

CHAPTER III

COMPLAINT AND REFERRAL POLICIES AND PROCEDURES

I) **Complaint**

A) **Legal Basis.** KRS 338.121 states, “Any employee, or representative of employees, who believes that a violation of an occupational safety and health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the commissioner of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except upon request of the person giving such notice his name and names of individual employees referred to therein shall not appear in such copy.”

B) **Definitions.**

- i) **Complaint.** Notice of an alleged safety or health hazard over which KY OSH has jurisdiction. There are two (2) types of complaints: formal and non-formal.
 - (a) *Formal Complaint.* Complaint made by a current employee or a representative of employees that:
 - (1) Asserts that an imminent danger, a violation of KRS Chapter 338, or a violation of a standard or regulation exposes employees to potential harm in the workplace;
 - (2) Is reduced to writing or submitted on an OSHA-7; and
 - (3) Is signed by at least one (1) current employee or employee representative.
 - (b) *Non-formal Complaint.* A complaint alleging a safety or health violation(s) that does not meet the requirements of a formal complaint and does not come from a referral.
- ii) **Inspection.** An onsite examination of an employer’s worksite conducted by a KY OSH compliance officer.
- iii) **Letter Complaint / Referral Inquiry.** A process conducted in response to a complaint or a referral that does not meet one (1) of the identified inspection criteria. It does not involve an onsite inspection of the workplace, but rather KY OSH notifies the employer of the alleged hazard(s) or violation(s) by telephone, fax, email, or letter if necessary. KY OSH requests the employer provide a response and KY OSH notifies the complainant of that response via appropriate means.
- iv) **Electronic Complaint.** A complaint submitted via OSHA’s public website and forwarded to the KY OSH program. KY OSH considers electronic complaints in which the complainant checks the “*This constitutes my electronic signature*” box.
- v) **Permanently Disabling Injury or Illness.** An injury or illness that results in permanent disability or an illness that is chronic or irreversible.

vi) Referral. An allegation of a potential workplace hazard or violation received from:

- (a) CSHO: information based on the direct observation of a CSHO;
- (b) Safety and health agency: from sources including, but not limited to NIOSH, other state programs, OSHA, consultation, state or local health departments, as well as safety and/or health professionals in other State or Federal agencies;
- (c) Discrimination complaint: made by a discrimination investigator when an employee alleges retaliation for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, or engaging in other protected activities related to occupational safety or health;
- (d) Other government agency: made by other Federal, State, or local government agencies or their employees, including local police and fire departments;
- (e) Media: news reported in the media or information reported directly to KY OSH by a media source;
- (f) Employer / Employer Representative: reportable incidents other than fatalities; or
- (g) The public.

vii) Representative of Employees. Any of the following:

- (a) An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization.
- (b) An attorney acting for an employee.
- (c) Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, as well as government officials or nonprofit groups and organizations.

NOTE. KY OSH ascertains the representative capacity of the person filing complaints on behalf of another unless it is already clear. In general, the affected employee requested or approved filing of the complaint on his or her behalf.

viii) Employee. For purposes of submitting an inspection complaint, an employee is:

- (a) A current employee of the employer about whose establishment the complaint is made; or
- (b) A current employee of another employer when that employee is working at or near some other employer's workplace and the employee is exposed to hazards of that workplace.

ix) Invalid Complaint. An invalid complaint is a request for a KY OSH inspection of an alleged hazard over which KY OSH does not have jurisdiction or is not covered by a KY OSH standard, regulation, or KRS 338.031.

C) Criteria for Conducting a Complaint Inspection. An inspection is normally warranted if at least one (1) of the conditions below is met:

- i) A formal complaint is submitted and there are reasonable grounds to believe that a violation of the law, standard, or regulation exists that exposes employees to physical harm, imminent danger, serious injury / illness, or death.
- ii) The complaint alleges that physical harm occurred as a result of a hazard(s) and there is reason to believe the hazard(s) or related hazard(s) still exist.
- iii) The complaint identifies an establishment or an alleged hazard covered by an emphasis program.
- iv) The firm or establishment has a history of egregious, willful, or failure to abate citations within the last five (5) years. The director or designee may determine not to inspect a facility when the firm or establishment provides evidence of abatement and implements programs to prevent a recurrence of a hazard(s).
- v) When an inspection is assigned or begins at an establishment and a complaint or referral is received that would normally be investigated by letter, the program manager may assign that complaint or referral as a companion complaint.
- vi) The information received in a signed, written complaint from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a potentially serious safety or health violation.
- vii) The information alleges an imminent danger.
- viii) The employer does not provide an adequate response, or the individual who provided the original information provides evidence demonstrating the employer's response is false or does not adequately address the hazard(s) and is descriptive of a current, ongoing, or recurring hazardous condition(s).
- ix) The establishment has a history of egregious, willful, failure to abate, or repeated citations during the past three (3) years or is an establishment or related establishment in the Severe Violator Enforcement Program. The program manager may determine that an inspection is not necessary if the employer submits adequate documentation demonstrating abatement and that programs are implemented to prevent a recurrence of the hazard(s).
- x) A discrimination investigator requests an inspection in response to an employee's allegation of discrimination for refusing to perform an allegedly dangerous job or task or engaging in other protected activities related to occupational safety or health.

