STATEMENT OF LLOYD B. CHINN
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON WHISTLEBLOWER AND VICTIM'S RIGHTS PROVISIONS OF H.R. 2067, THE PROTECTING AMERICA'S WORKERS ACT

April 28, 2010

Good morning Chairwoman Woolsey, Ranking Member Rodgers and Members of the Subcommittee. My name is Lloyd Chinn, and I am a partner with the law firm Proskauer Rose LLP in its New York City office. It is an honor to appear before you at this hearing to address the Protecting America's Workers Act ("PAWA"), specifically Title II "Increasing Protections for Whistleblowers." My testimony is not intended to represent the views of Proskauer or any of the firm's clients.

Although I practice out of my firm's New York City office, I have handled employment matters in federal and state courts and administrative agencies around the country. My eighteen year legal career has been almost exclusively devoted to the representation of employers in employment matters, whether engaged in counseling for the purpose of avoiding employee disputes or litigating those disputes as they arise. Throughout, I have advised and represented clients in connection with litigating or avoiding retaliation and whistleblower claims.

PAWA'S RE-WRITING OF THE OSH ACT WHISTLEBLOWER PROVISIONS

Title II of PAWA re-writes Section 11 (c) (29 U.S.C. 660 (c)) of the Occupational Safety and Health Act, fundamentally changing the statute in a variety of ways including:

- Adding an entirely new form of protected whistleblower activity – an employee's refusal to perform his or her duties – that is (i) unprecedented among the seventeen statutes whistleblower statutes administered by OSHA; and (ii)

supplants an already comprehensive and reasonable OSHA regulatory scheme on the topic.

- Modifying the current statute of limitations by triggering the commencement of the running of limitations period not only upon the date of the alleged violation but alternatively upon the date that a complainant "knows or should reasonably have known" that a violation occurred.

- Allowing any a complaint to bring any time-barred claims (other than a termination claim) provided that just one alleged adverse action is timely.

- Lengthening the current limitations period from 30 to 180 days.

- Providing the right for a de novo hearing before an administrative law judge.

- Providing the right for an administrative appeal to the Secretary of Labor (in effect, the Department of Labor's Administrative Review Board).

- Providing a complainant the right to bring a de novo action in a United States District Court, if either the administrative law judge or the Secretary of Labor has failed to meet very strict (and unrealistic time periods).

- Providing a right of appeal to the United States Court of Appeals following a final decision.

- Allowing either the Secretary of Labor or the complainant to commence an action in the United States District Court to enforce any order - even if preliminary - issued under this statute.

- Adopting a complainant-favorable burden of proof, requiring only that the complainant prove that his or her protected activity was a "contributing factor" in the alleged adverse action.

- Providing a variety damages recoverable by a complainant including, in addition to backpay, unlimited "consequential" damages and attorneys' fees and costs – while notably providing no right of recovery of costs or attorney's fees by a prevailing employer.

- Prohibiting (at least arguably) pre-dispute arbitration agreements, whether executed by individual employees or contained within a collective bargaining agreement.

WHERE IS THE EMPIRICAL RATIONALE?

Before turning to the more problematic of these provisions, a rather obvious question is "Why?" The stated purpose of the Occupational Safety and Health Act of 1970 is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). None of the provisions alluded to above bears directly on the question of workplace safety; rather, they all enhance the position of complainants in employment litigation. If PAWA is, in fact, about workplace safety, it is only by virtue of several unstated assumptions: (i) that Occupational Safety and Health whistleblowers ("OSH whistleblowers") contribute to overall workplace safety by bringing to light dangerous conditions; (ii) OSH whistleblowers will only come forward if there are adequate legal protections to prevent retaliation and; (iii) the current legal protections for such whistleblowers are inadequate. While it may be fair to assume the truth of assumptions (i) and (ii), at least for the sake of argument, the third proposition rests on a questionable empirical judgment about the inadequacy of protections provided under the current law.

I am unaware of any empirical data supporting the assertion that the current statute fails to protect occupational safety and health whistleblowers. Indeed, my concern is that this assumption is supported by nothing more than cherry-picked anecdotes or conclusory assertions that occupational safety and health OSH whistleblowers do not "win often enough." According to data for fiscal year 2007, OSHA received 1205 OSH whistleblower complaints under the Occupational Safety and Health Act alone. U.S. GOV'T ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND

CONSISTENCY 26 (2009) [hereinafter 2009 GAO REPORT]. Pointing to one or even a handful of anecdotes is of no statistical significance when addressing numbers like this.

Moreover, to decry the fact that the "win rate" for OSH whistleblowers is "low" assumes that either that there is an objective standard for judging whether the "win" rate is high or low – and there isn't – or that there has been a study of case outcomes, and (based on some objective criteria) those outcomes incorrectly favored employers. The recent GAO study of OSHA's Whistleblower Protection Program expressly disavowed undertaking any such analysis, "[W]e did not address the quality of [OSHA's] investigations or the appropriateness of whistleblower outcomes because these aspects were beyond the scope of the engagement." 2009 GAO REPORT, at 4-5.

