

WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE (WPAC)

Minutes of April 26, 2016 Meeting

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, DC

The meeting of the Whistleblower Protection Advisory Committee (WPAC) was called to order by Chairman Emily Spieler at 9:18 a.m., Tuesday, April 26, 2016.

The following members and U.S. Department of Labor (USDOL) staff were present:

NAME	SECTOR REPRESENTED	TITLE & ORGANIZATION
Emily Spieler (Chair)	Public	Edwin W. Hadley Professor of Law, Northeastern School of Law
Richard Moberly	Public	Associate Dean, University of Nebraska
Jonathan Brock	Public	Emeritus Faculty Member (Retired), University of Washington
David Eherts	Management	Vice President Global EHS, Allergan, Inc.
Gregory Keating	Management	Shareholder, Co-chair of the Whistleblowing Practice Group and Member of the Board of Directors, Littler Mendelson P.C.
Marcia Narine*	Management	Assistant Professor of Law, St. Thomas University School of Law; Compliance Consultant, MDO Partners
Kim Gaylo	Management	Global HSE Associate Director, Proctor & Gamble
Sylvia Johnson**	Labor	Deputy Legislative Director, United Automobile Aerospace and Agricultural Implement Workers of America (UAW)
Eric Frumin	Labor	Health and Safety Director, Change to Win
Nancy Lessin	Labor	Program Director, United Steelworkers' Tony Mazzocchi Center for Health, Safety and Environmental Education
JJ Rosenbaum	Labor	National Guestworker Alliance
Lezlie Perrin	OSHA State Plan States	Appeals, Audit and Discrimination Senior Program Manager, Department of Labor and Industries Division of Occupational Safety and Health, State of Washington
Rina Tucker Harris	Federal Agency	Enforcement Attorney, Consumer Financial Protection Bureau
Eric Bachman	Federal Agency	US Office of Special Counsel

Robert W. Miller	Federal Agency	U.S. Department of Transportation, Federal Motor Carrier Safety Administration
Brian Broecker	OSHA	WPAC Counsel, Office of the Solicitor, USDOL
MaryAnn Garrahan	OSHA	Director, Directorate of Whistleblower Protection Programs, USDOL OSHA
Anthony Rosa	OSHA	Deputy Director, Directorate of Whistleblower Protection Programs, Designated Federal Officer for WPAC, USDOL OSHA

* Conferenced in by telephone.

** Arrived late.

Approximately 20 members of the public, including OSHA and USDOL staff, were in attendance.

Introductory Remarks

Emily Spieler, WPAC Chair, opened the meeting and asked WPAC members, DWPP staff, and attendees in the audience to introduce themselves. Chair Spieler welcomed the Committee's new members, and noted the reappointment of several others. Chair Spieler also stated that the Department of Labor published a Federal Register notice on April 1, 2016, soliciting nominations for new WPAC members, and that nominations would be accepted until the end of May 2016. Chair Spieler then explained that WPAC has two new subcommittees that met for the first time the day before the meeting, and invited them to report out.

Outreach Work Group Report

J.J. Rosenbaum, Chair of the Outreach Work Group, began by reading the group's charge, and explained that the group viewed the charge as having three parts: the phrases and concepts that help with outreach; the types of information, guidance products, and communications that carry those phrases and make them effective; and the organizations that would be most helpful to receive those products.

Ms. Rosenbaum stated that the group acknowledged that the work of the former best practices work group would be important to the group's conversation, and that the group discussed two types of employers: those that are willing to learn best practices and those that are unwilling. The group also recognized that they should discuss how outreach can be furthered by collaborating with OSHA's safety and health enforcement program and partner agencies.

Further, Ms. Rosenbaum reported that the group discussed reviewing the existing outreach tools that are available, including looking at website traffic, and pulling together research showing that retaliation costs employers money, in addition to being the right thing to do. The group also discussed the legal overlays that might incent employers to establish anti-retaliation programs (e.g., the new executive order on federal contracting); opportunities with large supply chain employers to encourage the adoption of best practices throughout their supply chains; looking at OSHA's and partner agencies' touch points with employers to identify areas in need of outreach;

the idea of targeted outreach; and products that highlight concrete experiences and stories from employers and employees.

