been made since the OIG's last audit in 2010. In particular, the OIG's conclusion that OSHA has reduced its error rate from four out of every five cases in 2010 (80%), to less than one in five cases in the current audit (18%), represents a dramatic improvement in complaint investigations that has resulted from OSHA's sustained effort and significant organizational reforms in the intervening five years.

As noted in the draft report, OSHA has reinvigorated the whistleblower program since 2010. Some of the changes OSHA made include elevating the program to a stand-alone Directorate, increasing staff, restructuring regional whistleblower programs, and enhancing whistleblower training. Additionally, OSHA has streamlined its paperwork procedures, issued new guidance to investigative staff, published numerous procedural regulations, strengthened our collaborative relationships with our partner agencies, developed new customer service and outreach tools, and much more. Despite growing caseloads and limited resources with which to handle them, OSHA's internal improvement efforts have helped gradually reduce investigative lapse times and backlogs of pending investigations while enhancing the quality of investigations.

The OIG draft report identifies several areas for further improvement, and OSHA agrees that more work can be done and is committed to continuing to strengthen the whistleblower program. We do, however, believe that a number of the findings in the draft report are inaccurate or unsupported. Responses to each of the recommendations, including those concerns, are detailed below.

1. Complete and Sufficient Complaint Reviews

As noted, the OIG's conclusion that 18% of whistleblower reviews were partially incomplete is a significant improvement over the OIG's 2010 findings, which showed an estimated 80% non-compliance rate. Of course, OSHA strives for a zero percent incomplete rate, and we appreciate the OIG's suggestions for continued improvement. However, OSHA's review of each complaint identified by the OIG as having at least one error makes clear that the OIG overestimated the rate of incomplete investigations. In some cases there seems to be confusion in how the OIG has interpreted OSHA's policies, procedures, and practices resulting in cases being misidentified as deficient. For example:

- OSHA's Docket/Dismiss Procedures:** The OIG identified exceptions in several complaints where OSHA issued one comprehensive letter instead of both a docketing/notification letter and a Secretary's Findings letter. This long standing practice, however, is consistent with the "docket and dismiss" procedure outlined in the Whistleblower Investigations Manual (WIM)¹, and should not be considered an incomplete complaint review. The "docket and dismiss" procedure occurs in instances² where OSHA must terminate a case because it was not timely filed, does not fall within OSHA's jurisdiction, or lacks a prima facie allegation of whistleblower retaliation. In these cases, OSHA sends one letter (Secretary's Findings) to the parties indicating both that the case has been docketed, and then dismissed with appeal rights. In cases where an investigation actually takes place, but is later dismissed, OSHA will send two separate letters – a docketing/notification letter and a later dismissal letter (Secretary's Findings with appeal rights). The OIG expected that even when the "docket and dismiss" procedure was appropriate, investigators should still send the parties both letters. OSHA does not believe that sending both letters in "docket and dismiss" cases is required by the WIM and sending separate letters would add unnecessary burden and delay to an already resource-constrained program.
- Supervisory Review:** In addition, the draft report concludes that about 9% of the sampled cases were incomplete because OSHA did not document supervisory review of the investigation. In more than half of these cases, however, "investigation" refers to a complaint that was closed at the initial screening phase by the supervisor, and OSHA does not believe that the WIM requires separate supervisory review of a supervisor's decision to administratively close or docket-and-dismiss a complaint after personally screening it³. Each of the cases that the draft report identifies as incomplete on this basis was either administratively closed or "docketed and dismissed" without an investigation.

¹ WIM states for OSHA, AHERA, and ISCA cases: "...if the complainant refuses to accept this determination [administrative closure], the case must be docketed and dismissed with appeal rights." Also, for all other cases, the WIM states "Complaints filed under these statutes must be docketed and a written determination issued, unless the complainant, having received an explanation of the situation, withdraws the complaint."

² Nineteen statutes require OSHA to docket all complaints. The three remaining statutes (section 11(c) of the OSH Act, the Asbestos Hazard Emergency Response Act, and the International Safe Container Act) allow for an administrative closure without docketing provided OSHA obtains the complainant's consent, otherwise they too must be docketed and dismissed.

Although the WIM states that, for administrative closure cases, “the investigator must draft a letter to the complainant explaining the reason(s) the complaint is not going to be investigated and send it to the supervisor for concurrence,” the WIM does *not* require a third-party review if the supervisor is the screener of the complaint. Rather, the WIM and long-standing agency practice give the supervisor the authority to decide whether or not a complaint contains the basic elements necessary to conduct an investigation. It is more appropriate and effective for the agency to use its auditing and monitoring processes to periodically review the handling of docket and dismiss cases.

2. Whistleblower Guidance and Training

The draft report concludes that OSHA’s whistleblower guidance is insufficient because the WIM has not been fully updated since 2011.

