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WORKERS' MEMORIAL DAY: ARE EXISTING PRIVATE SECTOR WHISTLEBLOWER PROTECTIONS ADEQUATE TO ENSURE SAFE WORKPLACES?

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING WORKERS' MEMORIAL DAY, FOCUSING ON IF EXISTING PRIVATE SECTOR WHISTLEBLOWER PROTECTIONS ARE ADEQUATE TO ENSURE SAFE WORKPLACES

APRIL 29, 2014

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C O N T E N T S

STATEMENTS

TUESDAY, APRIL 29, 2014

WORKERS' MEMORIAL DAY: ARE EXISTING PRIVATE SECTOR WHISTLEBLOWER PROTECTIONS ADEQUATE TO ENSURE SAFE WORKPLACES?

TUESDAY, APRIL 29, 2014

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:58 a.m., in room SD–430, Dirksen Senate Office Building, Hon. Robert Casey, chairman of the subcommittee, presiding.

Present: Senators Casey, Isakson, and Murray.

OPENING STATEMENT OF SENATOR CASEY

Senator CASEY. Good morning, everyone. The hearing of the Subcommittee on Employment and Workplace Safety will come to order. We're grateful that you're here with us this morning. We're going to be moving very quickly because of the votes at 11 o'clock.

I'm grateful to be with our Ranking Member, Senator Isakson. He'll follow me, and I'll be as fast as I can in an opening.

Yesterday marked the 25th anniversary of the Workers' Memorial Day, which is observed every year on April the 28th. It's a day to honor those workers who have died, been disabled, injured, or made sick by their work. It is also a day to acknowledge the suffering experienced by families and communities and to recommit ourselves to the fight for a safe and healthy workplace for all workers. It is the day that the Occupational Safety and Health Administration was established in 1971.

Too many people each year mark this day by remembering loved ones lost in a workplace tragedy. To them we offer our sincere condolences, and we also honor the memory of their loved ones, and we take the opportunity to discuss ways to reduce future workplace tragedies so that fewer families have to face the pain of losing a loved one in an often preventable workplace incident.

In 2012 alone, 4,383 workers were killed on the job, including 163 workers in my home State of Pennsylvania. Nearly 3 million workers were injured, and an estimated 50,000 to 60,000 workers died from occupational diseases. That's about 150 worker deaths each day if you do the math on the total of those who lost their lives.

OSHA does not have nearly enough inspectors for the approximately 132 million workers nationwide. In fact, OSHA has only one

inspector for about every 69,000 workers at over 9 million work sites across the country. Let me just say that again—one inspector for every 69,000 workers.

Workers see firsthand the hazards on the job and in the workplace, and because OSHA cannot be everywhere, workers are an important resource in addressing the hazards in the workplaces. But in order for workers to properly identify and report workplace hazards, they must first have confidence that they will not lose their job or face other types of retaliation for doing so.

Previous congressional hearings focused on the Upper Big Branch mine disaster where 29 workers died, or the Deepwater Horizon explosion where 11 perished, both in 2010. In these instances, surviving workers and family members who lost loved ones recounted known hazards, but workers felt threatened or pressured to keep working fearing they might lose their job if they spoke up.

These incidents highlight the importance of whistleblower protections. Maybe these tragedies could have been avoided if safety violations and concerns that were not reported had been brought to light. OSHA has taken action to address administrative issues with its whistleblower protection program identified in reports by the GAO and the Department of Labor Inspector General and made great progress in improving how the program functions.

Despite these efforts, the gaps in OSHA's whistleblower protection statutes, specifically Section 11(c) of the OSHA Act, which accounts for over half of OSHA's whistleblower caseload, still leave me with concerns—and that's an understatement—concerns about workers' ability to freely identify hazards to their employers and authorities without fear of retaliation. With fewer inspectors and many more workers to protect today than in past decades, it is imperative that those in the best position to identify hazards—workers, I mean—have adequate whistleblower protections.

We called this hearing today so that we can do at least three things: No. 1, review the current whistleblower protections in the OSHA Act, Section 11(c), and compare them to recently updated whistleblower statutes. No. 2, we seek to consider whether the current whistleblower protections are sufficiently adequate to encourage workers to report safety and ethical concerns so as to avoid future workplace disasters like those we've seen in 2010, most recently; and, last, to evaluate what updates, if any, are needed to make workers more comfortable in identifying safety hazards or violations and ultimately make the workplace safer for American workers.

I look forward to the testimony and the ensuing discussion from our two panels. And with that, I'll turn the microphone over to our Ranking Member, Senator Isakson, for his opening remarks.

OPENING STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Senator Casey, and thank you for calling the hearing. And out of respect for time for our witnesses and the fact that we have votes at 11, I'll submit my full statement for the record and ask unanimous consent to have that included.

I want to make two specific points, however. Every worker should leave every morning from their home for every job with the anticipation of returning home that night safe and free of injury.

That is the goal of American business. That is the goal of every worker in American business.

Every owner of every business ought to leave home every morning hoping that he can do everything he can to prevent worker injury or worker death, because the greatest cost increase of doing business is higher workers' compensation or the risk you have when you have injuries on the job and workers who are hurt. So there's a financial motivation as well as a moral and human motivation for every owner.

I want to point out that when safety and compliance are placed as priorities within an organization from top to bottom, workers and employers benefit from a safer and more protective workplace. It's an attitudinal thing that we need to promote. Compliance assistance programs, whether they be voluntary protection programs or onsite consultation programs, have demonstrated their extreme effectiveness over the years.

I want to commend Dr. Michaels and Secretary Perez on the establishment of the Best Practices Working Group within the Whistleblow Advisory Committee, which is the exact place to build on better compliance, better programs, and better safety for our workers. By doing this, the department is focusing on the right thing to do, an attitudinal change within all of business and with all employers, an attitude toward a safer workplace, safer workers, less cost, and more productivity.

I commend Dr. Michaels and Secretary Perez on their initiative, and I look forward to the testimony today.

[The prepared statement of Senator Isakson follows:]

PREPARED STATEMENT OF SENATOR ISAKSON

I want to begin today by thanking the Chairman, Senator Casey, for calling this hearing so that we can examine ways to ensure safe workplaces for all Americans. Every working American should be able to leave their home every day confident that their workplace is safe so that they can return home to their families at the end of the work day. One critical tool to help ensure the safety of workers are the existing whistleblower protections.

Since OSHA's own statistics demonstrate that there simply cannot be an OSHA inspector at every workplace in the country to monitor working conditions, the OSH Act ensures that individuals who witness and report unsafe acts are protected. In order to ensure that these employees are treated fairly and properly, we must work to see that employers are educated and aware of their responsibilities in these situations. In order to achieve a safer workplace, we should be focusing our efforts on proactive steps to prevent workplace injuries and fatalities before they occur, rather than focus on punishments in reaction to these tragedies after the fact. Creating a culture of compliance is paramount to ensuring that workplaces are safe and reliable.

When safety and compliance are placed as priorities within and organization from top to bottom, workers and employers benefit from a safer and more productive workplace. Compliance assistance programs, whether they be Voluntary Protection Programs (VPP) or onsite consultation programs, have demonstrated their extreme effectiveness over the years. In addition to being fiscally efficient,

these programs empower both employees and employers to take ownership in creating cultures and safety and compliance. It remains disappointing that this Administration continues to propose reductions in funding for compliance assistance programs when these continue to prove to be effective means for maintaining safe workplaces.

I am encouraged that Secretary Perez and Assistance Secretary Michaels have established a best practices working group within the Whistleblower Advisory Committee in order to learn from industry experts about what has been working on the frontlines of workplace safety. I hope that the Department can expand on some of these best practices and find ways to incentivize their implementation by others wanting to achieve higher levels of safety and compliance.

I look forward to hearing the testimonies from our witnesses today and I now yield back the balance of my time.

Senator CASEY. Thank you, Senator Isakson.

Dr. Michaels, I'll do a brief introduction and then get to your testimony.

Dr. David Michaels is the Assistant Secretary of Labor for Occupational Safety and Health. He has served in this position since his appointment by President Obama in December 2009.

Prior to becoming head of OSHA, Dr. Michaels was a professor of environmental and occupational health at the George Washington University School of Public Health, a position he is currently on leave from while performing his duties with OSHA.

From 1998 to 2001, Dr. Michaels served as Assistant Secretary of Energy for Environment, Safety, and Health. He is a graduate of the City College of New York and holds a master's degree of public health and a Ph.D. from Columbia University.

Dr. Michaels, thank you. We'll ask you to encapsulate your testimony in 5 minutes. Thank you very much.

STATEMENT OF DAVID MICHAELS, Ph.D., MPH, ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Mr. MICHAELS. Thank you. Good morning, Chairman Casey and Ranking Member Isakson. Thank you for the opportunity to testify today on the importance of whistleblower protections and how we can improve them.

As Assistant Secretary of Labor for OSHA, I am proud of the work we are doing to protect whistleblowers. I look forward to working with the committee to continue to strengthen and improve our program.

Chairman Casey, as you just noted, yesterday was Workers' Memorial Day. This is a day when we remember those who have been killed, injured, or made sick by their work, and we rededicate ourselves to ensuring that these tragedies don't happen again.

April 28 is also the day that OSHA was established in 1971. Our mission is to assure the health and safety of every worker. Over the past 43 years, we've made dramatic progress in reducing work-related deaths and injuries, but there's still a great deal more work to do.

Because OSHA cannot be everywhere at once, we rely on America's workers to be this Nation's eyes and ears. whistleblowers serve as a check on government and business, shining a light on illegal, unethical, or dangerous practices.

In passing the Occupational Safety and Health Act, Congress was keenly aware of the crucial role employees play in ensuring that their workplaces are safe. Congress also recognized that workers would be unlikely to report a hazardous condition or make a safety complaint if they feared their employer would retaliate against them.

For that reason, Section 11(c) of the OSHA Act prohibits discrimination against employees for exercising their rights. However, in the decades since passage of the Act, Congress has enacted other statutes which also contain whistleblower provisions. We're a small agency with a big role to fill. Not only is OSHA responsible for defending workers' health and safety, but we also have the important charge of enforcing the whistleblower provisions of the OSHA Act and 21 other statutes.

Protecting whistleblowers is a responsibility we take very seriously. Over the last several years, we have implemented significant changes to strengthen the whistleblower program. To begin with, OSHA established the Whistleblower Protection Directorate with additional resources appropriated by Congress significantly increasing staffing.

We also developed an online form so that employees can file complaints electronically, enhanced training, and streamlined investigation procedures. In addition, we updated our whistleblower investigations manual and established a Federal advisory committee on whistleblower protections. As a result, we have reduced the backlog of 11(c) appeals, improved enforcement, and enhanced the consistency of our investigations.

But these changes are not enough. Section 11(c) is badly in need of modernization. The anti-retaliation statutes that Congress has enacted since the OSHA Act was passed provide greater protections and stronger remedies for workers who have been retaliated against. To give 11(c) the teeth it needs to be as effective, it must be updated to improve procedures for filing, investigating, and resolving complaints.

These newer statutes should serve as a guide for reforming and reinvigorating the protections in 11(c). To this end, OSHA has a few recommendations to strengthen 11(c).

To begin with, OSHA should have the authority to order immediate preliminary re-instatement where OSHA has found there is reasonable cause to believe that an employee has suffered illegal termination. Preliminary re-instatement allows employees to return to work and regain a regular income quickly and is available under all but one of the whistleblower statutes passed since 2000.

Second, OSHA recommends modifying the adjudication process to provide a kick-out provision. This will enable workers to take their disputes to a Federal district court if the department fails to reach a conclusion in a timely manner. By encouraging timely resolution of disputes, this provision benefits both employers and employees alike.

Third, OSHA recommends allowing a full administrative review of OSHA determinations from the Office of Administrative Law Judges and the Administrative Review Board.

Fourth, the statute of limitations for filing complaints should be extended. Section 11(c) currently requires whistleblowers to submit a complaint within 30 days of the discriminatory action. This is an extremely short period that disqualifies many otherwise eligible whistleblowers, and you'll hear testimony from one such whistleblower today. All recently passed whistleblower statutes give complainants 180 days from the date of the adverse action to file a complaint.

And, finally, Congress should consider revising the burden of proof under 11(c) to conform to the standard utilized in all statutes enacted since 2000.

In conclusion, workers who stand up for what's right should be held out as models of civic responsibility. By addressing wrongdoings or unsafe conditions, they protect themselves and the public at large. They deserve our protection against retaliation.

Thank you again for the opportunity to testify today. I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Michaels follows:]

PREPARED STATEMENT OF DAVID MICHAELS, PH.D., MPH

Chairman Casey, Ranking Member Isakson, distinguished Members of the subcommittee, thank you for inviting me to testify on current whistleblower protections, the importance of these protections, and how we can improve them moving forward. As Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), I am proud of the work we are doing to protect whistleblowers and the great strides we have made to strengthen and improve OSHA's whistleblower program.

This hearing comes one day after Workers Memorial Day, when we remember and mourn those workers who have been killed, injured, or made sick by their work, and rededicate ourselves to ensuring that these tragedies do not happen again. It is also the same day the Occupational Safety and Health Administration was established in 1971. OSHA's mission is to assure the health, safety, and dignity of every worker.

Over the past 43 years, working with our State partners, employers, workers, unions, professionals, and others, OSHA has made dramatic progress in reducing work-related deaths, injuries, and illnesses. But over 4,000 workers still die on the job every year, and almost 4 million workers are seriously injured. Workers Memorial Day is an occasion to remind the Nation that most of these workplace injuries, illnesses, and fatalities are preventable.

In passing the Occupational Safety and Health Act of 1970 (OSH Act), Congress understood that workers play a crucial role in ensuring that their workplaces are safe, but also recognized that employees would be unlikely to participate in safety or health activities, or to report a hazardous condition to their employer or OSHA, if they feared their employer would fire them or otherwise retaliate against them. For that reason, section 11(c) of the OSH Act prohibits discrimination of employees for exercising their rights under the law. In the decades since the passage of the OSH Act, Congress has enacted a number of other statutes which also contain whistleblower provisions, acknowledging that workers are this Nation's eyes and ears, identifying and helping to control not only hazards facing workers at jobsites, but also practices that endanger the public's health, safety, or well-being and the fair and effective functioning of our government. Whistleblowers serve as a check on the Government and business, shining a light on illegal, unethical, or dangerous practices that otherwise may go uncorrected. Whether the safety of our food, environment, or workplaces; the integrity of our financial system; or the security of our transportation systems, whistleblowers help to ensure that our laws are fairly executed.

Thus, OSHA is a small agency with a big role to fill. Not only is OSHA responsible for defending workers' health and safety rights, we also have the important charge of enforcing the whistleblower provisions of the OSH Act and 21 other statutes which provide employees with similar protections.

IMPROVEMENTS IN OSHA'S WHISTLEBLOWER PROGRAM

Protecting whistleblowers is a responsibility that we take very seriously. As you are aware, there have been reports—prepared by the Government Accountability Office (GAO) and the Department of Labor's Office of the Inspector General (OIG)—that criticized OSHA's whistleblower protection program. We took these criticisms seriously and successfully implemented all of the recommendations in the GAO and OIG reports, which not only increased the program's effectiveness, but also made the program more efficient.

Over the last several years, we have implemented a number of significant structural and programmatic changes to strengthen our whistleblower program. For instance, OSHA has established the Whistleblower Program as a separate directorate, with its own budget; developed an online form so that employees can file complaints electronically; enhanced training; streamlined investigation procedures; and, with additional resources appropriated by Congress, significantly increased staffing. In addition, by updating our Whistleblower Investigations Manual and establishing a Federal Advisory Committee on Whistleblower Protections, we have been able to improve our enforcement efforts, including enhancing the consistency of our investigations of complaints filed under the anti-retaliation statutes that OSHA administers.

As a result of the increase in resources and the changes mentioned above, in the past 2 years OSHA has been able to eliminate a backlog of more than 300 "over-age"[1] discrimination complaints under the anti-discrimination protections of section 11(c) of the OSH Act. OSHA is continuously finding ways to improve its internal investigative processes which has proven beneficial in its management of investigative caseloads. In addition, OSHA has significantly reduced the number of section 11(c) complaints under "administrative review"[2] in the National Office. At the beginning of the fiscal year, OSHA had more than 200 section 11(c) cases pending administrative review. As of April 2014, OSHA has reduced the number of pending cases in this category to approximately 40, all of which were newly filed or are actively under review. The changes highlighted above are described in much more detail in "Appendix III: Improvements in OSHA's Whistleblower Program."

Our efforts are bearing fruit. OSHA's strengthened whistleblower program has had many successes. For example, in our work enforcing the whistleblower provisions of the Federal Railroad Safety Act (FRSA), which protects railroad workers from retaliation for reporting suspected violations of railroad safety laws as well as on-the-job injuries, we achieved a significant accord with BNSF Railways. OSHA engaged BNSF in a conversation regarding a large number of whistleblower complaints filed against the railroad. This conversation ultimately led to an agreement, pursuant to which BNSF agreed to voluntarily revise several personnel policies that OSHA believed violated the whistleblower provisions of FRSA and dissuaded workers from reporting on-the-job injuries. This accord made significant progress toward ensuring that BNSF employees who report injuries do not suffer any adverse consequences for doing so and represents an important step toward improving the culture of safety in the railroad industry.

OSHA has strengthened the administration of its whistleblower program, and has made significant progress since the GAO and OIG reports were issued, but these changes alone are not enough. Although OSHA now enforces an additional 21 whistleblower statutes, cases filed under section 11(c) of the OSH Act make up more than half of OSHA's whistleblower program caseload—last year, 60 percent of the new cases OSHA received were docketed under section 11(c). This whistleblower provision, passed over 40 years ago, is badly in need of modernization.

NEEDED CHANGES TO SECTION 11(C) OF THE OSH ACT

In the decades since the OSH Act was passed in 1970, we have learned a great deal from newer anti-retaliation statutes, particularly those passed by the Congress within the last decade. Indeed, all of the recent whistleblower statutes provide a much greater level of protection, stronger remedies, and better procedural protections for workers who have been retaliated against. These statutes are more effective at making whole workers who have been retaliated against, enable OSHA to correct dangerous practices, and are leading to significant improvements in workplace culture.

To give section 11(c) the teeth it needs to be as effective as newer whistleblower statutes, it must be updated to establish improve procedures for filing, investigating,

[1] "Over-age" means ongoing investigation cases over 90 days from complaint filing date. At present, the backlog of such complaints stands at 1,726, down from 2,034, as of March 31, 2012.

[2] "Administrative Review" means a post-determination review of the investigative documentation by the National Office, similar to an appeal review.

and resolving whistleblower complaints—to afford employees the same protections that are found in these more recent anti-retaliation statutes. These newer statutes should serve as a guide for reforming and reinvigorating the protections in section 11(c).

To this end, OSHA recommends strengthening the procedural requirements of section 11(c) to be consistent with more recent whistleblower statutes, by: (1) providing OSHA with the authority to order immediate preliminary re-instatement of employees that OSHA finds to have suffered illegal termination; (2) modifying the adjudication process to provide a "kick-out" provision which will enable workers to take their disputes to a Federal District Court if the Department fails to reach a conclusion in a timely manner; (3) allowing for a full administrative review to the OALJ and ARB of OSHA determinations; (4) extending the statute of limitations for filing complaints; and (5) revising the burden of proof under section 11(c) to conform to the standard utilized in more recently enacted statutes.

1. Preliminary Reinstatement

Newer statutes include provisions that authorize OSHA to order immediate, preliminary re-instatement of wrongly discharged employees. Preliminary reinstatement is available under all but one of the statutes passed since 2000. Upon finding reasonable cause to believe that the worker was illegally terminated under these statutes, the Assistant Secretary may issue findings and a preliminary order requiring immediate re-instatement of the employee. These provisions provide OSHA with the authority to order that illegally terminated employees be put back to work, and thus enable them to quickly regain a regular income. Preliminary reinstatement provisions also promote the efficient resolution of disputes. When OSHA issues a preliminary re-instatement order, the onus is on the respondent to make a *bona fide* offer of preliminary re-instatement. Once that offer is made, the employee may either accept it or reject it. If the employee rejects the offer, the employer's obligation for back pay ceases as of the date the offer is rejected.

Preliminary re-instatement also can provide an important impetus for the employer and employee to resolve the whistleblower case. For example, in a recent case, an employee who led Countrywide Financial Corporation's internal investigations discovered widespread and pervasive wire, mail, and bank fraud. The employee alleged that colleagues who had attempted to report fraud to Countrywide's Employee Relations Department suffered persistent retaliation. The employee was fired shortly after Countrywide merged with Bank of America Corp. and subsequently filed a complaint under section 806 of the Sarbanes-Oxley Act (SOX). Upon review of the claim, OSHA found Bank of America Corp. in violation of the whistleblower protection provisions of SOX for improperly firing the employee. OSHA ordered the bank to re-instate and pay the employee approximately $930,000, which included back wages, interest, compensatory damages and attorney fees. The case later settled before an ALJ.

