

UNITED STATES DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Meeting of the  
Whistleblower Protection Advisory Committee  
(WPAC)

Tuesday, April 21, 2015

9:00 a.m.

Room S-4215 A-C  
U.S. Department of Labor  
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Washington, DC

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## Public Representatives

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School of Law

Jonathan Brock, Emeritus Faculty Member (Retired)  
University of Washington

Richard Moberly, University of Nebraska  
College of Law

## Labor Representatives

Ava Barbour, United Auto Workers

Eric Frumin, Change to Win

Nancy Lessin, Steelworkers' Charitable and  
Educational Organization

Jennifer J. (J.J.) Rosenbaum, National Guestworker  
Alliance

## Management Representatives

David Eherts, Actavis Pharmaceuticals

Gregory Keating, Littler Mendelson, P.C.

Marcia Narine, St. Thomas University School of Law

Kenneth Wengert, Kraft Goods Group

## State Plan Representative

Christine Dougherty, State of Minnesota

## Federal Agency Representatives

Rina Tucker Harris, Consumer Financial  
Protection Bureau

Robert W. Miller, Federal Motor Carrier  
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## Committee Contacts

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1 P R O C E E D I N G S

2 WELCOME AND REMARKS

3 MS. SPIELER: Good morning. This is the second  
4 day of the meeting of the Whistleblower Protection  
5 Advisory Committee. I would like to welcome all of you  
6 here.

7 Rather than going through a full set of  
8 introductions this morning, I would like to ask anyone  
9 who was not here yesterday, and anyone in the audience  
10 who was not directly associated with OSHA, to introduce  
11 themselves, so we know -- I know there are a bunch of  
12 ARAs in the room, and we are really delighted to have  
13 you. Rob said one of you wasn't here yesterday, and I  
14 wonder if you could introduce yourself.

15 MR. INCRISTI: My name is Anthony Incristi. I  
16 am the ARA for the whistleblower program for Dallas,  
17 Region 6.

18 MS. SPIELER: Thank you, and welcome.

19 MR. INCRISTI: Thank you.

20 MS. SPIELER: And those of you who are not OSHA  
21 employees?

22 MR. ESLCELTEN: I am Grant Eslcelsen, I am an

1 attorney with Morgan Lewis and Bockius, here in D.C.

2 MS. SPIELER: Bruce?

3 PARTICIPANT: He is right there.

4 MS. SPIELER: I know we think of you as B

5 PARTICIPANT: He is always here, so B

6 MS. SPIELER: Yeah.

7 MR. ROLFSEN: I am Bruce Rolfsen, I am a writer  
8 at Bloomberg BNA, Occupational Safety and Health  
9 Report B

10 MS. SPIELER: Okay, thank you. Anyone else?  
11 Great.

12 The agenda today looks short, but I think  
13 involves some very complex areas. We are going to be  
14 talking about the committee's recommendations -- or,  
15 actually, the subcommittee's recommendations to this  
16 committee regarding best practices for industry in the  
17 area of whistleblowing and retaliation. The  
18 subcommittee has worked extremely hard on this. And we  
19 now have a quite thorough document. The subcommittee  
20 was chaired by Jon Brock. And when he begins to speak  
21 I am going to ask him to introduce the people who were  
22 on the subcommittee.

1           What we will -- what I have asked Jon to do is  
2 spend up to an hour this morning summarizing the  
3 committee -- the subcommittee's recommendations. We  
4 will then begin a discussion -- there are six sections,  
5 plus an introduction of this recommendation. We will  
6 begin a discussion, then, of each section in turn.

7           When we complete that, if there are things  
8 within those sections that should be added or deleted  
9 or changed, we will discuss it while we are discussing  
10 the section of the document. If there -- at the end,  
11 if there are additional issues or concerns that members  
12 of the committee have, we will discuss those. And then  
13 we will formulate how we will vote on the document,  
14 plus comments in terms of forward it on to OSHA.

15           I am pushing ahead with this. I want it to be  
16 clear to both the committee members and everyone else  
17 in the room. The subcommittee has worked incredibly  
18 hard on this document. Arguably, we should take the  
19 comments of the committee and send it back to the  
20 subcommittee and have them work on it. But the staff  
21 of OSHA have -- including people in the front office --  
22 have really encouraged me to try to get a draft to them

1 quickly, so that they can begin working on it.

2           So, we will transmit, I hope, something to OSHA  
3 by the end of this meeting. At that point, if there  
4 are specific subareas within it that we feel the  
5 committee could give further advice on, we will likely  
6 refer them back to the subcommittee and take them up at  
7 our next meeting.

8           I am hoping -- but not convinced -- that we can  
9 finish our first run-through of the document before  
10 lunch. We will see. And then reconvene for a broader  
11 conversation. I want to make sure that we have an hour  
12 at the end of our meeting today before we adjourn to  
13 discuss next steps for the committee. So, in terms of  
14 sort of the absolute ending point of a discussion of  
15 this document, it would have to be before 3:00, so we  
16 can vote on it and transmit it.

17           With that, I am going to turn this over to Jon  
18 Brock, a member of our committee since we were first  
19 established, and who has considerable prior experience  
20 on this issue of best practices, and brought that --  
21 and brought together quite a few people, including  
22 external people, to discuss this before the document

1 was finalized by the subcommittee.

2           So, Jon?

3           PARTICIPANT: And we should mark this.

4           MS. SPIELER: Oh.

5           PARTICIPANT: Exhibit No. 7.

6           MS. SPIELER: Yes, we should mark the  
7 subcommittee's recommendation to the committee as  
8 Exhibit No. 7 for the meeting.

9           And let me just say that the various exhibits --  
10 and I think, ultimately, the minutes -- for this  
11 meeting will be -- can be found on regulations.gov. It  
12 is OSHA-2014-0028, if people want to find the various  
13 elements of the meeting after the meeting.

14           Go ahead, Jon.

15           PRESENTATION OF SUBCOMMITTEE RECOMMENDATIONS

16           MR. BROCK: Thank you. Can everyone hear me?

17 Good.

18           As our chair suggested, I want very much to  
19 introduce the members of the working group who have put  
20 in enormous effort through meetings in this building  
21 and many, many conference calls. And I think it is to  
22 everyone's enormous credit, the degree to which they



1 brought their experience, which was substantial, as all  
2 of you know, knowing the quality of appointments on the  
3 committee. And everyone also, besides their  
4 experience, brought their best listening skills. And  
5 we listened to each other, we challenged each other's  
6 assumptions. We went outside to get other expertise  
7 and other knowledge, and we were able, through,  
8 essentially, about a year of effort, to find common  
9 ground and to come up with what you have here, as a  
10 summary, but a very specific and structured way of  
11 presenting a program on best practices, guidance on  
12 best practices.

13           And Emily was nice to say I have background in  
14 this. The real background comes from the others, and  
15 it was my honor to knit it together, and be sure that I  
16 did my best to listen to them, and try to capture it on  
17 paper. And, in addition to their other qualities, they  
18 have enormous patience with the writing skills of a  
19 retired professor. So I greatly appreciate that  
20 patience.

21           It would be easy to slip into crediting each of  
22 them with specific contributions, but that would take

1 all morning. So I will identify them for you here, and  
2 I am sure you will, later in the morning, hear lots  
3 from them, and their contributions and expertise will  
4 be evident in specific ways.

5           On this working group were Nancy Lessin; Marcia  
6 Narine; not-present-today Billie Garde; Dave Eherts;  
7 J.J. Rosenbaum, who had either the good fortune or the  
8 misfortune to have joined our group in about December,  
9 and his -- extremely cooperative and patient, and I am  
10 sure she will make contributions from her background as  
11 we go along. Pleased to have her on board. Ken  
12 Wengert, Greg Keating, and I named Dave already. All  
13 of them brought things from their perspective, and have  
14 listened carefully, as I said, to the other  
15 perspectives presented.

16           So, what we have for you here is a comprehensive  
17 and integrated program for anti-retaliation program.  
18 This is a program for organizations that are willing to  
19 do a program like this, that are interested in doing a  
20 program like this. Nothing in here will coerce an  
21 unwilling organization. Perhaps the availability of  
22 knowledge like this will, we hope, bring organizations

1 who have previously not had effective anti-retaliation  
2 programs into the fold because there is capacity shown  
3 here, but we will not be able to coerce anybody into  
4 it. This is for those who have decided that they are  
5 willing to have robust anti-retaliation program, and  
6 this provides the guidance.

7           It was said during our discussions that this was  
8 something that could serve as a refresher for  
9 organizations that were already putting forth a  
10 constructive program, and that it would provide the  
11 information needed to organizations that were not doing  
12 so, or had not had access to information, resources, or  
13 guidance that would allow them to do so to now pick up  
14 this type of information, seek out the resources and  
15 the expertise that they needed, and to go ahead and  
16 make that kind of progress.

17           The way we have constructed this, it is aimed at  
18 the range of organizations: public, private, and non-  
19 profit. It is constructed in a generic way, not  
20 specific to any statute, but hoped that, in this  
21 formulation, that under -- in most industries, in most  
22 segments of the economy, and in -- under most of the

1 whistleblower statutes, that with the appropriate  
2 adjustments for those differences, including size,  
3 characteristics, history, that an organization could  
4 use this as guidance for constructing or beginning to  
5 evaluate the system that they have.

6           You will see in the format there are  
7 placeholders for adjustments for small business. There  
8 is a placeholder also for statute-specific or industry-  
9 specific characteristics. We did not attempt to detail  
10 those out. It was a substantial-enough task, of  
11 course, to put together the generic program and take  
12 care that we did so in a way that crossed all those  
13 boundaries.

14           As far as we were able to determine, you would  
15 not find a compendium like this useful in the United  
16 States for putting together a comprehensive, anti-  
17 retaliation program. There are a number of books,  
18 there are a number of articles. There are -- there is  
19 lots of information on ethics programs. Bu we did not  
20 find, and it did not exist in the experience of those  
21 on the subcommittee, any other comprehensive summary.  
22 You could go to individual organizations seen to be in

1 the forefront, and certainly some of those were  
2 represented on our group, or part of the experience of  
3 people on our group, but something that a general  
4 business owner, non-profit leader, a person in  
5 government or other types of organizations couldn't  
6 easily go to the places we normally go to the web  
7 elsewhere, to their professional organizations, and  
8 find this kind of product.

9           So, we are hopeful that, with this product,  
10 something very useful will become available and  
11 introduced to those who have obligations to provide a  
12 retaliation-free environment.

13           We divided this up into six categories. And I  
14 won't tell you how many hours were spent in determining  
15 what the proper categories were. And certainly one  
16 could organize this in a different way. But we were  
17 able to come up with a structure that made sense to us,  
18 and we believe it would make sense to those -- and we  
19 try to think about it this way -- if someone were  
20 handed whatever piece of paper we would ultimately  
21 produce, and ultimately would find its way through the  
22 committee process, could they turn it over to a chief

1 compliance officer, or to the appropriate senior person  
2 in the organization, and could they then see what  
3 components they needed to work on, put together and  
4 construct?

5           So, the categories are described in the pages  
6 here, named on the first page. First is leadership  
7 commitment, important for many reasons that we will  
8 discuss. But, to summarize it, very important because  
9 the kinds of behaviors, the kinds of skills, the kinds  
10 of programs that appear to be necessary for an  
11 effective anti-retaliation program are not things that  
12 are intuitive or natural in many, if not most,  
13 organizations that have not already made the  
14 investments and set up the structure to support anti-  
15 retaliatory behavior and related protections.

16           So, it takes a leadership commitment to call  
17 forth those behaviors, to say that those behaviors are  
18 the right ones, to put in the systems that support  
19 those behaviors, that train people on them. And, at  
20 the times when short-term economics -- my term -- take  
21 over, schedule pressures, and other things that cause  
22 people often to do things that result in retaliation

1 and suppressing employee reporting, it takes leadership  
2 to step in, not only in setting up the systems, but to  
3 step in in individual situations and know that those  
4 who are investigating, or supervisors who are supposed  
5 to respond, will, in fact, be backed up when they  
6 respond in protecting people from retaliation, and  
7 ensuring that issues can be brought forward by  
8 employees of the organization. So, that leadership  
9 commitment flows not only in the up-front investments,  
10 but also in making sure that things happen. And it  
11 also comes up later in this structure.

12           Second, we talk about a true speak-up culture  
13 that is the basis of a prevention-oriented program.  
14 This was actually not intuitive, even to our group that  
15 spent so much time on this. But it became evident that  
16 the first place one had to invest was in making sure  
17 that people could bring issues forward. This is  
18 prevention of the conditions that might lead to  
19 retaliation. So anti-retaliation really starts with  
20 making sure that people can come forward with issues,  
21 and that the issues will be handled in fair and  
22 effective ways.

1           Third, then, is the specific anti-retaliation  
2 program in steps. If, when people bring forth issues,  
3 that they are not actually able to do that  
4 successfully, either in general or in specific  
5 instances, then the organization must have a separate  
6 set of channels, much more oriented towards  
7 confidentiality, and protective ways of dealing with  
8 the employees that claim retaliation, so that the  
9 retaliation allegations can be properly assessed and  
10 investigated in an independent way that doesn't carry  
11 any of the old myths, either about that employee, those  
12 issues, or any defensiveness that might have grown up.  
13 So that is your backstop, if your issue resolution  
14 program does not work.

15           Because the skills to do this are not intuitive,  
16 because so much of what causes retaliation comes from  
17 other kinds of pressures in an organization, where it  
18 is culture, the way things are measured, incentives  
19 that are there, or natural human defensiveness. When  
20 someone criticizes something that you are doing, or  
21 that you stand for, or that you have created or made a  
22 central goal of your enterprise, people naturally react



1 defensively. Supervisors will naturally react  
2 defensively.

3           And so, specific training, so that everyone  
4 knows what the rights of whistleblowers are, and knows  
5 the skills and processes necessary to protect people  
6 and to overcome those, and also things like how to  
7 simply respond to issues properly and not defensively.

8           And those in the organization have to know what  
9 systems have been set up, and how they access them. So  
10 there is a really important training component to this,  
11 to work against what tends to be instinctive and  
12 natural in many organizations, particularly if they  
13 haven't had these kinds of practices or these kinds of  
14 ethics.

15           Fifth, monitoring and measurement. This will  
16 probably not surprise many of you, but its importance  
17 at least surprised me in the way that it came to us.  
18 It turns out that many of the very common measures used  
19 in organizations in our economy tend to actually -- if  
20 not encourage, certainly allow retaliation and work  
21 against people's being able to report. In a nutshell  
22 -- we will talk about it a bit more later -- it turns

1 out that if an organization has as an important measure  
2 of management performance that -- say their safety  
3 incident numbers, recordables, are low, if managers get  
4 bonuses for that, if employee groups get bonuses for  
5 that, or get some sort of a reward for that, guess what  
6 happens? Those numbers tend to be under-reported, and  
7 go down.

8           Besides the experience of people on our  
9 committee, we brought in one of the best-known  
10 researchers in the country that looks at reporting of  
11 safety and health issues, and other expertise, and the  
12 more we look the clearer it became that many of the  
13 common kinds of measures actually suppress reporting.  
14 If you suppress reporting, you sow the seeds of  
15 retaliation. So that connects back to why prevention,  
16 and having robust issue reporting and resolution  
17 programs and practices is so important.

18           But many of the common measures used in our  
19 organizations interfere with that. There is some new  
20 approaches to that that are starting to come out, less  
21 established, perhaps, than we like. But it certainly  
22 looks like the proper direction. And I will summarize

1 that later, and many of the members of the subcommittee  
2 are very conversant in that, and I am sure can add  
3 depth to the summary that I will provide.

4           And, finally, the sixth area is independent  
5 auditing to see if the program actually works. All of  
6 us are familiar with organizational policy statements  
7 and the like that say that retaliation is not  
8 appropriate, or retaliation won't be tolerated. And  
9 even in organizations that have well-defined programs  
10 -- you can go look, you can read all about the  
11 programs, you can actually see that people have been  
12 trained -- you will find at times that the organization  
13 as a whole, or pockets of the organization, particular  
14 facilities, particular shifts, particular supervisors  
15 perhaps, that it just isn't working, that people are,  
16 in fact, concerned to bring issues forward, especially  
17 concerned to report retaliation, and that the program  
18 isn't working.

19           And so, it is crucial to go back and review the  
20 program through some fairly specific ways that we were  
21 able to identify, which are also not that easy to find,  
22 but which seem quite useful and productive, to be able

1 to independently audit your program, and see how  
2 employees really feel.

