

May 7, 2019

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. 2018-0005

Dear Mr. Rosa:

Thank you for the opportunity to submit comments on the Occupational Safety and Health Administration's (OSHA) administration of whistleblower protection provisions under Section 11(c) of the Occupational Safety and Health (OSH) Act.

The undersigned organizations and individuals collectively have decades of experience monitoring and analyzing the efficacy of OSHA's Whistleblower Protection Program. We are concerned that the many challenges with OSHA's 11(c) program have dire implications for workers across the nation. Section 11(c) of the OSH Act was designed to protect workers who speak up and report concerns, but due to weaknesses in the law and the agency's record of lackluster enforcement, too many workers are afraid to report health and safety concerns in the workplace, and those who do speak up are left without any remedy against reprisals.

More complaints are filed under Section 11(c) than under all other whistleblower statutes enforced by OSHA's Whistleblower Protection Program. Yet, inexcusably, this law remains as originally drafted in 1970, without modern due process rights or burdens of proof and a short 30-day statute of limitations. Still, while many of the challenges with Section 11(c) – and OSHA's Whistleblower Protection Program more broadly – require congressional action, there are several things the agency can do within its current authority to improve employees' experience with the program.

In response to the agency's questions outlined in the notice of the stakeholder meeting scheduled for May 14, 2019, we propose the following recommendations:

1. How can OSHA deliver better whistleblower customer service?

Chief among the ways OSHA could deliver better customer service is by completing 11(c) retaliation investigations within 90 days. An employee who has experienced retaliation and filed a complaint with OSHA is in need of an immediate response from the agency. Whistleblowers have no option under the OSH Act to file suit independently; OSHA is the only recourse. Yet the agency's investigations of 11(c) complaints often take far longer than 90 days to complete, leaving workers suffering emotionally and financially while they await the agency's determination – sometimes for years. In addition, when an investigation languishes, it can adversely affect the outcome of the case, which serves the employer's interest and does a tremendous disservice to the employee who experienced retaliation. More than 20 years ago, the Department of Labor's Inspector General warned OSHA about the negative effects of delayed investigations, noting, "[T]he quality of the evidence tends to erode with the passing of time, key witnesses may no longer be available, and worker financial hardships tend to increase because of

the lack of timely compensation.”¹ Yet in 2019, whistleblowers who try to enforce their rights under Section 11(c) continue to face those same hardships.

Further, we encourage OSHA to support the due process reforms under the anti-retaliation provisions in Section 201 of the Protecting America’s Workers Act (PAWA). These provisions would grant whistleblowers the right to request a *de novo* hearing before an administrative law judge (1) within 30 days after receiving notification of a decision granting or denying relief, (2) within 30 days after a complaint is dismissed without investigation, or (3) within 120 days of the filing of a complaint if no decision has been issued. Supporting these reforms to modernize Section 11(c) would offer whistleblowers a path forward in seeking to remedy retaliation against them when OSHA has chosen not to act or has neglected to take any action.

Another way OSHA could improve the resolution of 11(c) complaints is by helping workers who have filed them determine whether their particular complaint falls under another whistleblower statute that the agency administers. Most of the federal whistleblower statutes that OSHA administers provide far better coverage than Section 11(c) of the OSH Act. For example, other whistleblower statutes provide a far longer window for workers to file complaints of retaliation, ranging from 180 to 210 days. Accordingly, if OSHA receives an 11(c) retaliation complaint later than the 30 days allowed by the statute, before dismissing it as untimely, the agency should assess whether it also falls under the scope of another, more protective whistleblower statute.

OSHA could also improve the Whistleblower Protection Program by publishing more data about the program for workers and the public. OSHA should consider evaluating the program’s operations annually and post on its website the results of that evaluation, along with the next year’s target goals. OSHA could also publish a list of companies for which the agency has made a merit finding in response to a retaliation complaint and issue press releases alerting the public about companies found to have retaliated against their employees.