In fact, although PAWA apparently posits access to the federal courts as a panacea for OSH whistleblowers, there is no reason to believe the "win" rate there will be any better than before OSHA. Indeed, in every administrative forum and court system in which I've practiced as an employment lawyer, it has been well understood that, in the aggregate, employment litigation plaintiffs lose more often than they win. This state of affairs is not, in my opinion, because of any particular bias in any of these court or administrative systems against plaintiffs; rather, it is simply because in the context of a particular employment statute, there is some substantial number of meritless claims filed.

And finally, if assumptions (i), (ii) and (iii) were each valid, then one would expect (all other things being equal) that inadequate OSH whistleblower protections have led to a less-safe workplace. But Bureau of Labor Statistics data support no such conclusion. According to BLS, both nonfatal injuries as well as fatalities in the workplace have continually declined over the past decade. *See* BLS,

http://www.bls.gov/iif/oshwc/cfoi/cfch0007.pdf;

http://www.bls.gov/iif/oshwc/osh/os/osnr0032.txt.

PARTICULAR CONCERNS REGARDING PAWA

Given the degree to which PAWA re-writes Section 11 (c), one could go on at some length about the proposed changes. I will focus my remarks on a few sections that, in my view, merit some discussion.

Refusal To Work

PAWA amends 29 U.S.C. 660(c), to add an entirely new form of protected activity under the act. It prohibits the discharge or any other form of discrimination against an employee "for refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee, or other employees." To receive protection under the section, the complainant must merely conclude, as a "reasonable person" would, that there is "bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances." *Id.*

It is, of course, a sensible proposition that an employee should not have to engage in work that will result in his or her injury or death. But PAWA's particular definition of protected activity appears to be unprecedented in federal whistleblower statutes.[1] And,

[1] Although some states recognize, either at common law or by statute, a cause of action for being retaliated against for failing to perform certain job duties, these states generally limit the protection to a refusal to perform unlawful activities. For instance, under Texas law, employees may refuse to work in unsafe work environments if they were to perform an illegal act that carries criminal penalties. *See Hancock v. Express One Intern., Inc.*, 800 S.W.2d 634, 636 (Tex. App. Dallas 1990), *writ denied*, (Nov. 11, 1992). Likewise, N.Y. LAB. LAW § 740 prohibits employers from taking retaliatory action against an employee who "objects to, or refuses to participate in an activity, policy or practice of the employer that is in violation of law, rule or regulation," if

moreover, OSHA regulations already address the issue of when an employee may refuse to work due to work conditions in a comprehensive and reasonable fashion.

Current OSHA regulations already prohibit discrimination against an employee who refuses to work. 29 CFR § 1977.12. But the regulations make clear that "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 CFR § 1977.12(b)(1). The regulations recognize that "an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards." *Id.* To avoid frivolous employee complaints and work stoppages, OSHA regulations provide that for an employee's refusal to work to be protected, a reasonable person must agree that there is "a real danger of death or serious injury." 29 CFR § 1977.12(b)(2). The employee must also demonstrate that he or she has refused to work in "good faith." *Id.* In addition, before discontinuing work, OSHA regulations require that an employee take various steps to place the employer on notice of the unsafe working conditions: (i) apprise the employer of the alleged hazard, if possible; (ii) ask the employer to rectify the danger; and (iii) unless there is insufficient time, "resort to regular statutory enforcement channels." *Id.*

Section 202 of PAWA's use of the "reasonable apprehension" standard and its failure to incorporate the employer protections contained in the OSHA regulations have the potential to encourage excessive litigation and false claims. If it is truly necessary to

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"the violation creates and presents a substantial and specific danger to the public health or safety."

address this issue through legislation, the standards set forth in the OSHA regulations should be used as a guide.

Statute of Limitations Issues

Section 203 of PAWA amends the existing statute of limitations provision in three ways: (i) by incorporating an alternative "discovery rule" concept for triggering the limitations period; (ii) by permitting "continuing violation" claims of virtually any sort, without regard to whether there is any connection between the timely assertions and the untimely ones; and (iii) by extending the current limitations period from thirty (30) to one hundred–eighty (180) days.

The most dramatic of these statute of limitation changes permits a complaint to be filed on the later of either the "date on which the alleged violation occurs" or "the date on which the employee knows or should reasonably have known that such alleged violation occurred."[2] The latter option, a "discovery rule", is a foreign concept in employment law. For example, of the seventeen OSHA-enforced whistleblowing laws, the statute of limitations under all of these statutes only begins to run when the alleged violation occurred. A discovery rule is not only unprecedented with respect to the OSHA-enforced whistleblowing statutes, it is not expressly adopted in any other federal employment statute, including the staples of employment discrimination law: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. It is hard to imagine how an OSH whistleblowing claim so unique that it would be alone among federal employment laws to apply a discovery rule.

[2] Proposed paragraph 4(A) in Section 203 refers to "paragraph (3)(A)", although there does not appear to be a subparagraph (A) to paragraph 3.