3           So, one of the things that -- so you take a  
4 leadership piece, point number one, and you come back  
5 to this. The board and top leadership really need to  
6 invest in going back to check to see if the program is,  
7 in fact, working. And that means do employees really  
8 feel that they can come forward with issues, and not be  
9 fearful of retaliation. So that became the last piece,  
10 the last brick in this structure.

11           So, now, if we go to the pages following -- I  
12 will try to put a little bit more meat on this, but you  
13 will hear more from my colleagues later with some of  
14 the real nuances in this, and how this tracks with  
15 their much greater experience.

16           There are a lot of reasons why leadership should  
17 look at this. It is the law, it is the right thing to  
18 do, and so on. There is also plenty of risk, plenty of  
19 liability. Not just direct costs; lots of indirect  
20 costs in goodwill, bad publicity. Do people want to  
21 come work here? All kinds of things that should make  
22 organizational leadership want to protect people from

1 retaliation. In some businesses it becomes more  
2 important as a matter of strategy than others, but it  
3 should be important all around. The growing number of  
4 laws -- and we have many experts on the committee who  
5 can talk about that -- create many kinds of liability  
6 besides the direct business risks that can be talked  
7 about.

8           There is also a great deal of belief among a lot  
9 of business leaders that this can be good for business,  
10 good for the success of the enterprise. And those  
11 benefits can also be talked about. There are some  
12 specific methods that we learned about for assessing  
13 particular kinds of programs, particular kinds of  
14 investments in anti-retaliation, safety, ethics, and  
15 other things.

16           And to gain any of these benefits, whichever of  
17 them that a business thinks are there -- and different  
18 businesses will see this in different ways at different  
19 times -- to gain the benefits -- if you look at the  
20 last sentence in this blue box there -- I don't know if  
21 your copy is in color or not -- yes, I guess it is --  
22 to gain the benefits the organization needs to move

1 from defense and reaction to proactive programs to hear  
2 and resolve issues and to otherwise prevent  
3 retaliation, that really goes to the common occurrence  
4 -- it is not everywhere.

5           But the common occurrence is that when someone  
6 raises an issue in an organization, raises allegations  
7 of retaliation, and particularly when they file a  
8 complaint with OSHA or in some other fairly formal way,  
9 the wagons -- common reaction is for the wagons to  
10 circle, to hand this over to a function in the  
11 organization, often the legal department. Not only  
12 that, to take a defensive position, and not really look  
13 into the problem, see what caused it, see if it might  
14 be causing other problems. And that defensive approach  
15 only increases the risks, only increases the costs, and  
16 only increases the unwillingness of employees to come  
17 forward and report, and only contributes to  
18 interfering, therefore, with rights.

19           So, we are really talking about a mind shift for  
20 at least many organizations -- or at least for me -- of  
21 the common beliefs that surround listening to  
22 employees, or protecting them from retaliation.

1           Some of the statements, then, in the next area,  
2 which list some of the way we have set this up, which  
3 lists some of the features of the programs, you know,  
4 some of it is evident. Managers at all levels should  
5 be held accountable. This also means that in  
6 performance evaluations, performance contracts, any of  
7 those kinds of things, that anti-retaliation needs to  
8 be a part of the expectations for management and  
9 supervision.

10           We also identified that leadership has an  
11 important job to do two things relative to the  
12 knowledge. One is they have to learn it themselves.  
13 It is somewhat surprising to see how many people at  
14 high levels don't know the definitions of retaliation.  
15 Lots of retaliation, as all of you know, because you  
16 work in this area, is not simply firing people because  
17 they raised issues. There are all kinds of subtle  
18 things that go on: ostracizing people, not inviting  
19 them to meetings, taking away job duties, which then  
20 leads to other things, maybe discipline, and so on.

21           And leadership at all levels really needs to  
22 understand those definitions, so they know what they

1 are liable for, and they know what they are looking  
2 for, and that behaviors that sometimes are excused as  
3 horseplay or natural workplace kinds of ribbing often  
4 are really classified as retaliation and often are  
5 pernicious and erode the trust of people in the  
6 organization and in each other. So those definitions  
7 are awfully important, and if senior management doesn't  
8 know them, they won't be able to carry out the kinds of  
9 programs and responsibilities that they need to do.

10           At the higher levels, board members -- and I  
11 want to call your attention to the asterisk at the  
12 bottom of that box -- if you hear me say terms like  
13 "board" or "CEO" or "company," we are really talking  
14 about public, non-profit, and other organizations, so  
15 we mean the highest-ranking leadership in whatever the  
16 relevant oversight board would be -- oversight  
17 governing board would be for that organization.

18           So certainly, in the corporate sector -- and I  
19 will just defer to our attorney friends here today --  
20 the board members themselves have risks and obligations  
21 under Sarbanes-Oxley, other statutes. They need to  
22 understand that to help them see why they should take



1 up this responsibility. These kinds of programs often  
2 falter because the responsibilities are split up and  
3 there is not coordination.

4           We think that a chief compliance officer needs  
5 to be designated, needs to have general oversight for  
6 the ethics programs and anti-retaliation programs, and  
7 should have some sort of a direct pipeline to that  
8 highest governing board, in the event that there are  
9 issues and problems that senior management is not  
10 willing to pay attention to, or not willing to deal  
11 with. And there were plenty of examples brought up  
12 from among the members and from some of the speakers we  
13 had, where it would have been very valuable if  
14 employees and managers could break through to the CEO  
15 and to the board when other people were suppressing  
16 information or retaliation, or simply not understanding  
17 their obligations.

18           I have already mentioned performance reviews. I  
19 want to emphasize in the leadership category -- and you  
20 will see it come up throughout here -- the importance  
21 of consulting with your bargaining unit leadership.  
22 Or, if it is not an organized workplace, to find

1 employee leaders or advocates, worker centers,  
2 someplace where you can get that employee perspective,  
3 because even very well-informed, well-intentioned  
4 management working hard at this will find themselves  
5 often missing an important piece of perspective on how  
6 a policy will affect the workforce, how it will be  
7 perceived, whether a mechanism is likely to be seen as  
8 trustworthy, and simply to understand the experience of  
9 a worker who is not being listened to, or is  
10 experiencing retaliation. It is a difficult thing to  
11 understand if you haven't been in those shoes,  
12 especially very recently.

13           So, in every aspect of this, getting that  
14 perspective will be so important. I have myself sat at  
15 tables, as all of you have, where some of the most  
16 compassionate and fair-minded management folks thought  
17 a policy was working, or would work. And when the  
18 employee perspective was really brought out, they began  
19 to think about it differently and in a much more subtle  
20 way. And it is not a perspective you want to miss when  
21 it comes to anti-retaliation and things that can become  
22 very personal and very painful in the workplace.

1           What you see here, below that box with the check  
2 marks, is a category of dos and don'ts that we created.  
3    And I think you could say this is -- this contains  
4 reminders about common failings, common myths, and  
5 things that just turn out to be very valuable to do:  
6 train the board, regular updates to the board. And in  
7 the don't category, as I said earlier, don't shield the  
8 board or senior leaders from employees who have issues  
9 that are not getting resolved. We don't want every  
10 employee going to the board, but when mechanisms are  
11 not working, you want to be sure that they can get  
12 somewhere where the issue can be addressed.

13           In the lower right-hand corner, just to  
14 underscore that, don't assume that policy statements --  
15 policies and policy statements are enough. It never  
16 is.

17           Okay. So, on to prevention. So leadership has  
18 a big role. The rest of this won't happen without  
19 leadership investment at the beginning, and leadership  
20 attention throughout.

21           Prevention, fostering a speak-up culture, as we  
22 have called it. There was a tremendous amount of

1 insight around our subcommittee table on this. And one  
2 way to distill that wisdom unfairly into a sentence is  
3 that you have to -- to have an anti-retaliation program  
4 work is the organization has to foster a real belief  
5 that something will be done. A number of our members  
6 and some of the outside speakers that we had made the  
7 point that, in surveys that they have seen or  
8 performed, or in their own experience, the number-one  
9 reason why employees don't bring issues up is not  
10 because they are afraid of retaliation -- which comes  
11 up as the number-two reason in many of the surveys --  
12 but the number-one reason is they think nothing will be  
13 done about it.

14           So, making it clear, by the policies and by  
15 actions, that something will be done if you raise an  
16 issue, something will be done timely, something will be  
17 done fairly, you won't have consequences for doing so,  
18 that is the most important thing to do. And that is  
19 why you need programs in training and so on, to be sure  
20 that people can get issues raised and handled fairly.  
21 It doesn't mean that they will always agree with the  
22 resolution, but they should agree that it was handled

1 fairly, and they had a good shot at getting it to the  
2 right people, and that they did not suffer any  
3 consequences while doing so.

4           Among the insights were that employees usually  
5 report first to their supervisor, and they will often  
6 report the same issue to their supervisor more than  
7 once if they don't get any action. Or they will report  
8 it elsewhere if they don't get any action. So it  
9 becomes terribly important that the first-line  
10 supervisors know what to do with issues. And so, the  
11 training for those people, the support for those  
12 people, and the accountability for those people is  
13 really a central feature, because that is where issues  
14 usually go first.

15           Sometimes, as we all know, employees don't have  
16 a good relationship with their supervisor for other  
17 reasons, and they will take it elsewhere. And that  
18 argues for multiple channels. It argues for having a  
19 separate employee concerns program, ombudsman, other  
20 kinds of mechanisms appropriate to your organization  
21 and its culture to work through safety reps or other  
22 employee representatives, but to have multiple channels

1 that everyone knows about and are accessible.

2           Some people feel more comfortable or tend to  
3 know about one set of channels, some people tend to  
4 know about others. Typically, it is not good enough to  
5 say, "Well, they had this one channel, they could have  
6 gone here, they should have known about it." Maybe  
7 they didn't trust that person, maybe they didn't trust  
8 that channel. Maybe it is not easy for them to learn  
9 about. Maybe it is downtown, not near where they work.  
10 So multiple channels, very important.

11           Having early channels, non-threatening channels,  
12 which somebody can raise an issue before it is some  
13 kind of an emergency, before they are stopping work on  
14 some -- at some major stage of a project. We heard  
15 some very useful and interesting programs described  
16 where there were ways to ask questions, ways to ask  
17 questions by email of people elsewhere in the  
18 organization besides your reporting line, where  
19 employees who didn't really want to put their head up  
20 too much could get an issue out there to be addressed,  
21 rather than letting it fester until the project was  
22 along, and somebody remembered that there was a wrench

1 left, you know, in the fuselage or somewhere. So,  
2 early, non-emergency options.

3           Some of the most important issues, it is  
4 believed, come up anonymously, because people are so  
5 concerned about reporting them, and the consequences,  
6 because it is such a fundamental issue to the  
7 organization, or because it is so threatening to a  
8 particular manager, or some set of management  
9 judgments. So, if you really want to catch the issues,  
10 it appears that having an anonymous channel is  
11 important.

12           So we heard about hotlines, we heard about 800  
13 numbers, we heard about a lot of different ways of  
14 doing this. It depends on the organizational culture,  
15 it depends on how spread out the organization is. But  
16 to have ways people can be -- can report  
17 confidentiality and anonymously. It is not that easy  
18 to process a concern anonymously, but it is also not  
19 good enough to say, "Oh, we are not going to process  
20 it, because the person wouldn't come forward, or tell  
21 us." If it really matters, you want to have the  
22 capacity for them to come forward in that way.

1           One of the most pernicious things we came  
2 across, and you heard about it yesterday when Dr.  
3 Michaels briefed us, we have heard about it at other  
4 times when employees have joined our subcommittee  
5 conference calls, you have heard it when employees have  
6 been here, and many of you have seen it in your  
7 experience, there are many instances where employees  
8 are punished for reporting issues. Sometimes that  
9 seems to be -- and has been proven to be -- a specific  
10 policy to discourage reporting. Reporting is  
11 discouraged for lots of reasons. It affects the  
12 schedule, it affects perceptions of costs, all kinds of  
13 things.

14           But the employers who were doing a good job on  
15 this were being proactive, have taken steps to be sure  
16 that people are not punished for reporting incidents or  
17 reporting concerns, and this can be -- this kind of  
18 punishment can be done in all sorts of subtle ways,  
19 hard to see, hard to find. And so it really needs  
20 attention. It certainly should not be a policy, but  
21 even when it is not a policy it can become a practice.  
22 It needs, really, to be guarded against because it



1 really will discourage, as you can easily see the  
2 people coming forward.

3           And it will silence other people. This is not  
4 just about -- all these programs are not just about the  
5 individual. These programs are about the effect on the  
6 work group and their belief and whether they can bring  
7 forward issues when they see the need or the  
8 opportunity.

9           When someone decides to come forward,  
10 particularly on an issue that might be very meaningful  
11 to others in the organization, could be meaningful to  
12 other workers, or meaningful to management because it  
13 would delay work or affect bonuses or profits or  
14 something, it is a really, as you know, difficult  
15 decision. And we have seen many people who make that  
16 decision lose their jobs. You heard the letter read to  
17 us yesterday from the input that came over email.

18           And so, having ways for employees to get  
19 accurate and confidential advice about how to bring an  
20 issue forward -- many times you can bring an issue  
21 forward in certain ways and be sure to get reactions  
22 that will affect you and maybe scare you, but there are

1 other -- sometimes other ways to do it. There is  
2 support sometimes available. Organizations should make  
3 that available, maybe through an EAP program.  
4 Certainly that is something that is frequently --  
5 advice can come from bargaining unit leaders on their  
6 other organizations, sometimes outside that serve as  
7 advocates, but helping be sure that, if you are serious  
8 about a speak-up culture, helping people know how to  
9 navigate that and deal with the inherent risk, because  
10 even in an organization that is doing a pretty good  
11 job, that is a resource worth having.

12           And, of course, as all of you know who work in  
13 this field, that employees still have rights to raise  
14 issues, even if they are wrong, even if they are  
15 unpleasant. They still have a right to be protected if  
16 they raise issues. This is frequently overlooked,  
17 frequently not realized. This is part of the training,  
18 part of the management commitment, and part of not  
19 being unduly defensive, and part of making a judgment  
20 about the issues, not about your opinion of the person  
21 or some past experience with the person.

22           The dos and don'ts cover many of these things.

1 Top left-hand corner, "Safe" and "Structured" are two  
2 words there I will point out. People need to know what  
3 the process will be if they raise an issue. They need  
4 to know who is going to be involved, which functions in  
5 the organization are going to be involved.

6           Are they going to be organizations that might  
7 have a conflict of interest in this issue, because they  
8 were the ones that called me out on it to begin with?  
9 So putting together something that people believe will  
10 be safe, this is why you have got to consult with your  
11 bargaining unit leadership and other employee  
12 leadership. How will people perceive it if we set up  
13 these mechanisms this way? Easy to miss some things  
14 that might be perceived negatively, so it has to be  
15 known, has to be safe.

16           Talked about the low key. Want to emphasize in  
17 the third point down, in the dos, to be ready to deal  
18 confidentially and to protect people that are coming  
19 forward to report.

20           Down the bottom of the do column, start with a  
21 blank page. So that means if somebody has brought  
22 forward an issue, and a couple of layers of folks have

1 said, "Well, no, it is not really an issue," it could  
2 be that they think that person is not credible. Could  
3 be that the issue wasn't investigated by people with  
4 the right expertise. So be ready to start with a blank  
5 page. And your system should have some trap doors for  
6 things to be started with a blank page.

7           It is also common that somebody that is bringing  
8 up issues gets surrounded by a false narrative about  
9 them and their motivations. So starting with a blank  
10 page can be awfully important.

11           Top of the don't column, don't rely on having  
12 told people to speak up; you actually have to follow  
13 through. You have to follow through on the issues. We  
14 had described to us an instance where one of the  
15 members of the committee was faced with something like  
16 ice in the parking lot, or something in the parking lot  
17 that somebody viewed as a hazard, and how quickly they  
18 got on that issue and got it resolved in a matter of  
19 days, and made it a priority because a lot of people --  
20 because it was important to do so, a lot of people knew  
21 about it.

22           And when asked, "Why did you make such a big

1 deal about that," it was, "I made a big deal about that  
2 because I wanted people to know that we are serious and  
3 that we follow up on anything that an employee thinks  
4 is serious, and we don't leave it alone and make  
5 judgments for any other reason, except whatever the  
6 facts are." So it is extremely important, with the  
7 issues, to follow up.