Under 11(c), on the other hand, the complainant can only gain re-instatement to his or her former position if the District Court orders re-instatement or if a settlement is reached. The lack of authority for OSHA to order preliminary reinstatement of employees under section 11(c) delays employees' ability to return to work and receive a regular paycheck, even if it is clear that they were terminated for retaliatory reasons. Without an equivalent provision in the OSH Act, there is less pressure for adequate settlements that include re-instatement.

2. Individual Right of Action Requirements

Individual right of action provisions are also common in newer whistleblower protection statutes. These "kick-out provisions" provide complainants with an alternate route for resolving their disputes when the Secretary of Labor's process has not provided a final resolution in a timely fashion. By encouraging timely resolution of disputes, these provisions benefit both employers and employees alike. Additionally, individual right of action requirements offer a desirable alternative course for employees who prefer to adjudicate their claim in a Federal court setting. "Kick-out provisions" may be particularly attractive for complainants that are represented by counsel, who may be more comfortable litigating in the Federal district court forum.

In a recent SOX case, the complainant, who was employed as the company's controller, reported to company management "actual and suspected frauds and improprieties" after refusing to prepare $1 million in bonuses for top executives without proper approvals. The controller was fired. After filing with OSHA and while waiting for a resolution by the Department, the complainant kicked out to U.S. District Court where, less than 2 years after filing the complaint, he received a jury award of $6 million. Not only was this a quicker decision when compared to past litigated

11(c) claims, the compensatory damages award of $6 million is believed to be the highest award ever recovered.

Employees who file under section 11(c), on the other hand, do not have this choice. Their cases remain under investigation by OSHA until the Department denies their claim or brings suit in Federal court on their behalf. Currently, complainants have no right to full administrative hearings or review of OSHA's administrative decisions. Moreover, employees who file under section 11(c) cannot litigate their claim in Federal district court on their own, and instead must hope that the Department of Labor chooses to take their cases to district court. Under section 11(c), if OSHA believes retaliation has occurred, it must refer the case for litigation by the Department of Labor's Office of the Solicitor, which may bring suit after seeking authorization from the Department of Justice.

3. Full Administrative Adjudication of Cases

Unlike newer statutes, section 11(c) does not include a process for employees to obtain administrative adjudication when OSHA dismisses a complaint. Although OSHA's National Office conducts an administrative review of OSHA's regional whistleblower decisions as a matter of policy, the National Office's review is still an intra-agency process, and there is no extra-agency check on OSHA's decisionmaking in individual cases.

Newer statutes, on the other hand, explicitly provide parties with the right to object to OSHA's findings and receive a *de novo* hearing from the Office of Administrative Law Judges. Parties may then petition the Administrative Review Board (ARB) to review the ALJ's decision, and should the ARB issue a decision or decline to review an ALJ decision, the decision may be further appealed to U.S. Courts of Appeals.

4. Statute of Limitation Requirements

All recently enacted or amended whistleblower statutes, including FRSA, the Consumer Product Safety Improvement Act, the Surface Transportation and Assistance Act (STAA), the Seaman's Protection Act, SOX, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Food Safety Modernization Act, and the Moving Ahead for Progress in the 21st Century Act, give complainants 180 days from the date of the adverse action to file a complaint with OSHA.

In contrast, section 11(c) of the OSH Act only provides 30 days for employees to file a whistleblower complaint. Several OSHA-approved State plans, including those in Kentucky, California, Connecticut, Hawaii, North Carolina, Oregon, and Virginia, have recognized the limitations associated with the 30-day filing period and have adopted significantly longer periods than those imposed by the Act.

Notably, there is no statutory time limit for whistleblower complaints filed by Federal employees. The Fair Labor Standards Act, which includes an anti-retaliation provision for workers that make wage and hour complaints, effectively has a 2-year statute of limitations, with a 3-year limitation period if the underlying violation was willful. The National Labor Relations Act has a limitation period of 180 days for complaints.

Section 11(c)'s 30-day statute of limitations is especially problematic because it begins to run when the employee learns about the adverse employment action, not when the employee learns that the action was motivated by an unlawful retaliatory purpose. Employees may not know about the motivation for an adverse action for days or weeks after the action occurred, which makes the short 30-day filing period particularly difficult for employees to meet.

We have seen many cases of alleged retaliation in which more than 30 days passed before an employee learned he/she had the right to file a complaint with OSHA, or before he/she learned that an action taken against him/her violated section 11(c). OSHA receives over 200 complaints each year that must be rejected because more than 30 days had passed since the date of the alleged retaliatory act. OSHA will never know how many of these complaints would have led to a remedy for the worker, or how many employees decide not to file a complaint after learning that they missed the deadline.

Only 1 to 3 percent of complaints filed under STAA, SOX, and FRSA during the past 3 fiscal years missed the 180-day filing deadline. In contrast, during the last 3 years, approximately 7 percent of section 11(c) complaints were "administratively closed" (not docketed) for missing the 30-day filing deadline (at least a third of which missed the deadline by only 30 days or less). If the deadline for filing under section 11(c) was extended to180 days, approximately 600 more complaints would have been considered timely and eligible for an investigation.

With so many claims determined to be untimely, there is no shortage of examples where employees were unable to avail themselves of OSHA's investigatory and adju-

dication processes because they did not file a complaint fast enough. To illustrate the impact the 11(c) statute of limitations has on workers, below are three examples in which OSHA was unable to investigate a complaint of retaliation because the employee filed with OSHA after the 30-day deadline had expired:

• A worker in Georgia filed a complaint in January 2013, alleging that she was terminated after she complained to her employer that she was suffering from fatigue due to exposure to chemicals at her worksite. Because she filed her complaint 41 days after her termination, OSHA was unable to investigate the matter.

• On January 30, 2014, an employee working at New York City's World Trade Center filed a section 11(c) complaint alleging he was terminated for raising concerns about the presence of hazardous fumes in the workplace. On October 13, 2013, the employee had reported to management that paint fumes were making him and others sick. The employee was terminated shortly thereafter on October 22, 2013. Because this complaint was not filed within the 30 day window, OSHA was unable to investigate the alleged adverse action.

• On December 27, 2013, an employee was given a tanker truck loaded with a chemical. The tank's gauge, which was faulty, indicated that the tank was empty. The employee alleges that his employer knew the gauge was faulty, but that he himself was unaware. When the employee went to unhook the tank, a chemical spilled onto the employee. After telling his employer what had occurred, he was advised not to report the incident. Shortly thereafter, the employee was fired. The employee filed a complaint with OSHA on January 27, 2014, 31 days after the incident occurred. Because the complaint was filed 1 day too late, OSHA was unable to investigate.

The time has come to rectify the statute of limitations problem under section 11(c). The hard evidence shows that allowing 180 days for employees to file a complaint would advance the investigation of retaliation complaints and help ensure that underlying violations are remedied.

5. Burden of Proof

Under section 11(c), the burden of proof is more rigorous than the burden of proof under newer statutes. Since 2000, all anti-retaliation statutes passed by Congress and administered by OSHA only require the employee to show that the employee's whistleblowing was a "contributing" factor to the employer's decision. Conversely, section 11(c) requires the employee to show that the adverse action was "because" of the whistleblowing. Therefore, OSHA recommends changing the burden of proof to ensure the standard a whistleblower must meet is consistent among the whistleblower statutes that OSHA enforces and is not overly burdensome for claimants filing under section 11(c).

CONCLUSION

Employees who stand up for what is right, who act with the public good in mind, and who are brave enough to come forward when others will not, should be held out as models of civil responsibility. We owe it to all workers to provide effective recourse against retaliation for those who have the courage to address wrongdoing or unsafe conditions to protect themselves and the public at large.

Your continued support and commitment ensures that whistleblowers are protected. I look forward to working with you to strengthen our program. Thank you again for this opportunity to discuss OSHA's whistleblower program and our recommendations for making section 11(c) of the OSH Act as protective as the other whistleblower laws enacted during the last 20 years.

APPENDIX I: PRELIMINARY REINSTATEMENT PROVISIONS

Below are statistics on the number of preliminary re-instatement orders that OSHA has issued over the past 3 fiscal years.

Statute	Preliminary reinstatement orders fiscal year 2011–13
AIR21	4
FRSA	12
SOX	5

Statute	Preliminary reinstatement orders fiscal year 2011–13
STAA	15
Total	36

APPENDIX II: INDIVIDUAL RIGHT OF ACTION REQUIREMENTS

Below are statistics on the number of complainants that chose to kick-out from an OSHA investigation during fiscal year 2012 and fiscal year 2013. Please note that these statistics *do not* include complainants that may have kicked-out to district court while their matter was pending before OALJ or the ARB.

Statute	Kick-outs from OSHA—fiscal year 2012	Kick-outs from OSHA—fiscal year 2013
CFPA	1	2
CPSIA	0	3
ERA	3	2
FRSA	31	34
FSMA	0	2
SOX	10	25
SPA	0	1
STAA	3	5
Total	48	74

APPENDIX III: IMPROVEMENTS IN OSHA'S WHISTLEBLOWER PROGRAM

In January 2009, the U.S. Government Accountability Office (GAO) issued a report with eight recommendations for improving OSHA's Whistleblower Protection Program, which focused on improving whistleblower data integrity, strengthening OSHA's audits of whistleblower activities, and ensuring that OSHA's whistleblower investigators have all the equipment needed to do their jobs.[3] A second GAO report, issued in 2010, included four additional recommendations, which focused on the strength of OSHA's oversight of whistleblower investigative activities, and specifically instructed OSHA to ensure that all whistleblower investigators and their supervisors have completed mandatory training courses.[4] Also in 2010, the Office of the Inspector General (OIG) issued a report that concluded that OSHA was not adequately managing the Whistleblower Protection Program, and issued recommendations directing OSHA to strengthen its supervisory controls, improve its management of whistleblower caseloads, and update the Whistleblower Investigations Manual to incorporate these recommendations.[5]

OSHA has worked diligently to improve the management and accountability of OSHA's Whistleblower Protection Program and has implemented all of these recommendations. Key changes to OSHA's whistleblower program are discussed below.

• In 2012 OSHA reorganized the Office of the Whistleblower Protection Program into a new "Directorate" of Whistleblower Protection Program at the National Office. Instead of being housed within OSHA's Directorate of Enforcement Program, the new whistleblower directorate has its own budget and is led by a Senior Executive Service-level Director who reports directly to the Assistant Secretary.

[3] GAO 09–106 "Better Data and Oversight Would Help Ensure Program Quality and Consistency."

[4] GAO–10–722 "Sustained Management Attention is Needed to Address Longstanding Program Weaknesses."

[5] 02–10–202–10–105 "Complainants Did Not Always Receive Appropriate Investigations Under the Whistleblower Protection Program."

• In fiscal year 2012 budget, OSHA developed a separate line item for the whistleblower program so it could better track and report to Congress the program's expenses.
• More than 35 full-time whistleblower employees have been hired since 2009, representing a 48 percent increase in whistleblower field staff nationwide. These new personnel include both whistleblower investigators to investigate whistleblower cases and whistleblower supervisors to oversee those investigations and manage regional investigative resources.
• In December 2013, OSHA unveiled its online whistleblower complaint form, which makes it easier for employees to file complainants electronically via the Agency's Web site.
• OSHA reorganized its whistleblower program so that all whistleblower personnel now report to centralized, whistleblower-dedicated supervisors that are fully trained in whistleblower investigations.
• All whistleblower investigators are now required to complete two mandatory training courses on Section 11(c) of the OSH Act and the other Federal anti-retaliation statutes enforced by OSHA. OSHA is actively engaged in establishing a dedicated whistleblower Training Track, comparable to the agency's Safety, Health and Construction Training Tracks. A workgroup is currently working on the development of this training track, which will expand the number of mandatory training courses, and will be managed by the Directorate of Training and Education at OSHA's Training Institute in Arlington Heights, IL.
• In September 2011, OSHA updated its Whistleblower Investigations Manual, the Agency's primary tool for communicating the procedures and policies that apply to whistleblower investigations, which incorporates the recommendations made in the GAO and OIG Reports, and provides detailed procedures and guidance so that investigations are thoroughly and consistently completed.
• In 2012, OSHA established a Whistleblower Protection Advisory Committee to make recommendations regarding implementation of better customer service to workers and employers, improvement in the investigative and enforcement processes, improvement of regulations governing OSHA investigations, and recommendations for cooperative activities with Federal agencies responsible for areas also covered by the whistleblower protection statutes enforced by OSHA.

APPENDIX IV: SUCCESS STORIES

A few key examples of workers that have benefited from OSHA's successful enforcement of the broader protections afforded by the new whistleblower statutes are discussed below.

Section 806 of the Sarbanes-Oxley Act (SOX)

• Bond Laboratories Inc., a manufacturer of nutritional supplement beverages and other related products, terminated an officer because he repeatedly objected to the manipulation of sales figures, which the officer believed misrepresented the company's value to potential investors. The officer filed a complaint against Bond Laboratories and its former CEO under Section 806 of SOX, and OSHA's investigation revealed that the officer's complaint was meritorious. In September 2011, OSHA issued an order of preliminary re-instatement to put the officer back to work, and also ordered that the company pay the officer approximately $500,000 in back wages, interest and compensatory damages. Settlement was approved on August 3, 2012.

Federal Railroad Safety Act (FRSA)

• OSHA recently investigated a case filed under the Federal Railroad Safety Act (FRSA) against Norfolk Southern Railway by two employees who had been terminated by the company. Norfolk Southern terminated both workers for reporting injuries to management they sustained when another vehicle ran a red light and struck the company truck in which they were riding. Prior to the incident in-question, the employees had been employed by the railroad for more than 36 years without incident. As a result of Norfolk Southern Railway Co.'s retaliatory behavior (several other orders were also issued by OSHA against Norfolk Southern Railway Co. in the past 2 years), Norfolk Southern Railway Co. was ordered to pay more than $1.1 million for the wrongful termination of employees, and was ordered by OSHA to preliminary re-instate workers who were wrongfully terminated for reporting injuries that occurred on the job.

Surface Transportation Assistance Act (STAA)

• Four employees of Gaines Motor Lines filed a claim under the Surface Transportation Assistance Act (STAA), alleging they were terminated for participating in

an inspection audit conducted by the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA). Following the audit and subsequent citations issued against Gaines Motor by FMCSA, the employees suffered retaliation by company officials, including termination, layoffs and removal of employee benefits. As a result of OSHA's investigation, Gaines Motor Lines was ordered to pay over $1 million in damages, on behalf of three former employees and the estate of an employee who died during the course of the OSHA investigation. OSHA also ordered preliminary re-instatement for the three living employees. The company filed a motion to stay the preliminary re-instatement order but the ALJ denied said motion and compelled Gaines to make *bona fide* offers of re-instatement, which Gaines did. Under STAA, complainants have 180 days to file their complaints and OSHA can order both compensatory and punitive damages. STAA also has a kick-out provision, which allows the complainant to take their case to a U.S. District Court if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint.

Submission for the Record

At the request of the U.S. Senate Committee on Health, Education, Labor, and Pensions, the Occupational Safety and Health Administration has collected 3 years of data (fiscal year 2011–13) relating to the impact of extended filing periods for whistleblower complaints in eight State Plan States that have deadlines that exceed the 30-day period required by OSHA. The eight States covered include California, Connecticut, Hawaii, Kentucky, North Carolina, New Jersey, Oregon, and Virginia. The below summary results are based on data collected about the 1,382 cases from these eight States during fiscal year 2011–13 where both an adverse action date and a filing date can be determined and which are closed cases.

- 748 cases (54.1 percent) were filed within 30 days of the adverse action, while 634 (45.9 percent) were filed after 30 days.
- Of those 634 cases filed 31 or more days after the adverse action, 88 (13.9 percent) were determined to be meritorious.
- The percentage of cases filed within 30 days that were determined to be meritorious (18.4 percent) was higher than those filed 31 or more days after adverse action (13.9 percent).

In summary, 88 workers received meritorious decisions for their cases where, if filed under OSHA jurisdiction, they would have seen their cases dismissed due to missing the filing deadline. While the percentage of meritorious cases is somewhat lower than for cases filed within 30 days, it stands as a testimony to the value of longer filing windows in these States. Additionally, a total of 634 complainants received a decision regarding the disposition of their cases based on the merits of the case rather than the technicality of missing the filing deadline, which provides a level of resolution that would not otherwise be offered.

OSHA believes that extended filing deadlines are a valuable resource in protecting worker rights, and as such would welcome the opportunity to extend the filing deadlines throughout OSHA and the other State Plans.

Whistleblower Cases in States With Extended Deadlines

State	Total no. of cases	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
Fiscal Year 2011	423	211	23	10.9	212	21	50.1	9.9
Fiscal Year 2012	519	296	64	21.6	223	37	43.0	16.6
Fiscal Year 2013	440	241	51	21.2	199	30	45.2	15.1
Total, fiscal year 2011–13	1382	748	138	18.4	634	88	45.9	13.9

Senator CASEY. Doctor, thank you very much. You'll be invited back, because you're right on the button. Senator Isakson and I have never seen this happen before.

[Laughter.]

Senator ISAKSON. It's a first.

Senator CASEY. It's a first. We'll do 5-minute rounds, and we're going to try to move to our next panel at about 10:20.

But I know that, No. 1, we've both acknowledged—both Senator Isakson and I have acknowledged the advancements you have made in setting up an important whistleblower program. We know that within the existing statute or within the existing resources that you have, you might be able to make more changes, and we look forward to working with you on that.

But just tell us—if we're going to help in reforming the work that you can do under existing law and also consider statutory changes, let's start with what you can do right now. What are some of the limitations you have working within the existing law, but also working within your current resources?

Mr. MICHAELS. The issues in the existing law are some of the ones that I addressed in my testimony. Just to enumerate them very quickly, the statute of limitations is a very serious problem. There are 200 cases a year which we dismiss simply because they're untimely. Some of them involve what we think are very meritorious cases of workers who file 32, 34, or 35 days after the event, and that simply isn't fair. Congress has passed a dozen pieces of legislation which give workers 180 days to file a complaint, and we think that would be one that makes sense for all of them.

Senator CASEY. Let me just interrupt there. You think just that alone—there might be as many as 200 cases a year that are meritorious that don't get considered.

Mr. MICHAELS. We dismiss 200 cases a year. We believe many of them are meritorious. That's correct. And, certainly, there are some workers who don't file, knowing full well that they've been told, "Well, you missed your 30 days." We think that would have a big impact.

The second thing, though, is to have an administrative review outside of OSHA. While I believe OSHA staff do an excellent job, the system is set up so we're the final arbiter, and I don't think that's fair. I think all Americans should have the right to take any decision that we make to an administrative law judge or to Federal court if they want to do that.

We can be wrong, and, right now, there's no recourse. If we're wrong, that's the end of the case. I think it's fair for both employers and for employees to have administrative reviews and the same reviews that Congress has put into these dozen other laws. As you'll see in my testimony, there are a couple of other areas as well—changing the burden of proof issues. But those are the key ones.

Senator CASEY. So what you've outlined or what would be statutory.

Mr. MICHAELS. Exactly.

Senator CASEY. Anything in the process of—we know that sometimes the time between introduction of legislation, even legislation that has a lot of consensus that undergirds it—that time can be substantial. So I want to ask you about under your existing—just the existing resources and what you can do now. Is there anything that we can do through either oversight or appropriations or otherwise?

Mr. MICHAELS. There is certainly an appropriations approach. You know, in the years following the expansion of the whistleblower program, where we were given new statutes every few years, where we got a dozen new statutes since the year 2000, for many years, no additional resources came with that. We are grateful that Congress in the last several years has given us greater resources, and we're using them very productively.

But we certainly could use more, because we do get new statutes all the time, and there's no money attached to those. There's no additional funding. Again, we're grateful in the appropriations process to get that additional help.

One of the things we're doing with the new money that we're getting this year is setting up a national alternative dispute resolution process. We piloted that in a couple of regions. We saw it was successful in getting cases to settlement very quickly to the agreement of both the worker and the employer involved. We want to do more of that, and certainly more resources will help us do that under current statutes.

But let me just mention—and I think Senator Isakson talked about it—the work we're doing through our advisory committee to look for better ways to essentially change the culture of ethics and compliance, which is what you'll hear later on from Greg Keating, who is a member of our advisory committee. That's something that we can do now, and one thing that—we've reached out to the employer community and to others to help us get the word out that better managed employers who have this culture of ethics and compliance will do better. They'll treat their employees better. They'll get the concerns and be able to address them in a way that's effective.

