



May 5, 2020

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Anthony Rosa
OSHA Docket Office
Room N-3653
U.S. Department of Labor
200 Constitution Avenue NW
Washington DC 20210

Re: Comments on OSHA's Whistleblower Program, Docket No. OSHA-2018-0005

Dear Mr. Rosa:

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
W. Thompson Comerford, Jr.
Sally Greenberg
John Passacantando
Henry Waxman
Robert Weissman

Thank you for the opportunity to submit comments on key issues facing the Occupational Safety and Health Administration's (OSHA) whistleblower program and the ways the agency could address those issues to improve the program.

As you are well aware, the Whistleblower Protection Program (WPP) faces many obstacles directly related to statutory barriers and limited budgetary resources. But there are several ways OSHA can improve its administration of the WPP within its existing authority and without significant additional resources.

The agency's ability to administer the WPP is as important as ever. As the coronavirus pandemic spreads across the nation, essential workers on the frontlines are facing a significant and imminent workplace danger. While many employers have taken swift action to safeguard their employees and customers, some have been much slower to institute protections. And other low-road employers have done essentially nothing, requiring work to continue as usual without social distancing measures in place, without enhanced cleaning, and without protective gear. Workers across many industries are facing adverse consequences for asking questions, speaking up about their concerns, and in some cases, even for bringing their own protective gear into the workplace. Because of this retaliation, workers are seeking recourse by filing retaliation complaints with

OSHA. In many cases, OSHA is their only avenue for recourse; there is no option under the OSH Act, for example, to file a whistleblower suit independently.

Thousands of workers are now looking to OSHA for help in their greatest time of need. Yet according to the agency's data on COVID-related whistleblower cases, discussed more below, it does not appear the agency is resolving these complaints in a timely manner. In this way, the ongoing coronavirus pandemic not only highlights longstanding challenges with OSHA's administration of the WPP and the adverse effect these challenges have on workers' decisions about whether to speak up about hazards, but it also highlights the urgency with which the agency should act to address these issues.

With the coronavirus crisis in mind, and in response to the agency's questions outlined in the notice of the stakeholder meeting scheduled for May 12, 2020, I offer the following recommendations:

1. How can OSHA deliver better whistleblower customer service?

OSHA can deliver better customer service by providing comprehensive data on its administration of whistleblower cases, completing investigations in a timely manner, and assessing whether complaints it receives fall under a more protective statute.

By making data on OSHA's administration of whistleblower cases more transparent, workers contemplating filing complaints would be able to learn what to expect – how the average case winds its way through the agency process and the typical outcome of such cases. If OSHA improves its administration of the WPP and the data begin to show that filing a retaliation complaint can produce favorable outcomes for workers, more workers will likely be willing to put their trust in the process. As a result, workers may, over time, become less fearful of speaking up about hazards in the workplace, confident that OSHA has their backs.

Recent data on OSHA's WPP website on COVID-related whistleblower complaints is a useful starting point. The effort to post real-time data is laudable; however, the data are limited in important ways – ways OSHA should address. First, the website does not indicate whether the data are limited to complaints received under Section 11(c) of the OSH Act or if it also includes complaints alleging violations of other whistleblower statutes administered by OSHA. Second, the website fails to provide any information about the outcome of the complaints OSHA has investigated and closed. Third, the data only reflect changes in the caseload over a ten-business-day period beginning on April 21, 2020 and ending on May 4, 2020, although the data supposedly reflect total counts starting with complaints on Feb. 18.

Moving forward, OSHA should address these limitations and then use the model it has created for COVID-related cases to build out a comprehensive real-time tracker of its administration of all whistleblower cases, COVID and non-COVID. OSHA should also

create an online utility for complainants to track their complaints through the process and access case related documents. To enhance transparency, OSHA should also provide an annual evaluation of program operations on its website, along with its target goals. Further, OSHA should consider publishing a list of scofflaw companies found to have retaliated against employees, issue press releases alerting workers and the public about these companies, and make those press releases readily available on the OSHA website.

Based on the COVID-related whistleblower data on the WPP site, federal OSHA is receiving an average of 21.2 new cases per day. Of the 987 complaints received between February 18, 2020 and May 4, 2020, the agency administratively closed 28.4 percent of COVID-related retaliation complaints without investigation. Only 9.8 percent (77 of 556) of cases within federal OSHA's jurisdiction have been docketed for investigation. Shockingly, the agency has completed only five investigations related to COVID—which is not even 1 percent of the total complaints received and only 6.5 percent of the 77 cases docketed for investigation. The data provided give no indication about the outcome of those five cases.

