

**TESTIMONY OF JORDAN BARAB
DEPUTY ASSISTANT SECRETARY
FOR OCCUPATIONAL SAFETY AND HEALTH
U.S. DEPARTMENT OF LABOR
BEFORE
THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
THE COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
APRIL 28, 2010**

Chair Woolsey, Ranking Member McMorris Rodgers and Members of the Subcommittee, thank you for the opportunity to testify today on the Protecting America's Workers Act (PAWA) particularly on the issues of whistleblower protections and victim's rights in OSHA's enforcement process.

I recognize the significance of today's hearing being held on both the 39th anniversary of the creation of the Occupational Safety and Health Administration and Workers Memorial Day. Today is the day set aside to recognize workers killed, disabled, injured or sickened by their work – to honor the men and women who have died on the job and to rededicate ourselves to improving safety and health in every American workplace.

This commitment is especially needed now, as we commemorate this Workers Memorial Day not only to remember the 29 brave miners who lost their lives at the Upper Big Branch mine, the 7 refinery workers who were killed the week before at the Tesoro refinery in Washington, but also the 14 workers who die on the job every day in this country.

This hearing focuses on two areas that are crucial to reaching the goal set by the Occupational Safety and Health Act (OSH Act) to assure safe and healthful working conditions for all working men and women in the United States: 1) ensuring that workers are safe from retaliation for exercising their health and safety rights; and 2) ensuring victims of workplace incidents and their family members have information and a meaningful role in OSHA enforcement activities.

Whistleblower Protections

Congress realized that OSHA inspectors would never be able to visit more than a small fraction of the nation's workplaces. The OSH Act therefore relies heavily on workers to help identify hazards at their workplaces. The authors of the OSH Act also realized that employees are not likely to participate in safety and health activities if they fear that they will lose their jobs or otherwise be retaliated against. That is why Congress wrote Section 11(c) -- to protect employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers.

Section 11(c) was innovative and forward looking in 1970, but 40 years later it is clearly antiquated and in dire need of substantial improvement. Achieving Secretary Solis' goal of *Good Jobs for Everyone* includes strengthening workers' voices in their workplaces. Without robust whistleblower protections, these voices may be silenced.

This Administration strongly supports the whistleblower provisions of the Protecting America's Workers Act (PAWA), which expands the OSH Act's anti-retaliation provisions, codifies a

worker's right to refuse to perform unsafe work, prohibits employer policies that discourage workers from reporting illnesses or injuries, prohibits employer retaliation against employees for reporting injuries or illnesses, and grants workers the right to further pursue their case if OSHA does not proceed in a timely fashion.

OSHA currently administers the whistleblower provisions of sixteen other statutes, protecting employees who report violations of various trucking, airline, nuclear power, pipeline, environmental, rail, consumer product, and securities laws. In the four decades since the OSH Act became law, Congress has enacted increasingly expansive whistleblower protections in these other laws, leaving section 11(c) of the OSH Act in significant ways the least protective of the 17 whistleblower statutes. It is time to bring OSHA's protections up to the same level of these other laws.

Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints; lack of an administrative forum for the adjudication of cases; lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Department of Labor filing an action in U.S. District Court.

PAWA would strengthen section 11(c) by including the full range of procedures and remedies available under the more modern statutes and by codifying certain provisions, such as exemplary damages and the right to refuse work that could result in serious injury or illness, which have been available but not expressly authorized by current statute. There is no reason that workers

speaking up about threats to their safety and health should enjoy less protection than workers speaking up about securities fraud or transportation hazards. PAWA would also make explicit that a worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions to employers or to a safety and health committee. This protection is already implicit in the OSH Act, but PAWA would leave no doubt in employers' or employees' minds about this right.

