

**WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE
(WPAC)**

Minutes of April 20-21, 2015 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 Spieler at 1:03 p.m., Monday, April 20, 2015. The following members and OSHA 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
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
Kenneth Wengert	Management	Director of Safety, Environment and Business Continuity Planning, Kraft Foods
Ava Barbour	Labor	Associate General Counsel, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America
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
Christine Dougherty	OSHA State Plan States	Principal Discrimination Investigator, Minnesota Department of Labor and Industry

Rina Tucker Harris	Federal Agency	Enforcement Attorney, Consumer Financial Protection Bureau
Robert W. Miller	Federal Agency	U.S. Department of Transportation, Federal Motor Carrier Safety Administration
Dr. David Michaels•	OSHA	Assistant Secretary, U.S. Department of Labor, Occupational Safety and Health Administration
Louise Betts	OSHA	WPAC Counsel Office of the Solicitor, USDOL
Eric Harbin	OSHA	Acting 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

• participated only on April 20, 2015

Monday, April 20, 2015

Approximately 25 members of the public, including OSHA staff, were in attendance.

Introductory Remarks

Rob Swick, Directorate of Whistleblower Protection Programs (DWPP), welcomed the members and visitors and explained building safety procedures.

Following Mr. Swick’s introductions, Emily Spieler, WPAC Chair, welcomed new member Jennifer “J.J.” Rosenbaum, discussed the committee’s charge, and explained the agenda. Chair Spieler also welcomed the Assistant Regional Administrators (ARAs) who came from around the country for participating in the meeting and passed the microphone amongst the participants and attendees to introduce themselves.

Mr. Swick explained that the session was on the record and asked that members speak one at a time. Chair Spieler explained that this was a public meeting with detailed minutes being prepared.

Welcome from Assistant Secretary Dr. Michaels

Dr. Michaels thanked everyone for their efforts. Introducing OSHA’s latest report, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, he explained that 3 million injuries are reported each year and that the biggest impact of these injuries is borne by the worker. Worker’s compensation only picks up 20% of the cost of the workers’ losses, while the remainder is paid either by the worker’s family, disability, or other government social programs. Dr. Michaels explained that this, in effect, works as a taxpayer subsidy of unsafe work practices because the employer is not bearing the cost of the consequences of failing to improve safety in their workplace.

Dr. Michaels explained that the Whistleblower Program is getting stronger and has come a long way in the last six years. The number of whistleblower cases has increased steadily every year, processing 3,150 cases in FY2014. In that same year, OSHA awarded \$35 million and reinstated 69 workers.

Dr. Michaels also noted the popularity of the online complaint form, which has increased the number of complaints received. Furthermore, he stated that OSHA's improved investigatory efficiency has allowed it to better serve whistleblower parties.

In FY12 and 13, whistleblower complaints awarded \$30 million, in comparison with \$15 million in 2011. This shows the improvement in the program in the form of results since the changes the OSHA made in 2011 and its successes in reducing the backlog. Higher numbers of merit findings in the last two years show improved investigation, and there remains an ongoing goal of improving efficiency and quality.

Dr. Michaels then laid out recent personnel changes, introducing MaryAnn Garrahan as the new Director of the Whistleblower Program, explaining that Director Garrahan brings 25 years of experience in all areas of OSHA programs and experience as a senior executive and proven history as a manager. Dr. Michaels explained that Director Garrahan will start next month.

Dr. Michaels also thanked and introduced Eric Harbin, explaining that he came in from the Dallas Regional Office to act as the program Director for the last several months and assist in the transition. Dr. Michaels also introduced Deputy Director Anthony Rosa and thanked him for the contributions he has made and his stewardship of the program over the last several months.

Dr. Michaels emphasized that OSHA is expanding all Whistleblower Regional Programs and has a successful management strategy in place from the ARA pilots, and plans to create dedicated ARA positions to supervise Whistleblower Programs in all the regions. He noted that the Regions that have implemented the ARA structure have had noted improvements, and both investigators and RSIs have been helped through the plan.

Additionally, he stated that OSHA is committed to providing more training and more advanced training to the works of the Whistleblower Program. OSHA will be producing webinars to provide on-going training to staff as well. One forthcoming webinar will be on the Fairfax memo/Incentives memo which came directly out of the 11(c) Work Group of WPAC.

OSHA will also be working more closely with partner agencies, including the development of Memoranda of Understanding (MOU), such as an MOU with the Federal Aviation Administration on Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). We will be asking partner agencies to provide links to our program on their websites.

