

# Chapter 6

## REMEDIES AND SETTLEMENT AGREEMENTS

### I. Scope.

This section covers policy and procedures for the determination of appropriate remedies in whistleblower cases and for the effective negotiation of settlements. Damage awards should result from a fact-specific evaluation of the evidence developed in the investigation. Investigators should consult with the IA/Legal Staff before IOSHA awards any of the following remedies: preliminary reinstatement, front pay, punitive damages, compensatory damages from non-pecuniary losses such as emotional distress, and any order to change or rescind a corporate policy.

### II. Remedies.

In cases where IOSHA is ordering monetary and other relief or recommending litigation, the investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation. Investigators must collect and document evidence in the case file to support any calculation of damages. It is especially important to adequately support calculation of compensatory (including pain and suffering) and punitive damages. Types of evidence include bills, receipts, bank statements, credit card statements, and other documentary evidence of damages. Witness and expert statements also may be appropriate in cases involving mental distress or pain and suffering damages. In addition to collecting evidence of damages, it is important to have a clear record of total damages calculated and itemized compensatory damages.

In addition to including this evidence in the case file, Investigative Findings should include an explanation of the basis for awarding any punitive or emotional distress damages. The basis for such damages should be something beyond the basis for finding that the respondent violated the statute.

#### A. Reinstatement and Front pay.

Under 88.9(3) enforced by IOSHA, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases, and is a critical component of making the complainant whole. Where reinstatement is not feasible, such as where the employer has ceased doing business or there is so much hostility between the employer and the complainant that complainant's continued employment would be unbearable, front pay in lieu of reinstatement should be awarded from the

date of discharge up to a reasonable amount of time for the complainant to obtain another job. Legal Staff should be consulted on front pay.

**B. Back Pay.**

Back pay is available under 88.9(3). Back pay is computed by deducting net interim earnings from gross back pay. Gross back pay is defined as the total taxable earnings (before taxes and other deductions) that the complainant would have earned during the periods of unemployment. Generally gross back pay is calculated by multiplying the hourly wage by the number of hours per week that the complainant typically worked. If the complainant is paid a salary or piece rate rather than an hourly wage, the salary or piece rate may be broken down into a daily rate and then multiplied by the number of days that the complainant typically would have worked. If the complainant has not been reinstated, the gross pay figure should not be stated as a finite amount, but rather as x dollars per hour times x hours per week. The back pay award should include any cost-of-living increases or raises the complainant would have received if employment had continued. Investigators should also include lost bonuses, overtime, benefits, raises and promotions in the back pay award when there is evidence to determine these figures.

Net interim earnings are interim earnings reduced by expenses. Interim earnings are the total taxable earnings complainant earned from interim employment (other employers) and are subtracted from the lost wages attributable to the timeframe between termination (or other adverse action) and reinstatement (if applicable). Examples of expenses are:

1. Those incurred in searching for interim employment, *e.g.*, mileage at the current IRS rate per driving mile; toll and long distance telephone calls;
2. Employment agency fees, other job registration fees, meals and lodging if travel away from home;
3. Bridge and highway tolls;
4. Moving expenses, etc.; and those incurred as a condition of accepting and retaining an interim job;
5. Special tools and equipment, safety clothing, union fees, employment agency payments, mileage for any increase in commuting distance from distance travelled to the discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc.

A complainant must mitigate their damages incurred as a result of the adverse employment action. To be entitled to back pay, a complainant must exercise reasonable diligence in seeking alternative employment. A

complainant must make an honest, good-faith effort to find work, but is not required to succeed. The investigator should ask the complainant for evidence of their job search and keep evidence in the case file. A complainant's obligation to mitigate their damages does not normally require that the complainant go into another line of work or accept a demotion. However, a complainant who is unable to secure substantially equivalent employment after a reasonable period of time must consider other available and suitable employment.

After preliminary reinstatement (if applicable) is ordered, the complainant mitigates their damages simply by being available for work. Under these circumstances, the complainant does not have a duty to seek other work for at least a period of time after the preliminary reinstatement order is issued.

Unemployment insurance is not deducted from gross back pay. Worker's compensation is not deducted from back pay except for the portion which compensates for lost wages.