8           So, if something slips through your issue  
9 reporting system, if a supervisor doesn't respond  
10 appropriately, if the investigation maybe doesn't work  
11 as well as you hoped, or if maybe the employee didn't  
12 express the issue sufficiently at first and it was  
13 misunderstood, any number of reasons, you may have --  
14 the issue may be unheard. It could be there was a  
15 breakdown in the system. It could be on the backshift  
16 there is a supervisor who has got a different attitude.  
17 It could be that some scheduling incentives or bonus  
18 incentives got in the way, and the issue wasn't  
19 listened to, wasn't attended to the way that the  
20 policies intended, the way that top leadership might  
21 have preferred. So then we need the backstop of a  
22 robust, anti-retaliation system.

1           And the system for the retaliation response  
2 needs to have characteristics of protection and  
3 confidentiality in much different and elevated ways  
4 than an issue reporting system, which, you know, may be  
5 much more transparent, because people need to learn  
6 from those issues, and so on. Many people have to be  
7 involved in resolving those issues.

8           When someone reports retaliation, they -- in  
9 many organizations, not all -- may have reasons to be  
10 worried about what happens to their status in the  
11 organization, even their employment. And so,  
12 protecting them with confidentiality, not allowing  
13 rumors to spread, not allowing people to lobby on the  
14 case, not having people involved in judging the  
15 retaliation who may have been involved at an earlier  
16 point, not assigning this to offices that will take a  
17 defensive posture, all become extremely important to  
18 guaranteeing that the evaluation of the retaliation  
19 allegation will be fair and objective, and that the  
20 employee won't somehow suffer.

21           And I think it is important to point out that  
22 peer groups can often be very cruel about retaliation.

1 Peer groups that are interested in meeting the  
2 schedule, they think someone is a crybaby, that has any  
3 -- you know, any number of traditions, the peer group  
4 can often be a part of that. And so it is important  
5 that that employee be protected, not only from  
6 management, but also from any sort of ridicule from  
7 their peers, because that can also serve to discourage  
8 reporting of others in the future.

9           Sometimes -- you want to have internal programs  
10 to deal with anti-retaliation, but you also want to  
11 have the possibility for someone to go outside, or for  
12 the organization to organize some much more independent  
13 process, maybe a standing process. I am part of a  
14 standing process that lives outside of several  
15 companies that use it. There are other examples. Or  
16 you may want to contract for some sort of a special  
17 investigation so you can get that true independence.

18           Talked earlier about starting with a blank page,  
19 so that previous assumptions about the employee or  
20 about the issues don't color the evaluation of  
21 retaliation allegations. Here, once again, very  
22 important: discipline. You find in many cases

1 employees who are alleging retaliation have been  
2 disciplined for raising issues, or discipline sometimes  
3 arises as a form of retaliation. And it is really  
4 crucial that the organization's policies and practices  
5 don't permit this, and that this is carefully policed.

6           If you see discipline on an employee, if you  
7 don't already have it in an organization, it is  
8 probably very important to look at the employee's  
9 record of reporting issues. Did they report any safety  
10 issues, any ethics issues, any integrity issues? And  
11 can we see a relationship? Will others see a  
12 relationship in the fact that they are now being  
13 disciplined for something apparently unrelated, but  
14 maybe -- just maybe -- it traces back to who was not  
15 happy with them for raising that issue? This is not  
16 unheard of. Doesn't happen every day. Some  
17 organizations it happens every day, but it is certainly  
18 something that has to be watched out for. And having  
19 that kind of review being explicit seems to be an  
20 extremely important safeguard.

21           It is common, when somebody files with OSHA or  
22 files outside -- I said this earlier in the



1 introduction -- that the organization defaults to a  
2 defensive posture. As, really, everyone on this  
3 subcommittee noted, that is the wrong response. Be  
4 proactive, try to get to the bottom of it, find out  
5 what the underlying issues were, and find out what  
6 kinds of behaviors may have been triggered, might still  
7 be common in the organization, that could have resulted  
8 in retaliation or a feeling that one was retaliated  
9 against.

10           I have mentioned conflict of interest. Crucial  
11 to only have people who can look at the retaliation  
12 circumstance objectively, fairly, openly. I have  
13 talked earlier about employees having the unrestricted  
14 ability to elevate, elevate outside the chain of  
15 command, elevate outside levels where they normally  
16 operate. And they should not have to go through  
17 prescribed steps before they can elevate, if they think  
18 that things were blocked. They should be able to  
19 elevate it. If the organization is well positioned to  
20 respond, they will be able to respond at higher levels  
21 and not be threatened by it.

22           We have talked about rumor control. There is a

1 lot of lobbying that goes on around these cases within  
2 organizations. People show up and say, "Oh, I know  
3 about that guy," or try to protect other friends in the  
4 organization. So very important to take that  
5 retaliation case and put it in a cocoon.

6           And you may need to protect that person years  
7 afterwards. Sometimes the retaliation comes later, in  
8 other forms.

9           And on the question of multiple channels and  
10 anonymity and so on, we heard one story -- maybe it  
11 will be told today -- about senior manager getting on a  
12 plane, going a few continents away to meet an employee  
13 who said in kind of a deep throat, Woodward and  
14 Bernstein sort of way, "I have got an issue, I am  
15 afraid to raise it." Well, this didn't come up through  
16 any of the standard programs, but a manager found a way  
17 to learn about it and deal with it. And you don't  
18 always get plane tickets to foreign countries to deal  
19 with this, but you should be prepared to go to some  
20 lengths to make sure you hear the issues.

21           In the dos and don'ts, I think things are -- I  
22 pretty well covered the items in the dos and don'ts.

1 One thing, second from the bottom on the don'ts, don't  
2 rely solely on a strong chance of prevailing in court,  
3 or that the issues go away with a win in court. If the  
4 issue goes to court, more often than not -- and I will  
5 let my colleagues more experienced than I talk more  
6 about this -- everyone loses. It may be that you have  
7 a good case. It could be that the whistleblower  
8 actually is wrong about the issue. It could be they  
9 are wrong about retaliation. But if you can't find a  
10 better way, a more constructive way, a more problem-  
11 solving way of dealing with it than simply saying,  
12 "Well, we are going to win in court, let's go there,"  
13 at least try to do it in other ways.

14           You have got people doing depositions, speaking  
15 negatively about each other. You have got coworkers  
16 testifying against each other. And you have got all  
17 kinds of other costs that make it a lot harder for  
18 people to come forward, and which have other impacts on  
19 your culture. So it is not really a win if you win.  
20 You win if you resolve it, if you find underlying  
21 problems, if you can promote the sense of fairness in  
22 your organization.

1           On the training, it should be evident at this  
2 point that people need to be trained in order to deal  
3 with these very subtle kinds of problems and issues and  
4 conflicts, and conflicts that involve not just one  
5 person and supervisor, but that sometimes involve lots  
6 and lots of interests in the organization, and which  
7 may challenge a variety of policies, and the people who  
8 put them in place.

9           So, in this list, we have identified some of the  
10 specific elements of training that seem to be  
11 important. Certainly one could name others. And the  
12 -- what we are trying to do here, really, is to create  
13 new habits, to work against those instincts that make  
14 people defensive, that make people maybe want to shun  
15 someone who is a little bit different than the others,  
16 who is raising issues that are a little bit unpleasant,  
17 to give people the skills, the courage, the knowledge,  
18 the awareness of the consequences, if they don't  
19 respond well to issues being brought up, and if they  
20 don't respond well to retaliation. We are trying to  
21 create new habits.

22           I talked earlier in the introduction about the

1 importance of management, but also employees: knowing  
2 what constitutes retaliation. As I said, it is not  
3 just firing someone, or imposing some major employment  
4 status discipline. But it is all the subtle behaviors  
5 that also are retaliation, and that have the same kinds  
6 of destructive effects, and also are in, most  
7 instances, illegal, and exposes the organization to  
8 liability.

9           And this is about training both employees and  
10 managers, and knowing the definitions, knowing the  
11 rights, knowing the obligations and then, in training  
12 managers, on the skills to respond, and training both  
13 on the systems that are available, and the systems that  
14 they should be using.

15           So, I talked about definitions, teaching and  
16 response. And for supervisors to know how to diffuse.  
17 I have seen supervisors who didn't really know how to  
18 go to a workgroup and say, "Hey, everyone, cut it out.  
19 What you are doing is illegal. What you are doing is  
20 against our ethics, our code of conduct. You need to  
21 cut it out." And, besides saying cut it out, what  
22 kinds of consequences are there for people who are

1 engaging in the work group of supervisors, engaging in  
2 that kind of behavior? And that takes skills, and it  
3 takes knowing your organization will back you up.

4           I have talked about knowing the elements of the  
5 system that is in place, so that you can make use of  
6 it, that you can direct people to it. Talked about the  
7 laws.

8           Knowing what constitutes notice. A lot of  
9 managers put their organizations at risk because they  
10 don't understand that a certain kind of reporting has  
11 now put the organization on notice. And it is required  
12 that they respond in a constructive way to deal with  
13 the allegations of retaliation.

14           And an important skill not easy to learn, not  
15 easy to carry out, particularly under pressure, is to  
16 separate behavior that a supervisor might find  
17 annoying, or perhaps is, indeed, inappropriate, to  
18 separate that from the report itself, and the  
19 obligation to act on the report in the interest of  
20 product quality, of integrity, of safety, and then  
21 dealing with the behavior, otherwise, if the behavior  
22 was not appropriate, but also staying away from using

1 punishment inappropriately, which sometimes is a  
2 response.

3           And assuming the employee's motive -- I think is  
4 worth pointing out -- in raising an issue tends to  
5 cloud the evaluation of the issue, and how to handle  
6 it. The dos and don'ts are pretty short here, but  
7 don't assume that people intuitively know what  
8 constitutes retaliation, or know what to do to prevent  
9 it. You must teach them the skills.

10           Number five, monitoring progress. I will rely  
11 on some of my colleagues on the committee, particularly  
12 those who operate and operate within the measurement  
13 and incentive systems. But we got some very clear  
14 feedback from the members of the committee, of the  
15 subcommittee, and from a number of the speakers that we  
16 brought in that the message that we, in fact, promoted  
17 -- heavily promoted by the health and safety community  
18 a couple of decades ago to measure management, to  
19 measure organizations based on getting low -- to  
20 encourage getting low numbers of reporting.

21           And you could probably translate this -- and I  
22 will again defer to others -- in other industries, in

1 finance, and other places: You don't want to have a  
2 lot of complaints. So if you are a manager, you have a  
3 lot of complaints, you don't maybe get your bonus. If  
4 you have low injury reporting, you get your bonus. We  
5 heard from a lot of people, very knowledgeable, very  
6 experienced, some of whom have worked in OSHA, some of  
7 whom have worked in senior safety and health positions,  
8 senior compliance positions, to say it turns out that  
9 doesn't work very well, because it is easy to  
10 manipulate those numbers. There are all kinds of  
11 organizational informal norms that can discourage  
12 reporting, to discourage how we report. Those of you  
13 who work in the field must see this at times.

14           And so, a number of organizations -- and some of  
15 our colleagues can perhaps talk about it -- have  
16 actually severed the link between those traditional  
17 reporting numbers and compensation for their management  
18 and incentives for employees. And, of course, there  
19 are lots of incentive programs where employees are  
20 encouraged to have X-many work days without reported  
21 injury. Well, you know, people behave in funny ways  
22 when they are going to miss out on the trip, the group



1 bonus, the management incentive.

2           So, there is a movement, in industry at least,  
3 to get away from those measurements, which they are  
4 calling lagging indicators. It is not exactly an  
5 accurate term, in the way that is understood in  
6 economics, but it is a useful way to distinguish it  
7 from what they are calling leading indicators, which  
8 are the inputs to creating a safe environment, a high-  
9 integrity environment, and to encourage people to come  
10 forward and to report and to deal effectively in anti-  
11 retaliation ways and in retaliation response.

12           And it is possible, I am told -- it is not  
13 something I am an expert in, but it was very persuasive  
14 to us all -- that you can measure management actions  
15 that contribute to encouraging people to report,  
16 encouraging people to feel protected, to put actual  
17 protections in place, if you measure a manager based on  
18 how well they respond to issues, how well employees  
19 react to the way they responded, how well they respond  
20 to retaliation, how much -- how well they intervene.  
21 You can measure those things, rather than, "Did you get  
22 low numbers reported?"

1           And so, this is not well established, but it is  
2 emerging, it is being used. There is experiments with  
3 it, and it seems to be the direction. So getting the  
4 weight away from "Give me lower reporting numbers"  
5 seems to be very important, because that can overcome  
6 many -- much of the training, and many of the policy  
7 statements and so forth.

8           So, it is important that the board see some of  
9 these numbers, and not only get summaries, and  
10 understand what is really going on, and to understand  
11 that if you put in -- if you really start -- if you try  
12 to start a speak-up culture, if you haven't had one,  
13 you are likely to get more incidents reported, instead  
14 of less, and to recognize that that is an opportunity  
15 to address issues, not a reflection of a lack of  
16 interest, necessarily. So, carefully measured, it  
17 should be looked at not in the traditional ways, but in  
18 a more creative and a more comprehensive way.

19           Number six, independent audits and program  
20 improvement. I said at the beginning this begins to  
21 close the leadership circle. So leaders say we have  
22 new and better policies, we have clearer statements

1 about protecting employees, about the importance of  
2 coming forward with issues, about our philosophy, our  
3 ethics. We have established programs, we have trained  
4 people. Does it actually work? Do you really know if  
5 your employees are willing to come forward?

6           So, I will give you an example that impressed me  
7 a lot. And others on the committee may have their own  
8 examples. We had the opportunity here from at least a  
9 couple of people that spend a lot of time on this kind  
10 of auditing and measuring. And when a survey is done  
11 -- I will call this a typical survey -- a typical  
12 survey gets sent out to a broad range of employees, a  
13 big sample maybe to everyone in the organization, and,  
14 "Will you raise an issue if you think it is threatening  
15 to your health and safety, or that of coworkers?"

16           Something in the 90 percent plus, 95 percent,  
17 maybe 97 percent, say, "Yes, I would report that," and  
18 then sometimes the person who did the survey comes up  
19 and says, "Oh, this is really great. Everyone is  
20 willing to report. We have no fear here of  
21 retaliation."

22           When the in-depth audit is done, when the in-

1 depth audit is done and part of that audit is  
2 interviews with focus groups of employees done by an  
3 independent, outside players, and not someone who is --  
4 employees will see as reporting that back to their  
5 supervisor or anything else they might be fearful of,  
6 and that is dug into, "Well, have you ever reported an  
7 issue?" "No." "Do you know anybody" -- or, "Have you  
8 ever feared retaliation?" "No." "Do you know anybody  
9 else who has?" And you start to dig down, those  
10 numbers can drop. If the program is not working, those  
11 numbers can drop. If the program is working, those  
12 second and third and fourth-tier numbers will also be  
13 strong and endorse the program.

14           But they are -- but you can find out how strong  
15 it really is by employing some of these methods. There  
16 is an organization that we had the opportunity to hear  
17 from through their executive director. It is the  
18 Ethics Resources Center. They do a national survey.  
19 It is a large survey, thousands of people across the  
20 economy. And they had some really interesting data  
21 from this survey, from their national surveys, that  
22 suggest that those top-line numbers are not always

1 reliable, that it is important to dig down. And they  
2 were able to display that, and that was consistent with  
3 the experience of at least one of our committee members  
4 who is active in doing these kinds of assessments in  
5 organizations.

6           So, we have here in the checkmark area the --  
7 some of the features. So, for those of you more  
8 familiar with the safety and health area, you are used  
9 to safety systems audits. Common practices, especially  
10 in large organizations. This has certain parallels  
11 with that, but does some other things. So you can  
12 think of it that way. Safety systems audit, as I  
13 understand it, you are going to do direct audits of  
14 your program data. Have people been trained? You  
15 know, what is being reported? Response times, things  
16 like that, done typically from people outside the  
17 immediate business unit being evaluated.

18           But you also need this layer of independent  
19 surveys, confidential interviews, so you can really see  
20 what, in fact, is going on. You need to structure  
21 these audits and surveys in ways that reflect the  
22 organization structure, where the facilities are

1 located, how they relate to each other, and so on.

2           And, here again, as in all these categories, in  
3 putting together that audit, and understanding the  
4 results of that audit, crucial to talk to your  
5 bargaining unit leadership when you put together the  
6 samples of employees. Whatever you are doing, there is  
7 an enormous amount of information and insight that you  
8 need to get from your bargaining unit leadership. And,  
9 again, if it is not an organized workplace, you have  
10 got to do other outreach so you get that perspective  
11 and can understand your numbers and results.