PAWA is an improvement on OSHA's current law in significant ways. It would increase the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with some of the other whistleblower statutes. Over the years many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. For example, we received an 11(c) complaint from a former textile employee who claimed to have been fired for reporting to management that he had become ill due to smoke exposure during the production process. The worker contacted OSHA to file an 11(c) complaint 62 days after he was fired, compelling OSHA to dismiss the case as untimely under existing law. Under PAWA, however, OSHA would be able to investigate the merits of cases such as this one. Increasing the filing deadline to 180 days would greatly increase the protections afforded by section 11(c).

PAWA's adoption of the "contributing factor" test for determining when illegal retaliation has occurred would be another significant improvement in 11(c). This test, which examines the employer's decision to take adverse action against the employee following whistleblower activity, is less stringent than the current "motivating factor" test to which OSHA is currently restricted. Adoption of the "contributing factor" test would make 11(c) consistent with other

more recently enacted whistleblower statutes and would strengthen the whistleblower protections afforded to America's workers.

The private right of action is another key element of whistleblower protections that is lacking in OSHA's current 11(c) provision and is contained in PAWA. It is critically important that, if an employer fails to comply with an order providing relief, both DOL *and* the complainant should be able to file a civil action for enforcement of that order in a U.S. District Court. We strongly support this provision.

PAWA also allows complainants to move their case to another prescribed venue if the Department does not make prompt decisions or rulings. For example, PAWA would allow complainants to "kick out" from an OSHA investigation to a *de novo* Administrative Law Judge (ALJ) hearing if the Secretary has not issued a decision within 120 days from the case filing; "kick out" from an ALJ hearing to district court if an ALJ has not issued a decision within 90 days of the request for a hearing; or "kick out" from an Administrative Review Board (ARB) hearing to district court if the ARB has not issued a final order within 60 days of the request for an administrative appeal. "Kick-out" provisions have become a standard feature of whistleblower protection statutes, and OSHA believes it is appropriate for 11(c) complainants to have the same right.

The provision in PAWA allowing employees in states administering OSHA-approved plans to choose between Federal and State whistleblower investigations would likely result in a significant increase in the number of Federal complaints. All 22 states and territories that

administer private sector plans are required to provide protections at least as effective as Federal OSHA's. We have some reservations about this provision because we are not convinced it would add much protection to workers in those states and it would be a significant drain on OSHA and Solicitor resources. We would welcome further discussions on how to best ensure whistleblower protections in these states.

Finally, PAWA would codify a number of OSHA's high standards for professionalism and transparency in conducting whistleblower investigations that are of critical importance to this Administration. For example, PAWA requires OSHA to interview complainants and to provide them with the respondent's response and the evidence supporting the respondent's position. PAWA affords complainants the opportunity to meet with OSHA and to rebut the employer's statements or evidence. While we train our investigators on the critical importance of conducting thorough interviews with complainants and involving complainants in the rigorous testing of proffered employer defenses, we believe that requiring these investigative steps by statute would assist OSHA in its mission of providing robust protection to occupational safety and health whistleblowers.

These legislative changes in the whistleblower provisions are a long-overdue response to weaknesses that have become apparent over the past four decades. This legislation makes good on the promise to stand by those workers who have the courage to come forward when they know their employer is cutting corners on safety and health and guarantees that they do not have to sacrifice their jobs in order to do the right thing.

Not only do we support the provisions of PAWA intended to improve whistleblower protections, we would like to explore areas where we might want to go further.

I would propose amending the OSH Act to provide for assessment of civil penalties against employers who violate the whistleblower provisions. Currently, while an employer found to be discriminating against an employee must make the employee whole again, there is no provision for civil penalties against employers. The provisions are not in the current version of PAWA but similar provisions were included in the S-MINER Act that was passed by this Committee and the full House of Representatives in 2008. Under such a provision, any employer found to be in violation of Section 11(c) of the Act would be subject to civil penalties of not less than \$10,000 and not more than \$100,000 for each occurrence of a violation.

Additionally, as conclusion of these cases can often take many months, a provision should be made to reinstate the complainant pending outcome of the case. The Mine Safety and Health Act provides that in cases when the Mine Safety and Health Administration (MSHA) determines that an employee's complaint was not frivolously brought, the Review Commission can order immediate reinstatement of the miner pending final order on the complaint. OSHA's 11(c) complainants should have the same reinstatement rights.