You know, we just had the anniversary of the Deepwater Horizon incident. There was a survey done weeks before that explosion where workers told their employer in an anonymous survey—almost half of them reported there was some fear of reporting a safety concern. Can you imagine how much better off this country would be if those workers had felt comfortable raising concerns with their employer, and the employer could address those?

I'm very glad that we're taking this approach, and I hope the Senate also will be supportive of those attempts to change what goes on in workplaces so employers set up compliance management systems very much like they set up safety management systems.

Senator CASEY. I'll stop for now. I may come back and wrap up.

Senator Isakson.

Senator ISAKSON. Dr. Michaels, I commended you in my statement about what you and Secretary Perez have done in terms of best practices promotion and trying to work with your group to come up with recommendations on best practices. But I've read the President's budget request year in and year out. It seems like there's been less of an emphasis from the administration on compliance programs, training programs, and best practices programs, and more of an emphasis on enforcement.

There's got to be a balance somewhere there in between. Are there places where you could use additional support in terms of bringing about better compliance and positive programs?

Mr. MICHAELS. That's a great question. Thank you for asking. That's exactly right. There is a balance. And we know that some employers are only impacted by fear of inspections, and there are lots of other employers who want to do the right thing, and we have to help them. So we generally ask for money for both, and we certainly continue to do that.

This area of whistleblower protection is not one, though, where we've really focused on compliance assistance, and that's why we've asked our advisory committee to help us do that, to help us figure out what that tool is. Right now, in the world of safety, we're able to tell employers lots of positive messages. We have a Web site with lots of information. We have a free consultation program in every State to help small employers address safety and health concerns, independent of OSHA inspections.

But we don't yet have that for whistleblower protection, and we'd like to develop that, and we're going to need help doing that, because we don't yet know the message to give. Right now, our message is simply don't retaliate against whistleblowers, and we have to do better than that. We have to say,

> "Here's the program. Here's the management system that will help you learn what your workers' concerns are and how you can address them best."

We're hoping to develop that.

Senator ISAKSON. I'm a big supporter of whistleblowers. In fact, I passed legislation a couple of years ago within the Peace Corps to create a whistleblower standard in the Peace Corps that had not existed before. So I am on your side in terms of recognizing that we can't hire enough inspectors to watch the workplace all over the world. What we need is the workers and the employers being the inspectors, bringing forward those things that need to be changed. I'm on that team.

But I'm also on the team—there are two great motivators in life. One is fear, and the other is reward. In your testimony, you pointed out that the fear of an inspection is one of the motivators where people will do better if they know they're more often inspected. But a lot of people may hope they don't get inspected and they might slip and slide a little bit.

Have you got any programs within the Department of Labor where you illuminate or reward or raise up and elevate someone you find doing positive efforts to reduce workplace accidents and deaths and injury?

Mr. MICHAELS. Absolutely. We have two programs. One is called the Voluntary Participation Program, the VPP, and we have well over 1,000 employers across the country who are members of that program, and those are really the best of the best. They tend to be large employers.

They've committed to doing safety programs far beyond anything OSHA requires them to do under the law, and we give them a flag, and we say they're doing a great job, and they are exempted from certain other requirements. They do it because they know it's the right thing to do, and we recognize them.

Then we have a program like that called SHARP, which is for small employers, and that is run through our State consultation program. And that's the same thing, where we recognize the small

employer who has taken steps and made a commitment well beyond what OSHA requires. They're true believers. They're doing this not because OSHA recognizes them, though. They're happy for our recognition, but they know they're a better, more productive, and more profitable employer by doing this.

Senator ISAKSON. You've just underlined my point, because we all know the fear is the inspector. The inspector is coming, and everybody says, "Oh, my God, where am I going to get"—especially at MSHA and places like that, which I deal with mine safety a lot. But reward is also important.

What exemptions do you give somebody for good practices and good behavior?

Mr. MICHAELS. We don't put them on the inspection list. That's what they get. After the Texas City BP explosion several years ago, we did a national program where we did an inspection of every single oil refinery. But those oil refineries that were already in our VPP program were exempted from that, because we know they're doing a good job.

We're in and out of those plants all the time on compliance assistance activities. We're in touch with the management. So we don't need to inspect those plants. If they're that good, we put our resources somewhere else.

Senator ISAKSON. Thank you, Dr. Michaels.

Thank you, Mr. Chairman.

Senator CASEY. Thanks, Senator Isakson.

Dr. Michaels, you'll be out the door in about 5 minutes. We're almost ready to wrap up.

But I wanted to ask you about the experience that States have had recently. I know that a lot of what—virtually everything you've outlined in your testimony in terms of statutory change conforms with other Federal statutes. If you lengthen the time period within which you bring a complaint, that's not some novel idea. It's been embedded into a lot of Federal statutes.

I'm told that 8 of the 27 States that operate some form of their own OSHA State plans—that these States, in particular, have already identified at least two areas that are important. One is the need to have complaint filing times for 11(c) type cases longer than the existing Federal OSHA statute or longer than Federal OSHA. And another, I guess, five States have provisions where they allow claimants a private right of action—so time within which to bring a complaint and then a private right of action where an individual can bring the action.

Can you tell us, to the extent that you know, some of the State data, what this has meant to States that have those kind of broader—I might call them broader remedies or more effective remedies for a whistleblower case?

Mr. MICHAELS. That's a very good question. We don't have data on hand, and we can certainly get back to you on the impact. North Carolina, for example, allows 180 days for whistleblowers to raise concerns, and Kentucky allows 120 days.

But there are several States across the country that, in their wisdom, have looked at this, and they have provided more time for whistleblowers to raise concerns under 11(c), because they themselves are the ones that enforce the 11(c) provision. And their State

legislatures have given them private rights of action—many of these States as well. I can look a little more and get back to you on what the impact has been.

[The Impact of Extended 11(c) Discrimination Filing Deadlines Within OSHA State Plans Chart may be found in Additional Material.]

But when we look at that, we say, "Well, obviously, these programs are working OK." And when we see the problems that we face, we believe that it would be very useful for the Federal Government to adopt this 180-day statute, for example, for 11(c) across the country.

Once we do that—because of the way the OSHA Act is written, it says every State has to be at least as effective as OSHA. If we change it on a national level, then other States which haven't gone to 180 days will do that. But a number of States already are there, so they wouldn't have to make any changes.

Senator CASEY. And I know in your testimony starting, I guess, at page 4, you outline the changes you had hoped for. I'm assuming that when you—just for purposes of being specific on the record, when you rank them—No. 1 being preliminary re-instatement, No. 2 being individual right of action requirements—that you're ranking them in order of priority. Is that——

Mr. MICHAELS. I think they're all important.

Senator CASEY. They're all important. And you've got a total of five, the last one being burden of proof. We will certainly take those recommendations into consideration, and we hope that we can come together on a bipartisan piece of legislation to make these changes. But in the meantime, while that process grinds on, we hope that you'll stay in touch with us and figure out and help us figure out ways that we can help in the near term, even prior to any whistleblower statutory changes.

Mr. MICHAELS. I'm grateful for that, and I promise to do that.

Senator CASEY. Before we wrap up, Doctor, Senator Murray is here, and she'd like to ask you a question. I know that we were going through a list of statutory changes, and we're grateful to have those in front of us. We do want to make sure that as we consider those changes that you continue to stay in touch with us regarding the near term. And I was promising you'd be out the door soon, so my questions are over, but Senator Murray might have one or two.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Nice delay. Thank you. Good morning, and thank you, Mr. Chairman, for holding this hearing. I just want to recognize that yesterday was Worker Memorial Day, and today—which we pause to honor and remember the more than 4,000 workers who die every year on the job and the other 4 million workers who suffer serious job-related injuries. It's a tragedy that this country, if it was any other thing, would really be focused on it. But these kind of rippled out throughout the year, and we sometimes forget.

We know things need to change, and we owe it to those who have died or been injured to allow the voices of whistleblowers to be

heard and protected. I really appreciate you being here, Dr. Michaels. Thank you for staying an extra moment.

I wanted to talk to you because DOL manages the whistleblower program under several different laws. Is that correct?

Mr. MICHAELS. Yes, 21 statutes in addition to OSHA's.

Senator MURRAY. Twenty-one. How many whistleblower programs do you manage?

Mr. MICHAELS. It's one program, but 22 statutes with some variation between them, though most of them look very much the same.

Senator MURRAY. Are there differences between the laws that you manage?

Mr. MICHAELS. The primary difference is between the 11(c) and all of the new statutes, which have some of the recommendations that we would make that also are in your bill that would require—would give workers more time to file, would have administrative review for cases, would have the ability for OSHA to have preliminary re-instatements, would change the burden of proof that we follow for 11(c) to make them consistent with all these other statutes that Congress has passed in the last decade and a half.

Senator MURRAY. Walk us through some of the practical implications of having to manage the differences between these laws.

Mr. MICHAELS. Right now, we do a tremendous amount of training and regularly have to oversee our staff to remind them that the burden of proof is different under 11(c), and it's actually a higher burden of proof. So in cases that wouldn't be dismissed under any of the new statutes—food safety, modernization, consumer product safety—get dismissed under 11(c).

You'll hear about this later on in testimony from the next panel. A worker who looks like he has a meritorious case that we haven't fully investigated files 34 days after an event occurs where they feel like they've been retaliated against, and, you know, we dismiss the case.

Senator MURRAY. Just because of that?

Mr. MICHAELS. Yes. The law says they have 30 days.

Senator MURRAY. Do you think it's patently unfair and illogical that whistleblowers in different industries get treated differently just because Congress hasn't been able to act to raise the protections afforded to everyone?

Mr. MICHAELS. Yes, and I think it impacts the health and safety and the well-being of not just workers but of all Americans. If workers don't feel free to raise their concerns—and I talked about the Deepwater Horizon right before coming out here. It's important for workers to be able to raise those concerns for everybody's safety.

Senator MURRAY. As I understand it, the Department of Labor's solicitor's office has only prosecuted 6.7 percent of all merit claims under the OSH Act over the past 14 years, and fully 60 percent were abandoned entirely. Is that correct?

Mr. MICHAELS. The good news on that is things have changed. The solicitor of labor and I signed a memorandum 2 years ago instructing the field to work together to make this a high priority, and since then, our numbers have gone up dramatically.

Senator MURRAY. They have.

Mr. MICHAELS. Yes.

Senator MURRAY. Do you have those numbers?

Mr. MICHAELS. I do. Currently, for example, we are proceeding in litigation on 38 cases, which was more than the entire number for the first 12 years of the program. From 1996 to 2008, we litigated 32 cases. We settled some. But right now, I think the actual percentage—I can get back to you—is about 67 percent of the cases that we now refer to SOL are taken on for litigation. It's totally different.

Senator MURRAY. What has improved that, and what can we continue to do to improve it?

Mr. MICHAELS. That's been one where the solicitor of labor and I have said very clearly that this is a priority and has to be given resources. And when we say that from the national office, that cascades down to every office across the country. I think it's been very effective.

But there are still these great limits. I mean, there are only certain things we can do. We still have to go to Federal court to proceed on every single case. We know that if we go through a different sort of investigation and have administrative review, we can resolve these cases much earlier and, in fact, not go to the Federal court if not necessary, but also get people back to work, if we can, as quickly as possible and get everything settled. We don't need to win the case. We want to settle the case, so the worker and the employer are both happy with the result.

Senator MURRAY. Mr. Chairman, this isn't about any one piece of legislation. But the OSH Act itself has not been updated since 1970, and the vast majority of whistleblowers don't have the most up-to-date protections. In fact, as one of our witnesses is going to point out, by far, the most whistleblower complaints are covered by the OSH Act, which has the oldest and weakest protections of any whistleblower law.

So I have legislation, the Protecting America's Worker Act, that deals with this, and I hope that we can really look at updating these laws that need to be updated. Thank you very much.

Senator CASEY. Senator Murray, thank you very much.

Dr. Michaels, you're out early because your testimony was within the time limit. But thanks for being here. Thanks for your public service.

Mr. MICHAELS. Thank you so much to all three of you.

Senator CASEY. We'll move to our second panel, and as people are getting seated, I'll begin with the introductions in the interest of time. I'll start first on my left and your right.

Emily Spieler is the Edwin W. Hadley Professor of Law at Northeastern University School of Law in Boston, MA. She also serves as chair of the Whistleblower Protection Advisory Committee for the U.S. Department of Labor. Ms. Spieler previously held senior government positions with the State of West Virginia, faculty positions with the West Virginia University College of Law and was the dean of the Northeastern University School of Law from 2002 to 2012.

Prior to beginning her academic career, she practiced labor and employment law in Boston and West Virginia. She received her

A.B. degree magna cum laude from Harvard University and her J.D. from Yale School of Law.

Dean, we're grateful you're here. I'm allowed to call you dean, I think, still. We talked about that earlier.

Second, Tom Devine is Legal Director of the Government Accountability Project, where he has worked to assist thousands of whistleblowers to come forward. He has been involved in all of the campaigns to pass or defend major whistleblower laws over the last two decades. He is a frequent expert commentator on television and radio talk shows. Mr. Devine is the recipient of the "Defender of the Constitution" Award bestowed by the Fund for Constitutional Government.

Thank you very much.

Ross Baize is an employee of Caterpillar in Peoria, IL. Ross began his career at Caterpillar as a material handling specialist in the Morton, IL, world distribution headquarters and is now a mill, drill, and bore specialist at Caterpillar's east Peoria, IL, location. He is also on the UAW Safety Committee. He's a committeeman for that and a member of the UAW Local 974.

He grew up in Peoria. He is married to his wife, Laura, with a 3½-year-old son, and they're expecting a daughter in June.

Good luck. I have four daughters, and I'm sure you'll enjoy all of them, if you have more, I should say.

Gregory Keating is the co-chair of the Whistleblowing and Retaliation Practice Group at Littler Mendelson, P.C., in Boston, MA. He's a member of Littler's board of directors. In June 2012, Senators Enzi and Isakson nominated Mr. Keating to serve as a management representative on the Whistleblower Protection Advisory Committee, and he was appointed to the committee by Secretary of Labor Hilda Solis in December 2012.

Great to be with you all this morning.

Emily, will you start us off? Thank you very much.

STATEMENT OF EMILY SPIELER, A.B., J.D., PROFESSOR OF LAW, NORTHEASTERN UNIVERSITY SCHOOL OF LAW AND CHAIR, WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE, BOSTON, MA

Ms. SPIELER. Thank you, Chairman Casey, Ranking Member Isakson, and Senator Murray. I really appreciate the opportunity to be here today. Please note, however, that my testimony reflects only my own views. I'm not yet able to present conclusions from the advisory committee nor our working subgroups, one of which you've already referenced in the discussions, nor, of course, am I representing the Department of Labor or OSHA.

The mandate of the OSHA Act is broad to assure so far as possible every working man and woman in the Nation safe and healthy working conditions. But as you have noted, the resources of OSHA are limited. We therefore have no choice but to depend on workers as our first line of defense to identify hazards. It's critical to be able to assure all workers that the law against retaliation is strong in order to be able to encourage them to come forward and in order to remedy any retaliation that they may suffer.

It is also important to remember that our collective well-being is at risk if workers fear retaliation. Safety problems inside work-

places can lead to environmental and community disasters. Two notorious examples of this are the BP oil spill and the explosion in the west Texas fertilizer plant.

As you know, 11(c) was an early anti-retaliation statute, but it's now part of a growing number of Federal statutes. All of the recent statutes provide much stronger protections for whistleblowers than 11(c). Section 11(c) has been left behind. As a result, workers are afraid to come forward and legitimately so. We're giving them an illusory promise.

The provisions of the statute are weak, and these provisions place responsibilities on the Department of Labor that it simply cannot meet. I want to briefly explore these two related problems. My written testimony provides much more detail.

A comparison of 11(c) and other whistleblower provisions tells the story. First, many 11(c) complaints are screened out from the beginning because they don't meet the 30-day filing requirement. Every whistleblower law passed since 2000 allows 180 days for filing, a deadline I believe 80 percent of the screened out 11(c) filings would meet if the time period were extended.

Second, there is no review process for complaints that are screened out, and there's only an informal agency review of a dismissal by OSHA at any later stage. Cases that are held non-meritorious by OSHA can, under other whistleblower statutes, be pursued before DOL administrative law judges or through a kick-out provision in Federal court.

Third, the monetary settlements in these cases tend to be small, and re-instatement for discharged workers is rare. Section 11(c) requires proof that the illegal motivation is a motivating rather than a contributing factor. It has no provision for preliminary reinstatement. There's no guarantee to complainants that their cases will be pursued.

There's little pressure on employers to engage in serious settlement discussions. Where, then, is the disincentive for employers who are engaging in unlawful retaliation. Other whistleblower statutes address all of these issues.

Fourth, once OSHA completes its work on a case, meritorious cases that have not been settled are referred to the solicitor. If SOL chooses to reject a case—and this has happened frequently over the years—there's no review of this decision. The complainant has no recourse.

Litigation may not always be better, but there are three problems with this part of the process. First, SOL lacks the resources to litigate all of the cases that need litigation. Second, complainants may legitimately feel they've not been heard if their cases are never brought forward. And, third, without the promise of litigation, in the end, the pressure on employers to comply with the law is lessened.

America's workers who are concerned about safety deserve the same level of protection that is extended to those who report about financial mismanagement. If the language of 11(c) were consistent with other whistleblower statutes, many of these problems would be solved.

What are the key changes? Lengthen the statute of limitations; create a right of preliminary re-instatement; change the burden of

proof to a contributing factor; change the process for adjudication of complaints, including a right to hearings before administrative law judges; a kick-out provision to allow complainants to remove cases to court; and a system that provides legal representation.

All of these changes would be consistent with the more recently passed whistleblower laws, including Sarbanes-Oxley, the ACA, and Dodd-Frank. None of them are revolutionary. All of them would change the landscape for workers who are brave enough to come forward to raise concerns about safety and who then face retaliation.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Spieler follows:]

PREPARED STATEMENT OF EMILY A. SPIELER, A.B., J.D.

Chairman Casey, Ranking Member Isakson and members of the Subcommittee on Employment and Workplace Safety: Thank you for the opportunity to appear before you today.

My name is Emily Spieler. I am now the Edwin W. Hadley Professor of Law at Northeastern University School of Law in Boston, having stepped down as dean of the law school in 2012. I currently serve as the Chair of the Whistleblower Protection Advisory Committee, the Federal Advisory Committee that is charged with providing advice and guidance to the Secretary of Labor and OSHA on whistleblower protection programs. I have extensive experience in the fields of occupational safety and health and legal issues surrounding retaliation at work, and I have served on committees relevant to these issues for the National Academy of Social Insurance, the National Academies of Science, and the American Bar Association. I also served as Chair of the Federal Advisory Committee to the Department of Energy on the implementation of the Energy Employees Occupational Injury Compensation Program Act.

I am here today to offer my comments regarding Section 11(c) of the Occupational Safety and Health Act,[1] in response to the question that you have posed: Are existing protections adequate to build a safer workplace?

Please note that this testimony is drawn from my own research and, in part, from what I have learned from my work as Chair of the Whistleblower Protection Advisory Committee (WPAC). I am not here, however, representing the advisory committee, nor am I representing the Department of Labor or Occupational Safety and Health Administration (OSHA): the views I express today are entirely my own. The WPAC is considering administrative, regulatory and statutory issues relating to section 11(c), and we have a workgroup that is actively investigating these issues. We also have a subcommittee that is working to evaluate and recommend best practices in industry. I hope, in the future, to be able to provide you with the official findings on these and other issues from the advisory committee. At this point, however, the committee has not reached the conclusion of its inquiries.

The Occupational Safety and Health Act (OSHAct) was designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[2] But OSHA lacks the resources to be universally present at workplaces to enforce safety standards: there is only about one inspector for every 59,000 workers; one inspector per 3,600 covered workplaces.[3]

In view of this, it is critical that workers be able to raise safety concerns without fear of reprisal. They are the first line of defense against hazards. While many employers are working to create cultures that encourage workers to come forward with concerns, this is by no means universal. The more we can encourage these voluntary practices, the better.

But it is critical to be able to reassure *all* workers that the law against retaliation is strong—in order to be able to encourage them to come forward, and in order to remedy any retaliation that they may suffer. In my opinion, section 11(c) is simply inadequate to fulfill this purpose and to provide this essential reassurance.

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[1] 29 U.S.C. §660(c)(1), commonly referred to as section 11(c); see also 29 CFR Part 1977 for the regulations governing this section.

[2] 29 U.S.C. §651(b).

[3] According to the FAQs currently posted on OSHA's Web site, the Federal and State plan agencies charged with enforcing the OSHAct have about 2,200 inspectors who are responsible for the health and safety of 130 million workers in more than 8 million worksites. See *http://www.osha.gov/OSHA__FAQs.html#q__25*.