2. What kind of assistance can OSHA provide to help explain the whistleblower law it enforces?

OSHA’s Whistleblower Protection Program faces many structural and financial handicaps, making it difficult to enforce 11(c) and the 21 other whistleblower statutes that it administers. An audit by the Department of Labor Office of Inspector General in September 2015 concluded:

- OSHA did not consistently ensure complaint reviews under the Whistleblower Programs were complete, sufficient, and timely;
- OSHA did not ensure the Whistleblower Investigations Manual and training efforts reflected the most recent program updates and changing priorities;
- More than 70 percent of investigations were not conducted within statutory timeframes; and
- OSHA did not adequately and communicate in a timely fashion the violations alleged by whistleblowers internally to OSHA’s enforcement units or externally to other federal agencies with jurisdiction to investigate the allegations.²

¹ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LABOR, REPORT NO. 05-97-107-10-105, NATIONWIDE AUDIT OF OSHA’S SECTION 11(C) DISCRIMINATION INVESTIGATIONS 14 (1997).

² OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LABOR, REPORT NO. 02-15-202-10-105, OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROTECTION PROGRAMS (2015).

In 2016, OSHA made substantial improvements to its Whistleblower Investigations Manual. However, questions remain about effective enforcement of the manual. OSHA could take concrete actions to ensure that OSHA whistleblower investigators are in compliance with the updated manual. It could institute mandated annual trainings (or more frequently, depending on changes in the applicable laws) for its whistleblower inspectors. It could also support an annual audit of regional compliance and enforcement of 11(c) and the other whistleblower laws for which OSHA's Whistleblower Protection Program is responsible, conducted by an independent institution outside of the Department of Labor.

Lastly, OSHA could work to fill the whistleblower investigator vacancies immediately to help address many of the aforementioned concerns.

In closing, we strongly recommend that OSHA reestablish the Whistleblower Protection Advisory Committee (WPAC), which was disbanded in 2018. While we benefit from stakeholder meetings pertaining to each of the agency's 22 whistleblower statutes, they do not serve as an adequate substitute for WPAC, which was established to advise OSHA on "the development and implementation of improved customer service models, enhancements in the investigative and enforcement process, training, and regulations governing OSHA investigations."³ WPAC also advises OSHA on collaboration with other agencies that are responsible for areas covered by the whistleblower statutes enforced by the Whistleblower Protection Program. Those services are needed desperately, as OSHA's Whistleblower Protection Program faces many structural and financial handicaps that make it difficult to oversee the patchwork of whistleblower statutes that it administers.

We hope you will take the above recommendations into consideration as you seek to improve the Whistleblower Protection Program. We look forward to communicating these recommendations to you in person on May 14.

Sincerely,

Organizations:

ACORN8
Center for Progressive Reform
Centro de los Derechos del Migrante, Inc.
Defending Rights & Dissent
Derby Trucking
El Comite de Apoyo a los Trabajadores Agrícolas
Equal Rights Advocates
Essential Information
Faith and Justice Worker Center
Food and Water Watch
FracTracker Alliance
Government Accountability Project
Government Information Watch
Interfaith Worker Justice San Diego
International Chemical Workers Union Council

Justice at Work
Justice at Work (Pennsylvania)
Mississippi Workers' Center for Human Rights
National Center for Law and Economic Justice
National Employment Law Project
National Whistleblower Center
Open the Government
Public Citizen
Public Justice Center
REAL Women in Trucking, Inc.
SafeWork Washington
Sugar Law Center on Economic & Social Justice
Temp Worker Justice
The Rutherford Institute
Truckers Justice Center

³ *Whistleblower Protection Advisory Committee*, U.S. DEPARTMENT OF LABOR (viewed on May 2, 2019), <https://bit.ly/2P4WVwL>

Truth About Trucking LLC
United Food and Commercial Workers
Whistleblowers of America

Workers Defense Project
Worksafe

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