12           Also very interesting is to cross-check what is  
13 reported about incidents and what is reported about  
14 retaliation with other sources. Even exit interviews,  
15 grievances, workers comp. We heard -- we had a summary  
16 of a pretty significant multi-state study where firms  
17 in the area were not reporting -- were reporting  
18 incidents at a certain level, and workers comp data  
19 from that area showed a much higher level of incidents  
20 in injury.

21           And so, there are ways to, depending on the  
22 investment that an organization is prepared to make,

1 there are ways to check the data that is being reported  
2 inside your company in the official channels with  
3 either unofficial or alternative channels. I found the  
4 exit interviews and grievance data some of the easiest  
5 to access, and sometimes yielding very useful insights  
6 through such cross-checks.

7           There is also the issue, down towards the bottom  
8 of the checkmarks, if you change policies, change  
9 programs, change the way you measure things, change  
10 incentives, there should be some requirement to say,  
11 "Will this have an impact on reporting? Will this have  
12 an impact on retaliation?" Particularly because we  
13 have seen so much impact by traditional measuring  
14 systems, traditional incentive systems, unintentionally  
15 causing those impacts. Intentional things are for the  
16 people that are not willing. But for those who are  
17 trying, their efforts and their trying can often be  
18 thwarted by measures and incentives that run in the  
19 wrong direction.

20           And so, down at the bottom, the dos and don'ts,  
21 I will just take you to the last box on the bottom  
22 right. Don't restrict the board to cursory

1 information. This is where you close the leadership  
2 circle. The board and top leadership need to know if  
3 these programs are really working, and pay attention to  
4 what the get-well plan is.

5           So, if you flip back to the first page, you look  
6 down at the bottom, you look at the six points, what we  
7 have, then, is a six-part program. We are now in  
8 violent agreement that these are exactly the right six  
9 categories, there couldn't be any others, but six  
10 categories of common-sense, integrated, hang-together  
11 ways of caring about anti-retaliation, recognizing that  
12 it doesn't start with anti-retaliation, it starts with  
13 making sure people can report issues, making sure that  
14 management responds timely and fairly.

15           It means leadership is taking the proactive,  
16 let's-get-it-right, let's-learn-from-it approach that  
17 -- you need that backstop in a protected, confidential  
18 way, to take care of allegations of retaliation, and  
19 really run them to ground in the specific anti -- the  
20 specific conflict of interest and protective dimensions  
21 of that, supporting people as they go through that,  
22 which is, you know, probably a hard thing for an



1 organization to want to do, because sometimes it is not  
2 that natural to support that. But organizations that  
3 do support that get much better results.

4           The crucial dimension of training and teaching  
5 new habits, overcoming some of the natural tendencies  
6 that come from performance pressures and some natural  
7 human reactions, getting the measurements not to  
8 interfere with your efforts in creating counter-  
9 incentives and sewing seeds for suppression, and the  
10 importance of independently determining whether or not  
11 your programs actually work.

12           That is where we ended up. We commend it to  
13 your attention, and I turn it over to the chair to take  
14 us further.

15           DISCUSSION OF SUBCOMMITTEE RECOMMENDATIONS

16           MS. SPIELER: Thank you. That was terrific, and  
17 a terrific report.

18           So, here is my suggestion. There are 12 of you  
19 plus me on this committee, and many of you have been  
20 involved in this, but some of you haven't. I don't  
21 think we should have a wordsmithing conversation here.  
22    What I would like to do is focus in on issues. Are

1 there things here that you disagree with? Are there  
2 issues that have not been addressed?

3           So, the way I would suggest we do it -- I think  
4 I have said this already -- is to work our way through  
5 the six areas in the document, and then, if there are  
6 issues that are outside those six that you think we  
7 need to discuss, we will move on to those.

8           I am disinclined -- unless someone really jumps  
9 up and down right now -- to have a conversation about  
10 the introductory section. And the reason is that I  
11 think the substance is in the six areas, and, much as  
12 we may be wedded to this document, I am quite certain  
13 that staff at OSHA will be rewriting much of it,  
14 anyway. And so, I think we should not spend our  
15 committee time on introductory issues that are not part  
16 of the substance of the document.

17           So, unless someone wants to overrule the chair  
18 on that, what I would like to do is turn to the role of  
19 leadership, focus on that issue for the next period of  
20 time. I know that some of you -- Greg and Nancy and  
21 Marcia -- had particular roles in the development of  
22 this. If there are members of the committee that would

1 -- who -- and some others. If there are particular  
2 things you would first like to add to Jon's summary, I  
3 would like to invite you to do that. And then let's  
4 have a more general conversation about this first  
5 section, what is here, what is not here, whether there  
6 are things that we need to think about, as a committee.

7           So, Greg?

8           MR. KEATING: Thank you, Emily. I just wanted  
9 to say three quick things. The first is that he is  
10 incredibly reserved, and doesn't like to take credit  
11 for what he does, but Jon really and truly did an  
12 unbelievable job in pulling all this together, staying  
13 on the committee, pulling -- summarizing extensive  
14 notes, and then putting this together. And so I just  
15 -- I think it is really important that we recognize the  
16 leadership and hard work of Jon.

17           Second, I think this is a really, really  
18 terrific initiative, and I hope we can get around it.  
19 Because I know that, from my -- from where I stand,  
20 employers are clamoring for guidance. They really want  
21 to know, not just conceptually, but -- what I love  
22 about these recommendations is they get pretty

1 granular, and they really give some specifics.

2           And then the last just broad-brush thing I want  
3 to note that the committee grappled with -- and I think  
4 Nancy will acknowledge this -- is one of the challenges  
5 of putting together this document -- and it reflects  
6 the broad brush that OSHA has of 21 statutes and a  
7 very, very significant body of whistleblower  
8 protections to look out for -- is that there is a  
9 difference in how we approach the safety retaliation  
10 and the -- what I will call white collar fraud and  
11 other.

12           And that was a challenge, I think, for us. I  
13 think Jon, everyone on the committee will acknowledge  
14 that. I think we came out in the right place, but it  
15 just is an issue. And I think the full committee would  
16 probably already recognize that. But it is something  
17 we grappled with, and I thought that was a relevant  
18 background to have.

19           MS. SPIELER: Thank you. Nancy, Marcia, anyone  
20 else on the committee want to add anything here?

21           MS. NARINE: Not yet.

22           MS. SPIELER: Not yet? You mean not on Section

1 1?

2 MS. NARINE: If something comes up that I want  
3 to respond to, I have B

4 MS. SPIELER: Okay.

5 MS. NARINE: He basically said everything I  
6 would have said.

7 MS. SPIELER: Okay, okay. So, opening this up  
8 more broadly, comments, concerns, things that are not  
9 here that should be here?

10 Eric?

11 MR. FRUMIN: So, first, thank you all for doing  
12 this. You know, I got all the emails, and studiously  
13 avoided diving into it until I got the last one. And  
14 so I have read it carefully, I have marked it all up.

15 [Laughter.]

16 MR. FRUMIN: And only have one issue that I  
17 think needs to be addressed in some explicit way to add  
18 as a comment to what you have done. That is a lot  
19 fewer than I thought I was going to have. So I really  
20 appreciate the way that -- as Greg said, you have  
21 managed to put together a generic document that is  
22 pretty granular across a broad spectrum of issues.

1           The thing that concerns me that is lacking here  
2 is a granular discussion of accountability in  
3 management. And we, in the transport working group,  
4 has this very sharp conflict over the concept of the --  
5 how to evaluate the effectiveness of management  
6 training. And it made it very difficult for us to put  
7 forward a recommendation on training to the full  
8 committee.

9           And Marcia and I and the others labored at  
10 length, and we had really party-line labor management  
11 votes. And, you know, what does it mean to know that a  
12 management policy and initiative to implement the  
13 policy, a training program as part of that initiative,  
14 an evaluation process to see if it is working, a  
15 practice to assure that the implementation is as  
16 promised, that it actually is working?

17           And, on the labor side, we felt pretty strongly  
18 that if the managers who were involved in the  
19 retaliation walked away from it with no discernable  
20 consequence, that the program would be viewed as,  
21 basically, a failure. And that was a key test of the  
22 effectiveness of the training.

1           If a manager was trained, nonetheless engaged in  
2 retaliation, the subsequent investigation demonstrated  
3 that, and there was no apparent consequence for that  
4 manager -- talk about people feeling like why bother  
5 reporting, you know? These are very serious issues for  
6 the workers who are working under that supervisor.

7           Jon's report alluded to the sensitivity of the  
8 supervisor-employee relationship. And I am using the  
9 term "supervisor" more broadly than just the front-line  
10 supervisor, the immediate supervisor. Sometimes those  
11 supervisors have a real independent ability to make  
12 judgments about discipline. Sometimes they can't do  
13 squat without getting the approval of someone a level  
14 or two above them. So there are often levels of  
15 management that are implicated in a decision by a  
16 supervisor to discipline or otherwise, you know, take  
17 action against someone who is reporting something.

18           And so, the question of accountability for a  
19 "supervisor" can actually, you know, make its way  
20 fairly -- several levels up in the organization, and  
21 pose all sorts of problems for the politics in that  
22 particular line of authority. Because this supervisor

1 happened to be a long-time friend of this manager, who,  
2 you know, has been there for 10 years, and is relied  
3 upon by the division head to get the production numbers  
4 out. And if, all of a sudden, this manager is being  
5 asked by the division head to throw the supervisor  
6 under the bus, all hell is going to break loose at the  
7 next manager's meeting.

8           And, you know, this is not unique to  
9 corporations or OSHA or labor unions, for that matter.  
10 You know, we all go through these kinds of -- or law  
11 firms. We all go through these -- or universities. We  
12 all go through these kinds of politics. So I am just  
13 trying to be very concrete about the importance of this  
14 question of accountability for supervisors, not just a  
15 broad statement of accountability all the way up to the  
16 board of directors. It is fine to talk about that, I  
17 agree. If I didn't say that, then it would be an  
18 obvious failure.

19           Now, the document talks about accountability in  
20 a number of places. It talks about consequences in a  
21 number of places. And I think, if we just go back and  
22 look at those, do a word search and look at those two



1 terms, you will see a few places where, without  
2 modifying it, it would be -- OSHA could then take this  
3 concept into account in however it decides to work with  
4 this.

5           So that was my only concern about an omission.  
6 It didn't really capture the concept of accountability  
7 or consequences in this kind of operational way that  
8 makes a real difference to both the workers who are  
9 considering -- or reporting problems and, you know,  
10 trying to judge retaliation. And, secondly, the  
11 organization's ability to come to grips with a  
12 retaliation threat.

13           I had another issue about not an omission, but  
14 just some questions about some of the terms in the  
15 leadership section, but I will B

16           MS. SPIELER: Let's talk about that point you  
17 are making, which clearly is within this leadership  
18 section, in terms of the holding accountable and the  
19 performance reviews. And I saw some hands up from  
20 members of the subcommittee, so I would like -- I think  
21 we should hear from them.

22           MS. NARINE: I actually agree. I think it needs

1 to be a little bit stronger here. I know, during some  
2 of the conversations -- and I have to do a word search  
3 to see if it is reflected someplace else.

4           We did have the statement about the performance  
5 reviews should support anti-retaliation behavior. But  
6 I think what doesn't come across -- and, again, if it  
7 is in here someplace else, and I missed it, I apologize  
8 -- is we had talked about specific -- whether it is  
9 financial or other kinds of penalties -- you know,  
10 termination, suspension, et cetera, you know, clawback  
11 of bonuses, whatever it could be -- for retaliatory  
12 behavior when it comes to supervisors, because I think  
13 that is what employees will know happens. And that is  
14 really -- it could be a deterrent effect.

15           So, to the extent that there is some way to  
16 capture not just rewarding you went to the compliance  
17 training, you put up the poster, you had a speak-up  
18 culture, but actual penalties -- financial and  
19 otherwise -- for managers that engage in retaliatory  
20 behavior. I think that is important. Because I think  
21 I gave the example of I have personally been involved  
22 in ensuring that someone in very high level was

1 terminated when it came out that they had -- and it was  
2 known throughout the organization that somebody at that  
3 level could be terminated for engaging in retaliatory  
4 behavior -- that was more than any of the training that  
5 I could actually do, is that one statement.

6           So, I think something that is in here that says  
7 it a little bit more strongly would be valuable.

8           MS. SPIELER: Nancy?

9           MS. LESSIN: And I agree, as well, and want to  
10 throw it back to you, Eric, as having thought about  
11 this.

12           Do you have -- I mean it does appear, the issue  
13 of accountability, and the leadership, there are  
14 several other places where it is talked about. Do you  
15 have a specific suggestion of the -- how to frame the  
16 concept that needs to be added?

17           MR. FRUMIN: Well, I could write something --  
18 yes. There are a few places where we could add -- fill  
19 out -- add a phrase or two to the word "consequences,"  
20 where it talks about consequences, that I think would  
21 capture that. So I could do that and get back to you  
22 -- I don't want to try to do it instantly, but I could

1 do it this morning.

2 MS. LESSIN: That would be great.

3 MR. FRUMIN: If you want to actually consider  
4 wordsmithing, but that B

5 (Laughter.)

6 MS. SPIELER: I don't know that we want  
7 wordsmithing, but I think, to the extent that we want  
8 to amend the document, that we pass through having some  
9 level of specificity about it -- it doesn't have to be  
10 exact, but I think -- that gives the committee a sense  
11 of what it is the amendment entails would be very  
12 helpful.

13 But, first, let me ask. Is there anyone who  
14 wants to speak against this, who has concerns about it  
15 that should be aired now, so that, if Eric goes off and  
16 thinks about it, they can be -- those concerns can be  
17 addressed?

18 MR. KEATING: I don't have any concerns. I just  
19 would note that I do think it is reflective in this  
20 document. I mean there are a number of places where it  
21 is very clear that, whether it is the CEO and the board  
22 or managers, they are to be expected, under these best

1 practices, to, you know, walk the walk. And, if they  
2 don't, they will be held accountable.

3           So, I mean, whatever you want to do to suggest  
4 some sort of stronger language, I am certainly willing  
5 to look at it. But I think it is B

6           MS. SPIELER: Okay. Other comments, concerns,  
7 additions to, number one, the role of leadership?

8           (No response.)

9           MR. FRUMIN: Okay.

10          MS. SPIELER: Okay.

11          MR. FRUMIN: So it, thankfully, does talk about  
12 identifying employee leadership. And in this section  
13 it refers to bargaining unit leaders. In other  
14 sections it refers to the identification of leaders in  
15 non-union situations. And so, for the 95 percent of  
16 the private-sector workforce that is not in a union,  
17 working our way towards 96, probably, as we sit here B

18          (Laughter.)

19          MR. FRUMIN: This is a really critical question  
20 for anybody who is actually taking this subject  
21 seriously. And we are sitting here at an advisory  
22 committee to OSHA, which has to come to grips with this

1 issue. No, it doesn't have to. It sometimes thinks  
2 about this issue, but often doesn't, avoids it like the  
3 plague.

4           So, I think it is worth trying to clarify the  
5 intent. I don't think anyone has got a decent answer  
6 under prevailing American labor law for a concrete  
7 mechanism that identifies employee leadership in an  
8 operational way in any representational capacity for  
9 hearing from employees and then, in the words of the  
10 National Labor Relations Act, dealing with them on  
11 these issues. We have, instead, the opposite. We have  
12 prohibitions against -- thank goodness, useful  
13 prohibitions against employers dealing with employees  
14 on important workplace issues under most conditions  
15 that would go on. I mean there are a few that might  
16 pass muster, but most of them won't.

17           And that is -- I am being very obtuse here, but  
18 this is a real operational problem for large, non-union  
19 organizations. So I think it is fine to talk about an  
20 intent, to seek out employee leaders on this vital,  
21 vital, vital issue of protecting people against  
22 retaliation in an at-will environment, thank you very

1 much. But how the hell you do it is a really tough  
2 question.

3           And if we like the intent, but we go into this  
4 with our eyes wide open, that it is an extremely  
5 difficult thing to operationalize, then I think it is  
6 worth saying so, because I don't think there should be  
7 any illusions about the difficulty that an organization  
8 will have in seeking out employee leadership.