Not only the safety of workers and the effectiveness of the safety laws depend on strong anti-retaliation protection, but our *collective* well-being is at risk if workers fear retaliation. Safe practices inside worksites affect not only the workers, but also the surrounding communities. Chemical leaks lead to community threats and evacuations. Safety problems inside workplaces cause explosions that create environmental and community disasters. Examples of community threats from workplace safety hazards abound. The 2010 BP oil spill in the Gulf was one glaring example.[4] The ammonium nitrate explosion in the West Texas, fertilizer plant in 2013, is another[5] I lived for many years in Charleston, WV, where we depended on the workers in the chemical plants to ensure that safety rules were followed to avoid environmental disasters—this was brought to light again in 2008 when there was an explosion near a tank holding Methyl Isocyanate (MIC) at the Bayer CropScience facility located in Institute, WVA.[6] I'm sure you will recall that it was MIC that caused the Bhopal disaster in 1984.[7]

Our communities are at risk when our workers are at risk.

In recent years, considerable attention has been paid to whistleblower protections, and few Federal statutes that impact the public good have been passed without whistleblower protection provisions—from the Consumer Product Safety Act to Sarbanes-Oxley to Dodd-Frank to the Affordable Care Act. The laudable intention of this Congress has been to offer protection to people who act on behalf of all of us, calling attention to the need for citizens to help in the enforcement of laws.

Many of these statutes have been assigned to OSHA for investigation and enforcement. *All* of the recent statutes provide much stronger protections for whistleblowers than the OSHAct. Section 11(c) is also far weaker than any of the other whistleblower provisions that address safety in specific industries, including the mining industry (under the Mine Safety and Health Act of 1977[8]) as well as the commercial motor and public transportation, aviation and railroad industries, which are covered by more recent statutes.[9] These other statutes have longer statutes of limitation, lower burdens of proof, and extensive procedural rights that are not included in 11(c).

Section 11(c) has been left out and left behind.

As a result, workers are afraid to come forward, and legitimately so. Although it is difficult to find hard data on things that are not reported, we do know that many occupational injuries and illnesses are not reported,[10] and we have some windows into the level of fear and the problems of retaliation. We know that safety "incentive" programs that discourage reporting are common, and that both workers and others are pressured not to report hazards and injuries.[11] In discussions in WPAC meetings, labor representatives have repeatedly brought to our attention the extraordinary problems faced by workers who report injuries or hazards. Retaliation is rampant. Relief is inadequate.

Why is this so?

First, the provisions of the statute are weak. The statute fails to protect workers, and therefore fails to send the necessary message to those employers who need legal boundaries to discourage reprisals. Second, these weaker statutory provisions place responsibilities upon the Department of Labor that it simply cannot meet. In this

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[4] Eleven workers died and thousands were affected by the oil spill.

[5] Fifteen people were killed, more than 160 were injured, and more than 150 buildings were damaged or destroyed.

[6] One worker died, and thousands in the Kanawha Valley of West Virginia were at risk.

[7] Thousands died in the community, over 500,000 were exposed.

[8] Mine Safety & Health Act, 30 U.S.C. § 815. Even the 1969 Coal Mine Health and Safety Act provided for a public hearing regarding retaliation complaints, a right that is not included in the 1970 OSHAct.

[9] *See*: Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121; Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142, b; Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109.

[10] There is a large literature concerning the underreporting of injuries and illnesses in workplaces. The majority staff report of the Committee on Education and Labor, U.S. House of Representatives, The Honorable George Miller, Chairman, *Hidden Tragedy: Underrporting of Workplace Injuries and Illnesses* (June 2008) provides a comprehensive review of the problem. Underreporting was also a theme in at least one GAO report: *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*, GAO–10–10 (Oct 15, 2009).

[11] *See e.g.* GAO, Workplace Safety and Health: Better OSHA Guidance Needed on Safety Incentive Programs, GAO–12–329 (April 2012); GAO, *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*, GAO–10–10 (Oct 15, 2009). See note 25 *infra* regarding OSHA's current response to this particular problem.

written testimony, I first explore these two related problems. I then will close with suggestions that would reshape section 11(c) to make it more consistent with contemporary whistleblower laws.

WHAT HAPPENS TO COMPLAINTS UNDER SECTION 11(C)?

Complaints that arise under section 11(c) may involve any of the following activities: refusal to perform dangerous work; raising complaints to management; participation in safety and health activities; reporting injuries and hazardous conditions; and testifying in OSHA proceedings.

Once a complaint is received at an OSHA area office, it is assigned to an investigator. First, the investigator reviews the complaint to see whether it is timely filed (within 30 days of the retaliatory action) and presents a *prima facie* case. Cases that do not meet these standards can be "screened out" and are not docketed. *Once screened out, the complainant has no alternative recourse*, and there is no clear mechanism for any review (administrative or judicial) of a "screen out" decision. The data show that many section 11(c) complaints are screened out without docketing.[12]

	Total no. of complaints received	Total screened out	Percent screened out
Fiscal Year 2011	3,561	1,869	52
Fiscal Year 2012	4,348	2,562	59
Fiscal Year 2013	4,589	2,904	63
	12,502	7,335	59

The deadline for filing a section 11(c) case is 30 days. This is a very short statute of limitations—it passes before many workers who have been subjected to retaliation have had a full opportunity to assess their situations and, when appropriate, consult with an attorney. In contrast, every whistleblower law passed since 2000 allows 180 days for filing with the appropriate administrative agency[13]—a deadline most section 11(c) filings would meet if the time period were extended.

Cases Screened Out For Late Filing Fiscal Year 2011, 2012, 2013

TOTAL screened out	31–60 days	61–90 days	91–120 days	121–180 days	181+ days
905	399 (44 percent)	152 (17 percent)	70 (8 percent)	95 (10 percent)	189 (21 percent)

If not screened out, a case is docketed. Although OSHA is now responsible for over 20 whistleblower statutes, section 11(c) cases constitute about two-thirds of all cases docketed. As you can see from the following chart, the number of newly docketed

[12] All data in charts were provided to me by email by the Directorate of Whistleblower Protection Programs (DWPP) on April 7, 2014, or earlier. The decision to screen out can occur without any review. See OIG Report No. 02–10–202–10–105, Complainants Did Not Always Receive Appropriate Investigations Under the Whistleblower Protection Program (Sept. 30, 2010). Note that only the OSHAct, Asbestos Hazard Emergency Response Act, and International Safe Container Act allow OSHA to close a complaint administratively without docketing and a written determination. Although these data include AHERA and ISCA cases, only one case in this group was an AHERA case and none were ISCA cases; therefore the total that are OSHA 11(c) cases is N–1. See also GAO, Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency, GAO–09–106 (January 27, 2009).

[13] A complete compilation of the whistleblower laws enforced by OSHA can be found in the OSHA whistleblower Investigations Manual, Directive No.: CPL 02–03–003, eff. Sept. 20, 2011. A full chart with the statutes and much relevant information can also be found on the Web site of the whistleblower directorate in OSHA: *http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf* (rev. 4/4/2013). This same information is posted on the ABA Web site: *http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/occupational_safetyhealthlawcommitteemidwintermeeting/10whistleblower.authcheckdam.pdf*. Statutes with 180-day filing deadlines include: STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA. The relevant provisions of all of these were passed after the year 2000. Earlier statutes enforced by OSHA had shorter statutes of limitations, but title VII and other statutes enforced by the EEOC all have administrative statutes of limitation of 180 days or greater. In fact, FLSA retaliation complaints may be filed within 2 years, or 3 years if the employer's violation is willful.

11(c) cases, and the number pending at the close of the fiscal year, grew consistently until fiscal year 2013.[14]

	Newly docketed 11(c) cases	11(c) cases as percent of all whistleblower cases (all statutes) filed with OSHA	11(c) cases completed in fiscal year	Total 11(c) cases pending at end of fiscal year
Fiscal Year 2005	1,194	62	1,160	N/A
Fiscal Year 2006	1,195	65	1,229	N/A
Fiscal Year 2007	1,301	66	1,167	N/A
Fiscal Year 2008	1,381	62	1,255	N/A
Fiscal Year 2009	1,267	59	1,168	663
Fiscal Year 2010	1,402	61	1,144	927
Fiscal Year 2011	1,668	62	1,234	1,355
Fiscal Year 2012	1,745	61	1,653	1,440
Fiscal Year 2013	1,711	58	1,826	1,321

Once docketed, cases are investigated. They can be dismissed, withdrawn or settled. If they are settled, the settlement may include monetary damages or reinstatement. The data look like this:

Total Determinations Fiscal Year 2005–13

	Total	Dismissed		Withdrawn		Settlements					
		No.	Percent (of total)	No.	Percent	Total settled	Percent	Total damages collected	Average damages per settled case (total excludes N/A years)	No. of people reinstated	Percent of total settlements with reinstatement (total excludes N/A years)
Fiscal Year 2005	1,200	760	63	146	12	271	23	N/A	N/A	N/A	N/A
Fiscal Year 2006	1,276	787	62	196	15	279	22	N/A	N/A	N/A	N/A
Fiscal Year 2007	1,204	766	64	176	15	248	21	N/A	N/A	N/A	N/A
Fiscal Year 2008	1,318	830	63	227	17	247	19	N/A	N/A	N/A	N/A
Fiscal Year 2009	1,200	726	61	187	16	265	22	$1,839,299	$6,941	42	16
Fiscal Year 2010	1,183	672	57	177	15	310	26	$1,741,863	$5,619	49	16
Fiscal Year 2011	1,282	694	54	177	14	388	30	$2,478,212	$6,387	45	12
Fiscal Year 2012	1,717	977	57	340	20	382	22	$2,435,831	$6,377	38	10
Fiscal Year 2013	1,946	921	47	415	21	570	29	$4,939,444	$8,666	60	11
Total	12,326	7,133	58	2,041	17	2,390	19	$13,434,649	$7,015	234	12

Several additional issues are worth noting:

• Many of these settlements do not include any admission that the Act was violated, and as a result they do not include notice to other employees or employers regarding the outcome of the claim.[15]

• If OSHA dismisses a complaint, there is an informal agency review of the decision, but no formal or evidentiary review. The decision by the agency is non-reviewable and non-appealable to a separate administrative or judicial process. Under all other whistleblower statutes, cases that are held non-meritorious by OSHA can be pursued before an Administrative Law Judge or through a "kick-out" provision in Federal court.

[14] While the number of complaints filed continued to rise in fiscal year 2013, the number docketed and the number pending declined. It is difficult to know whether this decline reflects a decline in meritorious cases, or a change in the evaluation of claims filed. The change is too small to be significant. It is, however, notable that OSHA has begun to make inroads on the pending case backlog.

[15] Whistleblower Protection Advisory Committee (WPAC) Minutes of Tuesday, January 29, 2013.

• The number of cases dismissed is affected by the burden of proof that is required to find that the claim is meritorious: Section 11(c) requires proof that the illegal motivation was a "motivating" rather than a "contributing" factor to the employer's decision. Again, other whistleblower statutes use the less stringent standard.[16]

• The amount of average monetary damages per settlement in a section 11(c) case was less than $7,000 in every fiscal year 2005–12, and rose to only $8,700 in fiscal year 2013. These amounts may provide welcome relief to individual workers, but they are not large enough to create significant disincentives for employers who are engaging in unlawful retaliation.

• The percentage of settlements that included re-instatement was only 12 percent on average. Unlike many of the other whistleblower statutes, there is no provision in the OSHAct for preliminary re-instatement pending further review and litigation. Under these other statutes, preliminary re-instatement is available when the agency finds that there is reasonable cause to believe that the claim has merit or, under the Mine Safety and Health Act, when the agency concludes that the claim is not frivolous.[17] Without an equivalent provision in the OSHAct, there is less pressure for adequate settlements.

If OSHA is unable to settle a meritorious complaint, the case is referred to the Solicitor of Labor (SOL) for litigation. At this point, OSHA considers its investigation closed, and SOL can pursue settlement or litigation in Federal district court. There is no enforceable agency order that can be issued, nor is there provision allowing for adjudication before an administrative law judge, nor can a complainant bring the case on his or her own into court.

Remarkably few cases are accepted for litigation by SOL.

11c Cases Referred to SOL by OSHA and Accepted For Litigation

	No.	Percent of total OSHA determinations	Percent of "merit" cases
Fiscal Year 2005	23	2	8
Fiscal Year 2006	14	1	5
Fiscal Year 2007	14	1	5
Fiscal Year 2008	14	1	5
Fiscal Year 2009	22	2	8
Fiscal Year 2010	24	2	7
Fiscal Year 2011	23	2	6
Fiscal Year 2012	20	1	5
Fiscal Year 2013	38	2	7
Total	192	2	7

As you can see from these data, only 1 to 2 percent of total OSHA determinations result in acceptance for litigation by SOL.

If SOL decides not to pursue a case, there is no further action that can be taken. The decision by SOL not to pursue a case is completely non-reviewable.[18] As you can see from the data below, in the years 1996–2008, this occurred in 60 percent

[16] Using "contributing factor" standard: STAA, ERA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA, MAP–21. Again, the statutes passed more recently use this more liberal standard.

[17] Information about OSHA-enforced statutes can be found in the OSHA Whistleblowers Investigations Manual and on the DWPP desk reference, supra note 13. Preliminary re-instatement is available under all statutes passed since 2000, except for the ERA, according to the ABA chart. This includes STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, and FSMA. For the provisions under the Mine Safety and Health Act, see 30 U.S.C. § 815(c)(2) (". . . investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate re-instatement of the miner pending final order on the complaint.")

[18] See e.g. *Wood* v. *Department of Labor*, 275 F.3d 107 (D.C. Cir. 2001) and *Wood* v. *Herman*, 104 F. Supp.2d 43 (D.D.C. 2000), both holding that the Secretary of Labor has no statutory obligation to bring an enforcement action.

of the cases that were referred for litigation by OSHA—and these were the cases that OSHA considered strongest and worth pursuing!

11c Cases Referred to SOL Fiscal Year 2006–2008[19]

	No.	Percent of total
Rejected by SOL, no further action	279	56
Settled before litigation	156	31
Total litigated	32	6
Settled during litigation	21	4
Litigated and lost	3	1
Litigated and won	8	2

At our WPAC meetings, we have been assured that SOL and OSHA regional offices are now working much more closely on these determinations, and that SOL is committed to pursuing the cases that are referred by OSHA. This commitment has resulted in an improvement in the litigation rate of cases that are referred, as can be seen by more recent data.

11c Cases Referred to SOl CY2011, 2012, 2013 Q1[20]

	No.	Percent of total
Total Referred	69	
Accepted for legal action or settled	52	75
Declined, no further action	8	12
Pending review in SOL	9	13

According to more recent correspondence from SOL, a total of 38 cases were moved forward to litigation in fiscal year 2013.

The core problem with section 11(c), however, is that it requires complete dependence on agency and SOL action. A complainant has no way to bring forward a meritorious claim that the employer does not settle unless SOL pursues litigation. The design of the statute, which requires that every case that is not settled must be filed by SOL in Federal district court, makes the process inherently unwieldy. As long as responding employers know that the cases will not be litigated, there is no incentive for them to abide by the law or to settle cases rapidly and fairly.

OSHA has been criticized by both the GAO and OIG for more than 20 years for its handling of section 11(c) complaints. Investigators have reported that they lack the resources needed to do their jobs.[21] In 2009, the OIG found that OSHA was failing to perform adequate investigations on 80 percent of docketed complaints.[22] In April 2010, an OSHA whistleblower program review team conducted an internal investigation and found deficiencies and challenges facing the Whistleblower Protection Program and made extensive recommendations regarding procedures, evaluation and performance measures.

I am not here to criticize OSHA. As you know, OSHA's responsibility for whistleblower laws has grown dramatically since the OSHAct was passed in 1970. The agency is now responsible for more than 20 of these laws. Staffing has not kept pace. Currently OSHA's whistleblower program has a staff of 131 people nationwide[23]—this is hardly enough to investigate the growing number of complaints under the growing number of statutes that present a bewildering array of complex legal issues.

What we have learned at the meetings of the WPAC is that OSHA is committed to making this as effective a program as possible. In particular, with regard to occu-

[19] I was unable to verify some of these data from SOL. It is my understanding, however, that these data give a reasonably accurate picture of the treatment of these cases once referred to SOL.

[20] See comment in note 19, *supra*, regarding data accuracy.

[21] See GAO–09–106 (January 27, 2009) *supra* n. 12 at 35–40.

[22] OIG, *Complainants Did Not Always Receive Appropriate Investigations Under the Whistleblower Protection Program*, OIG Report No. 02–10–202–10–105 (September 30, 2010)

[23] OSHA had 115 full-time positions, received authorization for an additional 16 after requesting an additional 47. *See* Fiscal Year 2014 CONGRESSIONAL BUDGET JUSTIFICATION, OCCUPATIONAL SAFETY AND HEALTH, page 7, *http://www.dol.gov/dol/budget/2014/PDF/CBJ–2014-V2–12.pdf* (information on current and requested staffing for whistleblower program).

pational safety issues, the agency has focused energy and resources on protecting workers. A March 2012 policy memorandum expands protections for workers who report work-related injuries (and discourages safety incentive programs that discourage reporting of both hazards and injuries), noting that, "Ensuring that employees can report injuries or illnesses without fear of retaliation is . . . crucial to protecting worker safety and health."[24] There has been significant movement in relation to railroad industry employer policies that result in discipline for workers who report injuries. New procedures have been put in place in both the regions and in the review of non-merit findings. Coordination with regional solicitors has improved. Training has been instituted. The new central Directorate is overhauling procedures, creating new databases, and working to improve consistency among the regions.

The core problem remains, however: The law is weak and the Department of Labor simply lacks the resources to enforce section 11(c) as it is currently designed. These problems can only be remedied through statutory revision.

In preparation for this testimony, I conducted a full search of Federal court cases that have cited OSHA 11(c) provisions. What I found is both remarkable and informative. First, fewer than 200 cases over the time period since the Act was passed in 1970 came up in response to an initial broad query; many of these cases cited section 11(c) by analogy and did not actually involve retaliation for raising safety concerns. Second, many of the section 11(c) cases were brought by individuals under both State and Federal law, attempting to assert a private right of action because OSHA had failed to act on their complaints. This should not be a surprise, given the few cases that the Department of Labor has filed on behalf of complainants. These cases were almost universally dismissed, on the grounds that there is no private right of action under the Federal law. Very few jurisdictions have been willing to create a separate cause of action under State law, given that the OSHAct presumably creates a remedy. In contrast, while fewer complaints are filed under, for example, the Sarbanes-Oxley whistleblower provisions, there are far more reported cases.

The reported litigation shows again that the situation is extremely problematic. Individuals who are the subject of reprisal for asserting their rights under the OSHAct do not have a reasonable, fair, accessible system in which to assert these rights.

WHAT IS NEEDED TO CORRECT THE PROBLEM?

Section 11(c) cannot meet its objectives without statutory revisions. While there is no doubt that there are additional administrative improvements that can be made within OSHA and SOL, the current statutory provision is too weak, and it is much weaker than the whistleblower provisions in analogous and more recent statutes. Section 11(c) is too weak to provide the essential level of protection needed to ensure both that employees will be encouraged to come forward and that employers are discouraged from engaging in acts of reprisal. America's workers who are concerned about safety deserve the same level of protection that is extended to those who report financial mismanagement.

Here are several specific statutory changes that are needed to accomplish this:

1. Lengthen the statute of limitations to 180 days. *All* of the whistleblower statutes that have been passed in the last decade include 180-day statutes of limitation for the filing of complaints. The retaliation provisions in the anti-discrimination statutes enforced by the Equal Employment Opportunity Commission allow employees a minimum of 180 days (or 300 days when there is a relevant State law) to file a charge. The retaliation provisions under the Fair Labor Standards Act have an even longer statute of limitations. The OSH Act's exceedingly short statute of limitations makes it far more likely that workers who face discharge or other retaliation will miss the deadline for filing a complaint, meaning that they will have no recourse.

2. Create a right of preliminary re-instatement, pending final adjudication. Given that it is the most analogous statute, it would be appropriate to consider adopting the MSHA standard that if the complaint was not frivolously brought, the individual should be re-instated pending further litigation. Right now, workers who have been discharged cannot return to their workplace unless the employer settles the case and includes re-instatement, or the Solicitor of Labor pursues the case in Federal

[24] *See* Memorandum from Richard Fairfax, Deputy Assistant Secretary, to Regional Administrators, Re: Employer Safety Incentive and Disincentive Policies and Practices (March 12, 2012) *https://www.osha.gov/as/opa/whistleblowermemo.html*.

court. As noted above, many other whistleblower laws authorize preliminary reinstatement.