NOTE. The program manager has broad discretion in determining whether to conduct an inspection pursuant to receipt of a complaint.

D) Criteria for Conducting Letter Complaint / Referral Inquiry. A letter complaint is a non-formal complaint that does not typically meet the complaint inspection criteria. A Letter

Complaint Inquiry differs from an Inspection in that KY OSH advises the employer of the alleged hazard(s) by letter and the employer must provide a written response.

- i) Sources of letter complaints include, but are not limited to, the public and former employees. A program manager may decide to conduct an on-site inspection following receipt of a letter complaint. However, a program manager may schedule an on-site inspection when:
 - (a) The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis program.
 - (b) The employer fails to provide an adequate response.
 - (c) The firm or establishment has a history of egregious, willful, or failure to abate citations within the last five (5) years. The director may determine that an inspection is not necessary if the employer submitted adequate documentation demonstrating abatement and that programs are implemented to prevent a recurrence of the hazard(s).
 - (d) When an inspection is scheduled or underway at an establishment and a complaint is received that would normally be investigated by letter, that complaint may, at the program manager's discretion, be included in the existing inspection.
 - (e) The complaint alleges an imminent danger condition.

E) Procedures for receiving a complaint by telephone.

- i) To the extent feasible, the person taking the complaint must:
 - (a) Determine if the complainant is a current employee or an employee representative of a current employee;
 - (b) Explain the complaint process, and when appropriate, the concepts of a Letter Complaint Inquiry and complaint inspection, as well as the relative advantages of each;
 - (c) Explain to the caller of his or her right to file a complaint in writing if he/she wishes an inspection and the requirements that must be met for a complaint inspection to be initiated;
 - (d) Determine the exact nature of the alleged hazard and the basis of the complainant's knowledge;
 - (e) Determine if the complaint items are apparent violations of KY OSH law, standards, or regulations;
 - (f) Inform the complainant(s) of his or her right to confidentiality in accordance with 803 KAR 2:090 Section 1(1);
 - (g) Explain the discrimination protection provided by KRS 338.121(3) to the complainant.

F) **Electronic Complaints.** OSHA automatically forwards electronic complaints submitted via the OSHA public website to the Kentucky OSH Program.

- i) When Kentucky receives an email complaint and the signature box is not checked, a KY OSH representative contacts the complainant to determine if he/she is willing to file a formal complaint, including a signature. If so, KY OSH mails the complainant a complaint form or instructs the complainant how to obtain the form on the cabinet's website. The complainant must provide sufficient contact information such as phone number, email address, and mailing address to allow KY OSH to verify that he/she is a current employee or an authorized employee representative for processing a formal complaint. When the complainant states that he/she is no longer a current employee or an authorized employee representative, KY OSH processes the complaint as a non-formal complaint. When the complainant does not provide sufficient contact information, or cannot be contacted, KY OSH processes the complaint as a non-formal complaint.
- ii) Complete an OSHA-7 for all complaint information received. In order to facilitate the tracking of electronic complaints, enter the following code in the Optional Information field:

N-11-LOGXXXXXX

- (a) Where N-11 indicates that the complaint was filed electronically; and
 - (b) The digits following LOG are the unique complaint ID / log numbers assigned to the electronic complaint. The log number may vary and does not have to be exactly six digits. In entering the code, there is no space between the word LOG and the digits.
 - iii) KY OSH considers electronic complaints when a current employee provides his or her name and checked the "*This constitutes my electronic signature*" box as a formal complaint and processes it accordingly.
 - iv) KY OSH maintains all complaint-related material received electronically and date stamps the submitted material. When dates are not the same, the program manager determines the appropriate date for the incoming material.
- G) **Verifying Complaints.** When KY OSH receives a complaint, regardless of type, the program manager contacts the complainant to ascertain if he/she filed the complaint. When a KY OSH employee has previous contact with the complainant, this step is not necessary. When KY OSH receives a non-formal complaint, the program manager contacts the complainant to determine if he/she is willing to file a formal complaint and to ensure that the complainant is provided a complaint form or can use the form on the cabinet's website.
- H) **Formal Complaints.** To constitute a valid inspection or letter complaint, the notice must allege a hazard exists in the workplace or that a law, standard, or regulation is, or has recently been, violated.
- i) When the notice is vague or unsubstantiated and the program manager is unable to make a reasonable judgment of the workplace hazard, there is no valid complaint. In such a case,

every reasonable attempt must be made to contact the person giving the notice to obtain more specific information. The program manager must document these efforts.