A respondent's cumulative liability for back pay ceases when a complainant rejects a bona fide offer of reinstatement. A bona fide offer must afford the complainant reinstatement to a job substantially equivalent to the former position.

#### **C. Compensatory Damages.**

Compensatory damages may be awarded under the IOSHA whistleblower statute. Compensatory damages include, but are not limited to, out-of-pocket medical expenses resulting from the cancellation of a company health insurance policy, expenses incurred in searching for a new job (see paragraph B above), vested fund or profit-sharing losses, credit card interest and other property loss resulting from missed payments, annuity losses, compensation for mental distress due to the adverse action, and out-of-pocket costs of treatment by a mental health professional and medication related to that mental distress. Legal staff should be consulted on computing the amount of compensation for mental distress.

#### **D. Punitive Damages.**

Punitive damages should be considered whenever a management official involved in the adverse action knew about the relevant discrimination statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages should also be considered when the Respondent's conduct is egregious, *e.g.* when a discharge is accompanied by previous harassment or subsequent blacklisting; when the Complainant has been discharged because of his/her association with a whistleblower; when a group of whistleblowers has been discharged; or when there has been a pattern or practice of

retaliation in violation of the statute IOSH enforces.

When an investigation uncovers evidence which could lead to a recommendation for punitive damages, the Investigator should advise the IA/IEO as soon as possible in order to alert Legal Staff of the egregious nature of the potential violation. If Legal Staff agrees that such damages may be appropriate, further development of evidence should be coordinated with Legal Staff.

When determining punitive damages, refer to *Reich v. Skyline Terrace Inc.*, 977 F. Supp. 1141 (N.D. Okl. 1997). Circumstances which make a case more or less egregious than *Skyline*, as well as inflation, should be considered.

**E. Interest.**

Interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes. See 26 U.S.C. §6621 (the Federal short-term rate plus three percentage points). That underpayment rate can be determined for each quarter by visiting [www.irs.gov](http://www.irs.gov) and entering “Federal short-term rate” in the search field. The press releases for the interest rates for each quarter will appear. The relevant rate is the one for underpayments (not large corporate underpayments). A definite amount should be computed for the time up to the date of calculation. The findings should state that in addition, interest at the IRS underpayment rate at 26 U.S.C. §6621, compounded daily, must be paid on monies owed after that date. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function.

**F. Expungement.**

The respondent will be required to expunge any warnings, reprimands, and derogatory references (such as references to the complainant’s termination) which may have been placed in the complainant’s personnel file as a result of the protected activity.

**G. References.**

The Respondent will be required to provide the complainant a neutral reference for potential employers.

**H. Training.**

Require the respondent to provide employee or manager training regarding the rights afforded by Iowa Code Chapter 88.9(3). Training may be appropriate particularly where the respondent's conduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation.

**I. Posting.**

The Respondent may be required to post a notice regarding the IOSHA order.

**III. Settlement Policy.**

Voluntary resolution of disputes is desirable in many whistleblower cases, and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. It is IOSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation.

Furthermore, at any point prior to the completion of the investigation, IOSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it. IOSHA should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

**IV. Settlement Procedure.**

**A. Requirements.**

Requirements for settlement agreements are:

1. The file must contain documentation of all appropriate relief at the time the case has settled and the relief obtained.
2. The settlement must contain all of the core elements of a settlement agreement (see IV.C. below).
3. To be finalized, every settlement, or in cases where the IDOL approves a private settlement, every approval letter must be signed by the appropriate IOSHA official.
4. To be finalized, every settlement must be signed by the respondent.

**B. Adequacy of Settlements.**

1. **Full Restitution.** Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the investigator. One hundred percent relief should be sought during settlement negotiations wherever possible, but investigators are not

required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass and is not necessarily limited to any or all of the following:

- a. Reinstatement to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement. See Ch. 6 II. A. above.
- b. “Front pay” in the context of settlement is a term referring to future wage losses, calculated from the time of discharge, and projected to an agreed-upon future date. Front pay may be used in lieu of reinstatement when one of the parties’ wishes to avoid reinstatement and the other agrees. See Ch. 6 II. A. above.
- c. Wages lost due to the adverse action, offset by interim earnings. That is, any wages earned in the complainant’s attempt to mitigate his or her losses are subtracted from the full back wages (NOTE: Unemployment compensation benefits may never be considered as an offset to back pay). See Ch. 6 II. B. above.
- d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which have been placed in the complainant’s personnel file or other records.
- e. The respondent’s agreement to provide a neutral reference to potential employers of the complainant.
- f. Posting of a notice to employees stating that the respondent agreed to comply with the whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting.
- g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property loss resulting from missed payments, compensation for mental distress caused by the adverse action, and out-of-pocket expenses for treatment by a mental health professional and medication related to that distress See Ch. 6 II. C.