9           That doesn't mean you can't have a strong anti-  
10 retaliation program in a non-union environment. You  
11 certainly can. But seeking to identify employee  
12 leaders to help design the program, monitor the  
13 program, implement it, that is a different question,  
14 entirely, and I think it is worth noting the obstacles  
15 in our law about it. And, for that reason, to take --  
16 to recognize the special urgency in non-union  
17 environments for a really strong anti-retaliation  
18 program, because there are not good opportunities for  
19 legal solicitation of worker leadership. They go on  
20 illegally, but that is a different matter.

21           MR. WENGERT: Can I say something?

22           MS. SPIELER: Sure go ahead.

1           MR. WENGERT: Eric, thank you for raising that  
2 point. It is probably obvious, from your read of this,  
3 that at least I struggled with language to try --  
4 right? I mean I am not as well-versed as you and any  
5 other here in the little nuances. But it was very  
6 difficult to find language that would identify that  
7 this was important to do in a non-union environment,  
8 you know, to get that perspective. So, while we are  
9 not wordsmithing here, better words or more consistent  
10 words to describe it might be valuable.

11           But it was just interesting to note there was a  
12 general sense -- I don't know if you could find  
13 dispositive statistics -- that people are more likely  
14 to raise issues if they felt protected, and that tended  
15 to be -- if they were in a unionized environment, they  
16 had something to fall back on. And so, you know, that  
17 just is something I will just note. But it was not  
18 particularly easy for me to find some language to try  
19 to make this point. So it is B

20           MR. FRUMIN: You and several courts of appeal.  
21 I mean, really, it is B

22           (Laughter.)



1           MR. FRUMIN: This is a tough question.

2           MR. WENGERT: Well, I am sure I am about to be  
3 appointed to a court of appeals.

4           Anyway, so I don't know how to resolve it, but  
5 it is a B

6           MS. SPIELER: Nancy?

7           MS. LESSIN: In the leadership section, we have  
8 the wording about, you know, with represented  
9 employees, bargaining unit leaders can also play a  
10 valuable role.

11           But if you look at the monitoring progress in  
12 the last checkmark, we went a little further. And  
13 whether -- you know, I don't -- we used different  
14 words. I think your issue about how in the world does  
15 this really happen remains. But the wording that we  
16 have is "bargaining unit leaders should be involved in  
17 development and review of measures in non-represented  
18 workplaces, consult other employee leaders, worker  
19 centers, advocates."

20           I think it kind of points -- direction that says  
21 without a bargaining unit there are other things you  
22 have to do. What that is, how that is done, who does

1 that, how to stay within, you know, legal frameworks, I  
2 think, are real questions. But I think that was our  
3 attempt to try to say there are some real issues here.

4           If there are things that can be added to assist  
5 in that, I would certainly be open to hearing them.  
6 Because I think the reality of the situation is exactly  
7 as you laid out. The bargaining unit piece is much  
8 smaller, and this other entity of non-represented  
9 workers is huge.

10           MS. SPIELER: Greg?

11           MR. KEATING: I would just note also, Eric, that  
12 in the second section preventing -- prevention and  
13 fostering a speak-up culture, the second-to-last bullet  
14 talks about to help gain a real speak-up culture, seek  
15 the input and involvement of workers and union leaders  
16 in design and operation of reporting channels and anti-  
17 retaliation programs.

18           So I think there is at least an attempt to flag  
19 what you are talking about.

20           MR. FRUMIN: Yes, it is here in multiple ways.  
21 I am not saying that any of the language there is bad.  
22 But it is good. And both of those are good sections.

1           The problem is that it punts on the severe  
2 obstacles that a compliant HR department would face in  
3 trying to identify worker leaders in a non-union  
4 environment.

5           MS. SPIELER: So let me make a suggestion here,  
6 because I am not sure we can, as a group -- I am not  
7 sure any of us individually, nor could we, as a group,  
8 craft something that sort of navigated that difficult  
9 pathway.

10           So -- but I do think we can add in our  
11 transmission to OSHA an alert that we have concerns  
12 about this, and urge them to address it in whatever the  
13 -- to the extent they think it is possible in the final  
14 document. And I think the solicitor's office, and  
15 possibly in consultation with lawyers and other parts  
16 of the government, might be able to come up with some  
17 language that they felt comfortable with, ultimately.

18           Yes, Richard?

19           MR. MOBERLY: I am just going to -- Eric, was  
20 going to express my ignorance here, which I don't like  
21 doing publicly, but I am going to do it, in case anyone  
22 else is with me.

1           So, can you just describe the difficulties of B

2           MR. FRUMIN:   So B

3           MR. MOBERLY:  -- identifying workers in non-  
4 union B

5           MR. FRUMIN:  Yes.  Real short, Section 8(a)2 of  
6 the NLR reg prohibits company unions.  A committee  
7 established by an employer of workers intended -- where  
8 those workers are intended to represent other workers,  
9 not just themselves, and with whom the employer deals  
10 -- that is, takes suggestions, comes back to the  
11 groups, gets their feedback, says, "We did X, you  
12 wanted Y," or, "We did A&B, you wanted A, B, and C."  
13 That is "dealing with."

14           That is prohibited under the National Labor  
15 Relations Act in a non-union environment, when that  
16 committee depends on the employer to pick the people,  
17 set the time for the meeting, pay them, run the  
18 committee B

19           MS. SPIELER:  It is even true if they allow the  
20 employees to elect their representatives.

21           MR. FRUMIN:  Right, because it depends on the  
22 employer.  It is a company union.  And we prohibited

1 that, thankfully, in 1937. But today that is still a  
2 live issue. So -- there was a famous case, it was on  
3 quality issues, wasn't about safety, but they got into  
4 problems. DuPont ran into problems in the unionized  
5 environment running a safety committee outside the  
6 union. So this is -- and there are multiple state laws  
7 requiring safety committees. In non-union  
8 environments, I would say 99 percent of those safety  
9 committees violate the National Labor Relations Act.  
10 And no one pays attention.

11           So, does any of this matter? We have been going  
12 on for decades with this law, with these practices. It  
13 doesn't really matter. Well, it does matter, because  
14 this agency has night-and-day different practices  
15 regarding worker leadership and worker involvement in  
16 the enforcement process between unionized and non-union  
17 environments.

18           And are there walk-around reps in unionized  
19 workplaces? Most of the time. Are there walkaround  
20 reps in non-union worksites? Next to goddamn never.  
21 Does the -- does OSHA -- do OSHA's regulations take  
22 that into account? Not really. Is there an

1 opportunity, as the agency is trying to come to grips  
2 with the issue of worker involvement in reporting non-  
3 compliance, and participating in enforcement? Is there  
4 an opportunity to try to figure out a way around that?

5 Yes.

6           So, if we were just doing this in an academic  
7 setting, you know, okay, it would be a footnote. But  
8 we are doing it in the U.S. Labor Department, where  
9 these issues matter, and where these ideas may show up  
10 in a settlement agreement, they may show up in agency  
11 practice, they may show up in lots of places. We have  
12 ARAs here, listening to us, and wondering, "Well, why  
13 does this make a difference, in terms of the compliance  
14 stuff?" Well, it does, because we don't have effective  
15 worker involvement in fighting retaliation in an OSHA  
16 enforcement setting, never mind other settings. You  
17 know, in non-union environments, people are kind of on  
18 their own.

19           So, we get passionate about this, you know,  
20 those of us who do this work, because the stakes are  
21 really high, in terms of just seeing the OSHA Act  
22 enforced with worker involvement.

1 MS. SPIELER: So let me just B

2 MR. MOBERLY: I just wanted to make sure that  
3 was clear.

4 MS. SPIELER: Thank you, Richard. And I have to  
5 say that it is definitely clear that OSHA has been  
6 grappling with these issues, and at least has issued  
7 one memo that specifically addresses the employee  
8 representative walk-around rights that says -- allows  
9 for non-bargaining agent representation.

10 So, this is not -- just to add to the  
11 background, it is very clearly an issue that OSHA is  
12 grappling with. It is not something that they have  
13 ignored. And I think it -- and grappling with, also,  
14 in the context of the work that OSHA is doing around  
15 temporary work, and staffing agencies.

16 So, it is a problem. And I think -- I do think  
17 the committee, as a whole, when we transmit this, can  
18 certainly alert OSHA to the concern.

19 Marcia?

20 MS. NARINE: So I don't know if this makes it  
21 better or worse. And Greg and Eric might have  
22 something to say about it.

1           There is a possibility to maybe just put in a  
2 parenthetical the -- seeking the feedback of certain  
3 affinity groups that exists within organizations.  
4 Might be the gay and lesbian organization, it might be  
5 the black workers -- it is not going to be called black  
6 workers, but you know what I mean? The women's --  
7 whatever it is.

8           Because those groups, some of them tend to be  
9 more high -- upper management than others. But  
10 sometimes it is a broad cross-section. And even though  
11 they aren't unions, and those are voluntary, and the  
12 company does not set them up, you know, in some -- you  
13 know, in -- depending on who your perspective is, so  
14 from a management perspective B

15           MR. FRUMIN: Right.

16           MS. NARINE: -- worst case scenario, sometimes  
17 act like unions, and they will come forward with a list  
18 of demands and say, "We want these things done." But  
19 if there is a way to channel that, and a way to say,  
20 you know, "We are actually looking to try to find a way  
21 to make this better," you know, you can -- you know,  
22 you don't have to represent all women in the



1 organization, or all people in the affinity group.

2           But if you have suggestions that can help us,  
3 that you are hearing from your membership when you have  
4 your normal meetings -- because, obviously, people will  
5 meet to plan, you know, this event, that event, this  
6 initiative. But at any given time people will talk  
7 about what they are unhappy with in the workplace,  
8 because that is just a given, when you have more than  
9 two people sitting down to talk to each other.

10           So, to the extent that groups are comfortable  
11 providing that kind of input, and it is not going to be  
12 something that is forced, you are not going to ask for  
13 names, that might be something where we can kind of  
14 help fill, in part, a little bit of that gap. Now,  
15 whether there is going to be other legal issues that  
16 come from that is a whole other issue. So I don't know  
17 if Greg or Eric have any thoughts on that.

18           MR. FRUMIN: No, that is fine.

19           MS. SPIELER: Jon?

20           MR. BROCK: Just a quick point. Nancy, I think,  
21 really described the -- what we were attempting to do,  
22 and acknowledged the difficulty. I think if we are

1 looking -- if we want to say, "OSHA, think about  
2 language," we should pull from the transcript what she  
3 said about -- you know, there are places you can go to  
4 try to get the employee perspective.

5           And what we are really talking about is, if you  
6 miss that perspective, you are likely to misdesign  
7 this, you are likely to not understand the impact of  
8 certain efforts or failures. So you really want to  
9 make an effort to get that perspective. And the world  
10 is changing, and there are these kinds of  
11 organizations.

12           We heard from Government Accountability Project.  
13 You know, whistleblowers go to places like that and  
14 say -- you know, well, employers can go to places like  
15 that and say, "Take a look at this." So we want to get  
16 that perspective, and I think she introduced -- she  
17 laid out the effort necessary, and then we have these  
18 examples.

19           I don't know if that helps, but B

20           MR. FRUMIN: No, I think that is exactly the  
21 point. That is exactly the point that you need to  
22 stress, which is there is at least the opportunity for

1 one way -- for solicitation of one-way communications  
2 by employers from workers to get that input. If you  
3 try to go -- as a manager, try to go beyond that, and  
4 establish a two-way line of communication, then that  
5 turns into a committee, and you are dealing with  
6 requests and back and forth. Then you run into all  
7 kinds of trouble.

8           But there is no prohibition under the NLRA from  
9 soliciting employee input. And if there is a  
10 systematic way to do that in the design of the program,  
11 great. In the monitoring of the program? Great. That  
12 is a good concept to talk about here, as you have.  
13 Soliciting input about it to try to make sure you are  
14 -- you know, at least at that level, that you are not  
15 getting problems. And I am just noting that it --  
16 doing that well is even more urgent in a non-union  
17 environment, where to go beyond that runs afoul of the  
18 law.

19           MR. BROCK: And it could be that the term  
20 "leaders" kind of messes it up.

21           MR. FRUMIN: Yes. Well, yes and no. It depends  
22 on the situation.

1 MS. SPIELER: Okay. So B

2 MR. BROCK: Sorry, didn't mean to say a word.

3 MS. SPIELER: Yes. I think we do collectively  
4 understand the issue. And we will figure out a way to  
5 tack it on to our transmission to OSHA as a concern.

6 Nancy?

7 MS. LESSIN: Can I just -- I think there are two  
8 issues here, actually. And one is the, you know,  
9 consulting -- you know, getting advice from. It is not  
10 two-way, it is that.

11 The other is more of a discussion. And I do  
12 think we can flag that there are organizations, there  
13 are worker centers in many, many locations. There is  
14 the, you know, Government Accountability -- you know,  
15 there is a list of organizations that deal with  
16 employee concerns, right, that are out there, that  
17 could actually read something over and give some  
18 feedback, and it could be more two-way. And so, I  
19 think both of those things should be part of what OSHA  
20 can look at.

21 MS. SPIELER: I think this is really useful.

22 Okay. So, other issues and concerns regarding the part

1 one?

2 (No response.)

3 MS. SPIELER: So, it is almost a quarter to  
4 11:00, which is when our break was supposed to be. Why  
5 don't we take a 15-minute break, and we will reconvene  
6 to talk about two?

7 (A brief recess was taken.)

8 MS. SPIELER: By the way, earlier, Dave Eherts  
9 is traveling in Asia. Originally thought that he might  
10 call in for the meeting, and concluded that was really  
11 not doable, something that I totally second.

12 So, he isn't with us, but he was -- and Jon and  
13 others can attest to this -- an incredibly strong  
14 participant in this subcommittee. In particular,  
15 because of the kind of work he has done, is very  
16 attuned to issues of monitoring and questions of how to  
17 act pro-actively. And so, his participation on the  
18 subcommittee was invaluable, I think, and his absence  
19 is clearly noted.

20 Okay. So, we are going to move on to the second  
21 section: prevention, fostering a speak-up culture. We  
22 will have this conversation in the same way. We have

1 already had a summary of it. So, again, not  
2 wordsmithing, but concerns that you have about what is  
3 here, or issues that you think need to be here that are  
4 not here, or issues that are not adequately addressed.  
5 The floor is open.

6 Richard?

7 MR. MOBERLY: So this is actually in combination  
8 with the next section, too. You have done a nice job,  
9 I think, in some ways, of separating out the report of  
10 the underlying wrongdoing, and then a report of  
11 retaliation for reporting the underlying wrongdoing.  
12 But in some ways there is differences in language that  
13 I don't know if it is intentional or not.

14 So, on the number -- on part two you talk about  
15 giving a timely response to the report of underlying  
16 wrongdoing. And when you talk about a retaliation  
17 response system, you talk about de novo independent  
18 investigation, and then they get proper closure with  
19 the issue.

20 And you know, one of the problems when you  
21 report an underlying wrongdoing is employees don't know  
22 what happened to the underlying -- complaint about the

1 underlying wrongdoing. And that, I think, discourages  
2 other employees from coming forward. They think  
3 nothing was done about it, necessarily, unless there is  
4 something open and obvious.

5           And even if the underlying report is -- turns  
6 out to be invalid, I think there is value in coming  
7 back to employees and saying, "You know, we looked into  
8 this, and it is not actually what you think. You  
9 didn't have all the information," or whatever.

10           So, in some ways, by separating those two types  
11 of reports out, I think we lost something. And then,  
12 also, it seems to me like some -- a lot of these  
13 reports become intertwined in reality, that, you know,  
14 you make a report about underlying wrongdoing to the  
15 supervisor, and you get retaliated against, and then --  
16 so you go up a level, or you go outside, and now you  
17 have a report about the underlying wrongdoing and the  
18 retaliation. And so, I think we need to kind of  
19 recognize and deal with that intertwined nature of  
20 those reports.

21           You know, in OSHA -- and we have talked about  
22 this before -- OSHA often is dealing with both, in the

1 safety and health issues, the underlying wrongdoing and  
2 the retaliation. But in other statutes under Sarbanes  
3 Oxley, you know, they kind of have to go to the SEC to  
4 look at the underlying wrongdoing. And so I think this  
5 is a problem in the statutes and in the way OSHA has to  
6 deal with some of these issues. They are separate, but  
7 they are also intertwined.

8           And so, I didn't know if there was some way we  
9 could at least acknowledge that throughout -- when we  
10 submit this report.