As OSHA explained to the OIG during its review, the WIM is not an exclusive source of policies and procedures, and full rewrites of the WIM are not the only means for OSHA to communicate updated information to whistleblower program staff. As fully updating the WIM is a lengthy process, OSHA makes periodic partial updates of the WIM – the most recent of which was completed in April 2015 – to reflect updates in program, policies, and procedures. OSHA also publishes new policies and procedures through other means, such as OSHA’s procedural and interpretive regulations under each whistleblower statute, and policy guidance memos.⁴ OSHA also has distributed desk aids that provide a quick reference on a variety of topics. These materials collectively ensure that investigators are fully updated on new investigative practices and procedures.

The OIG draft report incorrectly states that “OSHA had no official directive to provide guidance on 5 of the 22 whistleblower statutes that it has been tasked to enforce.” In fact, OSHA has published interim final rules in the *Federal Register* that articulate the procedures for handling complaints under four of these five statutes,⁵ and an initial rulemaking publication for the fifth statute (the Moving Ahead for Progress in the 21st Century Act (MAP-21)) is scheduled for later this year. And, although no final rule has been published to establish procedures specific to MAP-21, OSHA has published guidance instructing its staff to follow the investigative procedures for the Consumer Product Safety Improvement Act (CPSIA), which has similar requirements.⁶ Hence, at no time was staff left without specific guidance on how to investigate

⁴ OSHA’s regulations, directives, and memoranda are publicly available at http://www.whistleblowers.gov/regulations_page.html.

⁵ See Interim Final Rule, Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010, 79 Fed. Reg. 18,630 (Apr. 3, 2014); Interim Final Rule, Procedures for Handling Retaliation Complaints under Section 402 of the FDA Food Safety Modernization Act, 79 Fed. Reg. 8,619 (Feb. 13, 2014); Interim Final Rule, Procedures for Handling Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. 13,222 (Feb. 27, 2013); Interim Final Rule, Procedures for Handling Retaliation Complaints under the Employee Protection Provision of the Seaman’s Protection Act, as amended, 78 Fed. Reg. 8,390 (Feb. 6, 2013).

⁶ OSHA made its notification that the procedures regarding the CPSIA are controlling until MAP-21 is published was made publicly available at http://www.whistleblowers.gov/regulations_page.html.

all statutes administered by OSHA. OSHA will continue to provide supplementary training opportunities, including topic-specific webinars, as priorities dictate and resources allow.⁷

Finally, OSHA has taken significant steps towards completing a comprehensive training curriculum and overhauling and expanding its internal training offerings for whistleblower investigative staff. OSHA staff has dedicated significant time to designing improved training courses, and OSHA created a new position in 2015 for a full-time instructor who is a whistleblower subject matter expert.

3. Timeliness of OSHA Whistleblower Investigations

The draft report notes that OSHA is not always able to meet statutory timeframes for completing whistleblower investigations. Although OSHA agrees that it should continue to improve the timeliness of investigations, OSHA notes that the OIG's discussion omits two important considerations. First, the timeframe of the OIG audit coincided with a spike in newly-filed whistleblower claims to a historic peak, due in part to congressional enactment of new statutes and amendments to an existing statute. OSHA nevertheless was able to reduce both its backlog of pending cases and the average time taken to issue a merit determination every year since 2012.

In addition, OSHA recently implemented an Alternative Dispute Resolution (ADR) process for whistleblower cases that OSHA believes will continue to reduce investigation times and improve outcomes for complainants. The ADR process was piloted in two regions, which resulted in a significant increase in the settlement rate for both regions as well as providing significant savings in time and costs. In light of the positive results obtained during the pilot period, the program was expanded in August 2015 to provide all regions with the opportunity to implement an ADR program.

4. Communication with Other Federal Agencies

The draft report concludes that OSHA should strengthen its referral procedures to ensure that relevant enforcement agencies are advised of the underlying workplace safety violations alleged in whistleblower complaints. Although OSHA agrees that strong collaboration with federal agency partners is critical, OSHA disagrees with the processes used by the OIG to determine whether the agency adequately and timely shared relevant whistleblower complaints with its safety and health enforcement program or other federal agencies.

- **Internal referrals to the enforcement program:** Although some Section 11(c) cases were not referred to OSHA's safety/health enforcement team, OSHA policy states that the decision to make an 11(c) referral depends on the investigative team's assessment of the hazards alleged in the complaint.

⁷ Regarding the OIG's observation that "the manual did not outline the specific requirements for the five most recent statutes," OSHA has determined that statute-specific chapters published in the WIM are duplicative of the procedural regulations already established under the Code of Federal Regulations (CFR). In fact, OSHA plans to remove all statute-specific chapters from the WIM.

- **Referrals to Other Federal Agencies:** The OIG relied on inaccurate data to determine the timeliness measurements and the frequency with which OSHA failed to share copies of complaints in accordance with our policies and procedures. The OIG based its analysis on the other agencies' databases, rather than the inter-agency correspondence in OSHA's case files. Also, OSHA is allowed to use its discretion in deciding which complaints to refer to partner agencies. In some cases that the OIG identified as failing to share complaints, the complainant requested that the complaint not be referred, fearing further retaliation or potential negative impact to on-going settlement negotiations between the parties. In other cases, the complaint was withdrawn by the complainant prior to docketing it for investigation. As a result, there was no need to refer the case.