Eric Frumin, a member of the work group, added that the group was interested in reviewing any information that OSHA may have regarding the current practices and programs in place at the employers with which OSHA interacts. Gregory Keating, another member, noted that he viewed the outreach work group as furthering the work of the former best practices work group.

Training Work Group Report

Marcia Narine, Chair of the Training Work Group, reported out for the group via telephone. She explained that, at the group's first meeting, Anthony Rosa, from OSHA's Directorate of Whistleblower Protection Programs (DWPP), and Anthony Towey, from the OSHA Training Institute, provided background to the group on OSHA's whistleblower investigator training program.

Ms. Narine explained that the work group will look at how OSHA's training courses should be delivered (e.g., webinar or in person), and summarized the whistleblower training courses that OSHA currently offers, as well as those that Mr. Rosa and Mr. Towey said were planned for the future.

Ms. Narine reported that the group discussed how OSHA's training program will be responsive to the Office of Inspector General's (OIG) September 2015 report on the whistleblower program, and added that the group was not sure that OSHA's training program could address the investigation timeliness issues that OIG identified, as they viewed that as more of a resource issue.

Ms. Narine summarized the priorities for the training work group, which include identifying learner takeaways from OSHA's whistleblower training courses; helping OSHA develop more technical courses (such as an advanced transportation course); finding shared resources for investigators to study independently; looking at the opportunity for training investigators on issues such as emotional intelligence, empathy without sympathy, and cultural differences; and looking at lessons learned from the case reviews that are conducted by DWPP.

Ms. Narine also clarified that looking at external training for employers, unions, and organizations is not currently within the work group's charge.

Securities and Exchange Commission (SEC) Presentation

Sean McKessy, the Chief of SEC's Office of the Whistleblower, gave a presentation on his office's enforcement of the anti-retaliation protections included in the Dodd-Frank Act. Mr. McKessy explained that the Dodd-Frank Act's anti-retaliation protections do not replace the retaliation protections and remedies that are available to securities law whistleblowers under the Sarbanes Oxley Act (SOX), but rather provide another mechanism for whistleblowers to seek redress for retaliation. Mr. McKessy discussed the history of his office, the features of the anti-retaliation provision that SEC enforces, and the efforts taken to educate and train SEC staff to investigate retaliation claims.

Mr. McKessy also discussed the several legal issues arising under whistleblower protection laws; for example, the SEC believes that internal reporting should be protected activity, although federal appellate courts are currently split on whether solely internal reporting is protected or not. Mr. McKessy explained that whistleblowers are not required to first report their concerns internally before filing with the SEC. Additionally, Mr. McKessy discussed the issue of “pre-retaliation”, where employers attempt to preclude employees from reporting possible securities law violations to the SEC in the future.

Mr. McKessy responded to several questions and comments from members of the Committee on a variety of topics, including the structure of the SEC’s enforcement program, OSHA and the SEC’s communication regarding retaliation cases, and the statute of limitations for filing under the Dodd-Frank Act’s anti-retaliation protections.

Wage and Hour Presentation

Due to time restraints, a scheduled presentation from the Department of Labor’s Wage and Hour Division was postponed until the next meeting.

Break

Railroad Workers United Presentation

Prior to the meeting, the Railroad Workers United (RWU) requested time to present concerns to WPAC regarding retaliatory practices in the railroad industry, and particularly the actions and policies of Burlington Northern Santa Fe Railroad (BNSF). Chair Spieler first asked if Charles Shewmake, BNSF’s Vice President and General Counsel, was in attendance, as Mr. Shewmake submitted a letter to WPAC prior to the meeting regarding RWU’s request. Mr. Shewmake was not in attendance, and Chair Spieler asked that his letter be marked as an exhibit. Mr. Shewmake’s letter was subsequently marked as Exhibit 1, and RWU’s letter requesting to speak at the meeting was marked as Exhibit 2.¹

