

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 not 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 subject to KY OSH jurisdiction. There are two (2) types of complaints: formal and non-formal.
 - (a) *Formal Complaint.* A complaint made by a current employee or a representative authorized by the 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 physical harm in their workplace;
 - (2) Is reduced to writing;
 - (3) States the reason requesting the inspection with reasonable particularity;
 - (4) States the date the violation is alleged to have occurred; and
 - (5) Is signed by an employee or the representative authorized by the employees.
 - (b) *Non-formal Complaint.* A complaint alleging a safety or health violation(s) that does not meet the requirements of a formal complaint.
- ii) **Inspection.** An onsite examination of a worksite conducted by a KY OSH compliance officer.
- iii) **Letter Inquiry.** A process conducted in response to a complaint or a referral that does not meet inspection criteria.
- iv) **Electronic Complaint.** A complaint submitted via cabinet or OSHA website.
- v) **Permanently Disabling Injury or Illness.** An injury or illness that results in permanent disability; or an injury, or illness, that is acute, chronic, or irreversible.
- vi) **Referral.** An allegation of a potential workplace hazard or violation received from:
 - (a) Direct CSHO observation;

- (b) Safety and health professionals;
- (c) Discrimination investigator;
- (d) Federal, State, or local government agencies or their employees;
- (e) Information reported in the media or reported directly to KY OSH by a media source;
- (f) Employer, employer representative, employee, or employee representative reported incident(s); or
- (g) The public.
- (h) Representative of Employees. An representative authorized by the employees.

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

- vii) Employee. For purposes of submitting a complaint:
 - (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 a hazard(s) of that workplace.
 - viii) Invalid Complaint. An invalid complaint is a request for a KY OSH inspection of an alleged hazard over which:
 - (a) KY OSH does not have jurisdiction; or
 - (b) Does not assert an imminent danger, a violation of KRS 338.031, or a violation of a standard, or regulation that exposes employees to physical harm in their workplace;
 - (c) Is not reduced to writing; or
 - (d) Does not states the reason requesting the inspection with reasonable particularity, or
 - (e) Does not state the date the alleged violation occurred, or
 - (f) Is not signed by an employee or representative authorized by the employees.
- C) **Criteria for Conducting an Inspection.** An inspection is normally warranted if at least one (1) of the conditions below are met.
- i) A formal complaint is submitted.

- ii) 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 or referral.
- iii) The information alleges imminent danger(s) at the employee's workplace .
- iv) The employer does not provide an adequate response, or evidence demonstrates the employer's response is false or does not adequately address the hazard(s).
- v) 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 Director or designee 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).
- vi) A discrimination investigator makes a referral in response to an employee's allegation of discrimination for refusing to perform an allegedly dangerous task or engaging in other protected activity.

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 Inquiry.** A letter inquiry differs from an inspection in that KY OSH informs the employer of the alleged hazard(s) by written format and the employer provides a written response. A letter inquiry may be initiated when an inspection is not initiated.
- E) **Procedures for receiving a complaint by telephone.** KY OSH does not accept a complaint by telephone. KY OSH informs the caller of her / his right to file a complaint in writing, the requirements that must be met for an inspection to be initiated, and the discrimination protection established by KRS 338.121.
- F) **Electronic Complaints.** KY OSH receives complaints from the cabinet website and OSHA's website.
 - i) When KY OSH receives an email complaint and the signature box is not checked, KY OSH contacts the complainant to determine if he / she is willing to file a formal complaint.
 - ii) If so, KY OSH informs the complainant how to submit a complaint on the cabinet's website.
 - iii) The complainant must provide sufficient contact information to allow KY OSH to verify that he / she is a current employee, or a representative authorized by the employees. The complaint may be invalidated if sufficient contact information is not provided.
 - iv) When the complainant states that he / she is not a current employee or a representative authorized by the employees, KY OSH may invalidate the complaint or process the complaint as non-formal.
 - v) When the complainant cannot be contacted, KY OSH may invalidate the complaint.