OSHA will also be developing a nationwide outreach plan for the Whistleblower Program that will emphasize joint outreach opportunities with federal partners. Additionally, OSHA will be implementing policies from its Alternative Dispute Resolution Pilot Program nationwide to better facilitate early settlement negotiation, which is highly desired.

For FY16 we are requesting \$22.6 million request which will result in an increase to the number of employees in the Whistleblower Program.

Dr. Michaels then highlighted some recent successes:

He referred to AT&T cases and the cases against their subsidiaries, where employees were punished for violating safety rules after reporting an injury; Region 5 made all workers whole. In October 2014, Region 7 also had a landmark case against BNSF for violating the FRSA when an apprentice electrician reported an injury. The Region achieved a victory of \$225,000 in damages and punitive damages for the employee and had all discipline removed from the employee's record. Additionally, in Region 1, OSHA achieved a \$250,000 judgement against Metro North after a supervisor discouraged a coach cleaner from reporting an injury. In Seattle, a district court judge reinstated a United States Postal Service employee who had been retaliated against for helping a coworker file an OSHA complaint. The judge awarded the employee almost \$230,000 in compensatory damages and permanently enjoined the Postal Service's Seattle facilities from violating 11-C of the OSH Act. The New York Regional Office had a recent case against a Bronx hair salon where an employee was retaliated against for warning their coworkers about formaldehyde risks. Dr. Michaels also discussed the success of Region 4 against Lear Corp. of Selma Alabama, where OSHA obtained a temporary restraining order against the employer to prevent further retaliation against an employee and a Strategic Lawsuit Against Public Participation (SLAPP) suit.

Dr. Michaels then thanked the Best Practices Work Group for their work and assistance in collecting best practices.

Chair Spieler noted that the ARA structure represents a sea change for OSHA and a vast improvement. She then opened the floor to the rest of the committee for questions and comments to Dr. Michaels.

Report from the Directorate of Whistleblower Protection Programs

Acting Director Eric Harbin of the OSHA's DWPP provided an update on the Directorate. He thanked Dr. Michaels for his leadership and dedication to protecting workers – including whistleblower rights. Mr. Harbin announced that Mary Ann Garrahan has been chosen to be the new Director of DWPP. Ms. Garrahan is currently the Regional Administrator in Region 3 and has been a valuable member of the OSHA team for over 25 years.

Next, Mr. Harbin thanked Chair Spieler as well as the chairs of the work groups: Dave Eherts – 11(c) Work Group, Jon Brock – Best Practices and Corporate Culture Group, and Eric Frumin – Transportation Industry Work Group. Mr. Harbin also thanked the ARAs, Christine Stewart, Anthony Rosa, and the DWPP staff, specifically, the WPAC Points of Contact (Meghan, Rob, Marisa).

Mr. Harbin announced that he would be here through the end of the week and offered to help in any way that he can. He explained that Anthony Rosa is the Designated Federal Officer and will continue to be the go-to person on policy issues and operational issues, while Meghan Smith will continue as point of contact for logistics and the day-to-day concerns.

Field Update

Mr. Harbin reiterated that as much as DWPP does, the bulk of the Whistleblower investigative work happens in the field. As a result, DWPP experimented with several pilots, and are moving to institutionalize those that were successful.

New Assistant Regional Administrator for Whistleblower Protection Programs

Mr. Harbin expanded upon Dr. Michaels' discussion of the new Assistant Regional Administrator position for Whistleblower Protection Programs. The position was piloted in Regions 4 and 5; both regions had overwhelmingly positive results. DWPP has already expanded the structure to Region 2 and the process is moving along to the remaining regions. The ARA model helps provide strategic leadership and guidance to the program. The Supervisory Investigators manage the caseload and supervise the investigators, but someone needs to look at the big picture, manage resources, develop and monitor strategic planning, establish regional goals and objectives, including emphasis programs (e.g., blitz, inventory/backlog reduction initiatives, etc.), coordinate priorities with the Office of the Solicitor (SOL), and all other management aspects of the program.