WPAC then heard a presentation from three individuals appearing on behalf of RWU: Kelly Rookiard, Mike Elliot, and Jeff Kurtz. Ms. Rookiard read a statement to the Committee that discussed the termination of her husband from BNSF and her recommendations for how railroad industry whistleblowers could be better protected. Mr. Elliot, a former BNSF employee and whistleblower complainant, and Mr. Kurtz, a retired railroad worker and union representative, also offered recommendations for improving whistleblower investigations and curtailing retaliatory practices in the industry. Written statements from Ms. Rookiard, Mr. Elliot, and Mr. Kurtz were subsequently marked as Exhibits 3, 4, and 5, respectively.

Public Comment Period

Before proceeding with the public comment period, Chair Spieler explained that WPAC received a letter from a member of the public, Don Davis, and asked the Committee to read it so that it could be discussed at a future time. The letter was marked as Exhibit 6.

¹ All materials associated with this meeting can be found at <http://www.regulations.gov> in docket OSHA-2016-0008

William Wahoff, from the law firm Steptoe & Johnson PLLC, stated that employers are not very familiar with whistleblower retaliation laws or OSHA's whistleblower retaliation investigation procedures, so he suggests that OSHA do more to acquaint employers with the laws and procedures in opening conferences. He also suggested that OSHA conduct all settlement negotiations using neutral mediators, rather than investigators, because it presents a better appearance.

Larry Mann, counsel to the Academy of Rail Labor Attorneys and rail safety coordinator for the transportation division of the Sheet Metal, Air, Rail, Transportation Union, made several recommendations and requests regarding the Federal Railroad Safety Act's (FRSA) whistleblower provision. He asked for a clarification of the statute of limitations for whistleblower complaints filed under the FRSA, and recommended that the statute be amended to make preliminary reinstatement orders enforceable. Mr. Mann also stated that employers have policies requiring that, when an employee is incapacitated and needs an ambulance, only the employer can call for the ambulance, and recommended that the statute be amended to allow anyone to call. Mr. Mann also requested a statutory change to counter the railroad's legal position that employees are not able to access the courts once an ALJ rules against an employee. Last, Mr. Mann stated that he believes that OSHA needs subpoena power.

Larry Halprin, a partner at law firm Keller and Heckman LLP and counsel for the Great American Insurance Company, raised concerns about OSHA's discouragement of employer incentive programs, explaining that the employers he represents have tried various measures to improve safety, but have found that the only ones that work are incentive programs. He stated that while employers have found incentive programs to be effective, OSHA has not produced data that would justify discouraging or prohibiting such programs.

Mr. Halprin fielded questions from several Committee members, including multiple questions and comments on the data that was relied upon in the written comments that he submitted prior to the meeting. For example, Ms. Lessin asked why Mr. Halprin's comments did not discuss studies on incentive programs that were previously published in peer reviewed journals. She also remarked on the comments' treatment of the Government Accountability Office's finding in 2012 that data gathered from OSHA's National Emphasis Program was inadequate to assess the effectiveness of safety incentive programs and other workplace safety and health policies on injury and illness reporting.

Additionally, Chair Spieler asked whether there have been, or if Mr. Halprin's organization would be interested in, direct-to-worker surveys conducted by an independent or study organization that asked workers about their perception of how the safety incentives work. Mr. Halprin expressed agreement that he would be interested in such information, but would want to know how the survey would be conducted.

The written comments and attachments that Mr. Halprin submitted prior to the meeting were subsequently marked as Exhibits 7A-7F.

Lunch Break

Remarks of Deputy Secretary of Labor Chris Lu and Assistant Secretary for OSHA Dr. David Michaels

Deputy Secretary Lu thanked the Committee on behalf of Secretary Perez. He noted that whistleblower is a high priority for this administration.

Dr. Michaels thanked the Committee, and OSHA and SOL staff, for their work. He discussed several projects that DWPP has been working on or has recently completed, including reviewing the comments that OSHA received on the Best Practices document, integrating the Reasonable Cause memorandum into the whistleblower investigations manual, expanding and strengthening OSHA's training courses for investigators, issuing new rules on food safety, and updating OSHA's online whistleblower complaint form.

