**MOSH INSTRUCTION:**

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| **INSTRUCTION NUMBER:** 23-2 | **EFFECTIVE DATE: January 19, 2023** |
| **SUBJECT:**  Discrimination Complaints  | **ISSUANCE DATE:** January 19, 2023 |
| **CANCELLATION:**  MOSH Instruction 17-1 | **EXPIRATION:** Effective from date above, until replaced by a new Instruction |

**Purpose:** This instruction provides Regional Office personnel with policy and guidelines for handling of discrimination complaints.

**Scope:** MOSH-wide

**Contact:** Chief of MOSH Compliance Services

 See MOSH Website for Current Information

 https://www.labor.maryland.gov/labor/mosh/

**Reference:**

1. Labor and Employment Article §§ [5-202(a)](https://mgaleg.maryland.gov/mgawebsite/laws/StatuteText?article=gle&section=5-202&enactments=false) and [5-604](https://mgaleg.maryland.gov/mgawebsite/laws/StatuteText?article=gle&section=5-604&enactments=false), Annotated Code of Maryland
2. [COMAR 09.12.20.05](https://dsd.maryland.gov/regulations/Pages/09.12.20.05.aspx)
3. Current MOSH [Field Operations Manual](https://www.dllr.state.md.us/labor/mosh/moshguidance.shtml) (FOM), including Chapters I.A & X
4. [OSHA DIRECTIVE: CPL 02-03-011](https://www.osha.gov/enforcement/directives/cpl-02-03-011-0) EFFECTIVE DATE: April 29, 2022

**Summary:** This instruction provides guidance to MOSH personnel concerning policy and procedures for implementing guidelines for handling discrimination complaints under Section 5-604 of the MOSH Act (the Act) and regulations found at COMAR 09.12.20.05.

**Scope**. This chapter sets forth guidelines for handling discrimination complaints under Section 5-604 of the MOSH Act (the Act) and regulations found at COMAR 09.12.20.05.

**Agency Policy**. It is MOSH policy to make the agency as accessible as possible to employees who have legitimate discrimination complaints.

1. **Time Limitations**
	1. Section 5-604(c)(2) of the Act requires that "an employee shall file a complaint under this subsection within 30 days after the alleged discrimination occurs."
	2. Section 5-604(d)(3) of the Act requires that "within 90 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection."
2. **Program Administration**
	1. ***The Commissioner has delegated to the Assistant Commissioner, under Section 5-202(a), the authority to implement and enforce Section 5-604 Discrimination against employee.***
	2. The Discrimination Manager shall oversee the investigation of discrimination complaints and recommend appropriate dispositions to the Chief of Compliance who shall, after review, obtain the Assistant Commissioner’s final approval on all case dispositions and settlements.
	3. The Office of the Attorney General (OAG), as counsel to the Assistant Commissioner, provides legal assistance as necessary to determine the validity of a discrimination complaint. The OAG reviews all cases recommended for litigation as a “pre-closing” before a final determination is made to assign for litigation, negotiates settlements at the direction of the Chief of Compliance, and litigates discrimination complaints.
3. **Responsibility of All MOSH Personnel**
	1. MOSH personnel shall have a general knowledge of the MOSH law, regulations, and procedures pertaining to discrimination cases and shall provide information to businesses and employees upon request.
	2. MOSH Compliance personnel shall review the prohibitions and requirements under Section 5-604 of the Act with each employer during the closing conference.
	3. All MOSH personnel shall refer any discrimination complaints to the MOSH Operations Unit for prompt response.
4. **Administrative Procedure.**
5. **Filing of Complaint**
	1. Any employee or employee representative may initiate a discrimination complaint.
	2. A discrimination complaint shall be in **writing** and shall include:
		1. the name, address, and telephone number of the complainant
		2. the name, address, and telephone number of the employer
		3. a brief description of the discrimination alleged
		4. the date on which the discrimination occurred
	3. A complaint alleging discrimination may be filed by email, mail, online, or in person at any MOSH office or by delivery to any MOSH employee.
	4. A MOSH employee receiving a discrimination complaint shall immediately forward the complaint to the MOSH Operations Unit.
6. **Initial Processing and Evaluation**
	1. Upon receipt of a discrimination complaint, the MOSH Operations Unit shall assign a case number, record the complaint in the discrimination log, and forward to the Discrimination Manager.
	2. The Discrimination Manager shall ensure an acknowledgement of receipt is sent to the complainant and the complaint is assigned to a Compliance Officer (CO) to complete an initial screening of the complaint within 2 working days.
	3. The initial screening shall address and report on the following issues:
		1. Did the complainant file the complaint within 30 days after the occurrence of the alleged violation? If not, are there other mitigating circumstances? See Section E, below.
		2. Did the complainant engage in activity protected under Section 5-604 of the Act?
		3. If MOSH does not have jurisdiction, should the complaint be referred to another government agency?

