Investigating a Complaint
SOP# 500

Employment Discrimination Bureau
North Carolina Department of Labor

Procedure approved by: Tiffany Lathan, Bureau Chief

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STANDARD OPERATING PROCEDURE MANUAL

1. PURPOSE and SCOPE

1.1. Purpose

This SOP establishes the procedures for conducting a Retaliatory Employment Discrimination Act (REDA) investigation. Though it is impossible to cover all aspects of a thorough investigation as the vast diversity of cases and fact patterns make it impossible to address every possible scenario, this procedure has the following goal(s):

- To ensure consistent investigations among all investigators;
- To ensure the gathering of all necessary evidence via interviews and evidence collection;
- To ensure the proper documentation of all evidence and investigative activities.

1.2. Scope

This SOP outlines the necessary steps involved throughout the investigative process from case assignment through the collection of all evidence. This includes the opening conversations with the parties, documentation of investigative activities, gathering documentary evidence, conducting interviews with the parties and witnesses, and documenting case information in the Oracle database. This SOP does not discuss the weighing of the evidence, the drafting of a report, or the closing of a case investigation. Refer to SOP#'s 900, 1000, and 1100 respectively for those matters. For Occupational Safety & Health (OSH) cases, also refer to the OSH Discrimination Manual for specific OSH procedures.

1.3. Regulations

The following statutes, rules and/or codes must be followed while performing this SOP (clink the links for the most up-to-date rules and laws):

1.3.1. 13 NCAC 19.0401;

1.3.2. 13 NCAC 19.0402;

1.3.3. Article 21 of NCGS 95 (NCGS §95-240, et al); and

1.3.4. Department of Labor (DOL) Record Retention Policy

2. PERSONNEL RESPONSIBILITIES

The following is a list of people who participate in the procedure and the overall responsibilities of each role.

Role	Responsibilities
Investigator	• Preserve all written and electronic correspondences with the parties in the file; • Preserve all evidence in the file; • Document all case activity in the activity log; • Gather all appropriate, relevant documentary and testimonial evidence to address the 4 elements of REDA, Complainant's allegations, and Respondent's defenses; • Thoroughly document testimonial evidence; • Issue subpoenas when necessary; • Discuss settlement; • Enter case-related information into Oracle.

3. HEALTH AND SAFETY ISSUES

Refer to the Employee Safety and Health Program Policies, the Employee Safety and Health Manual, and the Employee Safety Rules on the DOL Intranet for information related to safety matters affecting EDB personnel. For information related to the Americans with Disabilities Act, refer to the ADA Checklist on the Intranet as well. To access these policies and checklists, click on the links above or visit the DOL Intranet Safety and Health Program and the EDB Standard Operating Procedures pages.

4. PROCEDURE

4.1. Trigger

This procedure is triggered with the assignment of a case file to an investigator.

4.2. Primary Procedure

4.2.1. **Assign the case**: Each investigator must pull a new case from the file cabinet and immediately assign the case to him/herself in the Oracle Database. Refer to Exhibit Oracle for screenshot of the Oracle entry.

4.2.2. **Review the case file**: The investigator should review the case file, including all documentation submitted by both parties. At the time of assignment, the file usually

includes a Complainant Questionnaire and Respondent's Position Statement, which is the employer's response to the allegations.

4.2.3. **Review for Administrative Closure:** Review of the file should include a cursory jurisdictional and timeliness review to ensure the case should be open. Refer to SOP# 400 for Administrative Closure when closing the case file for lack of jurisdiction or timeliness.

a. A complaint is untimely if the complaint is filed with the DOL more than 180 days after the alleged adverse employment action. No tolling is permitted, though EDB may accept a complaint on the following business day, should the DOL not be open on the 180th day. If the 180-day deadline has not been met, the case will be administratively closed.

b. Jurisdiction is lacking if the alleged protected activity clearly does not fall under REDA. For instance, an alleged safety complaint may fall under REDA, so the case should be investigated regarding the protected activity and not closed administratively. On the other hand, an alleged racial discrimination complaint obviously would not be covered by REDA, so the case would be administratively closed. Another example of an administrative closure due to lack of jurisdiction would be when it is determined that the employee worked for an employer in South Carolina.

4.2.4. **Complete REDA Case History Form:** The investigator should fill out the REDA Case History data sheet located in the first right section of the case file. The investigator should research in Oracle whether any previous complaints have been filed by the Complainant or against Respondent and indicate such information on the form.