11           MS. SPIELER: Response? Discussion? Jon?

12           MR. BROCK: I can add something. It is a good  
13 point. We struggled with this a lot. And in some  
14 earlier draft, these two sections were sort of the same  
15 section, and there were some differences, and we  
16 separated them, which I think was necessary. Because  
17 the issue and response -- it is a different kind of --  
18 should be semi-routine, sometimes runs into problems,  
19 and it is the pre-requisite.

20           It is really in the retaliation response that  
21 the de novo stuff becomes really important. You  
22 clearly have to tell the -- you clearly have to tell



1 someone, "Here is what we did with your issue. We  
2 investigated it." Or you might have involved them in  
3 the investigation. Whatever you did, "Here is what  
4 happened. For all the reasons that you said it was  
5 important, it is important."

6           In retaliation it comes back a little bit to  
7 what Eric was talking about, about management  
8 accountability. Well, if somebody didn't respond to  
9 you properly, or retaliated against you, well, there  
10 are some privacy issues involved in what I now say to  
11 the person. We probably need to do something that has  
12 some symmetry, that says, "Well, these wrong things  
13 happened, and bad things happened. We have addressed  
14 them, and it is your right to know about that." And  
15 other people should be able to see aspects of it.

16           But it is in retaliation area that -- your point  
17 is really right -- you have to go back and look at the  
18 underlying problem. Otherwise, you are bound to get  
19 that again, or you are bound to get the repression of  
20 that again. And so, you leave the retaliation  
21 ingredients in place, unless you go back to that.

22           So I think that you are raising a very useful

1 point. Emily and I were talking about it just before  
2 the meeting started. I didn't quite editorially pry  
3 them apart, and then get them to touch at the right  
4 places. So I think it is -- there is some useful  
5 comment we can make, going forward, that responds to  
6 that.

7 MS. SPIELER: Yes, I think it was one of the  
8 things the committee, I recall, was really grappling  
9 with when you met in person here in D.C., I think, a  
10 couple of meetings ago. And that sort of where do they  
11 touch and where are they different has been an ongoing  
12 challenge, I think, for the subcommittee.

13 Ken, did you have your hand up?

14 MR. WENGERT: No, but you are absolutely correct  
15 in your recollection of that discussion.

16 (Laughter.)

17 MS. LESSIN: I guess, for Richard, the same kind  
18 of question.

19 Having thought about this, do you have some  
20 guidance for either something that can be added, or  
21 would this be a comment to OSHA when we give this to  
22 them? Is there something in here that could be

1 constructed to cover that and/or would this be some  
2 guidance where we say, you know, "There is this issue"?

3           MR. MOBERLY: You know, as I said, I think it  
4 makes sense to pull them apart. And, obviously, you  
5 all had this long discussion about it, so I don't want  
6 to revisit that issue at all. I think some parallel  
7 language, though, where -- particularly on the  
8 investigation, and the response, and getting back to  
9 the employee might be worthwhile, or at least note -- I  
10 could go either way on it, to be honest with you.

11           And again, I don't want to wordsmith. So I  
12 think we could give guidance to OSHA to, you know,  
13 "Don't forget about the underlying concern, don't  
14 forget about the underlying wrongdoing, and the  
15 importance of responding to employees about that to  
16 help foster a speak-up culture."

17           MS. LESSIN: I am just wondering if, you know,  
18 Eric has his assignment to, you know, bring back a  
19 concept. Would you be -- is this something that --  
20 again, having thought about this in, you know, a  
21 sentence or two that we could look at? Because I think  
22 it is an important point, and if there is something we

1 can do in this document that we all feel good about --  
2 not the dotting of the I's and the crossing of the T's,  
3 but the concept -- then I would love for it to be in  
4 here.

5           MS. SPIELER: I am wondering, just as a -- I am  
6 going to leap in and try to be helpful here -- so it  
7 seems to me, in number two, there should be a clear  
8 "do" that says, "Do investigate reports of issues  
9 promptly, thoroughly, transparently, and report back to  
10 the person who brought them forward," an additional  
11 "do."

12           And then, maybe, the other question comes up in  
13 the next section, where the issue is, "and also look at  
14 the underlying problem." Is that -- does that get at  
15 -- Richard, at your concerns?

16           MR. MOBERLY: Yes, yes.

17           MS. SPIELER: All right.

18           MR. BROCK: Emily, say that again. I want to  
19 capture it, so B

20           MS. SPIELER: I have got it.

21           MR. MOBERLY: Okay. Tell me later. Tell me  
22 later.

1 MS. SPIELER: Yes. Marcia?

2 MS. NARINE: So, I really hadn't focused on this  
3 as much when we were talking about it for months and  
4 months. It is possibly because I spent so much of my  
5 former life dealing with our company hotline that it  
6 seemed like we got so many calls -- and every company  
7 feels they get a lot of calls -- but, in fact, only  
8 about three percent of employees ever actually use an  
9 employee hotline. And I think we need to add something  
10 so -- it brings up a number of things, as I go back and  
11 look at this. And I think all of us have -- "We should  
12 have done this." So this is one of those, "We should  
13 have thought about this more."

14 And so, statistics also show that, pretty much,  
15 the companies that are tracking this see maybe 1.3  
16 calls or reports for every 100 employees. So it is not  
17 a huge amount. So if you are in a company and you see  
18 hundreds of hotline calls, you think that is a lot.  
19 But it is really not the way that most companies learn  
20 of anything that is going on.

21 So, we talk about a issue of reporting to -- and  
22 we know that 46 percent of the time they -- employees

1 go to their supervisor first and higher management,  
2 say, 29 percent. I just did a report on  
3 whistleblowers, so I have a whole PowerPoint I am  
4 looking at from all my statistics, none of which I gave  
5 you the two years we were discussing all this.

6 (Laughter.)

7 MS. NARINE: So I apologize. But one of the  
8 things I am thinking about is, do we need -- we say  
9 that we need to talk to managers on how to  
10 constructively respond. But I don't really know that  
11 that is clear enough, because -- so if you go through a  
12 hotline, typically the supervisor is not conducting any  
13 kind of an investigation.

14 Typically, it is some other people that, best  
15 case scenario, are trained to conduct an investigation.  
16 But what guidance can OSHA give, as to what it means  
17 to constructively respond when they are first told of  
18 this report? Does this mean, okay, thank you, and then  
19 pass it on to somebody else? Because I think most  
20 managers would be very happy if that is all they had to  
21 do.

22 And, obviously, we are telling them not to

1 retaliate, but what does that mean? Do they engage in  
2 any kind of preliminary investigation? Are they  
3 performing an intake function, where they are getting  
4 the facts?

5           So I think we need to provide a little bit more  
6 meat on what that means to constructively respond,  
7 other than pass it on to somebody else and don't  
8 retaliate. Because if that manager is the person -- if  
9 the employee goes to that supervisor, then you have to  
10 assume the employee trusts that supervisor and, more  
11 importantly, as was just said, thinks that something is  
12 going to be done. They don't know how something is  
13 going to happen, but they want something to happen.

14           And if they are going to go back to their  
15 supervisor and say, "I told you about this six months  
16 ago, nothing has happened," you know, it has got to be  
17 a little bit more transparent as to, "Okay, now I have  
18 got this, I got to give this to our head of safety, or  
19 our internal audit, or HR," et cetera. "I am not going  
20 to be involved any more, but if you have more facts and  
21 you are comfortable talking to me, then let me know,"  
22 but just some kind of guidance, I think, that we need

1 to give to managers about what it means to  
2 constructively respond, because, in the hotline area,  
3 even though a lot of employees don't find a lot of  
4 satisfaction, most companies do have some kind of  
5 infrastructure that is meant to handle that.

6 But what is a manager supposed to do, other than  
7 not retaliate? So just a little bit more flesh on  
8 that.

9 MS. SPIELER: Discussion on that point?

10 MR. FRUMIN: No, it is good.

11 MS. SPIELER: Okay. Yes, Eric?

12 MR. FRUMIN: So, on the fourth bullet from the  
13 bottom, checkmark there, it says, "Yes, policy on no  
14 punishment, but be alert also to punishments for  
15 unrelated reasons." So, this is a great concept. I  
16 was trying to think how could a company operationally  
17 be on the alert.

18 How could HR -- if that is part of their  
19 function, monitoring supervisors or managers, HR  
20 practices, how do they flag cases that -- actions which  
21 are not punishments, but actually might, on review,  
22 turn out to have been -- a bad call by a supervisor out



1 of resentment for an employee having done something?  
2 And it led me to think about the other kinds of  
3 decisions that supervisors are going to make which are  
4 then going to skirt under the now-official radar for  
5 retaliation, which will effectively communicate the  
6 message to their underlings, you know, "You do this,  
7 you are going to end up with something you don't want."

8           So, I am thinking that punishments is not the  
9 only thing that should be looked at here, but changes  
10 in employee status. And in the new contingent work  
11 relationship world, we have people working variable  
12 hours, and changing -- especially in the non-union  
13 environment, you know, where you are imposing changes  
14 in hours, scheduling, where people are desperate to get  
15 -- taking away overtime opportunities, and so forth.  
16 So changes in employee status could be, effectively, a  
17 punishment without calling it that. It flies under the  
18 radar, and then that turns into, you know, three of  
19 those, and all of a sudden someone has got a  
20 retaliation claim.

21           And then, the other thing that I thought was  
22 interesting for comparison sake is the emerging anti-

1 coercion rule that DoT is working on under -- per the  
2 congressional mandate. So Bob tells me that it is  
3 going to be out very soon, and I think it is useful for  
4 OSHA to -- and others -- or us, certainly -- to take  
5 note of that. This is an effort to identify other  
6 kinds of management imperatives, which are not  
7 punishments, but they involve a form of B

8 MR. WENGERT: Discouragements.

9 MR. FRUMIN: Pardon?

10 MR. WENGERT: Discouragements.

11 MR. FRUMIN: Yes. They involve affirmative  
12 actions by employers that will get sort of the same  
13 results that they were trying to get by threatening  
14 retaliation if someone didn't do it.

15 So, you know, a classic case of truck drivers --  
16 you know, you don't want to drive these hours or  
17 whatever, we are going to do something else to you.  
18 Not terminate you, but you are not going to get the  
19 next load that you want -- will allow you to get home  
20 that night, or whatever it is.

21 So, we will see what that rule looks like. It  
22 is a really fascinating concept. I don't know whether

1 another one exists in the federal anti-retaliation law.  
2 Right. Bob is shaking his head. Probably not. And I  
3 think it does open up a really interesting window on  
4 what a proactive anti-retaliation program would look  
5 like. So I would just look at anti-coercion broadly,  
6 as another aspect of expanding the what is it we are  
7 looking for here, not just changes in employee status,  
8 but other kinds of coercive actions by supervisors.

9 Now, none of that needs to change this. I am  
10 just putting it in the record. I am not saying we need  
11 to change B

12 MR. BROCK: Yes, and I think we certainly  
13 discussed those kinds of things, and tried to subsume  
14 it, although we didn't address it as specifically.

15 MS. SPIELER: Yes, Marcia?

16 MS. NARINE: So I am wondering if this might  
17 address Eric's concern. And, obviously, it is going to  
18 be very different, depending on company size. So some  
19 companies won't have an HR, internal HR infrastructure.  
20 They might actually outsource a lot of their HR work  
21 and just call some HR consultant if there is an issue.

22 But one thing you can think about, assuming that

1 the person is named, and not an anonymous person,  
2 however -- whatever kind of infrastructure a company  
3 sets up -- and it is going to have to be very, you  
4 know, case-specific -- it might be something that maybe  
5 there is one person in HR that is tasked with knowing  
6 this person has raised a certain issue. And that may  
7 be a matter of -- so if this person gets fired,  
8 demoted, they are put in a RRIF list, et cetera,  
9 someone is going to have to go back and double-check  
10 the documentation to make sure it is correct.

11           In an anonymous case, that is going to be more  
12 difficult, obviously. And a situation where there is  
13 no internal HR infrastructure, that is going to be more  
14 difficult. For the -- there is also the thought of,  
15 you know, the employees typically know the basics of  
16 what retaliation is, and they believe that other things  
17 are retaliation, which really are, but other people  
18 don't know.

19           So, for example, you know, I used to get my  
20 Christmas vacation for those two weeks, and everybody  
21 knows I got it, but all of a sudden now I am working  
22 every day, and every holiday, et cetera. That is

1 retaliation of the employee.

2           PARTICIPANT: Right, right.

3           MS. NARINE: The supervisor may not think it is  
4 retaliation, although they are actually doing the  
5 retaliation. But maybe some kind of a list -- and you  
6 are typically going to see it in the employee handbook  
7 that everybody is clear on this is what the company  
8 believes is retaliation. That might be very different  
9 than what is legally retaliation.

10          PARTICIPANT: Right, right.

11          MS. NARINE: So, obviously, in-house counsel and  
12 outside counsel and others will craft what that  
13 language looks like, but so that there is something  
14 that is very clear that these are things that, if you  
15 have made a complaint, this is what you should feel  
16 free to come forward with, so the anonymous person  
17 could then go to HR and says, "I was Complainant 12345  
18 on the hotline," or "in that letter that was sent to  
19 you guys," and now all of a sudden this is happening.

20          Whether or not it is going to be easy to prove  
21 that there is a causal relation is something totally  
22 different. But often times, as we know, you know,

1 supervisors will start to try to investigate who the  
2 whistleblower was. And so that would be something that  
3 HR would have to sit there and go through, or legal, or  
4 somebody else would go through and investigate.

5           But I think, number one, if there is some kind  
6 of clear pronouncement, whether it is in the handbook  
7 or other places, about what the company considers  
8 retaliation, what is legal retaliation -- because,  
9 again, those might be two different things -- so that  
10 the employee knows that when they go to HR or somebody  
11 else, they can say, "This happened to me," and so that  
12 is there.

13           And then the second is some kind of system to  
14 flag. I know, in the past, if there was a person that  
15 made any kind of charge, whether to OSHA, to EEOC, to  
16 other things, I have advised that some entity basically  
17 have some kind of asterisk next to that person's name,  
18 so that there is a double-check before B

19           PARTICIPANT: Right.

20           MS. NARINE: -- certain kinds of what might be  
21 considered adverse employment actions are taken to this  
22 person. So it doesn't mean that they have a golden

1 halo of protection B

2 PARTICIPANT: Right.

3 MS. NARINE: -- and have to stab somebody on  
4 videotape before they get fired.

5 (Laughter.)

6 MS. NARINE: But it does mean there is going to  
7 be a lot of looking and a lot of questioning before --  
8 and, by the way, if this person did -- was on their  
9 final warning, had done a number of things, and, you  
10 know -- then, if the termination is to take place, then  
11 it needs to take place. But it is going to be an extra  
12 layer of checking.

13 PARTICIPANT: Yes, right.

14 MS. NARINE: So, I think if there is a way to  
15 reflect something a little bit more robust B

16 MR. KEATING: It is already -- I think it is  
17 already in the document, though. I mean if you look at  
18 number three, there is a whole section in there on, you  
19 know, discipline, though not the only form of  
20 retaliation, should not be imposed in response to any  
21 employee action to report an issue, to report against  
22 retaliatory discipline. An independent review with a

1 pre-established process should review any proposed  
2 discipline, and apply just culture principles, and ask  
3 questions like one, two -- I mean I think the B

4 MS. NARINE: But I think it is a matter of just  
5 something that is a little bit more proactive and  
6 preemptive before it gets to that.

7 MS. SPIELER: Nancy?

8 MS. LESSIN: So I am remembering something that  
9 I think OSHA already has that talks about adverse  
10 employee action, or employer actions, that include --  
11 you know, and I am trying to remember what it might be  
12 in, whether it is an old B

13 MS. NARINE: It was a long list.

14 MS. LESSIN: -- something, but it is -- it is  
15 like changing hours, and changing lunch breaks, and,  
16 you know, different kinds of things. I think it  
17 already exists in OSHA and could be just dumped here.  
18 Yes.

19 MS. NARINE: So, yes, I agree. So I think maybe  
20 then combine what we have already here with maybe that  
21 as an appendix, to say, "These are the kinds of things  
22 that you need to be looking for," because every company



1 is going to have their own definition of what they  
2 think is retaliation. So, say, these are some things  
3 that you know are going to be issues under OSHA, these  
4 might be issues under various other laws.

5           But when you have this process, this independent  
6 review by somebody who is trained and has no conflict  
7 of interest, which is the definition of independent,  
8 then at least everybody is on the same page, in terms  
9 of what they are actually looking at.