ADR Initiative

Next, Mr. Harbin described the new Alternative Dispute Resolution (ADR) Initiative. Under the ADR Program, when both parties in a complaint investigation agree to seek early resolution, the investigation will be stayed while an ADR Coordinator will work with both parties to resolve the matter. During FY 2013, Regions 5 and 9 piloted the ADR Program with great results. Consequently, OSHA has decided to make the ADR Program available to every region. OSHA is currently finalizing the ADR Directive, which will provide specific instructions on the program's processes and procedures. FMCS will provide OSHA with ADR training materials, so that OSHA may train "in-house" additional whistleblower program staff in ADR skills in the future.

Training

DWPP is also working to establish a Parallel Whistleblower Training Track at OSHA Training Institute (OTI), alongside OSHA's Safety and Health Compliance Tracks. This includes establishing a permanent Whistleblower Training Coordinator at OTI and providing five process-based onsite whistleblower training courses. OSHA is currently working on finalizing the Training Directive that will establish this dedicated training track, which should be completed shortly. Further, OSHA is also exploring new avenues for providing additional training, including WebEx, Learning Link, webinars, etc. and to have these courses available "on-demand," for refresher purposes. For example, OSHA's recent webinar regarding the Fairfax memorandum on incentive programs is available to OSHA staff on LearningLink.

Statistics

Mr. Harbin then explained the statistics sheet that was handed out (Exhibits 1 and 2). Page 1 included statistics on case load management. These statistics do not include cases that were screened out for untimeliness or for lack of a prima facie case. Page 2 provided data on the determinations that complainants received in the cases that were closed during the time period.

National Office

DWPP Section 11(c) Administrative Reviews

Mr. Harbin explained that in FY14, DWPP brought the administrative review inventory under control. At any given time, there are approximately a dozen cases under review. He emphasized that this was not just a rubber stamp process.

DWPP Review Forum

Mr. Harbin explained the DWPP Review Forum. At these meetings, staff members discuss cases that may need more investigation or may need to go to the full Administrative Review Committee. The Review Committee consists of members from DWPP and SOL. Through these discussions, DWPP has been able to identify areas for improvement in OSHA's 11(c) investigations and have meaningful discussions on policy issues. The Forum has been very successful.

Online Whistleblower Complaint Form and Factsheets

Mr. Harbin reported that a new [Online Whistleblower Complaint Form](#) was launched on December 5, 2013. DWPP sent a questionnaire to the regions asking for feedback on the new system and the quality of the information received on the form. DWPP is using this feedback to evaluate the system. Further, DWPP is working toward creating a Spanish version of the online complaint form.

Mr. Harbin also announced that DWPP is updating older fact sheets and translating these fact sheets into Spanish. DWPP also worked with OSHA's Directorate of Enforcement Program to draft and publish a bulletin regarding whistleblower rights and responsibilities for the Agency's Temporary Worker Initiative. Bulletins issued under the Initiative outline how joint employers share responsibilities in protecting the safety and health of their workers. The bulletin was published in March and is posted on OSHA's Temporary Worker webpage.

Regulations

Next, Mr. Harbin discussed DWPP's responsibility for promulgating regulations specifying the procedures for the handling of retaliation complaints filed under the 22 statutes OSHA administers. Since the September 2014 meeting, OSHA has published several interim final rules and continued work on several other whistleblower rulemakings, including the publication of the SOX final rule on March 5, 2015.

Inter-agency Relations

Mr. Harbin then explained how DWPP has begun to meet regularly with its various partner agencies because so much of the work and statutes address non-OSHA issues. Last month, for example, DWPP met with the FAA to ensure smooth coordination in the handling of whistleblower complaints between the agencies.

Whistleblower Manual

Mr. Harbin mentioned that DWPP is working on updating the Whistleblower Investigations Manual, which addresses damages calculations and settlement agreements. DWPP also created a new chapter that consolidates all aspects of information disclosure. It is currently in concurrence.

Reasonable Cause Memo

Mr. Harbin briefly mentioned the Reasonable Cause Memo issued by SOL. The Memo clarified that the standard during an investigation is reasonable cause.

Response to Prior WPAC Recommendations

Finally, Mr. Harbin described previous WPAC recommendations and articulated how OSHA incorporated those suggestions.

WPAC recommended that there be greater transparency in investigations. Mr. Harbin noted that, in June, OSHA issued a memo to the compliance and whistleblower section addressing these issues.

WPAC recommended to OSHA that OSHA take steps, such as internal training programs, to improve consistency in the application of laws, regulations, and statutes subject to OSHA's jurisdiction. Mr. Harbin explained that that DWPP is in the process of developing a national outreach plan (including outreach materials such as fact sheets), developing statute-based webinars on demand, and new whistleblower competency models are being developed.