- vi) Complete an OSHA-7 for all complaint information received. To facilitate the tracking of electronic complaints, enter the following code in the Optional Information field:

N-20-LOGXXXXXX

- (a) Where N-20 indicates 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.
- vii) KY OSH considers electronic complaints formal when they meet the formal complaint definition articulated in Section B) Definitions of this chapter and processes it accordingly.
 - viii) KY OSH maintains all electronic complaint-related material.
- G) Verifying Complaints.** When KY OSH receives a complaint, KY OSH 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.
- H) Formal Complaints.** To constitute a valid inspection or letter inquiry, the notice must meet the formal complaint definition articulated in Section B) Definitions of this chapter allege a hazard exists in the workplace or that a law, standard, or regulation is, or was, recently violated.
- i) When the notice does not meet the formal complaint definition articulated in Section B) Definitions of this chapter, there is no valid complaint. In such a case, attempt(s) must be made to contact the complainant to obtain more specific information. The program coordinator must document these efforts in the casefile.
 - ii) When, as a result of a recent inspection, or on the basis of other objective evidence, the program coordinator determines a hazard(s) subject of the notice is not present, there is no valid complaint.
 - iii) If appropriate, the program coordinator promptly forwards complaints not subject to KY OSH jurisdiction to the OSH Federal-State Coordinator.
- I) Non-employee Complaints.**
- i) Oral complaint. KY OSH staff contact the non-employee and advise her / him of KRS 338.121 and inquires if the individual can contact a current employee or employee representative to file a written complaint.
 - ii) Written complaint. KY OSH staff contact the non-employee and advise her / him of KRS 338.121 and inquires if the individual can contact a current employee or employee representative to file a written complaint.
- 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 termination for exercising their rights are not valid OSH complaints and are transferred to the appropriate discrimination personnel.

K) **Inspection.** 803 KAR 2:090 Section 2(1) states “Inspections conducted pursuant to KRS 338.121 shall not be limited to matters referred to in the complaint.”

i) Procedures.

(a) *Inspection*

- (1) The program coordinator evaluates each complaint and referral, as well as other available information, and exercises professional judgment deciding if reasonable grounds exist to believe a violation or hazard is, or may be, present.
 - a. When no reasonable grounds exist to believe a violation or hazard exist, the program coordinator may decide an inspection is not warranted.
 - b. The program coordinator may determine no action is warranted when she / he has evidence the condition is being, or has been, abated.
- (2) When necessary, the program coordinator contacts the complainant to obtain additional details or clarification.
- (3) When an inspection is conducted, the CSHO contacts the complainant or employee representative.
 - a. The CSHO must make every reasonable attempt to interview the complainant concerning conditions alleged in the complaint and advise the complainant of inspection procedures.
 - b. The CSHO must document in the casefile all attempts to contact the complainant.
 - c. After an inspection, KY OSH 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 must be opened within one (1) working day after receipt.

- b. Complaints or referrals alleging a serious hazard(s) must be opened within 30 days of receipt.
- c. Complaints or referrals alleging a non-serious hazard(s) must be opened within 90 days of receipt.

(b) *No inspection*

- (1) An inspection is not assigned when the program coordinator receives a formal complaint or referral and reasonable grounds do not exist to believe that a violation or hazardous condition exists.
 - a. In such situations, the program coordinator notifies the complainant in writing of KY OSH decision not to inspect, the reasoning for the determination, and 803 KAR 2:090 appeal rights.
 - b. A copy of the notification must be included in the casefile.
- (2) When the program coordinator receives a non-formal complaint, he / she notifies the individual providing the information in writing of KY OSH's intent not to inspect.
 - a. The letter must address the reason for the determination and 803 KAR 2:090 appeal rights.
 - b. A copy of the notification must be included in the casefile.
- (3) When an employee or representative authorized by the employees submits a non-formal complaint that does not meet inspection criteria, the program coordinator may give the complainant ten (10) working days to make the complaint formal.
 - a. When the complaint is not formalized after ten (10) working days, KY OSH may invalidate the complaint.
 - b. KY OSH must document all attempts to formalize the complaint.

L) Procedures for a Letter Inquiry.

- i) KY OSH contacts the employer to notify it of the allegation(s). The notice contains a letter identifying the hazard(s) and a Certificate of Posting.
- ii) The letter informs the employer it must investigate and determine if the allegation is 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 and a representative authorized by the employees.