NOTE: All complaints under Section 405 of the Federal Surface Transportation Assistance Act shall be referred to OSHA.

* + 1. Is there an apparent relationship between the complainant's protected activity and the employer's action?
		2. Did the complainant suffer any loss as a result of action by the employer against the employee?
		3. If the complainant alleges discrimination for refusing to do unsafe or unhealthful work:
			1. Did the employer order the complainant to work under conditions the complainant reasonably could have believed presented an imminent risk of death or serious bodily injury?
			2. Did the complainant have reason to believe that he or she could not seek or obtain effective redress from the employer or from MOSH because there was not sufficient time or opportunity, or for some other reason?
		4. Based on the complainant's allegations, is there an apparent prima facie case of discrimination?
	1. If, after consultation with the CO, the MOSH Discrimination Manager determines that a full investigation is not required, the MOSH Discrimination Manager shall report the CO's findings to the Chief of Compliance for review and final recommendation to the Assistant Commissioner.
	2. If the Assistant Commissioner determines that no further action is warranted, the Assistant Commissioner shall notify the complainant in writing of the reasons for the decision.
	3. ***Within 10 days of receipt of the determination that no further action is warranted, a complainant may file a written appeal to the Commissioner of Labor and Industry. The Commissioner will review the case file and findings for proper application of the law to the facts and issue a written decision. The Commissioner may affirm the determination that no further action is warranted or remand the case to the Assistant Commissioner for additional investigation. If the Commissioner affirms no further action is warranted, this is the final agency level decision.***
1. **Full Investigation**. If the Discrimination Manager determines that a full investigation is warranted, the Discrimination Manager, with the Chief of Compliance concurrence shall:
	1. Advise the complainant and the employer that an investigation will be conducted, and;
	2. Assign a CO to fully investigate the facts surrounding the complainant's allegations of discrimination and prepare a report with recommendations.
2. **Report to the Chief of Compliance and Assistant Commissioner**. After consultation with the CO, and if necessary the Office of the Attorney General, the Discrimination Manager shall forward the final report to the Chief of Compliance.
	1. The final report shall include:
		1. A summary of the complainant’s allegation and employer’s response;
		2. An overview of the investigation, including initial interview, witness statements, and all other materials obtained during the investigation; and
		3. A recommendation to either pursue litigation or dismiss the case.
	2. After review and approval, the Chief of Compliance shall submit to the Assistant Commissioner the case file and concurrence with proposed final action.
3. **Determination**. The Assistant Commissioner shall determine whether or not the agency will file suit on behalf of the complainant.
	1. If the Assistant Commissioner determines that litigation is not appropriate, the Assistant Commissioner shall give written notification of the determination to the employer and complainant. The complainant will be informed of the reasons for the decision. The employer will be told only that the investigation has been completed, a determination issued and that the complainant has the right to appeal.
	2. ***Within 10 days of receipt of the determination, the complainant may file a written appeal to the Commissioner of Labor and Industry. The Commissioner will review the entire record of the investigation and issue a written decision. If the Commissioner affirms the Assistant Commissioner’s determination, the complainant and the employer will be informed that no further action is planned by the agency. If the Commissioner reverses the Assistant Commissioner’s decision, the procedure set forth in subsection (c) below will be followed.***
	3. If the Assistant Commissioner determines to proceed with litigation on behalf of the complainant, the Assistant Commissioner shall notify the complainant and the employer in writing and assign the case to the Office of the Attorney General for appropriate action.
