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Whistleblowers and Job Safety: Are existing protections adequate to build safer workplaces?

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

[1] 29 U.S.C. § 660(c)(1), commonly referred to as Section 11(c); see also 29 C.F.R. Part 1977 for the regulations governing this section.
[2] 29 U.S.C. § 651(b).

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 3600 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.

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 in 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, West Virginia, 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, West Virginia.[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

[3] According to the FAQs currently posted on OSHA's website, 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.
[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.

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 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

[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.

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 number complaints received	**Total screened out**	**% screened out**
FY 2011	3561	1869	52%
FY 2012	4348	2562	59%
FY 2013	4589	2904	63%
	12502	7335	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 FY2011,2012,2013					
TOTAL screened out	31-60 days	61-90 days	91-120 days	121-180 days	181+ days
905	399 (44%)	152 (17%)	70 (8%)	95 (10%)	189 (21%)

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

[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 website 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 website: 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 two years, or three years if the employer's violation is willful.

following chart, the number of newly docketed 11(c) cases, and the number pending at the close of the fiscal year, grew consistently until FY2013.[14]

	Newly docketed 11(c) cases	**11(c) cases as % of all whistleblower cases (all statutes) filed with OSHA**	**11(c) cases completed in FY**	**Total 11(c) cases pending at end of FY**
FY2005	1194	62%	1160	N/A
FY2006	1195	65%	1229	N/A
FY2007	1301	66%	1167	N/A
FY2008	1381	62%	1255	N/A
FY2009	1267	59%	1168	663
FY2010	1402	61%	1144	927
FY2011	1668	62%	1234	1355
FY2012	1745	61%	1653	1440
FY2013	1711	58%	1826	1321

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 FY 2005-2013											
	TOTAL	**DISMISSED**		**WITHDRAWN**		**SETTLEMENTS**					
		number	% (of total)	number	**%**	TOTAL settled	%	total damages collected	average damages per settled case (total excludes N/A years)	# people reinstated	% of total settlements with reinstatement (total excludes N/A years)
FY2005	1200	760	63%	146	12%	271	23%	N/A	N/A	N/A	N/A
FY2006	1276	787	62%	196	15%	279	22%	N/A	N/A	N/A	N/A
FY2007	1204	766	64%	176	15%	248	21%	N/A	N/A	N/A	N/A
FY2008	1318	830	63%	227	17%	247	19%	N/A	N/A	N/A	N/A
FY2009	1200	726	61%	187	16%	265	22%	$1,839,299	$6,941	42	16%
FY2010	1183	672	57%	177	15%	310	26%	$1,741,863	$5,619	49	16%
FY2011	1282	694	54%	177	14%	388	30%	$2,478,212	$6,387	45	12%
FY2012	1717	977	57%	340	20%	382	22%	$2,435,831	$6,377	38	10%
FY2013	1946	921	47%	415	21%	570	29%	$4,939,444	$8,666	60	11%
TOTAL	12326	7133	58%	2041	17%	2390	19%	$13,434,649	$7,015	234	12%

[14] While the number of complaints filed continued to rise in FY2013, 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.

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.
- 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 $7000 in every fiscal year 2005-2012, and rose to only $8700 in FY 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 reinstatement was only 12% on average. Unlike many of the other whistleblower statutes, there is no provision in the OSHAct for preliminary reinstatement pending further review and litigation. Under these other statutes, preliminary reinstatement 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:

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

[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 reinstatement 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 reinstatement of the miner pending final order on the complaint.")

11c CASES REFERRED TO SOL by OSHA and ACCEPTED FOR LITIGATION:

	number	% of total OSHA determinations	% of "merit" cases
FY2005	23	2%	8%
FY2006	14	1%	5%
FY2007	14	1%	5%
FY2008	14	1%	5%
FY2009	22	2%	8%
FY2010	24	2%	7%
FY2011	23	2%	6%
FY2012	20	1%	5%
FY2013	38	2%	7%
TOTAL	192	2%	7%

As you can see from these data, only one to two 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% 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 FY 1996-2008:[19]

	number	% 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%

[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.

[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.

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]

	number	**% 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 FY2013.

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 twenty 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.

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[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* FY 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).

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 occupational 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:

[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

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 reinstatement, 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 reinstated pending further litigation. Right now, workers who have been discharged cannot return to their workplace unless the employer settles the case and includes reinstatement, or the Solicitor of Labor pursues the case in federal 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 reinstated, 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.