Victims' Rights

OSHA has long known that workers, and often their families, can serve as OSHA's "eyes and ears," identifying workplace hazards. Workers injured in workplace incidents and their friends

and family often provide useful information to investigators, because employees frequently discuss work activities and co-workers with family members during non-work hours.

We are dedicated to finding ways to involve workers and their families in OSHA's enforcement investigations. Both Assistant Secretary Michaels and I make it a priority to set time aside to talk with victims' families whenever we have the opportunity.

Last month, as part of an effort to reach out and hear from stakeholders on a variety of safety and health issues, we hosted "OSHA Listens." As part of the event, we heard recommendations from the family members of workers killed on the job on how to enhance victims' and families' participation in the enforcement process.

I want to thank Tonya Ford whose uncle, Robert Fitch, was killed at Archer Daniels Midland on January 29, 2009, for coming to Washington today to testify and describe to us the tragic circumstances of Mr. Fitch's death and the unnecessary problems she and her family faced getting information about what happened and what OSHA was doing. We appreciate the suggestions she has on how to improve our enforcement process and better involve victims and their families.

Katherine Rodriguez, whose father was killed at the BP Texas City Refinery on September 2, 2004, also spoke at OSHA Listens and made several recommendations to OSHA officials on how to enhance the rights of victims' families. She said that before her father died in the hospital her family received information about the incident that might have been useful to OSHA

investigators, noting that “fellow coworkers are more willing to talk to the family members than any investigator.”

Family members and co-workers are sincerely and understandably interested in learning how an incident occurred, finding out if anything could have been done to prevent it, and knowing what steps employers and employees will take in the future to ensure that someone else is not injured or killed in a similar situation.

It is OSHA’s policy to talk to families during the investigation process and inform them about our citation procedures and settlements. OSHA first contacts the family at the beginning of the inspection. All families get a letter from the Area Director discussing the process and advising that they will be kept informed. In some cases the families initially get a phone call. Families are then normally provided a copy of the citations when issued.

However, we have found that some of these policies have not always been implemented consistently and in a timely manner. It is also clear that a letter is not adequate. Therefore, we will be putting these policies into a directive and adding them to our Field Operations Manual. We will also be instructing the Area Directors to call the family to express condolences, advise that a letter is coming, and assure families we will be staying in contact.

In addition, we need to work on interacting with families following a tragedy. As might be expected, many OSHA inspectors understandably have trouble knowing how to interact with a person who has just lost a loved one in tragic circumstances. While brief training on this issue is

provided to Compliance Officers at the Initial Compliance Course at the OSHA Training Institute, clearly more training is needed and will be developed. We will also develop webinars and webcasts for training of all compliance officers, team leaders, and Area Directors.

In general, OSHA is supportive of expanding interactions with families and victims. Therefore, the Agency is examining the issue of victims' rights from the administrative level to seek ways to better ensure the rights of victims and their families to participate in OSHA's enforcement efforts. OSHA supports many of the changes to the OSH Act embodied in PAWA for victims and their families.

PAWA would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA regarding the investigation and to receive copies of the citation or resulting report at the same time as the employer at no cost. PAWA would also enable victims to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation.

However, we also want to ensure – and I think the families would also want to ensure – that the provisions of PAWA do not unduly slow down the inspection, enforcement and adjudication process, which only hurt victims and their families in the long run. We believe therefore that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or the right to appear before parties conducting settlement negotiations. This could be logistically difficult for victims

and OSHA's regional and area offices, resulting in significant delays in the negotiations and ultimate citation. OSHA would be happy to work with the Committee to address this issue.

* * * *

Madam Chair, I appreciate the opportunity to appear today to discuss PAWA and how it would improve whistleblower protections and victim's rights. I believe stronger whistleblower protections and more substantial rights for victims and their families can lead to safer jobsites and ultimately, more men and women who go safely home to their families at the end of the day. I would be happy to answer your questions.