4.2.5. **Create Activity Log:** The investigator must begin an activity log, where case activities (such as phone calls made and received) will be documented. The activity log shall be typed and placed in the case file. Refer to Exhibit 500-4 for a sample log. Each entry in the log shall contain the following information at a minimum:

a. Date and time of each call;

b. The name of person the investigator spoke with;

c. A thorough description of the conversation. If the investigator keeps notes in a separate document during an interview (such as interview notes or a memo to file), the document should be referenced in the activity log.

4.2.6. **Retain all Written Communications:** In addition to documenting all conversations in the activity log, the investigator must retain a copy of all written or email communications with the parties and/or witnesses in the file. All faxed or mailed communications to the parties or witnesses must be on DOL letterhead, and emails must be sent from the investigator's work email account. Mail received by the DOL must be date stamped.

4.2.7. **Contact Complainant / Conduct Opening Conference:**

a. The initial contact with the Complainant shall be within 20 days of case assignment.

b. The investigator should always attempt to contact the Complainant first, unless certain facts require contact with the Respondent or a witness first. If the Complainant has an attorney representation letter on file, the investigator shall contact the attorney rather than the Complainant. Contact with a party directly without the attorney's knowledge is generally impermissible. (The attorney will set up a time for the investigator to speak with the Complainant.)

c. If the Complainant cannot be reached immediately:

   i. The investigator shall attempt to call the person at varying times of the day. All known phone numbers should be tried. If the person has voicemail, a detailed message should be left explaining why the investigator is calling and specifically asking the Complainant to contact the investigator by a certain date.

   ii. If the Complainant cannot be reached via phone after multiple attempts, the investigator shall send an email (if address known) and written letter to the last known address, again setting a date by which the party must contact the investigator. Refer to Exhibit 500-1 for a sample letter.

   iii. If the Complainant does not comply and contact the investigator by the stated date, then the investigator shall close the case as "uncooperative." Refer to SOP# 600 Uncooperative Complainant.

d. Upon initial contact with the Complainant, the investigator shall conduct an opening conference. In the opening conference, the investigator should:

   i. Explain that he/she is an independent fact finder and that he/she is not a representative of either party;

   ii. Explain the process of the investigation—that evidence will be taken, that party and witness interviews will be conducted, and that a determination will be made regarding whether a violation of REDA has occurred;

   iii. Discuss REDA, informing the parties that REDA is narrowly tailored and that not all forms of "unfair" treatment are necessarily illegal under the law;

   iv. Explain the right-to-sue letters. The Complainant should be made aware that the Complainant is typically issued a right-to-sue letter at the conclusion of the investigation and may be permitted to file a law suit even in the event of a no-merit finding; and

   v. Discuss the possibility of settlement as a resolution. The Complainant should be made aware that the investigator is willing to facilitate settlement discussions at any point during the investigation. It is important, however, that the Complainant is aware that settlement is purely voluntary.

1. The investigator should suggest that the Complainant do a cost / benefit analysis when considering settlement. Specifically, the Complainant should be encouraged to think of the potential costs associated with litigation, such as potential attorney fees, as well as potential loss in court.
2. Should settlement negotiations begin at this point or at any point in the investigation, the investigator may act in a semi-mediator capacity, offering to relay offers and counter offers between the parties in an attempt to provide a somewhat neutral negotiation. This is most helpful when the parties are not represented by legal counsel.

4.2.8. **Interview Complainant:**

a. After the opening conference, the investigator shall interview the Complainant. The Complainant should usually be interviewed before the Respondent. If the Complainant has an attorney, the attorney must be permitted to be present for the interview. Again, be sure to have a letter of representation on file.

b. The investigator must take thorough notes of any interview and/or draft a detailed statement or memo of the interview session. At the investigator's discretion, the Complainant may be asked to review and sign an interview statement. All notes and statements/memos are to be maintained in the file.

c. During the interview, the investigator must tailor questions to address the Complainant's allegations, the four elements, and Respondent's defenses.

   i. The investigator must ask questions to address the four elements of a REDA violation--that a protected activity occurred, that an adverse action was taken, that Respondent was aware of the protected activity, and that there is a causal connection between the protected activity and the adverse employment action. Even if an element appears to be proved already by evidence in the file, it is wise to confirm the information quickly with the Complainant;

   ii. If Respondent's defense is stated in the position statement and known to the investigator at the time of initial interview, the investigator shall question the Complainant regarding the Respondent's defense as well, to determine its legitimacy.

d. If the Complainant is uncooperative throughout any portion of this investigative process, either by refusing to answer questions or to submit evidence or merely by being unreachable throughout the course of the investigation, the investigator should close the case for lack of cooperation. As stated in 4.2.6.c, the Complainant should be given a time frame to comply. If the Complainant fails to comply, the investigator shall proceed to SOP# 600 for Uncooperative Complainants.