Legislatures and courts have presumably rejected a discovery rule in employment litigation because it is a bad idea. "One can never be sure exactly when on that continuum of awareness a plaintiff knew or should have known enough that the limitations period should have begun. A discovery rule thus substitutes a vague and uncertain period for a definite one." *J.D. Hamilton v. 1st Source Bank,* 928 F.2d 86, 88 (4th Cir. 1990). As a discovery rule has no firm outer limit, it would permit claims to be asserted years after the fact. Over the course of time, witnesses become unavailable and memories fade. Records are lost as electronic storage systems change. Moreover, it is not at all clear how a discovery rule benefits workplace safety – stale claims advanced many months or years after the fact will unlikely have any effect whatsoever on a practice that may well have changed with time. Indeed, that is precisely why the OSHA-enforced whistleblower statutes contain relatively brief (30 – 180 day) statutes of limitation – so to encourage the prompt reporting of conduct that is allegedly violative of the underlying statutes. While one can imagine the rationale behind a discovery rule in the context of certain personal injury-type cases (e.g., a surgical instrument left inside a person following surgery), there is no similar imperative in the employment litigation field.

Section 203 also provides that, for statute of limitations purposes, except for a termination, any series of alleged violations is timely provided that one alleged violation occurred within the limitations period. Although this subparagraph is labeled "Repeat Violation", it really should be referred to as "Continuing Violation." In the Title VII context, the Supreme Court has held quite clearly that discrete discriminatory acts outside the limitations period are time barred, even if related to alleged acts that are timely.

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002); *see also Delaware State College v. Ricks*, 449 U.S. 250 (1980). Even the more liberal approaches to the continuing violation doctrine adopted by the circuit courts of appeal that existed prior to Morgan required some relationship between the timely allegations and the untimely ones. *See, e.g., Morgan v. Amtrak*, 232 F.3d 1008, 1015-1016 (9th Cir. 2002). Under PAWA, no such requirement exists. A complainant could theoretically link an act taken years earlier, of a completely different nature, by different managers, in response to a totally distinct complaint, to a timely adverse action and proceed against the company with respect to both claims.

Finally, PAWA extends the existing statute of limitations period by a factor of six, from 30 to 180 days. In other words, of the OSHA-administered whistleblower statutes, the OSH whistleblower provision is now among the longest instead of among the shortest. As noted above in a different context, it is unclear how this lengthening of the limitations period improves workplace safety, given that it encourages complainants to sit on claims instead of advancing them promptly.

NEW RIGHTS OF ACTION

Currently, 29 U.S.C. § 660 (c) allows a complainant to file a complaint with the Secretary of Labor, which the Secretary of Labor is to investigate. The Secretary may then bring an action in the United States district court against the employer. By regulation, an employee submits his or her initial complaint to OSHA, and it is investigated. 29 CFR § 1977.15. Once an initial determination is made, only the whistleblower (not the employer) may request a review by OSHA's Appeals Committee.

The Appeals Committee either returns the matter for further investigation or denies the appeal.

While it is true that, of the 17 OSHA-administered whistleblower statutes, only three follow this particular procedure (the other two are the Asbestos Hazard Emergency Response Act and the International Safe Container Act), there is a sensible policy rationale for employing this process for the OSH whistleblower provisions. The substantive OSH act is, after all, the area of law most familiar to the typical OSHA investigator. It is the one substantive Act (out of the seventeen) on which all OSHA whistleblower investigators are trained. 2009 GAO REPORT, at 39.

Permitting OSH whistleblowers to take their claims before the Department of Labor's Office of Administrative Law Judges ("OALJ") and Administrative Review Board ("ARB") will have a significant impact on these bodies. OSH whistleblower claims make up, by far, the largest number of whistleblower claims addressed by OSHA under the 17 whistleblower statutes. For fiscal year 2007, of the 1,864 whistleblower complaints addressed by OSHA, 1,205 (approximately 65%) were OSH whistleblower claims. In essence, the adoption of PAWA would increase by approximately 200 percent the number of potential cases to be addressed by the OALJ and ARB. So doing will undoubtedly cause substantial delays in the processing of these claims. It is unclear how such delays will result in a safer workplace. What is certain is that employers will be forced to expend substantial sums defending OSH whistleblower claims through these additional processes – the majority of which will ultimately be found to be meritless.

Of course, PAWA would permit OSH whistleblowers to proceed to United States district court if the OALJ has not issued a decision and order within 90 days of a hearing

request or if the ARB has not issued a decision within 60 days of receiving the administrative appeal. Given that the vast majority of cases handled by the OALJ and ARB do not currently meet these timelines, it seems particularly unlikely they will do so once their pool of cases is dramatically increased. So the assumption under PAWA should be that every OSH whistleblower will at least have the opportunity to take his or her claims to United States district court. Again, it is not at all clear how this expansion of United States district court jurisdiction will improve workplace safety, but subjecting employers to federal court litigation in 1200 potential additional cases per year will certainly cost employers dearly.