Without more data, it is difficult to draw meaningful conclusions about the agency's administration of COVID-related retaliation complaints. However, it is clear from the data that the agency is not moving forward to investigate COVID-related cases in a timely manner. Failure to timely investigate cases is not unique to COVID-related complaints, but rather is a longstanding challenge for the agency. For example, Section 11(c) of the OSH Act requires OSHA to complete retaliation investigations within 90 days; however, the agency often takes far longer.

This is a key issue for the WPP because employees who experience retaliation need and deserve an immediate response from OSHA. When OSHA fails to respond in a timely manner, it leaves workers to suffer emotionally and financially. Failure to investigate a whistleblower complaint promptly may also lead to the erosion of key evidence and witnesses. Thus, OSHA should seek to improve its customer service by completing investigations within the mandatory period provided in the various statutes it administers. If OSHA leadership believes that the resources needed to meet these statutory requirements are insufficient, it should request those resources as part of the current budget cycle, and accompany that request with an explanation of the cost to workers of underfunding the agency.

Another improvement OSHA could make to its administration of the WPP is to review each complaint that it receives to assess which whistleblower statute applies and, if more than one could apply, to investigate the complaint under each statute.

OSHA's Whistleblower Training Manual states, "OSHA is responsible for determining the statutes under which a complaint is filed." OSHA holds this responsibility if the whistleblower does not explicitly state the statute in the complaint, and even if the

whistleblower mistakenly files the complaint under one statute, but another statute covers the protected activities. The manual goes on to state that, "If a complaint indicates protected activities under multiple statutes, it is important to process the complaint in accordance with the requirements of each of those statutes in order to preserve the parties' rights under each of the laws." OSHA should ensure that in every case investigators are processing the complaint under each possible statute that may apply, and work with the whistleblower and any representative to determine the most advantageous statute under which to proceed.

2. What kind of assistance can OSHA provide to help explain the agency's whistleblower laws to employees and employers?

On April 8, 2020, OSHA issued a news release reminding employers that they cannot retaliate against workers who report unsafe conditions during the coronavirus pandemic. OSHA has also updated its WPP webpage to include a few new COVID-related resources. However, as the data discussed above reveals, OSHA is moving slowly to investigate retaliation complaints it is receiving during the time workers need the agency's help most.

If OSHA is unable to adequately enforce the whistleblower protection laws it administers, employers may never improve compliance, and employees will never fully trust in their protections. Employers may well understand what each of the whistleblower laws requires on paper, but if OSHA delays investigations and dismisses a large number of complaints, employers have little fear they will be caught and vigorously penalized for unlawfully taking adverse action against an employee, and therefore little disincentive for such behavior.

Given employees' experiences under the whistleblower statutes to date, especially relating to Section 11(c) complaints, there is little trust that OSHA will take swift action in the interest of workers. Thus, moving forward, it will not be enough for OSHA to say that it intends to improve the Whistleblower Protection Program. OSHA will need to show its commitment to upholding whistleblower protections by moving cases through the system and showing the outcomes are fair and just.

To signal to employers and employees that OSHA intends to make improvements in the near term, a smart first step would be for OSHA to fill investigator vacancies immediately. OSHA should also reestablish the Whistleblower Protection Advisory Committee (WPAC) that was disbanded in 2018.

Once OSHA makes headway on these cases, it can communicate the improvements to workers by publishing all of the data on its website.

3. Where should OSHA target whistleblower outreach efforts?

OSHA should ensure that all workers have information about their protections under each of the whistleblower statutes. In the immediate term, given the ongoing coronavirus pandemic and significant risk of exposure essential workers are facing, OSHA should act immediately to target outreach efforts to workers and employers on the frontlines of this crisis. As the economy begins to reopen, OSHA should ensure that businesses across the nation understand that the risk COVID-19 poses to employees remains high and that they still have a legal duty to protect employees from exposure to this disease. Further, OSHA should convey that retaliation is unlawful and will be investigated swiftly by the agency.

In the near- and long-term, to the extent OSHA targets its outreach efforts, the agency should focus on the industries where retaliation is most likely to occur. For example, immigrant workers may fear that, if they speak up, their employer will threaten to have them deported or call immigration authorities. Likewise, workers who are paid low wages may be afraid to speak up because they cannot afford to be demoted, have their hours cut, or be fired. When vulnerable workers do speak up and experience retaliation, they may not report the retaliation because they do not trust the process and fear potential blacklisting in their industry.

OSHA can also target its efforts to workers inside establishments that OSHA is inspecting. During an inspection, the inspector should inform workers that their employer cannot retaliate against them for raising health and safety concerns in the workplace. The inspector should notify workers of their right under the OSH Act to report retaliation within 30 days. In all cases, OSHA's outreach to workers should be in clear terms and in multiple languages so that all workers can understand their rights and how to exercise them.

I hope that OSHA will meaningfully consider these recommendations and take steps to implement them as soon as possible. I look forward to discussing these ideas more on the telephone conference on May 12.

Sincerely,

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