- ii) When, as a result of a recent inspection, or on the basis of other objective evidence, the program manager determines a hazard(s) subject of the notice is not present, such notice is not a valid complaint.
- iii) Complaints not under KY OSH jurisdiction are not valid. The program manager will promptly forward such complaints to the OSH Federal-State Coordinator.

I) Non-employee Complaints.

- i) Oral complaint. When KY OSH receives a non-employee oral complaint, KY OSH staff contact the non-employee and advises her/him of KRS 338.121 and inquires if the individual can contact a current employee or employee representative to file a written complaint. This is not necessary when the nature of the hazard is imminent.
- ii) Written complaint. When KY OSH receives a non-employee written complaint, KY OSH staff contacts the non-employee and advises her/him of KRS 338.121 and inquires if the individual can contact a current employee or employee representative to file a written complaint. This is not necessary when the nature of the hazard is imminent.

NOTE. When the non-employee cannot contact a current employee or employee representative to file a formal complaint, KY OSH initiates an inquiry in an effort to develop probable cause that could lead to an onsite inspection. When the inquiry proves to be unsuccessful, KY OSH opens a non-formal letter complaint inquiry.

J) Discrimination Complaints.

- i) KY OSH advises the complainant of KRS 338.121(3) protection against discrimination and the procedure to file a complaint.
- ii) Safety and health complaints filed by former employees who allege they were terminated for exercising their rights under the law are not valid OSH complaints and are transferred to the appropriate discrimination personnel for investigation.

K) Complaint Inspection.

- i) Legal Basis. A complaint inspection is an inspection initiated primarily as a result of a complaint but is not limited to matters in the complaint.
 - (a) 803 KAR 2:090 Section 1(2) establishes that "If upon receipt of such notification the commissioner determines that the complaint meets the requirements set forth in subsection (1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the complaint."

ii) Procedures for a Complaint / Referral.

(a) *Inspection*

- (1) The program manager evaluates each complaint and referral, as well as other available information, and exercises professional judgment in deciding if reasonable grounds exist to believe a violation or hazard is present, or may be present.
 - a. When no reasonable grounds exist to believe a violation or hazard exists, the program manager may decide no inspection is warranted.
 - b. The program manager may determine not to inspect when she/he has evidence the condition complained of is being, or has been, abated.
- (2) When necessary, the program manager may contact the complainant to obtain additional details or for clarification of issues raised in the complaint or referral.
- (3) The CSHO conducting the inspection contacts the complainant or employee representative, or at least makes a reasonable attempt to do so.
 - a. The CSHO must make every reasonable attempt to interview the complainant concerning conditions alleged on the complaint and advise the complainant of inspection procedures and results.
 - b. The CSHO must document all attempts to contact the complainant.
 - c. After an inspection, the program manager sends the complainant a letter that describes the results of the inspection and specifically addresses each complaint item.
 - d. The letter also addresses the complainant's appeal rights and includes any citation issued.
- (4) When the program manager determines an inspection is warranted, the CSHO opens an inspection.
 - a. Complaints or referrals alleging imminent danger hazards must be opened within one (1) working day after receipt.
 - b. Complaints or referrals alleging serious hazards must be opened within 30 days of receipt.
 - c. Complaints or referrals alleging non-serious hazards must be opened within 120 days of receipt.

(b) *No inspection*

- (1) An inspection is not assigned when the program manager receives a formal written complaint or referral that is signed by a current employee or employee representative,

and reasonable grounds do not exist to believe that a violation or hazardous condition exists.

- a. In such situations, the program manager notifies the complainant in writing of KY OSH's decision not to inspect, the reasoning for the determination, and the 803 KAR 2:090 appeal rights.
 - b. A copy of the notification must be included in the casefile.
- (2) When the program manager receives a non-formal complaint or referral, he/she notifies the individual providing the information in writing of KY OSH's intent not to conduct an inspection.
- a. The letter must address the reasoning for the determination and the 803 KAR 2:090 appeal rights.
 - b. A copy of the notification must be included in the casefile.
- (3) When an employee or a representative of employees submits a non-formal complaint or referral that does not meet any of the inspection criteria, the program manager may give the complainant five (5) working days to make the complaint formal.
- a. The complainant may come to the office and sign the complaint, mail, email, or fax a signed complaint to KY OSH. Alternatively, KY OSH may mail, email, or fax an OSHA-7 to the complainant.
 - b. When the complaint is not formalized after five (5) working days, KY OSH proceeds with the Letter Complaint / Referral Inquiry process.
 - c. KY OSH must document all attempts to formalize the complaint.