- h. An agreed-upon lump-sum payment to be made at the time of the signing of the settlement agreement.
- i. Punitive damages may be considered. They may be awarded when a management official involved in the adverse action knew that the adverse action violated the whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, *e.g.* when a discharge is accompanied by previous harassment or subsequent blacklisting; when the complainant has been discharged because of his/her association with a whistleblower; when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of 88.9(3). See Ch. 6 II. D. above for more guidance, including other examples. However, coordination with the IA and Legal Staff as soon as possible is imperative when considering such action. If Legal Staff agrees that such damages may be appropriate, further development of evidence should be coordinated with the Legal Staff. (See Ch. II. D. for most of this information.)

**C. The Standard IOSHA Settlement Agreement.**

Whenever possible, the parties should be encouraged to utilize IOSHA's standard settlement agreement containing all of the core elements outlined below. This will ensure that all issues within IOSHA's authority are properly addressed. The settlement must contain all of the following core elements of a settlement agreement:

1. It must be in writing.
2. It must stipulate that the employer agrees to comply with the relevant statute(s).
3. It must address the alleged retaliation.
4. It must specify the relief obtained.
5. It must address a constructive effort to alleviate any chilling effect, where applicable, such as a posting (including electronic posting, where the employer communicates with its employees electronically) or an equivalent notice.

Adherence to these core elements should not create a barrier to achieving an early resolution and adequate relief for the complainant. But according to the circumstances, concessions may sometimes be made.

All appropriate relief and damages to which the complainant is entitled must be documented in the file. If the settlement does not make the

complainant whole, the justification must be documented and the complainant's concurrence must be noted in the case file.

In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Yet, posting of a settlement agreement, standard poster and/or notice to employees, while an important remedy, may also be an impediment to a settlement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

The investigator should try as much as possible to obtain a single payment of all monetary relief. This will ensure that complainant obtains all of the monetary relief.

The settlement should require that a certified or cashier's check, or where installment payments are agreed to, the checks, to be made out to the complainant, but sent to IOSHA. IOSHA shall promptly note receipt of the checks, copy the check[s], and mail the check[s], via certified mail, to the complainant.

#### **D. Sections of an IOSHA Settlement Agreement.**

Much of the language of the standard agreement should generally not be altered, but certain sections may be removed to fit the circumstances of the complaint or the stage of the investigation. Those sections that can be omitted or included, with management approval include:

##### *1. POSTING OF NOTICE*

Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, and maintain for a period of at least ninety (90) consecutive days from the date of posting, copies of the Notice attached hereto and made part hereof, said Notice to be signed by a responsible official of Respondent's organization and the date of actual posting to be shown thereon.

##### *2. COMPLIANCE WITH NOTICE*

Respondent will comply with all terms and provisions of the notice.

##### *3. GENERAL POSTING*

Respondent will permanently post in a conspicuous place in or about its premise, including all places where posters for employees are customarily posted the Iowa OSHA poster available at [www.iowaosha.gov](http://www.iowaosha.gov).

#### 4. *NON-ADMISSION*

Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law or regulation under the jurisdiction of the Iowa Division of Labor/Occupational Safety and Health Administration. Nothing in this agreement may be used against either party except for the enforcement of its terms and provisions.

#### 5. *REINSTATEMENT (this section may be omitted if adequate front pay is offered)*

- a. Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation, which he has declined/accepted.
- b. Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.
- c. The Respondent agrees to make the complainant whole by payment of back pay less normal payroll deductions. Checks will be made out to the complainant but provided to IOSHA.
- d. Respondent agrees to pay Complainant a lump sum of \$ . Complainant agrees to comply with applicable tax laws requiring the reporting of income. Check[s] shall be made out to the complainant, but mailed to IOSHA.

