TESTIMONY OF

DAVID MICHAELS, PHD, MPH
ASSISTANT SECRETARY
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR

BEFORE THE

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COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS

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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 two 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 towards 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

[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.

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, 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 reinstatement 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 reinstatement 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 reinstatement 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 reinstatement order, the onus is on the respondent to make a *bona fide* offer of preliminary reinstatement. 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 reinstatement 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 reinstate 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 reinstatement to his or her former position if the District Court orders reinstatement 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 reinstatement.

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 two 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 decision-making 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 two year statute of limitations, with a three 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 one to three percent of complaints filed under STAA, SOX, and FRSA during the past three fiscal years missed the 180-day filing deadline. In contrast, during the last three 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 adjudication 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 one 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 reinstatement orders that OSHA has issued over the past three fiscal years.

Statute	Preliminary Reinstatement Orders FY2011 – FY2013
AIR21	4
FRSA	12
SOX	5
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 FY2012 and FY2013. 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 – FY2012	Kick-Outs from OSHA – FY2013
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 United States 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.

- 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 website.

- OSHA reorganized its whistleblower program so that all whistleblower personnel now report to centralized, whistleblower-dedicated supervisors that are fully trained in whistleblower investigations.

[3] GAO 09-106 "Better Data and Oversight Would Help Ensure Program Quality and Consistency."
[4] GAO-10-722 "Sustained Management Attention to Needed to Address Longstanding Program Weaknesses."
[5] 02-10-202-10-105 "Complainants Did Not Always Receive Appropriate Investigations Under the Whistleblower Protection Program."

- 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, Illinois.

- 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 reinstatement 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 two 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 reinstate 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 dollars 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 reinstatement for the three living employees. The company filed a motion to stay the preliminary

reinstatement order but the ALJ denied said motion and compelled Gaines to make bona fide offers of reinstatement, 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.