Dr. Michaels answered questions from Committee members regarding the outlook for OSHA's budget, legislative activity, OSHA's efforts to coordinate its enforcement activities, and (with assistance from Mr. Rosa) OSHA's coordination with partner agencies. Chair Spieler also brought to Dr. Michaels' attention points that were raised during the public comment period by Mr. Wahoff (regarding employers' familiarity with OSHA's investigative process) and by the RWU representatives (regarding the effectiveness of OSHA's agreement with BNSF).

DWPP Update by Mary Ann Garrahan, DWPP Director

Ms. Garrahan thanked the Committee for its service, and explained that the Directorate's responsibilities include promulgating regulations, establishing national performance measures and policy and procedures, supporting the regions, and developing and conduct outreach. She added that DWPP is also tasked with running the administrative review process for complainant-requested reviews of regional determinations of investigations conducted under Section 11(c) of the OSH Act.

Ms. Garrahan updated the committee on the status of DWPP's various activities, including analysis of web traffic on DWPP's website, its efforts to strengthen the training of investigators and managers, administrative reviews of Section 11(c) investigations, promulgation of several procedural regulations, updates to the whistleblower investigations manual, and coordination with partner agencies. She discussed recent enforcement cases of note, and also discussed DWPP's outreach efforts, including the development of wallet cards, a whistleblower rights card, and the Best Practices document. Ms. Garrahan also updated the Committee on the whistleblower program's transition to a new case management database.

Ms. Lessin requested, and Chair Spieler seconded, that DWPP provide an update at the next meeting on how OSHA's Alternative Dispute Resolution program is working. WPAC members also discussed with Ms. Garrahan the possibility of providing feedback on OSHA's outreach materials, and OSHA's process for revising, and soliciting feedback on, the draft Best Practices document that WPAC's best practices work group developed. Mr. Frumin commented to

emphasize the importance of finding ways to take a proactive and preventative approach to whistleblower retaliation.

Public Comment Period (Continued)

Rick Inclima, Director of Safety and Education for the Brotherhood of Maintenance of Way Employees Division, provided a statement to WPAC regarding 49 CFR § 209.303, which Mr. Inclima explained provides a mechanism for the FRA to institute disqualification proceedings against employees in safety sensitive positions or managers who have oversight responsibility for those safety sensitive employees. Mr. Inclima suggested that OSHA coordinate with the FRA to use this authority to hold employees and managers who repeatedly violate railroad workers' whistleblower rights accountable.

Ms. Lessin asked if this mechanism had been used in the past, and Mr. Inclima responded that it had been used against railroad employees in safety sensitive positions, but was not aware of any cases against managers, though he has submitted a FOIA request to the FRA on this question.

Wrap up

Chair Spieler opened the floor to members to suggest topics for future meetings and any other observations or questions regarding the work groups

David Eherts raised the issue of WPAC's ability to have a dialogue with OSHA within the bounds of the Federal Advisory Committee Act (FACA), and Chair Spieler commented on the limitations that FACA imposes on the Committee's communications with Agency.

Mr. Frumin suggested that WPAC discuss the coordination between OSHA's whistleblower program and its safety and health enforcement program, including a joint discussion with OSHA representatives on how the enforcement programs can effectively work together. He also discussed the implications of the forthcoming rules on federal contracting pursuant to a recent executive order.

Mr. Keating requested that OSHA coordinate with the Outreach Work Group to help plan outreach events for when the Best Practices document is published.

Ms. Lessin requested that WPAC continue the discussion of whistleblower protection issues in the railroad industry.

Chair Spieler asked that DWPP follow up on the issues presented in the railroad presentation and report back to the Committee. She also suggested for the next meeting that DWPP report out on the ADR program, that the Wage and Hour Division give a presentation, that the whistleblower enforcement issues that Mr. Frumin raised be addressed, and that time for the two work groups be included on the agenda.

The meeting was adjourned at 3:47 p.m.