10           MR. KEATING: I mean it is -- obviously, we do  
11 have the whole day. So I think we can have some robust  
12 dialogue here. But I would be remiss, from the  
13 management perspective, if I didn't make a point of my  
14 own, which is, you know, I acknowledge that the  
15 standard for what is an adverse action has evolved, as  
16 it should, because I acknowledge that there are  
17 circumstances under which, for example, a single mother  
18 who is taking care of two kids and has to rely on that  
19 schedule, if it is changed, is going to be truly  
20 adverse to her, and it is going to be a bad thing.  
21 Okay? And it will be retaliatory.

22           But I also see many examples when an individual

1 who happens to be a poor performer, but it was never  
2 documented because he or she had a weak supervisor, and  
3 a new supervisor comes in and says, "All of these  
4 things are going on, you are not doing this, you are  
5 not doing that," and the individual senses the ice is  
6 cracking underneath them.

7           And so, what do they do? They run into either  
8 HR or compliance, and complain about some sort of  
9 perceived problem in the company, thereby wrapping  
10 themselves in some form of a bubble, such that no action  
11 can be taken against them because it will be deemed  
12 retaliation. And the broader we make any operational  
13 change that an employer cannot do, the more we tie up  
14 their ability to do their -- to run their business.

15           I mean it is a slippery -- it is a bit of a  
16 juggling act, and I think we have to at least  
17 acknowledge that employers have a right to schedule,  
18 transfer people around, and, you know, if in fact there  
19 is a -- I think the way to solve this one is we need to  
20 have the right system in place, so that if someone  
21 complains, and then a supervisor says, "I want to  
22 transfer them to so-and-so job," there has to be a

1 discussion around is that possibly retaliatory as to  
2 this individual.

3 I don't think it is fair to say that you can  
4 never take these actions, never transfer, reassign,  
5 change the times of their work --

6 MS. SPIELER: I actually don't hear anyone  
7 suggesting that. I mean I think the problem here is  
8 when there isn't a history of good supervision. So,  
9 clearly, when there is a history of poor performance,  
10 and someone comes forward, and -- or there is a history  
11 of disciplining people for violating legitimate safety  
12 rules, and then someone is legitimately disciplined for  
13 violating the safety rule post-injury, the question is  
14 what the history is, I think. And it is a question for  
15 -- on both the individual and on the -- and for the  
16 group.

17 But I -- but we are not going to solve the  
18 problem where there isn't the -- supervision has, for  
19 some reason, been weak, and the history doesn't exist,  
20 and then you have a whistleblower problem in this  
21 group. Those, I think, do end up often in litigation,  
22 as a result of the disagreement, and I don't see how we

1 can solve that here.

2           But I do think that those are legitimate issues,  
3 to some extent are already embedded in this document,  
4 and those concerns -- the set of concerns around the  
5 legitimacy of changes in status for employees is one  
6 that OSHA should be aware of when they draft a final  
7 document.

8           MS. NARINE: I will just say I -- you know,  
9 obviously, a management person, I completely agree with  
10 everything that Greg has said. When I used to do our  
11 training in-house, I used to tell people, "Fire early  
12 and fire often," you know? Don't wait for somebody to  
13 have their fifteenth thing to happen before you give  
14 them a first warning, because all employees will see  
15 that. And you start firing people, people will get the  
16 message. People will start to act right. And then you  
17 don't have these issues.

18           Because when you do have the issues, which not  
19 only go to OSHA and -- that is how we got our  
20 litigation rates down by 50 percent in 2 years. I  
21 started going around the country, giving people  
22 permission to fire people. Because the problem is some

1 managers don't want to fire people, but B

2 MS. SPIELER: It is hard to fire people.

3 MS. NARINE: But -- it is unpleasant. But some  
4 people deserve to be fired. And other employees see  
5 that. And when people don't -- and what you have is  
6 the inconsistent application. So, the person that is  
7 liked by the manager is the one who does not get fired,  
8 and the person

9

10 who is not liked is the person that gets fired, and  
11 that person files the OSHA complaint, the EEOC charge,  
12 et cetera.

13 So, at some point it is in the company's  
14 interest to be consistent. And for employees, fair  
15 means consistent. Fair doesn't necessarily mean be  
16 nice to me, it just means consistent, and treat  
17 everybody the same way. So, as we are talking about no  
18 one could be fired, I don't think that is the case.

19 But I think the employer has to bear the risk  
20 that, if they don't choose to put the right supervisors  
21 in place, and don't train those people as to effective  
22 discipline, and if they choose not to discipline

1 people, and not put records in place of poor  
2 performance, poor safety issues, there is going to be a  
3 legal risk that is going to come. Because when they  
4 fire the person who has never been disciplined, it is  
5 going to be a problem. That doesn't mean they  
6 shouldn't take that risk, but it is something that they  
7 need to be aware of.

8           So, I just think, to the extent that we have  
9 some kind of process, like you said, that says, "These  
10 are the kinds of things that are going to put you at  
11 risk for retaliatory discharge, you need to be aware of  
12 them, you need to be able to kind of watch the person."  
13 Again, no golden halo, they don't get a Get Out of  
14 Jail Free card, but there is going to be some  
15 additional level of scrutiny if you don't have the  
16 documentation in place to make whatever it is that is  
17 going to be perceived as a retaliatory action.

18           MS. SPIELER: Richard?

19           MR. MOBERLY: So there are two things here that  
20 are not legally required that I wanted to ask about  
21 when you think about building a different type of  
22 culture. And I just was wondering if they were

1 discussed.

2           So, the first one is whether you all discussed  
3 encouraging any sort of positive encouragement for  
4 speaking up beyond "We are not going to retaliate and  
5 we are going to give you a pathway to speak up." Was  
6 there any discussion about the rewards, or anything  
7 like that?

8           MS. SPIELER: Go ahead, Jon.

9           MR. BROCK: I can say yes, there was. And in  
10 the -- it is probably -- it may not be explicit enough  
11 in the measurements part. We certainly did talk about  
12 incentives. Ken, I think, talked about -- and Dave  
13 talked about programs where managers had incentives for  
14 responding well to it, encouraging that in the  
15 beginnings of some other kinds of recognition programs  
16 for that.

17           Ken, is there anything there that you B

18           MR. WENGERT: It was. In this particular  
19 section I think we just left it very generic, with the  
20 first bullet point B

21           MR. MOBERLY: Right. But I do see it. It is in  
22 -- the second one on number five, monitoring progress,

1 incentives to reward employee behaviors.

2 MR. BROCK: Should reward employee and  
3 management behavior, yes.

4 PARTICIPANT: It is in the first of the dos  
5 under the dos and don'ts in the same B

6 MR. MOBERLY: Oh, number five, right. Okay.

7 PARTICIPANT: Preventative activities.

8 MR. MOBERLY: Right. The other thing I wanted  
9 to ask about was, Jon, when you introduced all this you  
10 said on number four, for anti-retaliation training, it  
11 was important for managers to have skills for defusing  
12 situations, and you kind of mentioned peer group  
13 pressure and retaliation. And it seems to me that that  
14 is not explicit in this number two. A speak-up culture  
15 would deal with kind of peer group pressures on not to  
16 speak up.

17 I often tell the story that I have a colleague  
18 who, whenever he asks me about my research on  
19 whistleblowers, asks me about how my research on  
20 snitches is doing. Right?

21 (Laughter.)

22 MR. MOBERLY: I mean that is the reality of



1 culture. And it is not just a management-driven  
2 culture, it can be a peer group-driven culture. And  
3 so, there is -- I didn't know if that could be more  
4 explicit in here, as we submit this, to think about how  
5 you can change the culture, not just from a management  
6 -- top-down, but from a education of employees,  
7 generally.

8 MS. SPIELER: So, how about -- this is actually  
9 -- I was looking at root out formal and informal  
10 incentives and value systems that encourage or allow  
11 retaliation. But, really, you want to add to that, "or  
12 discourage reporting," it seems to me. And those peer  
13 systems are part of that. Does that make sense?

14 If you look at the dos on number two, and you go  
15 down one, two, three, four, five, six, maybe it should  
16 say, "Root out formal and informal incentives, and  
17 value systems that encourage or allow retaliation, or  
18 discourage reporting."

19 MR. MOBERLY: That is great, thank you.

20 MS. NARINE: I want to add one more thing to the  
21 conversation about incentives. We did have some  
22 discussion very early on about what kind of incentives

1 could be provided for employees who come forward. And  
2 part of the conversation -- I remember thinking we  
3 thought about something to the effect of what does that  
4 incentive look like? Is it a monetary incentive, is it  
5 a recognition incentive?

6           And then, are you saying, if you say we are  
7 going to reward you for coming forward on safety  
8 issues, that that is more important than sexual  
9 harassment or environmental issues or fraud issues,  
10 because there is not necessarily some kind of monetary  
11 or other kind of reward for coming forward on those?

12           And maybe there is, maybe there isn't, but I  
13 think, as OSHA looks at what that might look like, if  
14 there is any more specificity to providing incentives  
15 or rewards for people to come forward internally, there  
16 has to be a recognition that there is a wide range of  
17 laws that employees might want to raise that aren't  
18 covered by OSHA's purview.

19           And is there -- because I remember, for example,  
20 when there was issues about Dodd-Frank whistleblower,  
21 which is not under our purview, but there were a lot of  
22 companies that were saying, "Should we offer some kind

1 of money to make somebody come forward to us, as  
2 opposed to go to the SEC?"

3           And I said, "Well, how much money can you  
4 possibly give somebody that is not up to \$100,000, and  
5 in which case, is it really" -- don't you want  
6 companies -- don't you want employees to come forward  
7 because they are trying to do the right thing for the  
8 company? So there is a whole lot of issues that come  
9 out with what you are talking about, providing  
10 incentives.

11           So, clearly, you want to reward good behavior by  
12 managers and employees, but what does that look like,  
13 and just some sensitivity to the fact that there is a  
14 range of other things that aren't in OSHA's purview,  
15 and you don't want to make it look like you think  
16 something is more important than the other, unless you  
17 do, in which case we just need to be sensitive to that.

18           MS. SPIELER: Jon?

19           MR. BROCK: A couple of comments. As we think  
20 about things that would be clarifying and good to have,  
21 there are certainly clarifications that are just  
22 probably pretty crucial that are being pointed out.

1           We had contemplated -- and I took it out, except  
2 for I missed one place here -- we had in here the word  
3 "link" in a lot of places where you could go to an  
4 existing list of "here are forms of harassment and  
5 retaliation that are not specific employment adverse  
6 actions," and we had that word probably in here in  
7 about 30 places. And I actually couldn't fit the  
8 document into this format if I left that word in. So  
9 -- you know what 35-letter words does to your spacing?

10           (Laughter.)

11           MR. BROCK: So we took that out. But there is a  
12 list of examples that we created -- we didn't -- we  
13 took it out a while ago, so we didn't vet it  
14 particularly carefully.

15           But a lot of these details would be very  
16 valuable in referring to sources where they exist,  
17 because you get kind of lopsided here. So I just -- I  
18 wanted to bring that back into the conversation.

19           MS. SPIELER: It is certainly true that OSHA  
20 could add in links, as appropriate. And they often do,  
21 on these kinds of documents.

22           MR. FRUMIN: And one other comment on this

1 section, which is it doesn't discuss the question of  
2 preventing retaliation by employees in other closely-  
3 related business entities: contractors, staffing  
4 agencies, clients, the other workers who are a pretty  
5 integral part of the employer's B the host employer's  
6 business in, you know, a whole range of ways. And if  
7 the -- if there is no acknowledgment of the potential  
8 for retaliation by those entities, and the employers  
9 try to run a prevention program solely within their own  
10 four walls, you know, they might miss something.

11           And, whether it is a report from a contractor or  
12 employee who is telling something that -- to the host  
13 employer that the host employer really needs to know,  
14 but the supervisor, the boss, doesn't want to let on to  
15 about, you know, potential failure in a critical safety  
16 system to, you know, a host of other things, you know,  
17 all of a sudden the employer is now on the hook -- the  
18 host employer is on the hook as a joint employer for a  
19 lot of problems that they didn't think they were -- you  
20 know, that their business model didn't anticipate.

21           So, I don't want to belabor it, but I think the  
22 fact that related employers, clients, contractors,

1 joint employer, you know, they have -- they should be  
2 within the purview of a prevention program. I don't  
3 know how you would exactly deal with them as an -- part  
4 of an anti-retaliation effort. That gets a little  
5 sensitive. But certainly as part of a prevention  
6 program, it is worth considering something like that,  
7 too. And I think, you know, sort of the mirror of  
8 including those employees and training and, you know,  
9 whatever -- there is lots of examples of how they are  
10 included in other kinds of things.

11 MS. NARINE: I would like to echo what Eric  
12 said, and I think it is particularly important, since  
13 SOX is within our purview, that, after the loss in  
14 Supreme Court decision, the private contractors have  
15 protection. You need to add that in, which includes  
16 auditors -- this is obviously more in the financial  
17 realm, but, you know, auditors, outside counsel, et  
18 cetera. And there have been some filings that affect  
19 it already.

20 So, I think, to the extent that we want to add  
21 that in, not just in the fostering a speak-up culture  
22 -- because, from SOX, I am not sure that people are

1 going to be comfortable doing that -- but definitely in  
2 the anti-retaliation training, to make sure that people  
3 know, and the policies, that people know that there are  
4 others that don't directly work for you, but could have  
5 potential causes of action against you, especially in a  
6 SOX context.

7 MS. SPIELER: Yeah, J.J.

8 MS. ROSENBAUM: I would just say in a lot of the  
9 -- even in the same workplace you are going to have  
10 employees that look indistinguishable, but actually,  
11 one is an employee, one is a subcontractor, one is a  
12 temporary staffing agency. If you have got another  
13 entity engaged in rampant retaliation, it is going to  
14 undermine whatever entity in there does have a good  
15 policy.

16 So, whether it is in this section or more  
17 broadly, it would seem to me a best practice is doing  
18 this and making sure that the subcontractor's temporary  
19 staffing agencies, et cetera, that you work with also  
20 do it, as well. And, in fact, it is mandatory, as part  
21 of your contract.

22 MR. KEATING: I just want to -- not to put

1 Anthony on the spot, but I just had a question. Maybe  
2 you don't have any data or intelligence on this, but  
3 flowing from what Eric raised and Marcia mentioned,  
4 just a year-and-a-half or so ago, the U.S. Supreme  
5 Court dramatically broadened the pool of companies that  
6 are now liable under SOX from, by my count, 3,000 or  
7 4,000 publicly-traded companies to something like 6  
8 million private employers around the U.S.

9           Have you seen any type of upturn or spike in SOX  
10 complaints?

11           MR. ROSA: Actually, in fact, in terms of  
12 Sarbanes-Oxley, we have seen a decrease in the filings  
13 of Sarbanes-Oxley within OSHA. In fact, back in 2005,  
14 2004, when SOX was first started, we received  
15 approximately -- and I'm thinking from the top of my  
16 head -- about close to 300 complaints. Last year we  
17 received in Fiscal Year 2014 the lowest number of filed  
18 SOX complaints, at 145.

19           MR. KEATING: But I predict that is going to  
20 change this year, because I think there is a lull  
21 before people start to kind of realize their rights and  
22 so forth.



1           I mean Emily pointed out yesterday that the SOX  
2 complaints did aggregate to \$20 million in awards.

3           MR. ROSA: Right, right.

4           MR. KEATING: So, I think -- and I think, in the  
5 -- this is maybe speculation, and probably is  
6 speculation, but I think, in the wake of this decision,  
7 and as people start to realize their rights, you are  
8 going to see an uptick.

9           MR. ROSA: I do want to point out that OSHA has  
10 always stood -- it has stood on that position, that  
11 contractors and subcontractors -- in fact, even  
12 subsidiaries. Because before the amendments to SOX  
13 were enacted because of Dodd-Frank, OSHA had a process  
14 that we called the Integrated Employer Test, which  
15 included contractors, subcontractors, it included  
16 subsidiaries of parent companies.

17           So, we always had that position. And, actually,  
18 we are very glad to get that -- to get the Lawson  
19 decision in our favor, but that has been the agency's  
20 position all along.

21           MS. NARINE: I think I agree with Greg, though.  
22 When I sat on the panel in November, I talked about

1 whistleblower as one of the -- a panelist was a defense  
2 lawyer who said that he is -- his office is seeing more  
3 inquiries after Lawson. So I think it really is a  
4 matter of time.