3. Change the process for adjudication of complaints. Currently, complainants have no right to full administrative hearings or full review of administrative decisions. OSHA and SOL are unable to handle the volume of complaints; the process is opaque for many complainants; and employers have inadequate incentives to refrain from reprisals. Procedural aspects of OSHA 11(c) should be consistent with the procedural aspects of the more recently passed whistleblower laws (e.g., AIR21, SOX, ACA, Dodd-Frank), including the following:

a. Create an administrative process for adjudication of complaints. Whether or not the OSHA investigation is complete, complainants should have the right to bring the complaint forward to a *de novo* adjudicatory hearing. This can be done utilizing the existing Department of Labor administrative law judges and Administrative Review Board. In order to protect the importance of the OSHA investigatory process, the right to bring a case forward should be triggered after a formal finding or after the statutory time for investigation of a complaint has elapsed (currently 90 days).

b. Create a system that provides legal representation for complainants. I would suggest that this should have two parts. First, SOL should have the discretion to provide representation to complainants in meritorious cases, including ensuring that complainants are re-instated, when appropriate, pending full resolution. Second, amend the statute so that prevailing complainants can recover attorneys' fees in addition to damages; again, most of the other anti-retaliation and whistleblower statutes provide for fees for complainants who prevail.

c. Consider creating, in addition to the administrative process, a private right to bring a civil action that would allow complainants to remove cases from the agency and pursue them in Federal court. This should not be a substitute for administrative adjudication, however. Federal litigation is costly and lengthy. There are, however, examples of egregious cases that belong in court rather than before administrative agencies.

d. To ensure that cases involving dual motives can be successfully litigated by complainants, change the evidentiary standard from "a motivating factor" to "a contributing factor"—the standard in all of the more recent whistleblower laws enforced by OSHA.

I hope that this information is helpful to the committee. I would be happy to work with the committee in any future consideration of these provisions, and I look forward to providing you with WPAC reports when they are available.

Thank you for the opportunity to address you today.

Senator CASEY. Thank you very much, and you were right on the button. We're really moving quickly.

Mr. Devine.

STATEMENT OF TOM DEVINE, LEGAL DIRECTOR FOR GOVERNMENT ACCOUNTABILITY PROJECT, WASHINGTON, DC

Mr. DEVINE. Mr. Chairman, thank you for inviting my testimony, which is largely in consensus with Professor Spieler's. My name is Tom Devine. I serve as the Legal Director of the Government Accountability Project. We're a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who use free speech to challenge abuses of power that betray the public trust.

Since 1977, we have assisted over 6,000 whistleblowers formally or informally through representation and through advocacy to help create America's modern whistleblower laws in the corporate sector as well as for government employees. Section 11(c) is America's oldest and by far most frequently used whistleblower law. But, ironically, it is also America's weakest by far.

At GAP, we view credible whistleblower laws as metal shields, because employees who rely on those rights have a fighting chance to survive. By contrast, no matter how gaudily decorated, cardboard shields guarantee doom for anyone who depends on them.

Compared to best practices globally, section 11(c) is a cardboard shield without the paint job.

When you review section 11(c) versus the 20 global best practices, it only meets 25 percent of the criteria for an effective whistleblower law. That's ironic, because modern U.S. statutes like the Sarbanes-Oxley law and those for government contractors reflect a gold standard of whistleblower rights. The previously introduced Protecting America's Workers Act would upgrade occupational safety rights to those in all modern whistleblower laws enacted since 2002.

My testimony has a detailed analysis of these criteria. But overall, a 25 percent pass rate is flatly unacceptable. In putting that record in perspective, the five core principles for credible protection are loophole-free protection, realistic timeframe to act on rights, fair legal burdens of proof on the evidence necessary to prevail, meaningful due process to enforce the rights, and remedies that make the victims whole when they prevail.

If we look at these, section 11(c) has four cornerstones of failure by those criteria. If you look at realistic timeframes, the best practices range from 6 months to a year. Most people aren't even aware of their rights within 30 to 60 days. Section 11(c)'s 30-day statute of limitations ties for global worst practice.

Or let's look at realistic standards to prove violation of rights. Since 1989, every U.S. whistleblower law has set a quantum of evidence for how much it takes to win your case. It said that to do that, you have to show that your protected activity was a contributing factor, and if you do, the employer needs to show by clear and convincing evidence that it would have acted for innocent reasons anyway, even if you had remained a silent observer. Section 11(c) is the only law on the books since 1989 that doesn't have these burdens of proof.

Or there's the right to a genuine day in court, normal judicial due process, the same as available for citizens generally aggrieved by illegality. The Secretary has full access to court, but the complainant has the access neither to judicial nor guaranteed administrative due process, even at the informal level. It only provides for a discretionary investigation without any administrative or due process fact finding.

The investigations have no teeth because they can only be enforced by the solicitor of labor, which declines to prosecute up to 70 percent of favorable determinations in any given year. There is no appellate judicial review of agency discretion, as GAP learned from representing whistleblowers. The bottom line is they have no control over their rights.

And, finally, there's relief for whistleblowers. If you win your case, will you still lose? Under Section 11(c), that's very likely to happen. The provisions do not include financial relief. They do not include interim relief while the case is proceeding. They don't include a transfer preference for those who may not want to go back to the same supervisor. They don't provide for attorney fees or costs or accountability for those who engaged in wrongdoing. It's basically a symbolic victory.

Mr. Chairman, that's our analysis of a very deficient statute. It's a primitive statute which is long overdue to modernize so that it

matches the rest of corporate whistleblower law. Our testimony has an analysis of enforcement practices, and it shouldn't take an act of Congress for the Department of Labor to do a better job.

[The prepared statement of Mr. Devine follows:]

PREPARED STATEMENT OF THOMAS DEVINE

Mr. Chairman, thank you for inviting my testimony today on the adequacy of occupational safety whistleblower protection rights. My name is Tom Devine, and I serve as legal director of the Government Accountability Project ("GAP"), a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. Since 1977 we have assisted over 6,000 whistleblowers formally or informally through representation. GAP also has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including corporate rights enacted since 1992, AND the Whistleblower Protection Enhancement Act of 2012.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for government contractors, the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as *The Whistleblower's Survival Guide: Courage Without Martyrdom*, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on Government Oversight)(2002); and *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights*. (2008).

As part of our mission, I authored *The Corporate Whistleblower Survival Guide: A Handbook for Committing the Truth*," which won the getAbstract International Business Book of the Year Award at the 2011 Frankfurt Book Fair. *Committing the Truth's* legal chapter spotlighted weaknesses in legal rights for occupational safety whistleblowers, and enforcement practices for all whistleblowers by the Department of Labor's (DOL)

Their foundation for occupational safety is section 11(c) of the Occupational Safety and Health Act, which shields those who report safety violations and is America's first Federal whistleblower protection statute. Ironically, while section 11(c) is America's oldest and by far most frequently used whistleblower law, it also is America's weakest. At GAP we view credible whistleblower laws as "metal shields," because employees who rely on those rights have a fighting chance to survive. By contrast, no matter how gaudily decorated, lowest common denominator rights are "cardboard shields" that ensure doom for anyone who depends on them. Compared to best practices globally, section 11(c) is a cardboard shield without the paint job.

My testimony also will summarize the gap between rights on the books and rights in reality, based on enforcement practices by OSHA's new Directorate of Whistleblower Protection. (DWPP) It should not take an act of Congress for DOL to far more effectively protect whistleblowers. There is widespread consensus that prior policies administering section 11(c) severely frustrated the law's purpose. Under Assistant Secretary David Michaels, the Occupational Safety and Health Administration (OSHA) which administers section 11(c) has committed to policies that could reverse that track record. But change would disrupt deeply ingrained priorities by OSHA's regional leadership, which has a unique role. How much his policies make a difference will depend on accountability through independent oversight, from audits to hearings such as today's forum.

SECTION 11(C) COMPARED TO GLOBAL BEST PRACTICES

The standards below are based on comparisons with all Federal whistleblowers laws, those at Intergovernmental Organizations (IGO) like the United Nations or World Bank, U.S. funding prerequisites for IGO's, and other nations such as Great Britain. While compiled by GAP, they are consistent with those of the Council of Europe and the Organization for Economic Cooperation and Development. By these criteria, section 11(c) only meets 25 percent of the criteria. This is ironic, because modern U.S. whistleblower statutes such as those in the Sarbanes Oxley law and those for government contractors reflect the gold standard level of whistleblower rights. The previously introduced Protecting America's Workers Act would upgrade occupational safety rights to those in all modern whistleblower laws enacted since 2002. It is frustrating for whistleblower rights advocates that Congress has not acted on legislation to modernize occupational safety whistleblower rights to the standards that govern nearly all other private sector contexts. The analysis below explains the criteria for effective whistleblower protection, and evaluates section 11(c) with that baseline.

I. Scope of Coverage

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

1. *Context for Free Expression Rights with "No Loopholes".* Protected whistleblowing should cover "any" disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. It is necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organizational checks and balances.

Best Practices: United Nations Secretariat whistleblower policy (ST/SGB/2005/21), section 4; World Bank Staff Rule 8.02, section 4.02; Public Interest Disclosure Act of 1998 ("PIDA"), c. 23 (U.K.), amending the Employment Rights Act of 1996, c.18), section 43(G); Protected Disclosures Act of 2000 ("PDA"); Act No. 26, GG21453 of 7 Aug. 2000 (S. Afr.), section 7–8; Anti-Corruption Act of 2001 ("ACA") (Korea—statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 ("Ghana WPA), section 4; Japan Whistleblower Protection Act, Article 3; Romanian Whistleblower's Law ("Romania WPA"), Article 6; Whistleblower Protection Act of 1989 ("WPA") (U.S. Federal Government), 5 USC 2302(b)(8); Consumer Products Safety Improvement Act ("CPSIA") (U.S. corporate retail products), 15 U.S.C. 2087(a); Federal Rail Safety Act ("FRSA") (U.S. rail workers) 49 US 20109(a); National Transportation Security Systems Act ("NTSSA") (U.S. public transportation) 6 US 1142(a); Sarbanes Oxley Reform Act ("SOX") (U.S. publicly traded corporations) 18 US 1514(a); Surface Transportation Assistance Act ("STAA") (U.S. corporate trucking industry) 49 US 31105(a); American Recovery and Reinvestment Act of 2009 ("ARRA"), (U.S. Stimulus Law), P.L.111–5, Section 1553(a)(2)–(4); Patient Protection and Affordable Care Act ("ACA"), (U.S. health care), sec. 1558, in provision creating section 18C of Fair Labor Standards Act, sec. 18B(a)(2)(4); Food Safety Modernization Act ("FSMA") (U.S. food industry), 21 U.S.C. 1012(a)(1)–(3); Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank")(U.S. financial services industry), sec. 1057(a)(1)–(3).

Section 11(c): **PASS.** Section 11(c) does not contain any context loopholes.

2. *Subject Matter for Free Speech Rights with "No Loopholes".* Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

Best Practices: U.N. ST/SGB/2005/21, section 2.1(a); World Food Programme (WFP) Executive Circular ED2008/003, section 5; World Bank Staff Rule 8.02, section 1.03; African Development Bank (AfDB) "Whistleblowing and Complaints Handling Policy, section 4; The Whistleblowers Protection Act, 2010 ("Uganda WPA"), section II.2; PIDA, (U.K.); PDA, section 1(i)(S. Afr.); New Zealand Protected Disclo-

sures Act ("NZ PDA"), 2000, section 3(1), 6(1); ACA (Korea), Article 2; Public Service Act ("PSA"), Antigua and Barbuda Freedom of Information Act, section 47; R.S.O., ch. 47, section 28.13 (1990) (Can.); Ghana WPA, section 1; WPA (U.S. Federal Government), 5 USC 2302(b)(8); FRSA (U.S. rail workers) 49 USC 20109(a)(1); NTSSA (U.S. public transportation) 6 USC 1142(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1); ACCR (U.S. Stimulus Law) P.L.111–5, Section 1553(A)(1)–(5); ACA (U.S. health care) *id*.; FMSA (U.S. food industry) *id*; Dodd Frank (U.S. financial services industry) *id.*.

Section 11(c): **PASS.** In addition to protection for specific disclosures, protected activity in section 11(c)(1) includes exercise of "any right afforded by this Act."

3. *Right to Refuse Violating the Law.* This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

Best Practices: Asian Development Bank (ADB) Administrative Order No. 2.10, section 3.5 (see AO 2.04, section 2.1 (f) for corresponding definition of misconduct); World Bank Staff Rule 8.02, section 2.07 (see Staff Rule 8.01, section 2.01 for definition of misconduct); WPA (U.S. Federal Government) 5 USC 2302(b)(9); FRSA (U.S. rail workers) 49 USC 20109(a)(2); NTSSA (U.S. public transportation) 6 USC 1142(a)(2); CPSIA (U.S. corporate retail products) 15 USC 2087(a)(4); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1)(B); ACA (U.S. health care) sec. 18C (a)(5); FSMA (U.S. food industry) 21 USC 1012(a)(4); Dodd Frank (U.S. financial services industry) sec. 1057(a)(4).

Section 11(c): **FAIL.** Although the Act has a general right to refuse unsafe working conditions, section 11(c) does not codify protected activity that includes the right not to violate the law.

4. *Protection Against Spillover Retaliation.* The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as "assisting whistleblowers," (to guard against guilt by association), and individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

Best Practices: World Bank Staff Rule 8.02, section 2.04; AfDB Whistleblowing and Complaints Handling Policy, section 6; Organization of American States, "Draft Model Law to Encourage and Facilitate the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses" ("OAS Model Law"), Article 28; ACA (Korea), Art. 31; NZ PDA, section 4(3); WPA (U.S.), 5 USC sections 2302(b)(8) (case law) and 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regular Commission, Department of Energy and regulated corporations), 42 USC 5851(a); FRSA (U.S. rail workers) 49 USC 20109(a); NTSSA (U.S. public transportation) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a); ACA (U.S. health care) sec. 18C(a); FSMA (U.S. food industry) 21 USC 1012(a); Dodd Frank (U.S. financial services industry) Sec. 1057(a).

Section 11(c): **PASS.** Section 11(c)(1) protects those "about to" engage in protected activity,

5. *"No Loopholes" Protection for All Citizens With Disclosures Relevant to the Public Service Mission.* Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission. It should not matter whether they are full-time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines an organization's mission, the reprisal victim should

have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization's activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.

Best Practices: AfDB Whistleblowing and Complaints Handling policy, sections 5.1 & 6.2; ADB Administrative Order No. 2.10, section 8; IDB Staff Rule No. PE–328, section 2.1 & 2.2; Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]), Pillar 3; NZPDA, section 19A; PIDA (U.K.), sections 43 (K)(1)(b–d); ACA (Korea), Art. 25; Whistleblower Protection Act of 2004 (Japan WPA), section 2; Ghana WPA, sec. 2; Slovenia Integrity and Prevention of Corruption Act (Slovenia Anti-Corruption Act), Article 26; Uganda WPA, section II.3; Foreign Operations Appropriations Act of 2005 ("Foreign Operations Act")(U.S. MDB policy) section 1505(a)(11)(signed November 14, 2005); False Claims Act (U.S. Government contractors), 31 USC 3730(h); sections 8–9.; STAA (U.S. corporate trucking industry) 49 USC 31105(j); ACCR of 2009 (U.S. Stimulus Law) P.L.111–5, Section 1553(g)(2)–(4); Dodd Frank, Sec. 922(h)(1).

Section 11(c): **FAIL.** The law is silent on these relevant contexts.

6. ***Reliable Confidentiality Protection.*** To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect.

Best Practices: ADB Administrative Order No. 2.10, sections 3.2, 5.1 & 5.4 and Administrative Order No. 2.04, section 4.2; AFDB Whistleblowing and Complaints Handling Policy, sections 6.1 & 6.9.4; WFP ED2008/003, section 10; U.N. ST/SGB/2005/21, section 5.2; OAS Model Law, Articles 10 and 11, 49; PSA (Can.), sections 28.17(1–3), 28.20(4), 28.24(2), 28.24(4); NZ PDA section 19; ACA (Korea), Articles 15 and 33(1); Slovenia Anti-Corruption Act, Article 23 (4), (6) and (7); Uganda WPA, sections VI.14 and 15; WPA (U.S.) 5 USC sections 1212(g), 1213(h); FRSA (U.S. rail workers) 49 USC 20109(i); NTSSA (U.S. public transportation) 6 USC 1142(h); STAA (U.S. corporate trucking industry) 49 USC 31105(h); Dodd Frank (U.S. financial services) sec. 748(h)(2) and 922(h)(2); Jam PDA, section 24.

Section 11(c): **FAIL.** The law is silent on confidential complaints, which are protected in other statutes due to the chilling effect on preliminary efforts to exercise rights.

7. ***Protection Against Unconventional Harassment.*** The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from discipline to litigation.

Best Practices: ADB Administrative Order No. 2.10, section 2.11; IDB Staff Rule No. PE–328, sections 2.41–2.44; U.N. ST/SGB/2005/21, section 1.4; WFP ED2008/003, section 4; World Bank Staff Rule 8.02, section 2.04; OAS Model Law, Article 28; ACA (Korea), Article 33; Uganda WPA, section V.9(2), V.10, and V.11; WPA (U.S. Federal Government), 5 USC 2302(b)(8) and associated case law precedents; FRSA (U.S. rail workers 49 USC 20109(a); NTSSA (U.S. public transportation workers) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); SOX (U.S. publicly traded corporations) 18 USC 1514(a); ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(a); ACA (U.S. health care) Sec. 18C; FSMA (21 USC 1012(a); Dodd Frank (U.S. financial services industry) sec. 1057(a); Jamaican Public Disclosure Act, 2011, ("Jam PDA"), section 2.

Section 11(c): **PASS.** Section 11(c)(1) bans an employer from discriminating in any manner.

8. ***Shielding Whistleblower Rights From Gag Orders.*** Any whistleblower law or policy must include a ban on "gag orders" through an organization's rules, policies, job prerequisites, or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech, or even waiving access to statutory rights.

Best Practices: WFP ED/2008/003, sections 8 and 11; World Bank Staff Rule 8.02, para. 4.03; NZ PDA section 18; PIDA (U.K.), section 43(J); PDA (South Africa), section 2(3)(a, b); Ghana WPA, sec. 31; Uganda WPA, section V.12 and V.13; WPA (U.S.), 5 USC 2302(b)(8); Transportation, Treasury, Omnibus Appropriations Act of

2009 (U.S.), section 716 (anti-gag statute)(passed annually since 1988); FRSA (U.S. rail workers) 49 USC 20109(h); NTSSA (U.S. public transportation) 6 USC 1142(g); STAA (U.S. corporate trucking industry) 49 USC 31105(g); ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(d)(1); ACA (U.S. health care) Sec 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(c)(2); Dodd Frank (U.S. financial services industry) sections 748(h)(3) and (n)(1), 922(h)(3) and 1057(c)(2); Jam PDA, Sections 15, 20, third schedule, section 4.

Section 11(c): **FAIL.** Unlike nearly all modern whistleblower laws, section 11(c) does not have an "anti-gag" provision.

9. ***Providing Essential Support Services for Paper Rights.*** Whistleblowers are not protected by any law if they do not know it exists. whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. The U.S. Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk-free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

Best Practices: United Nations Office of Staff Legal Assistance (for access to legal services); NZ PDA, sections 6B, 6C; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S.), 5 USC 1212; Inspector General Act (U.S.) 5 USC app.; ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(b); U.S. WPA, 5 USC 1212–19; Jam PDA, section 21.

Section 11(c): **FAIL.** Section 11(c) does not impose any support or remedial responsibilities in connection with process complaints.

II. Forum

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

10. ***Right to Genuine Day in Court.*** This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

Best Practices: U.N. ST/SGB/2005/21, section 6.3; OAS Model Law, Articles 39, 40; Foreign Operations Act (U.S. policy for MDB's), section 1505(11); NZ PDA, section 17; PIDA (U.K.) Articles 3, 5; PDA (S. Afr.), section 4(1); ACA (Kor.), Article 33; Romania WPA, Article 9; Uganda WPA, sections V.9(3) and (4); WPA (U.S.), 5 USC 1221, 7701–02; Defense Authorization Act (U.S.) (defense contractors) 10 USC 2409(c)(2); Energy Policy Act (U.S. Government and corporate nuclear workers), 42 USC 5851(b)(4) and (c)–(f); FRSA (U.S. rail workers) 49 USC 20109(c)(2)–(4); NTSSA (U.S. public transportation) 6 USC 1142(c)(4)–(7); CPSIA (U.S. retail products) 15 USC 2087(b)(4)–(7); SOX (U.S. publicly traded corporations) 18 USC 1514(b); STAA (U.S. corporate trucking industry) 49 USC 31105 (c)–(e); ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(c)(3)–(5); ACA (U.S. health care) sec. 18C(b)(1); FMSA (U.S. food industry) 21 USC 1012(b)(4); Dodd Frank (U.S. financial services) sections 748(h)(1)(B)(i), 922(h)(1)(b)(1) and 1057(c)(4)(D).