All agreements utilizing IOSHA's standard settlement agreement must be recorded in the IMIS as "Settled."

IOSHA settlements should generally not be altered beyond the options outlined above. Any changes to the standard IOSHA settlement agreement language, beyond the few options noted above, must be discussed and approved by Legal Staff. Settlement agreements must not contain provisions that prohibit the complainant from engaging in protected activity or from working for other employers in the industry to which the employer belongs. Settlement agreements must not contain provisions which prohibit IDOL's release of the agreement to the general public, except as provided in Ch. 1 section 5.

#### **E. Settlements to which IOSHA is not a Party.**

Employer-employee disputes may also be resolved between the principals themselves, to their mutual benefit, without IOSHA's participation in settlement negotiations. Because voluntary resolution of disputes is desirable in many whistleblower cases, IOSHA's policy is to defer to adequate, privately negotiated settlements. However, settlements reached between the parties must be reviewed and approved to ensure that the terms of the settlement are fair, adequate, reasonable, and consistent with

the purpose and intent of the whistleblower statute and the public interest (See F. below). Approval of the settlement demonstrates IDOL's consent and achieves the consent of all three parties. Investigators should make every effort to explain this process to the parties early in the investigation to ensure they understand IOSHA's involvement in any resolution reached after a complaint has been initiated.

1. In most circumstances, issues are better addressed through an IOSHA agreement, and if the parties are amenable to signing one as well, the IOSHA settlement may incorporate the relevant (approved) parts of the two-party agreement by reference in the IOSHA agreement. This is achieved by inserting the following paragraph in the IOSHA agreement: "Respondent and Complainant have signed a separate agreement encompassing matters not within the Iowa Occupational Safety and Health Administration's (IOSHA's) authority. IOSHA's authority over that agreement is limited to the statute within its authority. Therefore, IOSHA approves and incorporates in this agreement only the terms of the other agreement pertaining to 88.9(3) under which the complaint was filed." These cases must be recorded in the IMIS as "Settled."
2. If the IDOL approves a settlement agreement, it constitutes the final order of the Labor Commissioner and may be enforced in an appropriate state district court according to the provisions of IOSHA's whistleblower statute.
3. The approval letter must include the following statement: "The Iowa Occupational Safety and Health Administration's authority over this agreement is limited to the statute it enforces. Therefore, the Iowa Occupational Safety and Health Administration only approves the terms of the agreement pertaining to 88.9(3)". These cases must be recorded in the IMIS as "Settled – Other."
4. If the parties do not submit their agreement to IOSHA or if IOSHA does not approve the signed agreement, IOSHA may dismiss the complaint. The dismissal shall state that the parties settled the case independently, but that the settlement agreement was not submitted to IOSHA or that the settlement agreement did not meet IOSHA's criteria for approval, as the case may be. The dismissal will not include factual findings. Alternatively, if IOSHA's investigation has already gathered sufficient evidence for IOSHA to conclude that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than the complainant, IOSHA may issue merit findings or continue the investigation. The findings shall note the failure to submit the settlement to IOSHA or IOSHA's decision not to approve the settlement. The determination should be recorded in IMIS as either dismissed or merit, depending on IOSHA's determination.

**F. Criteria by which to Review Private Settlements.**

In order to ensure that settlements are fair, adequate, reasonable, and in the public interest the investigator must carefully review un-redacted settlement agreements in light of the particular circumstances of the case.

1. IOSHA will not approve a provision that states or implies that IOSHA or IDOL is party to a confidentiality agreement.
2. IOSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to or shall prevent or interfere with Complainant’s non-waivable right to engage in any future activities protected under the whistleblower statute administered by IOSHA.”
3. IOSHA will not approve a “gag” provision that restricts the complainant’s ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to prevent, impede or interfere with Complainant’s providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.”
4. IOSHA must ensure that the complainant’s decision to settle is voluntary.
5. If the settlement agreement contains a waiver of future employment, the following factors must be considered and documented in the case file:
  - a. **The breadth of the waiver.** Does the employment waiver effectively prevent the complainant from working in his or her chosen field in the locality where he or she resides? Consideration should include whether the complainant’s skills are readily transferable to other employers or industries. Waivers that more narrowly restrict future employment, for example, to a single employer or its subsidiaries or parent company may generally be less problematic than broad restrictions such as any employers at the same worksite or any companies with which the respondent does business.