Mr. Harbin noted that DWPP has an excellent relationship with SOL, which includes discussing the award of punitive damages in meritorious cases. Further, Dr. Michaels testified in front of Congress to have the 11(c) statute amended to 180 days to file. Finally, in March 2015 there was an internal webinar on the Fairfax memo and that outreach will included information on incentive programs.

Questions

The question portion opened with Chair Spieler noting that DWPP has been responsive to WPAC's recommendations. The question and answer period touched on issues ranging from consistency in the award of punitive damages, outreach materials, the ADR program, transparency in investigations, disparities among the regions, and data.

Break

Clarification of the Investigative Standard for OSHA Whistleblower Investigations

Megan Guenther, an attorney in the Fair Labor Standards division of SOL, presented a clarification of the investigative standard for OSHA whistleblower investigations.

OSHA issued a memorandum on April 20, 2015, clarifying reasonable cause, the standard for whistleblower investigations. The memorandum was entered into the meeting record as Exhibit 3. Reasonable cause means that, based on everything gathered in an investigation, OSHA believes that a reasonable judge could rule in favor of the complainant.

Ms. Guenther answered questions on the nature of the changes, whether complainants can ask OSHA to close a case so that they can go directly to an Administrative Law Judge, why the memo was issued, and the length of whistleblower cases.

Public Comment Period

Mr. Rosa read a comment from an anonymous member of the public regarding preliminary reinstatement, which was marked as Exhibit 4.

The Committee marked as Exhibit 5A the “Know Your Rights” factsheet, Exhibit 5B the Spanish version of the same factsheet, and Exhibit 6 the NBC news report on a Temporary Restraining Order in Alabama. These exhibits were background information passed out at the meeting.

The second comment was presented by Tom Devine of the Government Accountability Project (GAP) and Jason Zuckerman of Zuckerman Law and consisted of a petition for rulemaking to restrict clauses that may chill whistleblowing activity. They answered questions from the committee relating to prosecutions against whistleblowers and steps that could be taken to implement the subject of their petition.

The committee recessed for the day.

Tuesday, April 21, 2015

Best Practices and Corporate Culture Work Group Presentation

Chair Spieler welcomed everyone to the second day of the meeting and had parties not present on the first day introduce themselves. She then introduced the day’s discussion topic: the Best Practices and Corporate Culture Work Group’s draft set of best practices. The draft was marked as Exhibit 7.

Jon Brock presented the “Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation” document to the WPAC. He thanked the work group members for their

efforts in drafting the document. Mr. Brock explained that the best practices document provides guidance for how willing participants can implement a robust anti-retaliation program. These best practices are aimed at a range of organizations and are not specific to any statute.

Noting that an effective whistleblower anti-retaliation system requires senior leadership commitment to proactively prevent discrimination, Mr. Brock explained that there are six key elements to a program. These elements are:

1. Leadership commitment,
2. Prevention,
3. Retaliation response systems,
4. Specific training,
5. Monitoring and measurement, and
6. Independent auditing.

Mr. Brock added that a good anti-retaliation program is the right thing to do, helps the organization comply with the law, and will help save the organization money. Mr. Brock then elaborated on each of the elements of the program. He also reviewed survey results regarding which practices encouraged and discouraged employees from reporting issues.

Chair Spieler opened up conversation about the document and asked members to focus on the issues and avoid wordsmithing.

The Committee began by discussing Part 1 of the document. After a discussion regarding managerial accountability for retaliation, the committee agreed to add language to the document that would take retaliation into account during manager performance reviews. The committee then engaged in a lengthy discussion regarding options for soliciting employee input in union and non-union work places. There was general agreement that the document needed to address employee input.

Break

The Committee resumed discussion of the Best Practices and Corporate Culture Work Group Report.

The Committee began discussing Part 2 - Prevention: Fostering a 'Speak Up' Culture. The committee discussed several issues related to this section, including de novo investigations, problems employees face when reporting retaliation and possible ways to address that issue, recognizing different forms of retaliation, whistleblowing issues relating to closely associated employers, and ensuring the employees can report wrongdoing to the government. As a result of this discussion, they crafted changes to the document, which included implementing procedures to ensure that employment status changes are undertaken for legitimate reasons; recommending that employers investigate reports of issues promptly; and ensuring that any employment agreement or public policy that requires confidentiality of non-disclosure of information contains a carve-out, which makes clear that nothing precludes the employee from communicating with a government agency.