Section 11(c): **FAIL.** The Secretary has full access to court, but the complainant has access neither to any judicial nor guaranteed administrative due process, even at the informal level. Section 11(c)(2) only provides for a discretionary investigation, without any administrative or judicial due process fact finding. OSHA investigations have no teeth, because they only can be enforced by the Solicitor of Labor, which declines to prosecute up to 70 percent of favorable OSHA merit determinations in any given year. There is no appellate judicial review of agency discretion. *See Wood*

v. *Department of Labor*, 275 F.3d 107, 110 (D.C. Cir. 2001) In other words, the whistleblowers have no control of their rights.

11. *Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent.* Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decisionmaker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the U.S. Whistleblower Protection Act.

Best Practices: Foreign Operations Act (U.S. MDB policy) section 1505(a)(11); WPA (U.S. Federal Government labor management provisions), 5 USC 7121.

Section 11(c): **FAIL.** There is no such provision.

III. Rules to Prevail

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

12. *Realistic Standards to Prove Violation of Rights.* The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards for intergovernmental organizations such as the United Nations.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur "because of" the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. Government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1–5 percent annually to between 25–33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

Best Practices: U.N. ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11); Whistleblower Protection Act (U.S. Federal Government) 5 USC 1214(b)(2)(4) and 1221(e); Energy Policy Act of 2005 (U.S. Government and corporate nuclear workers), 42 USC 5851(b)(3); FRSA (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); NTSSA (U.S. public transportation) 6 USC 1142(c)(2)(B); CPSIA (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); SOX (U.S. publicly traded corporations), 18 USC 1514(b)(2)(c); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(c)(1); ACA, sec. 1558(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank (U.S. financial services industry) sec. 1057(b)(3).

Section 11(c): **FAIL.** Unlike every corporate whistleblower law since 1992, section 11(c) has no legal burdens of proof.

13. *Realistic Time Frame to Act on Rights.* Although some laws require employees to act within 30–60 days or waive their rights, most whistleblowers are not even aware of their rights within that timeframe. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

Best Practices: ADB Administrative Order No. 2.10, section 6.5; WFP ED2008/003, section 7; U.N. ST/SGB/2005/21, section 2.1(a) & 5.1 (no statute of limitations); PIDA (U.K.), section 48.3; PDA (S. Afr.), section 4(1); NZ PDA, section 17; ACA (Kor.) (no statute of limitations); WPA (U.S. Federal employment) 5 USC 1212 (no statute of limitations); False Claims Act (U.S. Government contractors), 42 USC 3730(h) and associated case law precedents; Energy Policy Act of 2005 (U.S. Government and corporate nuclear workers), 42 USC 5851(b)(1); FRSA (U.S. railroad workers) 49 USC 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation) 6 USC 1142(c)(1); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus

Law) P.L. 111–5, Section 1553(b)(1); ACA (U.S. health care industry) sec. 18C(b)(1); FSMA (U.S. food industry) 21 USC 1012O(b)(1); Dodd Frank (U.S. financial services industry) sec. 748(h)(1)(B)(iii), 922(h)(1)(B)(iii) and sec. 1057(c)(1)(A).

Section 11(c): **FAIL.** The provision's 30-day statute of limitations ties for a global worst practice.

IV. Relief for Whistleblowers Who Win

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable.

14. *Compensation with "No Loopholes".* If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, sections 6.5 & 6.6 and Statute of the Administrative Tribunal of the African Development Bank Art. XIII (1); OAS Model Law, Articles 17 and 18; Foreign Operations Act (U.S. policy for MDB's), Section 1505(11); NZ PDA, section 17; ACA (Korea), Article 33; PIDA (U.K.), section 4; WPA (U.S. Federal Government employment), 5 USC 1221(g)(1); False Claims Act (U.S. Government contractors), 31 USC 3730(h); Defense Authorization Act (U.S.) (defense contractors), 10 USC 2409(c)(2); Energy Policy Act of 2005 (U.S. Government and corporate nuclear workers), 42 USC 5851(b)(2)(B); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(c)(3)(B) and (d); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4); STAA (U.S. corporate trucking industry) 49 USC 31105 (b)(3)(B); ACCR of 2009 (U.S. Stimulus Law) P.L. 111–5, Section 1553(b)(2)(A), (B), and (b)(3); ACA (U.S. health care) sec. 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(3)(B) and (b)(4)(B); Dodd Frank (U.S. financial industry) sec. 1057(c)(4)(B)(i) and 4(D)(ii).

Section 11(c): **FAIL.** Although section 11(c)(2) permits the Secretary to seek "all appropriate relief," courts do not always consider that language sufficient to permit consequential, special or compensatory damages that must be awarded for an employee to be made whole.

15. *Interim Relief.* Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

Best Practices: U.N. ST/SGB/2005/21, Section 5.6 and Statute of the United Nations Dispute Tribunal, Article 10(2); ADB Administrative Order No. 2.10, section 7.1; AfDB Whistleblowing and Complaints Handling Policy, sections 6.6.1, 6.6.5 & 9.6; World Bank Staff Rule 8.02, sec. 2.05; OAS Model Law, Articles 17, 32; PIDA ("U.K."), section 9; NZ PDA, section 17; WPA (U.S. Federal Government), 5 USC sections 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); SOX (U.S. publicly traded corporations), 5 USC 1214(b)(1); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012 (b)(2)(B); Dodd Frank, sec. 748(h)(1)(B)(i), 922 (h)(1)(B)(i) and sec. 1057(b)(2)(B).

Section 11(c): **FAIL.** While the Secretary may litigate for a restraining order, the complainant has no right to seek interim relief during the OSHA proceeding.

16. *Coverage for Attorney Fees.* Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, section 6.5.4; Statute of the Administrative Tribunal of the International Monetary Fund, Art. XIV (4); Statute of the Administrative Tribunal of the Asian Development Bank, Art. X (2); OAS Model Law, Art. 17; NZ PDA section 17; WPA (U.S. Federal

Government), 5 USC 1221(g)(2–3); False Claims Act (U.S. Government contractors), 31 USC 3730(h); Energy Policy Act (U.S. Government and corporate nuclear workers), 42 USC 5851(b)(2)(B)(ii); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(d)(2)(C); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly traded corporations), 18 USC 1514(c)(2)(C); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(A)(iii) and (B); ACCR of 2009 (U.S. Stimulus Law), P.L. 111–5, Section 1553(b)(2)(C) and (b)(3); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012(b)(3)(C) and (4)(D)(iii); Dodd Frank (U.S. financial services) sec. 748(h)(1)(C), 922(h)(1)(C) and sections 1057(C)(4)(B)(ii) and (D)(ii)(III).

Section 11(c): **FAIL.** There is no relevant provision, even for costs.

17. ***Transfer Option.*** It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, section 6.5.5; U.N. SGB/2005/21, Section 6.1; United Nations Population Fund (UNFPA) "Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity," para. 26; WFP Executive Circular ED2008/003, para. 22; The United Nations Children's Fund (UNICEF) Whistleblower Protection Policy, para. 23; OAS Model Law, Article 18; PDA (S. Afr.), section 4(3); ACA (Korea), Article 33; WPA (U.S. Federal Government), 5 USC 3352.

Section 11(c): **FAIL.** There is no relevant provision.

18. ***Personal Accountability for Reprisals.*** To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. The OAS Model Law even extends liability to those who fail in bad faith to provide whistleblower protection. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the United States in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

Best Practices: U.N. SGB/2005/21, section 7; UNFPA "Protection against Retaliation . . ." para. 29; UNICEF Whistleblower Protection Policy, para. 26; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.4, 6.9.2; World Bank Staff Rule 8.01, sec. 2.01(a); OAS Model Law, Articles 12,13 41–46; NZ PDA, section 17; ACA (Korea), Article 32(8); Article 32(8); Hungary, Criminal code Article 257, "Persecution of a conveyor of an Announcement of Public Concern"; Public Interest Disclosure Act, No. 108, section 32; Uganda WPA, sections VI.16 and 18; WPA (U.S. Federal Government) 5 USC 1215; FRSA (U.S. railroad workers) 49 USC 20109(e)(3); NTSSA (U.S. public transportation) 6 USC 1142(d)(3); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly traded corporations), 18 USC 1513(e); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(C); Jam PDA, section 23.

Some Multilateral Development Banks have created hybrid systems of accountability that indirectly protect whistleblowers from harassment by bank contractors. The banks' policies are to apply sanctions or even stop doing business with contractors who engage in whistleblower retaliation. AfDB Whistleblowing and Complaints Handling Policy, sections 6.2 and 6.3; ADB Administrative Order No. 2.10, section 8.5; Inter-American Development Bank Staff Rule No. PE–328, section 10.3 & 11.1.

Section 11(c): **FAIL.** There is no relevant provision.

V. Making a Difference

whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public—positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

19. ***Credible Corrective Action Process.*** Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation and report, to assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organization's Web site.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for Intergovernmental Organizations is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

Best Practices: ACA, (Korea), Articles 30, 36; NZ PDA section 15; PSA (Can.), section 28.14(1) (1990); Japan WPA, Section 9 (2004); Slovenia Anti-Corruption Act, Articles 23 and 24; WPA (U.S. Federal Government), 5 USC 1213; Inspector General Act of 1978 (U.S. Federal Government), 5 USC app.; False Claims Act, 31 USC 3729 (government contractors); FRSA (U.S. railroad workers) 49 USC 20109(j); NTSSA (U.S. public transportation) 6 USC 1142(i); STAA (U.S. corporate trucking industry) 49 USC 31105(i); Jam PDA, section 18. Third Schedule.

Section 11(c): **PASS.** The underlying Act has well-established, actively enforced provisions for underlying safety. While they have been the subject of justified criticism, they are far superior to practices for enforcement of section 11(c)'s anti-retaliation rights.

20. ***Private attorney general option: Citizens Enforcement Act.*** Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or "qui tam" actions in a reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good," a rare marriage of the public interest and self interest. In the United States, this approach has been tested in the False Claims Act for whistleblower suits challenging fraud in government contracts. It is the Nation's most effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from $27 million annually in 1985, to over $30 billion since, including more than $1 billion annually since 2000. Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions.

Best Practices: False Claims Act, 31 USC 3730 (U.S. Government contractors) Dodd Frank Act, sections 748 and 922 (Commodities Future Trading Commission and Securities and Exchange Commission violations)

Section 11(c): **FAIL.** There is no provision for independent enforcement.

On balance, a 25 percent pass rate is unacceptable when the baseline is best practice standards for an effective whistleblower law. Putting the criteria in perspective, the five core principles for credible protection are loophole free protection, realistic timeframes to act on rights, fair legal burdens of proof on the evidence necessary to prevail, meaningful due process to enforce the rights, and remedies that make victims whole if they prevail. While a pioneer statute in achieving the first principle of clear rights, section 11(c) fails the remaining four that are essential for the rights to be meaningful. It is a primitive statute long overdue to modernize so that it matches the rest of corporate whistleblower law.

SECTION 11(C) ENFORCEMENT

It is beyond credible debate that there is an unacceptable gap between section 11(c)'s broad mandate for protection, and reality. According to the DWPP Web site, from fiscal year 2005–13 there were 10,380 complaints, some 60 percent of the total volume for whistleblower cases. But there were only 138 decisions that a whistleblower's rights were violated, or a 1.45 percent success rate. While annual settlements ranged from 15–25 percent, even that voluntary relief generally is minimal when the chances of losing are so low. Employee rights and union colleagues credit

OSHA inspectors with using section 11(c) to prevent retaliation against witnesses, and even getting minimal help in up to 25 percent of cases is better than nothing. But the track record indicates little or no realistic chance for justice when a decision is rendered. In practice, the law rubber stamps almost any retaliation that is challenged if the case results in a final ruling. .

But it also is beyond credible debate that a breakdown in enforcement, not weak statutory rights, is the primary reason the track record has been so weak. This duty has never had priority in an overextended agency specializing in worker safety, not employment rights. Resources and training have been meager. Further, unusual regional authority and lack of independent oversight have frustrated consistent implementation of national standards for what the law means in practice. Reviews ranging from the Government Accountability Office, to the DOL Office of Inspector General, to GAP's own survey of whistleblowers and practitioners consistently found that OSHA's whistleblower program due to—excessive, even multi-year delays processing complaints; lack of training; inadequate resources for staff; inadequate staffing levels that sustained unrealistic workloads; failure to interview or functionally communicate with complainants; lack of fiscal control over appropriated funds; failure to use alternative disputes resolution mediations to resolve cases; lack of data to support decisions; widely varying interpretations of law between regions; widely varying success rates between regions; lack of authority by the national OWPP to reverse regional decisions; and most fundamentally—lack of accountability through an independent national audit of regional compliance with consistent national standards. In short, Dr. Michaels faced an imposing challenge to reach the law's available potential.

He is to be commended for establishing policies and taking actions that are first steps in a long road to legitimacy for the new Directorate of Whistleblower Programs. The reforms that he has initiated include:

- creation of the DWPP, with direct reporting authority to him, moving whistleblower rights up from OWPP's subsidiary status in the Office of Enforcement;
- a separate line item budget for the DWPP, so that it can control its own resources;
- significantly increased staff for DWPP;
- initiation of national training programs in whistleblower rights, to promote consistent interpretations of legal rights;
- more user-friendly procedures, such as accepting oral complaints;
- a modernized Web site that is an effective resource for those seeking to learn their rights;
- institution of a policy to conduct interviews of complainants in all cases; and
- institution of tougher standard against indirect discrimination, such as workplace bonuses for not reporting safety violations, and discipline for getting injured.

While OSHA is imposing increased auditing oversight, however, this function still will be under the functional control of the regions. The lack of independent accountability raises concerns about the strength and consistency of these reforms in practice. Similarly, while the national office now may reverse regional rulings, it has not yet exercised this authority.

It also is difficult not to be concerned that OSHA reassigned the DWPP Director, Elizabeth Slavet, shortly after she began implementing plans for a more independent audit. Ms. Slavet is a nationally recognized whistleblower expert, previously having served as the highly respected Chair of the U.S. Merit Systems Protection Board adjudicating the Whistleblower Protection Act for Federal workers. Many of the reforms credited above occurred under her leadership at DWPP. After her abrupt removal, it is essential that OSHA takes steps to: (1) assure there is no violation of Ms. Slavet's own whistleblower rights; (2) select a successor whose credibility and expertise also are beyond dispute; and (3) add independent audit enforcement teeth to his announced reforms.

While Dr. Michaels has created a credible blueprint for an effective enforcement program of whistleblower rights, it will take ongoing, independent oversight for that blueprint to make a significant difference in practice. Toward that goal, GAP is available as a resource both to this committee, and for the DWPP.

Senator CASEY. Mr. Devine, thank you very much.

Mr. Baize.

STATEMENT OF ROSS BAIZE, SAFETY COMMITTEEMAN FOR UNITED AUTO WORKERS, EAST PEORIA, IL

Mr. BAIZE. Chairman Casey, Ranking Member Isakson, thank you for the opportunity to testify before you today. Yesterday, as you stated, we paused on Workers' Memorial Day to highlight the preventable nature of workplace deaths, injuries, and illnesses. Today we continue to fight for improvements in workplace safety. I welcome the opportunity to share my own personal experience as a worker who attempted to use section 11(c) to protect myself from employer retaliation.

As a 7-year employee of Caterpillar, I'm proud of the products that we manufacture, and I can say with certainty that I personally want the company and workforce to succeed, and the International UAW wants the same thing. I am not here to bash Caterpillar or its reputation. I am here to simply share my experience and describe some of the work that I so proudly do every day.

The work tasks involved in the case I will be describing are part of the Full Link Heat Treat process. A link is a part of the caterpillar track that weighs anywhere from 15 to 80 pounds. In order to make the links more durable, they are heat-treated. The process starts with a large hopper filled with links, which shakes down the links onto the orientation track.

As the links travel down the track, it is controlled by pneumatic stops or large air-powered gates. At the stops, electric sensors measure the link position and, if needed, the link is reoriented. Oftentimes, the links will get jammed on the track, as well as debris can buildup in front of the sensors. Workers have been injured doing these tasks.

One of my co-workers was reaching from the steps next to the orientation track to unjam the link so the parts could continue to the heat-treated oven. When he unjammed the link, the electric eye sensor automatically initiated a pneumatic air gate that came down and broke his hand. He received 2½-months suspension without pay.

Another co-worker was injured when inspecting the cause of an orientation track jam. This worker had 38 years of seniority at Caterpillar and had never received any form of disciplinary action. He had a nearly perfect attendance record as well.

He was clearing debris from the front of a sensor to get the orientation track running. He pulled out the debris from inside the track when a stop came down, striking his left hand. He reported his injury to the supervisor on duty and was taken to seek medical attention. He was suspended as well for 2½ months without pay on the grounds that he had not shut off the air pressure valve before walking up to the platform.

He had, however, followed the employer's standard work practice for dealing with machine jams by turning the control switch from auto to manual on the main control panel. He had not been issued a lock to prevent the machine from hurting him while clearing a jam. He was the second employee in 6 months to be injured while trying to clear a jam in this machine.

In the first week of 2011, an 11(c) whistleblower complaint was filed on his behalf as well as a complaint about the lack of procedures, training, or equipment for Lockout/Tagout in the Full Link

Heat Treat area. In our view, the standard operating procedure for unjamming was a violation of the Lockout/Tagout standard. We brought this before management using the safety complaint procedure before going to OSHA.

On March 30th, I informed management that I wished to move the Lockout/Tagout safety complaint to the final step of the grievance procedure as per our collective bargaining agreement. I had a committeeman present when I made the request. In response, management asked my committeeman to leave and return to work. Then they informed me that my job was going to be eliminated.

My status was changed from a Labor Grade 4 to a Labor Grade 1 job, reducing my pay by thousands of dollars. I was at the lower pay grade for several weeks, but thankfully, because I am a member of the union, and with the seniority and qualifications that I have, I was awarded a bid to a different job back up to Labor Grade 4 pay.

The actual move was carried out on April 4, 2011. Originally, my job was the only one affected by the reduction in force, even though there were junior employees they were keeping on the job. Upon filing a grievance regarding RIF procedures used, the junior employees were subsequently moved back to the appropriate job classification, per RIF procedures. I successfully bid out of that particular division and vowed to start over.

An 11(c) whistleblower complaint was filed on my behalf on May 3, 2011. It was dismissed on procedural grounds. The stated reason for the dismissal was timeliness of the complaint. The actual adverse action, being job elimination and a resulting reduction in pay, did not take place until April 4, 2011, when I was placed on the new job and my pay was reduced.

Often, job moves are delayed by weeks or months. So I filed my complaint on May 3d, 29 days after the adverse action had taken effect. And our collective bargaining agreement states that we need to try and settle things in-house before bringing in a Federal agency, which was what I was trying to do.

The 30-day filing period for retaliation claims under 11(c) is one of the shortest anti-retaliation limitations periods in employment law. It is incredibly difficult to do your job, perform your family obligations, perform your union obligations to your co-workers, and build a retaliation case to OSHA within a 30-day period of time. This short timeframe is made even more draconian if it is interpreted rigidly, as it was in my case.

In my case, while I was told my job was being eliminated, I knew that I had bumping rights to other jobs. It was impossible on March 30th to know how my bumping rights would play out and whether I would lose my shift or lose income due to the job elimination. If I did not lose my shift or suffer a reduction in salary, it could be argued that no adverse action was taken under the OSH Act. It was therefore entirely proper to begin the running of the 30-day statute of limitations when the actual adverse action could be accurately determined.

Thank you.

[The prepared statement of Mr. Baize follows:]

PREPARED STATEMENT OF ROSS BAIZE

Chairman Casey, Ranking Member Isakson, Senators: Thank you for the opportunity to testify before you today. I am Ross Baize, an employee of Caterpillar in Peoria, IL and a UAW Safety Committeeman. Yesterday we paused, on Workers' Memorial Day, to highlight the preventable nature of many workplace deaths, injuries and illnesses. Today, we continue the fight for improvements in workplace safety. I welcome the opportunity to share my own personal experience as a worker who attempted to use Section 11(c) of the Occupational Safety and Health Act of 1970 to protect myself from employer retaliation.

As a 7-year-employee of Caterpillar, I am proud of the products we manufacture and I can say with certainty that I personally want the company and workforce to succeed and the UAW International Union wants the same thing. I am not here to bash Caterpillar or its reputation. I am here to simply share my experience and describe some of the work that I so proudly do every day.

The work tasks involved in the case I will be describing are part of the Full Link Heat Treat process. A link is a part of the caterpillar track. This part weighs between 15 and 80 pounds. In order to make the links more durable, they are heat treated. The process starts with a large hopper filled with links. The hopper vibrates and shakes the links on to an orientation track. As the link travels down the track it is controlled by pneumatic stops or large air-powered gates. At the stops, electric sensors measure the link position and the link is reoriented. Often times the links get jammed on the track. Also, debris builds up on the sensors and we have to clear the debris. Workers have been injured doing these tasks.