4.2.9. **Contact Respondent / Conduct Opening Conference / Schedule Interviews:**

a. The investigator shall contact the Respondent within 20 days from assignment.

b. If the Respondent is represented by an attorney, the investigator shall make initial contact with the attorney. (Contact with the party directly without the attorney's knowledge is generally impermissible. A letter of attorney representation must be on file. A position statement prepared by counsel is sufficient notice of representation). If the Respondent does not have an attorney, the investigator shall contact the person who signed Respondent's Position Statement. If a position statement is not in the file, then the investigator shall contact the person listed as the Respondent contact on the complaint form.

c. If the Respondent cannot be reached via phone after multiple attempts, the investigator shall send an email (if address known) and written letter to the last known address of the business, setting a date by which the Respondent must contact the investigator. Refer to Exhibit 500-2. If the Respondent does not comply, the investigator may proceed solely based on the evidence in the file and Complainant's evidence. But see Alternative Procedure 4.3.2.

d. Upon initial contact with Respondent, the investigator shall conduct an opening conference, just as he/she did in 4.2.6.d. Settlement discussions should be held in the same manner, as well.

e. The investigator shall then schedule necessary Respondent witnesses for interview. Interviews with employee witnesses identified by the Respondent shall [illegible]

4.2.10. **Interview Respondent:**

a. Each witness should be interviewed privately and separately. Group interviews are discouraged as the witnesses may influence one another's testimony.

b. Interviews with management:

i. Respondent has the right to have an attorney or representative present for interviews of management. See 13 NCAC 19.0402.

ii. If there is a question about whether an attorney should be present, contact DOL Legal Affairs.

iii. Management statements during interviews are not confidential.

c. Interviews with non-management:

i. If a lower level employee requests to have an attorney present during an interview, then the attorney will be allowed to participate after the interviewee has been informed of his/her right to be interviewed privately and that the attorney represents the employer, not the employee. See 13 NCAC 19.0402.

ii. If there is a question about whether an attorney should be present, contact DOL Legal Affairs.

iii. During interviews, the investigator should ask the Respondent's non-management witnesses whether they wish to remain confidential.

1. If confidentiality is requested, the investigator shall inform them that interviews are only confidential to the extent allowed by law--should the case go to court, the witnesses may be required to testify.

2. If confidentiality has been requested, the investigator shall be careful not to identify the witness when speaking with the parties about the case and evidence at hand. Seek assistance from the Bureau Chief when necessary regarding how to maintain confidentiality.

d. The investigator must take thorough notes of any interview and/or draft a detailed statement or memo of the interview session. At the investigator's discretion, the Respondent may be asked to review and sign an interview statement. All notes and statements/memos are to be maintained in the file.

e. The investigator shall tailor interview questions to address the Complainant's allegations, necessary elements, and Respondent's defenses. Refer to 4.2.7.c.

f. If the Respondent is uncooperative throughout any portion of this investigative process, either by refusing to answer questions or to submit evidence or merely by being unreachable throughout the course of the investigation, the investigator should proceed with the investigation and base the determination on information already obtained. But see Alternative Procedure 4.3.2.

4.2.11. **Interview Additional Necessary Witnesses Identified by Complainant:**

a. The investigator shall interview any additional witnesses provided by the Complainant (or identified when talking to other witnesses) who may have relevant information.

i. Not all witnesses must be interviewed if the witnesses possess the same information. Interviewing two or so should suffice in such circumstances.

ii. If the witness works or worked for Respondent as a manager, then the investigator should schedule the interview through Respondent's representative or attorney, as the employee's statement may legally bind Respondent.

iii. If the witness works or worked for Respondent as a non-management employee, and the witness has not already been identified by Respondent as a person to interview, then the investigator may contact the employee directly without Respondent's knowledge or permission.

1. In this case, the investigator should call the witness at a personal phone number, not on work time, if possible.

b. Non-management witnesses should be asked if they wish to remain confidential. Follow the same procedure set forth in 4.2.9.c.iii.

c. The investigator shall take thorough notes or draft statements/memos. The witnesses may be asked to sign statements, at the discretion of the investigator.

d. The interviews shall be tailored to obtain missing or disputed information regarding the Complainant's allegations, Respondent's defenses, and to address the four elements of the REDA claim.

e. If a witness is unavailable or unresponsive, the investigator may proceed with the investigation without the witness. But see alternative procedure 4.3.2.