L) Procedures for a Letter Complaint / Referral Inquiry.

- i) When the complaint or referral does not meet the criteria for initiating an onsite inspection, KY OSH conducts a letter complaint / referral. KY OSH contacts the employer by certified letter, return receipt requested, to notify it of the complaint or referral and its allegation(s). The notice contains a letter, completed OSHA-7, and a Certificate of Posting.
- ii) KY OSH's letter advises the employer it must investigate and determine if the complaint or referral allegations are valid.
 - (a) KY OSH advises the employer that a response is due within ten (10) working days from receipt of the notice.
 - (b) KY OSH requires the posting/sharing of information with employees, employee representative(s) and/or the safety committee.

- iii) Although the employer must respond within the established timeframe, it may not be able to complete abatement action. KY OSH instructs the employer on the needed information to answer the letter and encourages the employer to respond by fax or email.
- iv) Employers are encouraged to:
 - (a) Immediately investigate and determine if the complaint or referral information is valid and make any necessary corrections or modifications.
 - (b) Advise KY OSH in writing via email or fax within ten (10) working days of the results of the investigation into the alleged complaint or referral.
 - (1) At the program manager's discretion, the response time may be longer or shorter than ten (10) working days, depending on the circumstances.
 - (2) The employer may not be able to complete abatement action during that time, but is encouraged to do so.
 - (c) Provide KY OSH with documentation of the findings, including any applicable measurements, monitoring and sampling results, photographs, or videos the employer believes would be helpful, as well as a description of any corrective action the employer took or is taking.
 - (d) Post a copy of the letter from KY OSH in a location readily accessible for review by all employees.
 - (e) Return to KY OSH a copy of the signed Certificate of Posting.
 - (f) When the facility has a recognized employee union or safety and health committee, provide it a copy of KY OSH's letter and the employer's response.
- v) When KY OSH has not received the employer response or has received an inadequate employer response after ten (10) working days, the program manager may contact the employer before assigning an inspection. The contact must be documented in the casefile.
- vi) An inspection is assigned when the employer provides no response or an inadequate response, or the program manager determines from other information that the condition has not been or is not being corrected.
- vii) The program manager advises the complainant of the employer's response, the complainant's rights to dispute the response, and if the alleged hazard persists, the complainant's right to request an inspection.
- viii) The program manager does not normally assign an inspection when KY OSH receives an adequate response from the employer and the complainant does not dispute or object to the response.

- ix) When the complainant is a current employee or a representative of employees who wishes to dispute the employer's response, the complainant must submit her / his written and signed disagreement.
 - (a) When the complainant disagreement is written and signed, it is handled as a formal complaint.
 - (b) When the employee disagreement is not written and signed, the program manager has discretion in situations where the information does not merit an inspection.
 - (1) In such situations, the program manager notifies the complainant in writing of KY OSH's intent not to conduct an inspection and the reasoning for the determination.
 - (2) KY OSH will retain a copy of the documentation in the casefile.
- x) When the program manager receives a written and signed complaint after initiation of the complaint letter process, she / he determines if the alleged hazard is likely to exist based on the employer's response or by contacting the complainant and may assign an onsite inspection without further delay regardless of the letter investigation.
- xi) The program manager cannot close the complaint until KY OSH verifies the hazard is abated.
- xii) The program manager must document in the casefile the justification for not conducting a letter inspection.

M) Identity of Complainant.

- i) KRS 338.121(1) gives the complainant the right to request KY OSH withhold from the employer the complainant's name and the names of employees referred to in the complaint. No information is given to the employer that allows the employer to identify the complainant.
- ii) Discrimination Protection.
 - (a) KRS 338.121(2) provides protection for employees who believe they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that she/he has been discharged or otherwise retaliated against by any person as a result of engaging in such activities may file a discrimination complaint. The complaint must be filed within 120 days of the alleged retaliation.
 - (b) KY OSH staff should always advise complainants of KRS 338.121(2) rights and protections upon initial contact and whenever appropriate in subsequent communications.

N) Inspection complaint procedures. In general, CSHOs follow the procedures in Chapter IV when conducting complaint inspections.

- i) During the opening conference, the CSHO must give a copy of the complaint to the employer against whom the complaint is filed.
- ii) In the case of a multi-employer worksite, the CSHO provides a copy of the complaint to the host employer and/or general contractor.
- iii) The CSHO may provide a copy of the complaint to each subcontractor whose employees may be exposed to the alleged hazard.