One of my co-workers was reaching from the steps next to the orientation track to un-jam the link so the parts could continue to the heat treat oven. When he unjammed the link, the electric eye sensor automatically initiated a pneumatic gate that came down and broke his hand. He received 2½ months suspension without pay.

Another co-worker was injured when inspecting the cause of an orientation track jam. This worker had 38 years of seniority at Caterpillar and had never received any form of disciplinary action. He had a nearly perfect attendance record.

He was clearing debris from the front of a sensor to get the orientation track running. He pulled out the debris from inside the track when a stop came down, striking his left hand. He reported his injury to the supervisor on duty and was taken to seek medical attention. He was suspended for 2½ months without pay on the grounds that he had not shut off the air pressure valve before walking up to the platform. He had, however, followed the employer's standard work practice for dealing with machine jams by turning the control switch from AUTO to MANUAL on the main control panel. He had not been issued a lock to prevent the machine from hurting him while clearing a jam. He was the second employee in 6 months who was injured trying to clear a jam in this machine.

In the first week of 2011, an OSHA 11(c) Whistleblower Complaint was filed on his behalf as well as a complaint about the lack of procedures, training, or equipment for Lockout/Tagout in the Full Link Heat Treat area. OSHA issued two repeat citations and one serious citation to Caterpillar. The company contested the citation and the union filed a request for party status. The company eventually agreed to accept a serious citation for a violation of OSHA's machine guarding rule and paid a fine of $7,000, which is the maximum allowed by the OSHA statute for such a serious violation.

In accordance with the collective bargaining agreement between the UAW and Caterpillar, all efforts are made to reach an in-house settlement before involving a Federal agency. Unfortunately, in these cases, those efforts failed.

In our view, the standard operating procedure for un-jamming was a violation of the Lockout/Tagout Standard; we brought this before management using the grievance procedure before going to OSHA. On March 30, 2011, I informed management that I wished to move the Lockout/Tagout complaint to the final step of the grievance procedure as per part 8.3 of our collective bargaining agreement. I had my committeeman present when I made the request. In response, management asked my committeeman to leave the room. They then informed me that my job had been eliminated.

My status was changed from Labor Grade 4 to a Labor Grade 1 job, reducing my pay by thousands of dollars. I was at the lower pay grade for several weeks but thankfully, because I am a member of the union with the seniority and qualifications. I was awarded a bid to a different job back up at Labor Grade 4 pay.

The actual move was carried out on April 4, 2011. Originally, my job was the only one affected by the reduction in force (RIF), even though there were junior employees kept on the job. Upon filing a grievance regarding RIF procedures used, the jun-

ior employees were subsequently moved back to the appropriate job classification, per RIF procedures. I successfully bid out of that particular division and vowed to start over.

An OSHA 11(c) Whistleblower Complaint was filed on my behalf on May 3, 2011. It was dismissed on procedural grounds. The stated reason for the dismissal was timeliness of the complaint. I believe that since the adverse action in my case did not take place until April 4, 2011, I was within the 30-day statutory time limit set forth in the OSH Act. Again, I was told on March 30, 2011 that my job would be eliminated immediately after I put a safety complaint regarding Lockout/Tagout into the final step of the grievance procedure. The actual Adverse Action (job elimination and resultant reduction in pay) did not take place until April 4, 2011, when I was placed on the new job and my pay was reduced. Often job moves are delayed by weeks or months so I filed my complaint on May 3, 2011; 29 days after the adverse action took place.

The 30-day filing period for retaliation claims under section 11(c) is one of the shortest anti-retaliation limitations periods in employment law. It is incredibly difficult to do your job, perform your family obligations, perform your union obligations to your co-workers and build a retaliation case to present to OSHA within a 30-day period of time. This short timeframe is made even more draconian if it is interpreted rigidly, as it was in my case.

In my case, while I was told my job was being eliminated, I knew that I had "bumping rights" to other jobs. It was impossible on March 30th to know how my bumping rights would play out and whether I would lose my shift or lose income due to the job elimination. If I did not lose my shift or suffer a reduction in salary, it could be argued that I did not suffer an adverse action under the OSH Act. It was therefore entirely proper to begin the running of the 30-day statute of limitations when the actual adverse action could be accurately determined.

I would add that during the time I was at the lower pay, I felt the need to work as much overtime as I could in order to provide for my wife and child who was not even 9 months old at the time. I felt like I had to prepare for the worst case scenario that I could be stuck in that job for a lengthy period. This incident caused me and my family to have to scale back on certain amenities that we were previously able to afford. It also took its toll on my wife who was dealing with the stress that comes along with being a new mother and this was the last thing she needed to worry about.

At the end of the day, I never attempted private action on this case. I learned the day that I called in my complaint that it was probably going to be deemed untimely.

Under the OSHA law, I have no legal right to pursue my case on my own if the Department of Labor chooses not to take it up. Other whistleblower statutes provide for more time to file a complaint and the ability to pursue a case even if the Department chooses not to. The OSHA law must be strengthened to protect job safety whistleblowers.

It took a little time, but I have made myself a home in the building that I moved to. I have earned the respect of many management and hourly employees in my current job.

In closing, I would again like to thank you for the opportunity to testify before this subcommittee and I look forward to answering any questions you may have.

Senator CASEY. Thank you very much for your testimony.

Mr. Keating.

STATEMENT OF GREGORY KEATING, ESQ., CO-CHAIR, WHISTLEBLOWING AND RETALIATION PRACTICE GROUP, LITTLER MENDELSON P.C., BOSTON, MA

Mr. KEATING. Good morning, and thank you, Chairman Casey and Ranking Member Isakson, for the opportunity to be here and to speak with you about whistleblower protections. As noted, I'm a shareholder at Littler Mendelson, which is the largest labor and employment law firm in the country representing employers.

I also wrote a book that's in its fifth edition on whistleblowing, and I have greatly enjoyed the opportunity to serve on the Whistleblower Protection Advisory Committee, which Senator Isakson nominated me to. And, as noted by Dr. Michaels, I am working on

the best practices committee, and I have really, really enjoyed the opportunity to focus on that.

I'm here today, however, to encourage this body to consider an alternative to the current approach to whistleblower protection, one that focuses predominantly on increased penalties and deterrents in the whistleblowing context. While penalties and deterrents serve a purpose, providing employers with clear guidance and incentives to foster compliance is, I believe, more effective and more likely to result in better, safer, and more ethical workplaces for employees in America.

In my work with employers, I find that across regions and industries, companies of all sizes and stripes are eager to adopt concrete measures to help facilitate a culture of ethics and compliance. While I recognize the topic of today's hearing is whistleblower protections in the context of workplace safety, however, as Dr. Michaels has himself noted earlier today, in addition to the Occupational Safety and Health Act, OSHA enforces 21 other statutes.

I want to speak even more broadly today about how compliance measures can improve and sustain workplaces across many areas of corporate culture, including workplace safety. The goal, in my view, should be to educate and incentivize employers to create a culture of ethics and compliance across all layers of the organization.

By culture of ethics and compliance, I mean a workplace in which compliance with the letter and spirit of the law is both required and encouraged at every level of the organization. Employees feel comfortable and welcome to share concerns about possible noncompliance, and individuals who come forward in good faith to report possible misconduct or safety concerns can do so without fear of retaliation.

Achieving this kind of culture will result in workplaces that are safer, more ethical, more fulfilling, and more compliant with the specific laws and regulations which govern their industries. This culture can best be achieved, in my view, through a private-public partnership with the employer community, rather than an adversarial approach focused solely on liability, punishment, and deterrence.

Employers are clamoring for guidance on how to create this culture of ethics and compliance. Many are piloting innovative new technologies to do so. Perhaps even more exciting, we have seen a marked up-tick in revolutionary new products and services. These innovative ideas allow employers to foster an ethical and compliant culture by integrating compliance solutions directly into their business.

In my role as WPAC member, I have reiterated my view that in addition to legislative remedies to protect whistleblowers from retaliation, we must have clear guidance on best practices for employers to understand how to specifically create that culture of ethics and compliance. This focus is consistent with OSHA's mandate, and, indeed, as Dr. Michaels has indicated today and has repeatedly shared in advisory committee meetings, it is his hope that it will be one of the most significant accomplishments of the committee.

Making employers more aware of specific effective measures which they can adopt to enhance their workplace cultures will benefit not only those employers seeking this guidance, but also the individuals they employ. The vast majority of U.S. employers have a strong commitment to operating safe, ethical, and lawful workplaces, and with better guidance and stronger incentives, I believe they can and will continuously improve upon their efforts to do so.

I thank you again for inviting me to testify here today, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Keating follows:]

PREPARED STATEMENT OF GREGORY KEATING, ESQ.

Good morning Chairman Casey, Ranking Member Isakson and distinguished members of the subcommittee. Thank you for the invitation to be here before you today. My name is Greg Keating, and I am pleased to be speaking to you about the issue of whistleblower protections. I am a shareholder at Littler Mendelson, P.C. where I co-chair the firm's Whistleblowing and Retaliation Practice Group and serve on the firm's board of directors. I am also author of the book, *Whistleblowing & Retaliation*, which is now in its fifth edition. In addition to my work with clients on whistleblowing and compliance-related matters, the U.S. Secretary of Labor appointed me in December 2012 to serve as a management representative on the Occupational Safety and Health Administration's Whistleblowing Protection Advisory Committee ("WPAC").[1] I should note at the outset, however, that I am testifying not on behalf of the WPAC but rather in my capacity as an individual who has invested considerable time on whistleblower matters.

With more than 1,000 attorneys and 60 offices nation and worldwide, Littler attorneys provide advice, counsel and litigation defense representation in connection with a wide variety of issues affecting the employee-employer relationship. Additionally, through its Workplace Policy Institute, Littler attorneys remain on the forefront of political and legislative developments affecting labor, employment and benefits policy and participate in hearings such as this in order to give a voice to employer concerns regarding critical workplace issues. In my own practice, I often counsel, advise and represent employers in whistleblowing matters, including specifically advising employers on how to structure and implement concrete mechanisms to ensure a culture of compliance. Nevertheless, the comments I provide today are my own, and I am not speaking on behalf of Littler Mendelson or the firm's clients.

While I recognize that the topic of today's hearing is whistleblower protections in the context of workplace safety specifically, I want to speak today even more broadly about compliance measures that can improve and sustain workplaces across many aspects of the workplace and corporate culture, including workplace safety. Specifically, I want to encourage this body to consider alternatives to increased penalties and deterrents in the whistleblowing context—alternatives that are, I believe, more effective and more likely to result in better, safer and more ethical workplaces for employees in America. In my work with and on behalf of employers, I find that, across regions and industries, employers of all sizes and stripes are eager to adopt and enhance measures that foster workplace cultures of ethics and compliance.

By "culture of ethics and compliance," I mean a workplace in which compliance with the letter and spirit of the law is both required and encouraged at every level of the organization; employees feel welcomed and encouraged to share concerns about possible non-compliance; and individuals who come forward in good faith to report possible misconduct or safety concerns can do so without fear of retaliation of any kind. Achieving this kind of culture would result in workplaces that are safer, more ethical, more fulfilling and more compliant with the specific laws, regulations and norms that govern particular industries. What is more, this culture can be best achieved through a private-public partnership with the employer community, rather than an adversarial approach focused solely on liability, punishment and deterrence.

Employers are clamoring for guidance on how to create this culture of compliance, and many are piloting revolutionary new technologies and techniques to do so. What

[1] *See* Whistleblower Protection Advisory Committee, available at *http://www.whistleblowers.gov/wpac.html*. The OSHA WPAC "was established to advise, consult with, and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor of Occupational Safety and Health on ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA's administration of whistleblower protections."

these employers need most from OSHA and the DOL is concrete guidance about how to create this kind of culture and stronger incentives to invest company resources in doing so. To have the greatest impact, this guidance would need to identify specific elements of a meaningful, high-quality compliance program, identifying expected elements, audience targets and timeframes for particular elements. It is my hope that we cannot only provide this guidance, but that employers who invest in such measures will have those efforts taken into account in the liability and/or penalty phase of an administrative or judicial proceeding enforcing whistleblower protections. This incentive approach will serve as another important vehicle to foster awareness of whistleblower rights and transparency within the culture of corporate America.

In my role as WPAC member, I have expressed the view that, in addition to legislative remedies to protect whistleblowers from retaliation, we also need clear guidance on best practices for employers to understand how specifically to create a culture of compliance. This focus is consistent with OSHA's mandate and, indeed, Dr. David Michaels, the Assistant Secretary of Labor, OSHA has shared his hope that one of the important accomplishments of the WPAC will be to identify specific best practices to promote a culture of compliance. To that end, the chair of the WPAC has created three working groups intended to focus on specific issues of paramount interest to the committee, one of which is a "best practices" working group that is charged with identifying and describing concrete measures employers can take in order to foster a culture of compliance and minimize the risk of retaliation.

The working group has had numerous meetings and has made significant progress in identifying such measures, and it is my hope that, at the next meeting in September, we can provide formal recommendations to the U.S. Secretary of Labor. Though I cannot yet speak to what those formal recommendations will be, I can provide just a few examples of measures that have a real impact on workplace culture and corporate compliance:

• ***Measuring and Improving Workplace Culture:*** It can be eye-opening for an organization to measure its workforce's level of engagement and trust in its leaders. Employee surveys enable employers to measure the "tone" of the business and focus on areas that present opportunities for improvement. Based on the results of such surveys, employers can target specific reminders, policies and training to better reflect a strong commitment to ethical and ***safe*** practices. When employees are aware of and trust their organization's values and commitment to ethics, they are much more likely to also trust internal reporting systems and, as a result, to come forward with any concerns.

• ***Training at all Levels:*** Effective training can enhance awareness, commitment to compliance and willingness to come forward with concerns at all levels of an organization. There are excellent new training products and programs that can be customized for employers of various sizes, industries and budgets.

• ***Integrated Complaint Management System:*** Employers can adopt a new, formalized system of receiving, investigating and responding to complaints, or they can examine and enhance existing procedures. The best way to foster and ensure trust in the internal reporting system is for the company to establish a track record of responding promptly, thoroughly and consistently to internal reports and to effectively protect employees who make internal complaints from any form of retaliation. A strong complaint management system can provide multiple avenues for submitting complaints—from hotlines, to web portals to frontline supervisors and human resources professionals. It is also important to ensure that different departments and stakeholders communicate effectively and appropriately, working in partnership to investigate and respond to reports of wrongdoing or unsafe working conditions. Employers can also provide a dedicated resource to whistleblowers in order to ensure that there are no signs of retaliation and that any adverse employment actions are thoroughly reviewed before making a decision affecting a whistleblower.

• ***Comprehensive and Effective Policies and Procedures:*** Employers can adopt new or revamp existing internal compliance policies and procedures, investigation procedures, safety plans and policies, and whistleblower and anti-retaliation policies. Although there is no one-size-fits-all policy, there are hallmarks of effective policies and programs that could be communicated to employers, as well as guidance about how best to implement and enforce those policies.

It is my hope that OSHA will draft, disseminate and incentivize compliance measures such as these. Making employers more aware of specific, effective measures which they can adopt to enhance their workplace cultures will benefit not only those employers seeking this kind of guidance, but also the individuals they employ. The vast majority of U.S. employers have a strong commitment to operating safe, ethical and lawful workplaces and, with better guidance and stronger incentives, I believe

they can and will continuously improve upon their efforts to do so. I thank you again for inviting me to testify here today, and I look forward to answering any questions you may have.

Senator CASEY. Thanks, Mr. Keating.

And the panel was great about time. We're setting records today.

I want to start on my left and the audience's right with Ms. Spieler. I want to first of all note a couple of points in your testimony which I think bear repeating. Some of these words kind of leaped off the page. Often, we have hearings about improvements or changes we hope to bring to a statute that was passed years or decades ago, and we don't often go back to the original source about the reason for the statute.

The OSHA Act was designed to—and you say this at the bottom of your first page, "assure as far as possible every working man and woman in the Nation safe and healthful working conditions," which is language we should remind ourselves about.

One more before I ask a question. We've talked already, and we're going to explore further the defects or the problems with section 11(c). You say at the bottom of page 2, "All of the recent statutes provide much stronger protections for whistleblowers than the OSH Act." Unfortunately, that seems to be the case, and that's, I guess, the reason we're here this morning.

But I wanted to start with you about a question on some data. You provide data in your written testimony showing that 75 percent of docketed 11(c) cases—the provision we just said was very weak—for about an 8-year timeframe, fiscal year 2005 to 2013, that 75 percent of those cases are dismissed or withdrawn without achieving resolution. This includes almost 10,000 cases over that same time period.

My first question is: These numbers do not include the cases that are screened out. Is that correct?

Ms. SPIELER. That's correct.

Senator CASEY. And, second, this means that 75 percent of cases that pass the initial screening process are never resolved. Is that correct?

Ms. SPIELER. They're resolved in the sense that they don't go forward.

Senator CASEY. They don't go forward. You said it better than I did. So how do you deal with that in terms of making changes here? We're talking about making statutory changes to 11(c) to help the workers. Tell us how that would work and what you would hope would happen.

Ms. SPIELER. Obviously, some of those cases may, indeed, be nonmeritorious, and it's totally appropriate for them to be screened out through an investigative process. And we can't really say how many of them should go forward. I think part of the problem is that when cases don't go forward, and the individual or group that has filed the case has no further recourse, then the sense of unfairness is very deep in the people who can't pursue their cases.

So when a case is dismissed by OSHA, it goes into—I believe it to be quite informal. I think it's been somewhat formalized recently. But it's an informal review, I believe, now at the Central Directorate that can be obtained over a dismissal of a case. But it's

not—it's a review of a file, and it doesn't give a complainant a sense that they've really been heard.

I think it's incredibly important for people who are in that situation to have some mechanism to bring their case forward and actually have it heard. Those other statutes all allow the individual to bring their case forward to an administrative law judge for a *de novo* hearing in which their cases will be heard.

I don't have these data, but as I understand it, some of the cases in which OSHA has found that there's no reasonable cause have, in fact, been heard by ALJs and the complainant has won them. So there has to be, I think, a sense that the complainant has a place to go, and now, under 11(c), they have nowhere to go.

That, of course, also has an effect on employers' reactions, those employers, and I agree with Greg Keating that there are employers who very much want to comply with the law. But for those employers who don't have that motivation, there's very little back pressure on them to comply with the law because of the way the current system works on 11(c) compliance.

Senator CASEY. And I guess some of the words you used in your answer—it almost reminds me of a due process argument. Right?

Ms. SPIELER. Yes.

Senator CASEY. That you get notice, and you get to be heard, or the opportunity to be heard. But you're saying that the second part of that, in essence, the full measure of a hearing, is not the current policy.

Ms. SPIELER. That's right. And, actually, I don't know that the current statue would allow it to be.

Senator CASEY. I know we're trying to keep within our timeframe, but I have a quick question for Mr. Devine before I move to Senator Isakson.

A lot of what you said struck me, but the one part of your testimony which was especially significant to me, at least, was the statement you made—and I'm paraphrasing—but saying that even if you win the case, you still lose. Explain that again just in terms of the—how would you itemize your list of how you lose?

Mr. DEVINE. You may not be made whole in terms of the financial impact from losing your job. You could end up being reassigned to the same position that you were fired from, and it's very difficult to work for a boss you just defeated in a lawsuit. You may not be able to afford the victory, because the lawyers' fees and the cost of the litigation and expenses may outweigh any benefits that you gain.

And, finally, there's no accountability for the wrongdoers, which is the basic premise of our legal system. They have no reason not to keep doing—not to keep engaging in retaliation. The worst that would happen is they might not get away with it, but most likely they will. Almost certainly they will.

Senator CASEY. I know I'm over time, but I'll go to Senator Isakson and then I'll come back.

Senator ISAKSON. Thanks to all of you for testifying today. I want to focus on Mr. Keating for a minute if I can.

You talked about creating a culture of compliance, and you talked about some of the specific hallmarks of a culture of compliance which you would have seen in the workplace. How, specifi-

cally, can employers be incentivized to create a culture of compliance? How would it work?

Mr. KEATING. Senator Isakson, I think the starting point for that is that we all have to recognize—and this is something that I have heard over and over again in surveys we've done with employers. Their most important and valuable asset, by far, is their employees. When their employees' morale is up, when they're safe, when their injuries are down, when they trust their employer, productivity soars.

And the corollary is true. When things aren't working, things slow to a crawl, and bad things can happen in the safety area as well.

But, specifically, to answer your question, the way to incentivize employers—No. 1, provide the clear guidelines that we're talking about and we're working out at the advisory group level so that employers know what's out there and what they can do, things like an integrated complaint management system, using some of the new technology I referred to in my testimony.