- 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 email.
- iv) Employers are encouraged to:
 - (a) Immediately investigate and determine if the allegation(s) is valid and make any necessary correction(s) or modification(s).
 - (b) Inform KY OSH via email within ten (10) working days of the results of the investigation into the allegation. At the program coordinator's discretion, the response time may be longer or shorter than ten (10) working days.
 - (c) Provide KY OSH documentation of the findings, including applicable measurements, monitoring and sampling results, photographs, or videos the employer believes helpful, as well as a description of 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 a copy of the signed Certificate of Posting to KY OSH.
 - (f) When the facility has a recognized employee union and/or safety and health committee, provide it a copy of KY OSH's letter and the employer's response to the representative authorized by the employees and/or safety and health committee.
- v) When KY OSH has not received the employer response or received an inadequate response, the program coordinator may contact the employer before referring for an inspection. The contact must be documented in the casefile.
- vi) An inspection may be assigned when the employer provides no response or an inadequate response, or the program coordinator determines the condition has not been, or is not being, corrected.
- vii) The program coordinator informs the complainant the employer responded, the complainant's rights to dispute the response, and the complaint process if the alleged hazard persists.
- viii) When the complainant is a current employee or a representative authorized by the employees who wishes to dispute the employer's response, the complainant must submit written and signed disagreement.
 - (a) When the complainant disagreement is written and signed, it may be handled as a formal complaint if it meets the formal complaint definition articulated in Section B) Definitions of this chapter.
 - (b) When the employee disagreement is not written or signed, KY OSH exercises discretion in situations where the information does not merit inspection.

- (1) In such situations, the program coordinator notifies the complainant in writing of KY OSH intent not to conduct an inspection and the reason for the determination.
 - (2) KY OSH retains a copy of the documentation in the casefile.
- ix) When the program coordinator receives a formal complaint after initiation of the letter inquiry 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 refer for an inspection without further delay regardless of the letter inquiry status.
 - x) The program coordinator cannot close the complaint until KY OSH verifies the hazard(s) is abated or determines the allegation was not valid.
 - xi) The program coordinator documents in the casefile the justification for not conducting a letter inquiry.

M) Identity of Complainant.

- i) KRS 338.121(1) establishes the complainant's 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 protected activities related to workplace safety or health.
 - (b) 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.
 - (c) The complaint must be filed within 30 days of the alleged retaliation.
 - (d) KY OSH staff informs complainants of KRS 338.121(2) rights and protections upon initial contact and whenever appropriate in subsequent communications.

N) Inspection complaint procedures. In general, Chapter IV procedures are followed when conducting complaint inspections.

- i) During the opening conference, the CSHO provides 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 also 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.

II) **Referrals for Criminal Prosecution**

- i) The Director consults with the Commissioner or designee and the Department of Workplace Standards Legal Division (DWSLD) when considering a case for criminal referral.
- ii) Criminal referrals are normally made to the Attorney General and local prosecutor. Referrals are generally limited to fatality and fatality-related cases with a willful serious, failure to abate, or repeat serious violation directly related to a fatality. Other cases may be recommended for referral as the Commissioner or designee deem appropriate.
- iii) The DWSLD notifies the Commissioner or designee in writing if the DWSLD identifies a case that merits consideration for referral.
- iv) The Commissioner or designee consults with the DWSLD when the DWSLD recommends a case for criminal prosecution to the Commissioner or designee.
- v) The DWSLD drafts a letter to the Attorney General and local prosecutor recommending criminal prosecution. The letter is reviewed and approved by the Commissioner or designee.
- vi) The Commissioner or designee makes the final determination and referral.
- vii) The Commissioner or designee generally refers a case to the Attorney General and local prosecutor for criminal prosecution within thirty (30) days of citation issuance or other appropriate time.
- viii) In the event of a referral to the Attorney General and local prosecutor, and at the appropriate time, the Commissioner or designee notifies the next-of-kin in writing of the referral.
- ix) CSHOs can bring the issue of a potential criminal referral to the attention of her / his supervisor at any time during the inspection and review process. The supervisor forwards the information to the Program Manager who in turn forwards the information to the Director.