The investigator must ask the complainant, “Do you feel that, by entering in to this agreement, your ability to work in your field is restricted?” If the answer is yes, then the follow-up question must be asked, “Do you feel that the monetary payment fairly compensates you for that?” The complainant also should be asked whether he or she believes that there are any other concessions made by the employer in the settlement that, taken together with the monetary payment, fairly compensates for the waiver of employment. The case file must document the complainant’s replies and any discussion thereof.

- b. **The amount of the remuneration.** Does the complainant receive adequate consideration in exchange for the waiver of future employment?
- c. **The strength of the complainant’s case.** How strong is the complainant’s retaliation case, and what are the corresponding risks of litigation? The stronger the case and the more likely a finding of merit, the less acceptable a waiver is, unless very well remunerated. Consultation with Legal Staff may be advisable.
- d. **Complainant’s consent.** IOSHA must ensure that the complainant’s consent to the waiver is knowing and voluntary. The case file must document the complainant’s replies and any discussion thereof.

If the complainant is represented by counsel, the investigator must ask the attorney if he or she has discussed this provision with the complainant.

If the complainant is not represented, the investigator must ask the complainant if he or she understands the waiver and if he or she accepted it voluntarily. Particular attention should be paid to whether or not there is other inducement—either positive or negative—that is not specified in the agreement itself, for example, if threats were made in order to persuade the complainant to agree; or if additional monies or forgiveness of debt were promised as an additional incentive.

- e. **Other relevant factors.** Any other relevant factors in the particular case must also be considered. For example, does the employee intend to leave his or her profession, to relocate, to pursue other employment opportunities, or to retire? Has he or she already found other employment that is not affected by the waiver? In such circumstances, the employee may reasonably choose to forgo the option of reemployment in exchange for a monetary settlement.

**V. Bilateral Agreements (Formerly Called Unilateral Agreements).**

- A.** *A bilateral settlement* is one between the IDOL and a respondent—*without the complainant's consent*—to resolve a complaint filed under 88.9(3). It is an acceptable remedy to be used only under the following conditions:
1. The settlement is reasonable in light of the percentage of back pay and compensation for out-of-pocket damages offered, the reinstatement offered, and the merits of the case. That is, the higher the chance of prevailing in litigation, the higher the percentage of make-whole relief that should be offered. Although the desired goal is obtaining reinstatement and all of the back pay and out-of-pocket compensatory damages, the give and take of settlement negotiations may result in less than complete relief.
  2. The complainant refuses to accept the settlement offer. (The case file should fully set out the complainant's objections in the discussion of the settlement in order to have that information available when the case is reviewed by management.)
  3. The complainant seeks punitive damages or damages for pain and suffering (apart from medical expenses); attempts to resolve these demands fail; and the final offer from the respondent is reasonable to IOSHA.
- B.** When presenting the proposed agreement to the complainant, the investigator should explain that there are significant delays and potential risks associated with litigation and that IDOL may settle the case without the complainant's participation. This is also the time to explain that, once settled, the case cannot be appealed, as the settlement resolves the case.
- C.** All potential bilateral settlement agreements must be reviewed and approved in writing by the IA. The bilateral settlement is then signed by both the respondent and the IA. Once settled, the case is entered in IMIS as "settled."
- D.** Documentation and implementation
1. Although each agreement will, by necessity, be unique in its details, in settlements negotiated by IOSHA, the general format and wording of the standard IOSHA agreement should be used.
  2. Investigators must document in the file the rationale for the restitution obtained. If the settlement falls short of a full remedy, the justification must be explained.
  3. Back pay computations must be included in the case file, with explanations of calculating methods and relevant circumstances, as necessary.

4. The interest rate used in computing a monetary settlement will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. Compound interest may be calculated in Microsoft Excel using the Future Value (FV) function. See Ch. 6 II. E.
5. Any check from the employer must be sent to the complainant even if he or she did not agree with the settlement. If the complainant returns the check, IOSHA shall record this fact and return it to the employer.

**VI. Enforcement of Settlements.**

If an employer fails to comply with a settlement in an 88.9(3) IOSHA discrimination case, the investigator shall refer the case to Legal Staff for litigation and the complainant and respondent shall be so informed.