4. **Closing a Case**. When the Assistant Commissioner has made a final determination as to whether the complaint is appropriate for litigation, the investigator shall close the case by making appropriate entries on the log and completing the required data entry forms. OSHA Information System (OIS) forms shall only be completed for discrimination cases that require full field investigation.
5. **Investigation**
6. **CO’s Responsibility**. Under the direction of the Discrimination Manager, the CO assigned a discrimination case is responsible for making a thorough investigation of all aspects of the complaint.
7. **Focus of Investigation**. Before beginning the investigation, the CO shall identify the issues to be resolved, the facts to be determined and any other relevant matters. The CO shall meet with the Discrimination Manager if clarity is needed in any of these areas.
8. **Interview of Complainant**. Upon assignment of a complaint, the CO shall promptly contact the complainant to:
	1. Conduct a thorough interview and prepare an initial report;
	2. Obtain from the complainant:
		1. Written authorization to inspect and copy the complainant's personnel records and medical records, if necessary for the investigation;
		2. A list of all persons, including company management, who may have relevant information about the dispute; and
		3. Copies of all documents, including written statements, letters, reports, and pay receipts, that might be relevant; and
		4. Determine if the complainant has filed a discrimination complaint with Federal OSHA or with any other agency or is pursuing any other form of relief.
			1. If another agency, private or public, is currently attempting to resolve the matter for the complainant, and if the successful result of that process would result in the complainant being made whole, the Assistant Commissioner may defer or postpone MOSH’s investigation pending the final outcome of the other matter.
9. **Full Investigation**.
	1. In conducting a full investigation of a discrimination complaint, a CO shall:
		1. Determine the complainant's allegations;
		2. Seek corroboration of the complainant's allegations through witnesses, documents and other evidence;
		3. Determine the employer's response to the complainant's allegations, including denial or affirmative defense;
		4. Seek corroboration of the employer's assertions;
		5. Discuss with the complainant all the evidence; and
		6. If necessary, gather and corroborate any additional evidence to resolve discrepancies or factual disputes.
	2. The CO shall review MOSH records to determine if there is a related safety or health compliance case, injury or illness records, or other pertinent information.
	3. The CO will advise the employer during the opening conference that any serious hazard observed during the investigation may be addressed. If the hazard is not abated during the course of the discrimination investigation, the CO will refer the matter to MOSH Compliance for further action.
	4. The CO shall interview all persons indicated by the complainant to have knowledge of the circumstances surrounding the complaint, as well as any other persons who may have relevant knowledge of the facts at issue.
		1. In general, interviews will be conducted in private. If the person to be interviewed is a management representative, they may elect to have the employer or employer’s representative present during the interview. The CO shall clearly advise the interviewee of the right to a private interview before they make that decision.
		2. The CO shall attempt to obtain signed, written statements from persons interviewed whenever possible.
	5. The CO shall maintain contact with the complainant throughout the investigation, keeping the complainant apprised of the status of the investigation and clarifying any facts in dispute.
	6. The CO shall carefully document all findings, preparing and retaining accurate notes and other records of interviews, meetings, and telephone conversations. Documentary evidence shall be copied and made part of the file.
	7. At the conclusion of the investigation and prior to submitting a final written report, the CO shall discuss with the complainant the information obtained during the investigation, and solicit any new evidence, witnesses or other information.
10. **Final Investigative Report.** Upon completion of the investigation, the CO shall complete a final report. That report will contain:
11. The date the complaint was filed;
12. The name, address and telephone number of the complainant;
13. The name, address and telephone number of any individual or group representing the complainant;
14. The legal name, address and telephone number of the respondent (employer), as well as the number of employees and appropriate "SIC Code";