The Committee then turned to Part 3 - Implementing a Retaliation Response System. The Committee discussed appropriate consequences for acts of retaliation, accountability for retaliatory actions, and employer's taking a defensive posture when faced with claims of retaliation. No changes were made to Part 3 based on the discussion.

The Committee moved on to discuss Part 4 - Anti-Retaliation Training. They discussed the need for someone in an organization to track changes in the whistleblower landscape and translate it and problems that can arise over turnover in an organization. The Committee added language to the document indicating that training should address external changes in legal, regulatory, and policy requirements. To accomplish this, training must be continuous.

Lunch Break

The Committee returned from break and Chair Spieler presented Exhibit 8, which included Addenda 1-4 to the Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation.

Chair Spieler introduced Addendum 1. The committee's comments included the following:

1. This is a generic document. We encourage OSHA to develop materials that are more specific to specific statutes, sectors or industries, issues (e.g., safety and financial), or work relationships (e.g. temp workers).
2. We acknowledge the complexity of reaching out to obtain [an] employee voice in private sector employment where there is no union bargaining agent, in view of the existing labor laws. We urge OSHA to think creatively about this problem in developing the final best practice guidance. Solicitation of one-way input from unorganized workers for the development of policies and practices is important. It is also possible for employers to seek input from organized groups of employees within the workplace (e.g. identity groups), or from external worker advocates, in developing policies.
3. We also acknowledge the complexity of addressing these reporting and retaliation issues in complex employment relationships, particularly those that involve subcontracting and staffing agencies. We urge OSHA to be aware of these problems and to address them appropriately in final documents, with regard to appropriate policies and practices as well as training.
4. The purpose of this document, as drafted, is to forestall the necessity for an employee to seek official government action. It is directed to employers who want to establish internal programs and policies that will encourage employees to bring forward issues within the organization and discourage all forms of retaliation against employees who do so.
5. Although set out as six separate principles, the subcommittee and WPAC view these six elements as deeply intertwined. The recommendations interrelate.

Chair Spieler introduced Addenda 2 to 4 as Exhibit 8, which implemented changes to the document previously discussed. Some of the language underwent further refinement over the next break.

Chair Spieler next introduced Addenda 5 to 8 as Exhibit 9, which implemented changes to the document previously discussed. A brief discussion ensued to further refine the language.

The discussion of the Committee then moved to Part 5 - Monitoring Progress. Discussion revolved around the phrase “ensuring that the employee is satisfied,” which some members agreed should be deleted because it may be impossible to satisfy all employees.

The discussion moved to Part 6 - Independent Audits and Program Improvement. The committee discussed concerns with audit effectiveness, whether they should be public, and conflicts of interest. This discussion led to adopting additional language for the section on ensuring proper safeguards exist for avoiding conflicts of interest for independent auditors, instituting supplier contracts that are consistent with document principles, and the consideration of publishing the results of third party audits.

Chair Spieler continued by discussing Addenda 5 and 6, which added previously referenced language to Part 2.

Addendum 7, which referenced previously discussed language added to Part 6, was read, modified to its present form, and agreed to.

The committee next read Addendum 8, which was a general comment relating to audits and corporate-wide settlements.

Next, Chair Spieler requested that WPAC vote on the entire package. The motion to place the guidance up for a vote received additional support. The motion to recommend the revised document was approved unanimously.

Chair Spieler thanked the Committee, thanked Meghan Smith, and mentioned that she was looking forward to the final version.

The full text of the Best Practices document, addenda, transcript, and other exhibits can be found in the docket [OSHA-2014-0028](https://www.regulations.gov/#!docketDetail;D=OSHA-2014-0028), available at <http://www.regulations.gov/#!docketDetail;D=OSHA-2014-0028>.

WPAC Next Steps

The committee discussed possible next areas for discussion or action by the committee, including:

- Possible changes to the Transportation Industry Work Group
- Whistleblower issues in the rail industry
- State plan issues
- Differences in reporting cases in financial v. safety whistleblower statutes

- Possible “safe harbor” for small or medium-sized firms who adopt WPAC recommendations
- Issues surrounding ADR
- Data
- Training
- Preliminary reinstatement
- Immigration and employment
- Dissemination of the Best Practices Document

Chair Spieler thanked the ARAs for the important work that they do.

The meeting was adjourned at 3:55 pm.