RECOMMENDATIONS

Recommendation 1: Monitor the Whistleblower Programs to routinely assess the efficiency and effectiveness of the program, and finalize and implement the draft checklist to assist in determining if investigators completed steps and collected documentation to support determinations.

OSHA Response: OSHA agrees with the recommendation and will continue to monitor the Whistleblower Program to routinely assess the efficiency and effectiveness of the program.

OSHA currently monitors its Whistleblower Protection Program through several mechanisms, including monitoring of statistical performance metrics, the Management Accountability Program, and the Section 11(c), AHERA, and ISCA Appeals Program. Additionally, OSHA issued the first Quality Review Tool (referenced in the OIG's report as the draft checklist) in June 2014 to all ten regions. In June 2015, OSHA reissued it to the field to clarify that it is to be used when conducting reviews on whistleblower case files during focused audits of regional whistleblower programs, and may also be used during routine investigative oversight reviews.

Recommendation 2: Develop and monitor specific performance measures or indicators to ensure Whistleblower Programs are working as intended.

OSHA Response: OSHA has substantially improved its performance monitoring and agrees to continue its efforts to satisfy this recommendation. OSHA has already added two performance measures to the Department's 2014-2018 Strategic Plan, which measure the timeliness of the screening and investigative processes. OSHA has also established a group of core whistleblower performance measures for monitoring investigation timeliness and outcome trends, and routinely disseminates a package of statistical management reports to regional programs on a quarterly basis to provide up-to-date statistics on the program's performance.

Recommendation 3: Provide complete and unified guidance to ensure appropriate methods are used to close investigations.

OSHA Response: OSHA agrees to continue clarifying our procedures for closing complaints and investigations. OSHA has made progress in this area and will continue to improve upon these enhancements to ensure greater compliance with prescribed instructions and consistency among the regions.

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Recommendation 4: Issue an updated manual and implement controls to ensure the manual will continue to be updated in a timely manner to reflect current policies, procedures, and statutes.

OSHA Response: OSHA will continue to update the WIM on a periodic basis to incorporate changes to policies, procedures, and applicable law, and will establish controls to ensure that WIM updates proceed as planned. In addition, OSHA will continue to employ additional means to disseminate policy to keep staff apprised of changes to policies, procedures, and case law. Vehicles for sharing this information include policy memoranda, procedural regulations, and desk aids which can be issued on a timelier basis than manual updates.

Recommendation 5: Develop and provide a comprehensive training curriculum to investigators to ensure they have the proper skills, knowledge, and understanding of program requirements and goals.

OSHA Response: OSHA agrees with this recommendation.

Recommendation 6: Develop and implement a process to ensure that reasonable balance is applied between the quality and timeliness to complete investigations within statutory timeframes.

OSHA Response: OSHA will continue to develop policies and procedures to ensure that reasonable balance is applied between quality and timeliness, in order to increase the number of investigations completed within statutory timeframes. OSHA notes that many factors can impact the length of an investigation, and OSHA's investigations frequently continue beyond those timeframes both because of resource constraints and because the timeframes do not realistically reflect the complexities of the investigative process. In certain cases the statutory timeframe passes even before OSHA can complete the basic steps necessary to *start* an investigation. Judicial decisions make clear that OSHA's jurisdiction to complete an investigation is not affected if the investigation extends beyond the timeframe in the statute.⁸

Regarding resource issues, OSHA notes that although the agency has added more than 35 FTE to the whistleblower program since 2009, the number of new complaints filed with the agency has steadily increased by 58% from 1,934 in 2005 to 3,060 in FY 2014. Consequently, OSHA still lacks the resources that it needs to process and investigate whistleblower complaints with the expediency that we would like, while also maintaining the quality and thoroughness that is appropriate.⁹

Recommendation 7: Develop and implement a formal process and working relationships with other agencies to ensure information is shared in a timely manner to assist in the enforcement of the various statutes and correction of violations.

⁸ See, e.g., *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

⁹ OSHA notes that a January 2012 OIG report ("Federally Operated Whistleblower Protection Program Cost", Report No. 22-12-014-10-105) found that reducing whistleblower investigative caseloads to 6-8 cases per investigator would require resources for 49-58 additional investigators, assuming that OSHA would continue to receive the same number of new cases that it received in FY 2011. Since that time, staff has grown slowly, while the number of new investigations has increased substantially. Consequently, whistleblower investigators currently carry an average of 23 pending investigations.

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OSHA Response: OSHA has made measurable progress in establishing collaborative working relationships with its partner agencies and will continue to coordinate with partner agencies to ensure that complaints filed with OSHA are timely provided to partner agencies.