15. The name, address and telephone number of any individual or group representing the respondent;
16. A brief statement summarizing the complainant's allegation;
17. A brief statement summarizing the respondent’s defense;
18. Union information, including whether the complainant has filed a grievance;
19. The name, address, and telephone number of each witness interviewed, as well as other potential witnesses who were not interviewed. Indicate why each potential witness was not interviewed;
20. A chronological narrative of the investigative finding, including the complainant’s response to the employer’s defense and the investigative findings;
21. A brief summary of the CO’s recommendation, including any information that might be useful in reaching a settlement of the case.
22. **Timely Filing of a Complaint**. If there is a question about whether the complaint was filed within 30 days of the discriminatory event, the CO conducting the investigation shall report all relevant circumstances and facts, fully documented. Such circumstances may include:
23. Whether the employer misled the employee regarding the grounds for discharge or other adverse action, or concealed information from the employee;
24. Whether the employee has resorted in good faith to grievance arbitration proceedings under a collective bargaining agreement;
25. Whether the employee has filed a complaint regarding the same general issue with another agency, a court, or elected representative;
26. Whether the discrimination is of a continuing nature;
27. Whether the employee made reasonable efforts to file a timely complaint, but was unable to contact an agency representative or received erroneous information from the agency;
28. Whether the employee was unable to file a timely complaint due to illness, injury, disaster, or some other occurrence.
29. **Settlement**
30. If, during the course of the investigation, the CO feels that a settlement can be reached, the CO will advise the Discrimination Manager. At the Discrimination Manager’s discretion, the CO may then proceed to negotiate an informal settlement in the matter. The settlement must be agreed upon, in writing, by both the complainant and the respondent. Before becoming final, the settlement must be reviewed by the Chief of Compliance and accepted and signed by the Assistant Commissioner.
31. Upon request of the Assistant Commissioner and with the consent of the complainant, the Office of the Attorney General (OAG) may enter into settlement negotiations under the direction of the Chief of Compliance and the Discrimination Manager during the course of a discrimination case.
32. In negotiating on behalf of the complainant, the OAG shall make every effort to obtain full relief for the complainant, including reinstatement, back pay, expungement of personnel records, restitution of wages and other benefits, and posting of a notice to all employees of the settlement agreement. In the case of egregious complaints, the OAG may seek punitive and/or compensatory damages at the request of the Chief of Compliance.
33. The OAG shall submit all proposed settlement agreements to the Chief of Compliance and the Discrimination Manager who, after review and approval, submit to the Assistant Commissioner for final approval. The proposal shall indicate the position of all parties with respect to the proposed agreement, and the OAG's recommendations.
34. If a proposed settlement agreement includes restitution for back pay, with or without interest, the proposal shall indicate the specific amount at issue and determine any obligation or communications as appropriate due to complainant receipt of unemployment benefits or other pay received calculated on a pay period by pay period basis.
35. **Withdrawal of Complaint.** A complainant may submit to the Assistant Commissioner a request for permission to withdraw a discrimination complaint. The request will be honored only if the Assistant Commissioner is satisfied that the request is made voluntarily and with knowledge of the possible implications. The case file will contain documentation of all facts relevant to the decision to permit a complaint to be withdrawn.
36. **Release of Investigation Information.** Requests for access to information, statements, records, documents, and other evidence obtained during investigation of a discrimination complaint will be handled in accordance with the Maryland Public Information Act and the regulations adopted pursuant to that Act.

Under the Authority of

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Michael Penn, Acting Assistant Commissioner