There's some really exciting new technology out there that allows employers to no longer be reactive but to be integrated and to see what's happening in their workplace in real time through technology. And when complaints come in, there's transparency and there's communication by and among a lot of constituents, so the process goes more smoothly.

And then, last, training. That's another hallmark of a compliant culture. There are some exciting products out there in the safety area, in the Sarbanes-Oxley area, and in all areas of compliance and ethics that are available online, that are cost-effective, and that can allow you to train the person who always gets the complaint to begin with, who is the frontline supervisor.

Senator ISAKSON. You know, I attended a—I didn't attend, but I visited a Siemens plant in Alpharetta, GA, that makes the drive train systems for some of the largest pieces of equipment operating in the mining industry in the world. And I was not there for the purpose of looking at their safety compliance at all.

But I happened to notice as I went through the plant—at every stage in the production along the way—and this is probably similar to Caterpillar, I would hope, and you might comment on that, Mr. Baize. They had their safety score record and their safety recommendation record, and they had a solicitation for safety hints or tips the employees could give to the employer to better improve the safety environment. Is that the type of thing you're talking about?

Mr. KEATING. That is an example of something I'm talking about. And another example of what I'm talking about with regard to your question, Senator Isakson, about incentives—and you asked Dr. Michaels earlier. I firmly believe that similar to the sentencing guidelines under the Foreign Corrupt Practices Act, if an employer is given clear guidance about the seven, eight, nine concrete steps it should take, and if an employer takes those steps, and then say there's a rogue actor who lets something fall through the cracks, I think at the time when the DOL is considering its punishment, it should take into account all of the things the employer did right and perhaps consider a lesser penalty as an incentive to implement all these measures.

Senator ISAKSON. Any comment, Mr. Baize?

Mr. BAIZE. We do have something similar to that at Caterpillar, where its encouraging employees to put in safety ideas to improve the workplace. In my personal opinion, it's good on paper, the way I've seen it play out, and the theory is good behind it. But the actual execution of it has been fairly subpar throughout the years that they've been implementing that.

Senator ISAKSON. That makes a good point. It needs to be a culture within the company. I mean, anybody can paint a wall red, white, or blue, or put a new wallpaper on the wall and make it look better. But you've got to really have a part of the culture of the company where they're promoting that type of safety.

I know in my business before I came to Congress, I ran a company that, among other things, developed subdivisions and golf courses. I had a lot of maintenance workers and entry level workers, and compliance with safety rules was my No. 1 incentive for them, because every time one of them got hurt, my premiums went up or I had to go replace them with something else.

I tried to promote it from a positive aspect, not only for their health and safety, but for my cost of doing business. And I think that's the way businesses could better create a culture or environment that benefits the worker but also benefits the company as well.

Thank you, Mr. Keating and Mr. Baize.

Mr. BAIZE. Thank you.

Mr. KEATING. Thank you.

Senator CASEY. Thanks very much. I'm told the vote has not started. At least, I'm not aware that it has started. That's good news. But we have some—OK. We have less time than we thought. But I just have one or two more questions.

Mr. Baize, the experience you had was aided and assisted by the fact that you had a union, which I would argue that in a lot of instances—maybe not every instance—does help create the right culture that we talked about. A lot of companies I've been to—when you visit a manufacturing site, there's a great spirit of cooperation in trying to keep injury rates or incident rates down, and that's very positive to see that.

But in terms of your own situation, in terms of the concern that you identified in your case, where do you think it stands now? Has that work site been made safer or not? Or can you assess that?

Mr. BAIZE. I'm no longer over in that area anymore. But from what I've been told, it's been made safer to a point. However, in our opinion, it's still not in compliance with the Lockout/Tagout, because they're using controlled circuitry to isolate energy, and it's spelled out in the standard that you cannot use controlled circuitry. But it has been made safer to a point. They have done a better job getting the garbage out of the tubs that the links come into the heat treat operation.

Senator CASEY. When you say controlled circuitry, what does that mean?

Mr. BAIZE. Controlled circuitry would be like electronic disconnects, not actually physically isolating the energy with a lock. They still have not issued employees locks over in that area, so we're still not able to lockout when we have to go clear a jam. But,

like I said, cleaning the garbage out has been a big help. Little things like that will help them out.

Senator CASEY. In your own case—and I'm referring back to the question I asked Mr. Devine about when you prevail on something, you can still be in a losing position. In your own case, how about financial challenges that you experienced through this process?

Mr. BAIZE. The demotion that they gave me from a Labor Grade 4 to a Labor Grade 1 equated out to be about $6 or $7 an hour. So me and my wife had to scale back on certain amenities that we were previously able to afford. I had to prepare for the worst case scenario, that I was going to be stuck in this job for a lengthy period of time. So I felt the need to work as much overtime as possible, to do what I had to do to provide for my family.

Senator CASEY. What would you hope would happen with regard to the law? If you could make a list or even itemize one or two changes, what would you hope would happen?

Mr. BAIZE. What I would hope would happen was something like this, that we could change some of the verbiage in the standard stating that it's going to be the actual adverse action that's going to start your statute of limitations, not just a threat, because in my situation, if I would have pulled the trigger right away and gone to OSHA instead of trying to settle things in-house, then OSHA could have investigated and seen that I hadn't been displaced and my pay hadn't been dropped down at all. So they could argue that no adverse action had been taken. And then once my pay was affected, I couldn't file a second time on the same situation.

I'd also like, as many other people have stated today, to see the statute of limitations be extended from 30 days to possibly 6 months, like most of the other standards are.

Senator CASEY. I will go back to Ms. Spieler. One of the things we try to arrive at in hearings like this is an action plan or a set of steps we can take to strengthen the system. Your recommendations are on page 10 of your testimony. I guess you have three, and then those three have a number of subsets.

But you have as No. 1 to lengthen the statute of limitations to 180 days, which was just referred to a moment ago. Create a right of preliminary re-instatement pending final adjudication. Third, change the process for adjudication of complaints.

Could you walk through some of those? Obviously, the 180 days is more self-evident maybe than the others. But for folks that may not be familiar with the procedure, could you just walk through a little bit on two and three?

Ms. SPIELER. Sure. The preliminary re-instatement issue has, I think, really two components as a practical matter in the way it plays out, and it's part of the majority of the statutes and all of the recent statutes I'm pretty sure that OSHA is enforcing. One is that they can, in fact, move in in a situation where things are clear cut and insist that the individual, if they've been discharged, be re-instated while the case is pending.

That's important in part because the longer someone is away from a job, the less likely it is that they will be re-instated. That's true across the board if you look at the OC cases or any of the cases.

And the second thing is that if there's a right of preliminary reinstatement, it brings the employer to the table in a very serious way very early on so that if the individual doesn't want to go back, it can increase the monetary settlement that the individual has. These are always in cases in which the investigator believes that the law has been violated. So it's not non-meritorious cases in which this should be happening.

As I note, the strongest provision, actually, on preliminary reinstatement is not in one of OSHA's statutes, but actually is the MSHA statute.

Senator CASEY. For mine safety.

Ms. SPIELER. For mine safety, yes, and is quite aggressively used by the Mine Safety and Health Administration in reinstating people pending litigation of those complaints.

I grouped a whole set of things under what I call the process for adjudication of complaints, because I think that they all revolve around the problem of there not being any way for a complainant to pull a case out of the existing process. You have the problem of the informal review on the OSHA side, but you also have the problem of the fact that the solicitor has a very hard time litigating all the cases that come over the transom to the solicitor's side, and they are litigating many more now. But it's still quite a small number in terms of the number of potentially meritorious cases.

First, the creation of an administrative process, and that would take, frankly, a lot more cases into the ALJ system at the Department of Labor, which may create a separate issue that we're not discussing today. That's the first thing.

The second would be making sure that complainants have some mechanism of having legal representation, and that would be either that the solicitor's office would provide it, or that attorney's fees would be available for cases in which the complainant prevails, because, otherwise, it's actually quite difficult to find representation. And, frankly, I think neither judges nor ALJs like dealing with pro se complainants in any event.

Third, a private right of action, a right to pull a case out from the administrative process and into court. You know, those are expensive and complex processes, and, in general, lawyers don't want to take cases out of the ALJ process and into court unless there's a really good reason. But when there's a really good reason, it should be available.

And, finally—and I included in this the burden of proof issue, because I think that the higher the standard of the burden of proof in these cases, the more likely they're going to get kicked out—no, I shouldn't use that word because it's a term of art—but the more likely they're going to die along the way, even when a complainant can prove that it was a contributing factor in the adverse action that was taken.

All of those things together would provide what I think—maybe not technically constitutional due process, but would provide a sense of due process for people. And although I completely agree with Mr. Keating with regard to the importance of being able to educate employers, at the same time I think we have to provide a protection to the people for whom that isn't working.

Senator CASEY. Thank you very much. I know we have to wrap up because of the vote.

But we're grateful for all of our witnesses. Please know that members may submit additional questions to you for written response.

And, without objection, I'd like to include for the record the written testimony of Keith Wrightson, Worker Safety and Health Advocate for Public Citizen's Congress Watch Division.

I also submit for the record a statement from Chairman Harkin, chairman of the HELP Committee.

[The prepared statement of Mr. Wrightson and Chairman Harkin may be found in additional material.]

And we are adjourned. Thank you very much.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR HARKIN

Yesterday marked the 25th year that workers, family members, and safety advocates have come together to honor and remember those that have been killed on the job and advocate for safer workplaces. April 28th was chosen as the date to recognize the creation of the Occupational Safety and Health Administration ("OSHA").

The passage of the Occupational Safety and Health ("OSH") Act and creation of OSHA was a major legislative accomplishment and one that has improved the lives of millions of Americans. Four decades ago, this landmark legislation finally put into law the fundamental American value that workers shouldn't have to risk their lives to earn their livelihood, and it required workers, employers, and the government to partner together to keep people safe and healthy on the job.

Since that time, workplace safety and health conditions have improved dramatically. In the year the OSH Act was enacted, our country saw 13,800 on-the-job deaths. In 2012, that number was 4,628—down by almost 70 percent—providing concrete evidence that the OSH Act has saved the lives of hundreds of thousands of American workers.

We should take a moment today to reflect on the lives of all the workers that have been saved because of the OSH Act and OSHA, and then recommit ourselves to continue to push for stronger worker protections and safer and healthier workplaces. It is unacceptable that on average almost 13 workers die in this country every day just trying to earn a decent wage and provide for their families. Additionally, nearly 3 million more will suffer from injuries and illnesses at work. Altogether, these fatalities, injuries, and illnesses hurt families and take a massive toll on our economy and society—estimated at $250 billion to $300 billion a year. Preventing illnesses and injuries isn't just the morally right thing to do; it makes economic sense as well.

Although the OSH Act and OSHA have saved the lives of countless workers, we must also acknowledge the Act's limitations too. In 2014, too many workers remain at serious risk of injury, illness, or death on the job, as demonstrated by last year's fertilizer explosion in West Texas that killed 15 and injured over 200.

This hearing will examine one of the most important aspects of the OSH Act that drastically needs reform: ensuring that workers have adequate whistleblower protections when they speak out about unsafe working conditions. We know that whistleblowers are critical to bringing safety problems to light, but they won't come forward unless the law contains stronger protections against retaliation.

It is also common knowledge that OSHA doesn't have the necessary resources to inspect every workplace in the country on a regular basis, so whistleblowers play a vital role in the agency's ability to identify dangerous work conditions. However, OSHA's whistleblower statute has not been significantly amended or improved in over 40 years, and it is outdated and weak compared to retaliation protections in other worker protection, public health, and environmental laws. Right now, we have stronger protections

for financial whistleblowers under Sarbanes-Oxley than we do for workers trying to save lives, and that just isn't right.

The Department of Labor, under the leadership of Assistant Secretary Michaels, has taken many substantive administrative actions to improve OSHA's Whistleblower Protection Program. However, legislation is necessary to provide a safe environment for workers to blow the whistle on unsafe working conditions without fear from retaliation from their employers. That's why I am a proud cosponsor of the Protecting America's Workers Act ("PAWA")—legislation that greatly expands current whistleblower protections to foster workplace environments where workers will feel comfortable reporting dangerous conditions, thus, improving safety and health for all.

Among other reforms, PAWA extends the amount of time a worker has to file a complaint, provides an administrative process that allows workers to go back to work while they pursue their cases, and gives them a private right of action consistent with other modern anti-retaliation statutes. Collectively, these reforms represent a critical step toward providing a safer workplace for every worker in our country.

Today's hearing is important because it allows us to honor and remember those that have been unnecessarily lost while working on the job, and gives us an opportunity to examine and discuss ways to improve workplace safety and health by protecting workers who bravely choose to speak up. Although tremendous progress has been made over the last 40-plus years, much work remains to be done. All Americans have the right to a safe workplace, and we should not rest until all of our fathers, mothers, sisters, brothers, families, and friends can go to work each day knowing they will be able to come home safely to their families each night.

PREPARED STATEMENT OF KEITH WRIGHTSON, WORKER SAFETY AND HEALTH ADVOCATE, PUBLIC CITIZEN'S CONGRESS WATCH DIVISION

Mr. Chairman and members of the subcommittee: Thank you for the opportunity to present written testimony on the government's authority over whistleblowers rights and anti-retaliation provisions. I am Keith Wrightson, worker safety and health advocate for Public Citizen's Congress Watch division. Public Citizen is a national nonprofit organization with more than 300,000 members and supporters.

Public Citizen commends the subcommittee for taking up this critical issue. There are a number of statutory and common-law provisions aimed at safeguarding private-sector whistleblowers, and the Occupational Safety and Health Administration (OSHA) is charged with enforcing 22 of these statues. Generally, these provisions provide that employers may not discharge or retaliate against an employee if an employee has filed a complaint or otherwise exercised any rights provided to employees.[1]

As one part of OSHA's whistleblower responsibilities, the agency is responsible for the enforcement of 29 U.S.C. § 660, section 11(c) (1970), (hereafter 11(c)), an enactment that provides whistleblower and anti-retaliation protections to any employee who discloses an occupational health or safety violation. Unfortunately, the protections allotted to workers under 11(c) are grossly inadequate and not conducive to building a safe workplace because the statutory language denies workers protection after 30 days, prohibits access to jury trials and does not provide reasonable remedies to prevailing whistleblowers. As it stands today, 11(c) is in dire need of modernizing and its directive should provide workers with the strongest language possible.

[1] Whistleblower statutes enforced by the Occupational Safety and Health Administration. *http:// www.whistleblowers.gov/statutes_page.html*, retrieved on (April 23, 2014).

Of particular concern under 11(c), is the 30-day statute of limitations that has been provided to employees who think they have been retaliated against for disclosing a workplace hazard. Thirty days is simply not enough time for a worker to gather information and present a clear case to OSHA This time restriction provision is troubling because it takes immense courage to stand up to an employer to identify waste, fraud and or abuse, and a 30-day window could inhibit that courage.

In other, more recent, whistleblower and anti-retaliation legislative efforts, Congress agreed that this 30-day statute of limitations found in 11(c) was too short. For example, when Congress amended 49 U.S.C. § 31105, the Surface Transportation Assistance Act in 2007, it provided a 180-day statute of limitations to employees who felt they had been discharged, disciplined or discriminated because they filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety regulation. This longer window provides the employee with adequate time to gather information for a clear case record. Another example can be found in Federal Railroad Safety Act 49 U.S.C. § 20109 (1970) (as amended by the 9/11Commission Act of 2007 and The Rail Safety Improvement Act of 2008), wherein Congress provided employees the same 180-day statute of limitations.

11(c) has other problems beyond the issues with the statute of limitations. 11(c) also does not provide due process rights to workers and limits the worker to an initial investigation by OSHA and an administrative hearing by its Office of Administrative Law Judges. The ability to hold companies accountable for wrongdoing is critical to an injured person, and at present 11(c) denies the injured party access to court for a jury trial.

Access to the court is a cornerstone philosophy of our democracy. When Congress enacted the Sarbanes-Oxley Act they introduced jury trials to end the monopoly of administrative hearings, but unfortunately this right is only attainable after a 180-day administrative exhaustion period. In 2008 Congress also reaffirmed access to courts for whistleblowers by enacting 15 U.S.C. § 2087, the Consumer Product Safety Improvement Act. Under this Act, whistleblowers can seek relief via a jury trial after a 210-day administrative exhaustion period or within 90 days of a final administrative ruling.

Another area of concern with 11(c) is the available remedies extended to workers who disclose waste, fraud and abuse. As laid out in the statute, workers will only be allotted re-instatement and back pay if they are *successful* in their claim. Comparatively, 49 U.S.C. § 42121, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2001) calls for re-instatement, back pay, attorney's fees, and compensatory damages for workers who disclose waste, fraud, and abuse. The provisions allotted in the AIR21 are more appropriate and do not place the onus on the employee to provide their own legal funding if unsuccessful.

In addition to the limited statute of limitations period the lack of meaningful due process, and insufficient remedies, the so-called worker protections found in 11(c) are also neither comprehensive nor well enforced by government agencies and the courts.[2] 11(c) is in urgent need of reform. Workers who seek relief under this antiquated statute are both unlikely to receive it and face unnecessary challenges.

Impact of Extended 11(c) Discrimination Filing Deadlines

Impact of Extended 11(c) Discrimination Filing Deadlines Within OSHA State Plans

[Fiscal Year 2013 Cases] [1]

State	Total No. of Cases [2]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
CA	114	75	28	37.3	39	6	34.2	15.4
CT [3]	0	0	0	0.0	0	0	0.0	0.0
HI	20	17	3	17.6	3	0	15.0	0.0
KY	51	34	4	11.8	17	2	33.3	11.8
NC	90	44	8	18.2	46	8	51.1	17.4
NJ [3]	2	1	1	100.0	1	0	50.0	0.0
OR	122	40	6	15.0	82	13	67,2	15.9

[2] Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weaknesses (August 2010). Government Accountability Office (GAO) 10–722).

Impact of Extended 11(c) Discrimination Filing Deadlines Within OSHA State Plans—Continued

[Fiscal Year 2013 Cases] [1]

State	Total No. of Cases [2]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
VA	41	30	1	3.3	11	1	26.8	9.1
Total	440	241	51	21.2	199	30	45.2	15.1

[1] Open cases from fiscal year 2013 are not included in the totals.
[2] Cases where the gap between the adverse action and filing dates cannot be determined are excluded from the totals.
[3] Indicates the State plan covers State and local government workers only.

[Fiscal Year 2012 Cases]

State	Total no. of cases [1]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
CA	206	127	36	28.3	79	14	38.3	17.7
CT [2]	2	1	1	100.0	1	1	50.0	100.0
HI	8	7	1	14.3	1	0	12.5	0.0
KY	62	42	8	19.0	20	1	32.3	5.0
NC	84	34	6	17.6	50	9	59.5	18.0
NJ [2]	8	5	4	80.0	3	1	37.5	33.3
OR	114	48	6	12.5	66	11	57.9	16.7
VA	35	32	2	6.3	3	0	8.6	0.0
Total	519	296	64	21.6	223	37	43.0	16.6

[1] Cases where the gap between the adverse action and filing dates cannot be determined are excluded from the totals.
[2] Indicates the State plan covers State and local government workers only.

[Fiscal Year 2011 Cases]

State	Total no. of cases [1]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
CA	179	103	12	11.7	76	8	42.5	10.5
CT [2]	2	0	0	0.0	2	1	100.0	50.0
HI	6	4	1	25.0	2	1	33.3	50.0
KY	33	27	4	14.8	6	0	18.2	0.0
NC	51	27	3	11.1	24	2	47.1	8.3
NJ [2]	3	1	0	0.0	2	0	66.7	0.0
OR	133	38	3	7.9	95	9	71.4	9.5
VA	16	11	0	0.0	5	0	31.3	0.0
Total	423	211	23	10.9	212	21	50.1	9.9

[1] Cases where the gap between the adverse action and filing dates cannot be determined are excluded from the totals.
[2] Indicates the State plan covers State and local government workers only.

[Total Cases—Fiscal Year 2011–13]

State	Total no. of cases [1]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
Fiscal Year 2011	423	211	23	10.9	212	21	50.1	9.9
Fiscal Year 2012	519	296	64	21.6	223	37	43.0	16.6
Fiscal Year 2013	440	241	51	21.2	199	30	45.2	15.1

[Total Cases—Fiscal Year 2011–13]

State	Total no. of cases [1]	No. filed within 30 days of adverse action	No. filed within 30 days meritorious	Percent filed within 30 days meritorious	Filed 31 or more days after adverse action	No. meritorious	Percent filed 31 or more days after adverse action	Percent filed 31 days or more that are meritorious
Total, Fiscal Year 2011–13	1382	748	138	18.4	634	88	45.9	13.9

[1] Cases where the gap between the adverse action and filing dates cannot be determined are excluded from the totals.

[Whereupon, at 11:16 a.m., the hearing was adjourned.]

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