4.2.12. **Gather all necessary, relevant evidence:** The investigator should collect any necessary, relevant documentation or other evidence to support both Complainant's allegations and Respondent's defenses.

a. All documentary evidence received must be date stamped.

b. Necessary, relevant evidence may include, but is not limited to the following:

i. Warnings or documentation of reprimands;
ii. Performance evaluations;
iii. Pay statements;
iv. Division of Employment Security determinations (which may not be used as direct evidence to prove causal connnection);
v. Employee handbooks and job descriptions;
vi. Medical records (only request when absolutely necessary);
vii. Emails between the parties documenting discussions;
viii. Audio / video recordings; and
ix. Collective Bargaining Agreements.

c. The evidence shall be kept in the file and may not be returned to the parties.

d. The investigator shall not exchange evidence between the parties. Rather, all evidence obtained may be made available to the public, including the parties, in redacted format upon a disclosure request at the close of the case. Refer to SOP# 1300 for Disclosure procedures.

4.2.13. **Conduct Follow-up Interviews:** The investigator shall conduct follow-up interviews with the parties and witnesses and shall gather any additional documentation as necessary at any point during the investigation.

a. If the Respondent presents a defense unknown at the time of Complainant's initial interview, the investigator shall re-interview the Complainant to gather the Complainant's response to the defense.

4.2.14. **Additional Settlement Discussions:** The possibility of settlement should be discussed again during the investigation if the investigator believes that the parties are open to settlement or that the evidence on file indicates that the allegations may have merit.

4.3. Alternative Procedures

4.3.1. The investigator has the discretion to vary the order of the interviews and evidence gathering as necessary depending on the facts of the case.

4.3.2. **Alt. to 4.2.10.f. and 4.2.11.e.**--Subpoenaing Relevant Witnesses and/or Evidence:

a. An investigator may subpoena a witness or a specific piece of evidence. Two types of subpoenas can be issued: Subpoena Ad Testificandum, used to obtain an interview from a reluctant witness, and Subpoena Duces Tecum, used to obtain documentary evidence. Refer to Exhibit 500-3 for sample subpoena.

b. Before issuing a subpoena, speak with the Bureau Chief and DOL Legal Affairs.

c. When drafting subpoenas, the party should be given a short timeframe in which to comply and broad language like "any and all documents" or "including but not limited to," should be used.

d. Delivery of the subpoena can be made by the investigator or local law enforcement officials. If the Respondent or witness decides to cooperate, the investigator can choose to lift the subpoena requirements.

5. CUSTOMER SERVICE REQUIREMENTS

The following table lists the customer service requirements that must be satisfied for each Customer of the procedure.

Customer	Requirements
Complainants, Respondents, and Witnesses (The Public)	Clear communication, both in writing and verbally, is a must so that the parties understand all information being discussed. The investigator may not act in any manner that may appear biased toward one party or the other during the investigation. It is necessary to remain courteous and respectful when dealing with the public, even in the face of frustration. Though the investigator must remain professional at all times, verbal abuse from a party or witness will not be tolerated, and the investigator may end a conversation in such circumstances.

6. DATA AND RECORD MANAGEMENT

6.1. Data Entry in Oracle

6.1.1. At the onset of the investigation, investigators are to enter the following information (Refer to Exhibit Oracle):

a. Investigator (the investigator assigned to the case);
b. Assigned Date (the date the case was assigned)
c. Received (the date the investigator received the file –may be different from assigned date, depending on whether the case was mailed to field investigator);
d. R Contact (date Respondent was contacted);
e. C Contact (date Complainant was contacted).

6.2. Record Retention

6.2.1. All records must be retained in the file and may not be destroyed, per the DOL Retention Policy. Records include, but are not limited to, complaint forms, questionnaires, emails, any evidence submitted by the Complainant or Respondent, interview notes and memorandums, copies of any letters mailed to the Complainant or Respondent and activity logs.

7. Exhibits

Exhibits are examples of forms, letters, checklists, reports or other documents that are used or created during the execution of this SOP. Exhibits referenced in this SOP are available for view on the SOP website.

7.1.1. Exhibit Oracle (screenshot of Oracle)

7.1.2. Exhibit 500-1 (notice to Complainant to respond to investigation)

7.1.3. Exhibit 500-2 (notice to Respondent to respond to investigation)

7.1.4. Exhibit 500-3 (sample subpoena)

7.1.5. Exhibit 500-4 (sample activity log)