5           Now, whether some things are being settled  
6 because maybe there is demand letters going out, and  
7 things are being settled very quickly, that is entirely  
8 possible. But I think that you are going to see more  
9 or -- at least more people get B

10           MS. SPIELER: Or maybe compliance is getting  
11 better.

12           MS. NARINE: Maybe compliance is getting better.

13           MR. ROSA: And, at the same time, under SOX B

14           MS. SPIELER: That's the positive way to look at  
15 it.

16           MR. ROSA: And at the same time B

17           MS. SPIELER: Less retaliation.

18           MR. ROSA: And at the same time, under SOX, they  
19 do have the reward program, too.

20           MS. NARINE: Right.

21           MS. SPIELER: Yeah.

22           MR. ROSA: Through the Securities and Exchange

1 Commission. So there is a little bit of competition  
2 between, you know, which form are they going to file  
3 under.

4 MS. SPIELER: Right. It will be interesting to  
5 see, how -- whether the Supreme Court decision has an  
6 effect on on-the-ground behavior, not only there, but  
7 in some of the decisions that have been made under  
8 Title VII.

9 So -- but so far, may I say that, despite the  
10 tightening of the proof standard for retaliation under  
11 Title VII, the number of complaints of retaliation  
12 continue to rise at a rapid rate at the EEOC.

13 Okay. So, we are still on two. And this last  
14 -- I am puzzling over this last and, I think, very  
15 important point about the related contracting  
16 relationships, and whether we have -- we can actually  
17 address that concretely, or whether we just want to  
18 request that OSHA pay attention to this issue  
19 throughout the document, in terms of -- because I think  
20 there is a lot of thought being given to this issue  
21 right now at OSHA, and I would take guidance from the  
22 committee, because I am going to try to do a summary

1 during lunch time of where we are and -- is a general  
2 guidance suggestion fine?

3 MR. FRUMIN: I think that is fine.

4 MS. SPIELER: Okay.

5 MR. FRUMIN: I mean it would be difficult to  
6 create a best-practice document which teases out these  
7 nuances.

8 MS. SPIELER: Yeah.

9 MR. FRUMIN: So I would just say, from OSHA's  
10 standpoint -- because the other ones would have to make  
11 these B

12 MS. SPIELER: Yeah.

13 MR. FRUMIN: -- calls on which employer we are  
14 dealing with, you know.

15 MS. SPIELER: Yeah, okay. Anything else on  
16 number two?

17 (No response.)

18 MS. SPIELER: I guess I actually had a note  
19 here, myself, that I just want to throw out. And what  
20 I can't figure out is if it is already here or not.  
21 And this is just coming out of a recent observed  
22 experience, which is that it seems to me that there

1 needs to be a don't, explicit don't, that says, "Don't  
2 turn the investigation on the whistleblower." Is there  
3 here somewhere?

4 MS. NARINE: I am sorry, can you repeat that?

5 MS. SPIELER: Don't turn the investigation onto  
6 the whistleblower. So I come forward, I raise a  
7 concern -- this is happening in my organization right  
8 now, that is why I am sort of -- it is at the top of my  
9 mind.

10 And then the next question is, "Tell me about  
11 this guy who came forward."

12 MR. FRUMIN: I think it is the fourth B

13 MS. SPIELER: Is it here?

14 MR. FRUMIN: -- the fifth -- "Focus first on the  
15 employee who reported before investigating" --

16 MS. SPIELER: Okay, fair enough. I missed it.  
17 Yes, definitely.

18 MR. BROCK: And it is a great point. And I  
19 think we also deal with it at the very bottom under the  
20 do and don't. "Understand that there may be false  
21 scenarios to discredit the employee."

22 MS. SPIELER: Yeah, okay. Terrific. Okay. And

1 then, my last question -- although I hesitate to ask  
2 this -- is the issue that came up yesterday that I  
3 promised Greg we would re-raise today. Is that here,  
4 or do you want to have that conversation separately,  
5 about the issue of various agreements that employees  
6 are asked to sign with regard to not raising issues.

7 MR. KEATING: I am happy to take it on now, or  
8 stand alone later on. I don't really care.

9 MS. SPIELER: Why don't we discuss it for the  
10 next few minutes? Because I -- it would be helpful to  
11 me to get a sense about whether this is something that  
12 requires considerably more discussion within the  
13 committee and should be put off, or whether this is  
14 something that should be added in some way to -- in a  
15 directive to OSHA now, as we transmit this document.

16 So I cut you off yesterday. I felt, frankly,  
17 somewhat bad about that. And so, I am actually going  
18 to invite you to talk now about the issues that you  
19 were going to raise when Tom Devine was with us  
20 regarding his -- their petition for rulemaking, and how  
21 this bears on our conversation today.

22 MR. KEATING: Okay. Well, so I wanted to make a

1 few points, but I want to start at the end, which is I  
2 actually think this is a very easy fix. I actually  
3 think that we can probably make a recommendation and  
4 solve this problem pretty easily. But let me get to  
5 that by a couple of comments.

6           First of all, with regard to this concept, or  
7 this premise that employers are out there trying to  
8 impose gag orders on individuals -- and the reason that  
9 they insist on employees signing confidentiality  
10 agreements, for example, or separation agreements, but  
11 more of the former -- because they want to muzzle the  
12 whistleblower, and that is the intent behind these  
13 agreements, I have to say that -- and I have been doing  
14 this for 25 years, and I represent employers of all  
15 shapes and sizes -- I have never seen that as the  
16 stated intent behind a separation agreement or a  
17 confidentiality agreement.

18           And to that point, there is a reason for the  
19 confidentiality agreements and the separation  
20 agreements that is entirely legitimate, and has been  
21 recognized by many courts for decades and decades, and  
22 that is employers have a legitimate business interest

1 in protecting their confidential information. I have a  
2 pricing list. I have a marketing strategy. I have any  
3 number of different kinds of proprietary information  
4 that this individual has worked on for five years, and  
5 it is the tabula rasa for how our business operates.  
6 And if it gets into the hands of somebody else who is a  
7 competitor, our ship is sunk. That is why these  
8 agreements are entered into, period end, in my opinion,  
9 and not to muzzle someone from going and talking to a  
10 third party about their, oh, allegations of unsafe  
11 environments, or fraudulent, you know, workplaces.

12           So, I kind of take exception with this notion  
13 that there is a desire to go out and impose a gag on  
14 everybody in the workplace by these systemically  
15 retaliatory, you know, agreements. I think there is a  
16 legitimate reason behind them, and I don't think there  
17 is any intent to muzzle anybody.

18           But going to my point -- and I mentioned  
19 yesterday -- that a lot of publicity came from the  
20 SEC's recent clamp-down on a company for having a  
21 confidentiality policy that they gave everyone during  
22 an investigation. They said, "If your -- you have to



1 participate in this investigation, but you can't talk  
2 to anybody about it." I would never have advised a  
3 client to give anybody that document. The KBR general  
4 counsel is on record saying, "We never intended to  
5 muzzle anyone, we just -- we wanted to ensure that this  
6 investigation was effective, and that people didn't go  
7 talk to -- taint it."

8           But the simple fix is make clear at every  
9 juncture, in all of these agreements, whether it is a  
10 stand-alone confidentiality, a separation agreement, a  
11 settlement agreement, an employee handbook, an  
12 investigation protocol, make clear that nothing  
13 precludes the individual from reporting or  
14 communicating with a government agency, including but  
15 not limited to the SEC, the Department of Labor, or the  
16 EEOC. That is the fix. And I don't know of a single  
17 employer who has bristled against that, and I have  
18 recommended about 100 of them in the last week.

19           (No response.)

20           MS. NARINE: So just to give some context, the  
21 old language that -- over \$100,000 settlement was -- "I  
22 understand that, in order to protect the integrity of

1 this review, I am prohibited from discussing any  
2 particulars regarding this interview and the subject  
3 matter discussed during the interview without prior  
4 authorization of the law department. I understand  
5 unauthorized disclosure of information may be grounds  
6 for disciplinary action up to and including termination  
7 of employment."

8           I think that goes to what Greg was saying, that  
9 this is something that most people would consider to be  
10 standard, standing alone, because the thought is, "I  
11 don't want you going out to the press to discuss the  
12 fact that there is an investigation going on, or  
13 something is happening. I don't want you talking to  
14 anybody about it."

15           That is -- so the new language that the SEC  
16 required says nothing in this confidentiality statement  
17 prohibits me from reporting possible violations of  
18 federal law or regulation to any governmental agency or  
19 entity, including but not limited to -- and then it  
20 goes DoJ, SEC, Congress, any inspector -- any agency  
21 inspector general, or making other disclosures that are  
22 protected under the whistleblower provisions of federal

1 law, regulation. I do not need prior authorization of  
2 the law department to make any such reports or  
3 disclosures, and I am not required to notify the  
4 company that I have made such reports or disclosures.

5           That is kind of where that was coming from. So,  
6 just to give some context of what the -- so that is  
7 what they changed. And then agreement from the  
8 settlement.

9           I would just add to -- you know, to the extent  
10 that the SEC is -- this was in the context of an SEC  
11 Dodd-Frank whistleblower. I have not -- I did not have  
12 a chance -- by the time I saw the email, I had already  
13 woken up this morning, I didn't have a chance to see  
14 the petition for rulemaking. So I apologize if I don't  
15 have the substantive -- what he specifically is asking  
16 for.

17           One of the things I think is concerning  
18 companies on the opposite side from the -- on the SEC  
19 whistleblower thing after this is that the SEC has been  
20 asking companies for all codes of conduct, non-  
21 disclosure agreements, severance agreements, settlement  
22 agreements, et cetera. And so, companies do have to

1 tighten up the language. There is a petition for  
2 rulemaking over there that was filed last July to look  
3 at how to make this stronger. Because the premise is  
4 we want people to come forward because we are offering  
5 financial rewards, and this language is going to say,  
6 "Don't come forward."

7           The question then becomes just what are the  
8 parameters. It might be as easy a fix of you can go  
9 talk to whomever you want, as long as it is the  
10 government. I just think that the language has to be  
11 very specific, because it also goes into the context of  
12 not just what is written -- because that is something  
13 employees signed -- but what do investigators say to  
14 people when they have the conversations. How does that  
15 affect when an investigation is going on, and I say,  
16 "Look, you got to kind of keep this information  
17 confidential unless, by the way, you want to go to the  
18 government, and that is perfectly fine."

19           I think, practically, saying we are going to put  
20 this clause in agreements is a easy fix. How it  
21 actually happens in companies, when people are in the  
22 middle of an ongoing investigation, I think, is a

1 little bit more nuanced, and not as easy as let's put  
2 something in some document.

3 MS. SPIELER: So let me just separate out two  
4 separate issues for the purposes of our conversation  
5 today. One is the petition for rulemaking, the issue  
6 of whether OSHA should issue rules, whether anyone  
7 should issue rules on this issue, and how complex they  
8 need to be.

9 And the second is, in a best practices guidance,  
10 is there something this committee thinks should be  
11 included that says, generically, "Don't use codes of  
12 conduct and various individual agreements to discourage  
13 reporting"? And B

14 MS. NARINE: I think you want to say something  
15 to the effect of, "It is appropriate to have  
16 confidentiality agreements and others to protect your  
17 proprietary information, trade secret," you know,  
18 "information about employees that is governed by  
19 privacy laws," what that is, "but you don't want to" --  
20 you know, a don't would be "don't have any language,  
21 orally or in writing, that prohibits or punishes  
22 employees from reporting possible violations of a

1 federal law, regulation, to -- and you can actually use  
2 similar to the language that B

3 MS. SPIELER: But in a best practices situation,  
4 we are trying to encourage people to come forward  
5 internally, as well as to the government. And so,  
6 again, I am trying to separate out this sort of formal  
7 rulemaking from what might be advice from this  
8 committee about best practices. And it may be we can't  
9 do that simply, and so we should either postpone the  
10 conversation or whatever.

11 But I am wondering if there is a way of getting  
12 at this B

13 MS. NARINE: I think you just tell them, "Don't  
14 do this," you know, don't -- you know, you don't want  
15 people -- you want people to encourage, but don't tell  
16 people, in the context of when they are speaking to  
17 you, "By the way, you can't ever talk to the  
18 government." I don't think it is that difficult,  
19 because I think most companies I know -- everybody --  
20 all the companies are getting legal alerts from people  
21 like Greg and others saying, "Be careful about your  
22 language."

1           But right now, for those companies that aren't  
2 paying attention, the standard language is, "You are  
3 talking to us? You don't talk to anybody else." So I  
4 think we have to have a don't that says something to  
5 that effect, if that is what we care to do.

6           MS. SPIELER: J.J.?

7           MS. ROSENBAUM: Well, I mean, on that point,  
8 what I heard Greg saying, which I think is good, is  
9 even more affirmative. Like, "Do say that, in the  
10 context of whatever agreements you have, it does not  
11 include going to the government on something that you  
12 believe is good faith," and I think that is helpful.

13           What I heard Tom say yesterday -- and I didn't  
14 have a chance to read the petition, and I -- this is  
15 the first I have heard of it -- but I heard a couple of  
16 other issues in there, which I think we should just be  
17 clear about whether we are addressing or not, which go  
18 beyond confidentiality. That was agreements that  
19 require workers to bring issues and evidence to the  
20 employer before going to the government, and also  
21 agreements at the close of employment that require you  
22 to say under oath that you have not seen anything that

1 you have not brought forward.

2           There may be -- and then I guess there is  
3 something about the conduct in which you pursue people  
4 and litigation who believe they may be bringing good-  
5 faith claims forward through what he would characterize  
6 as SLAPP suits, or other things where there is a huge  
7 imbalance of finances and litigation.

8           So, I would say, in addition, where I think the  
9 suggestion you gave on the confidentiality agreements  
10 is pretty straightforward in helping with that, those  
11 issues to me seem a little bit different, and I think  
12 we should decide whether we are going to take them on,  
13 or whether we need more space.

14           MS. SPIELER: Yeah, Eric.

15           MR. FRUMIN: This raises the question of whether  
16 this document in general seeks to forestall -- I won't  
17 say prevent or discourage, but forestall the "external"  
18 complaint process. I think that is -- from the first  
19 sentence in number one, that seems to be the purpose.  
20 And I think it is worth addressing that presumption in  
21 some kind of a comment that we -- when we transit this,  
22 because there is a legitimate issue as to whether or



1 not managers really want to do that.

2           I have seen multiple situations where corporate  
3 was very thankful that people at the local level went  
4 to, you know, a government agency, because that was the  
5 only way that corporate could get the attention of  
6 local managers about a problem that the local managers  
7 were resisting dealing with. I mean, literally, that  
8 level of tension between corporate and a local  
9 facility. Sometimes union's processes can have the  
10 same effect, but it depends. Sometimes the HR function  
11 is all at the local level, delegated down there.

12           So, I have -- you know, just like -- it  
13 kickstarted at corporate. Thought they knew what was  
14 going on, they didn't have a reporting system that this  
15 thing anticipates, and -- Ken is nodding.

16           So, I am not saying we need to change the focus  
17 of this, but we just should make that presumption  
18 explicit, and point to the possibility that there well  
19 could be best practices which actually are -- even want  
20 to promote external reporting, where employees thought  
21 that was appropriate, which isn't everywhere, and it  
22 may not be the first preference within the management

1 system. But sometimes, you know what? It might be a  
2 good thing, from the standpoint of the management  
3 system, never mind the workers, the government, or  
4 whoever.

5           So, just -- you know, just a short comment along  
6 those lines, you know, just to accompany this, just  
7 raising the presumption.

8           MS. SPIELER: Richard?

9           MR. MOBERLY: So, most people probably already  
10 know this, but OSHA has, as part of its review of  
11 settlement agreements, language, standard language,  
12 that they put in there about "nothing in this agreement  
13 shall allow you to impede, interfere," et cetera. And,  
14 you know, that is specifically for settlement  
15 agreements, but it might be noting in here that, you  
16 know, whether that could be more applicable, as part of  
17 -- you know, as Greg said, for employment agreements,  
18 and that sort of thing, not just settlement agreements.

19           MS. SPIELER: Yeah, I am still a little unclear  
20 -- leaving Eric's more generic comment aside -- whether  
21 it is the interest of the committee to try to add  
22 something about this to this document at this point,

1 because I am not hearing a full consistency about what  
2 it would be, and I am struggling over how it would be,  
3 other than to say, "This is an issue that OSHA needs to  
4 deal with as a component of this."

5           Do we have additional concrete things we  
6 actually want to attempt to add to the document today?  
7 We can decide later whether we want to continue a  
8 conversation about this issue separately.

9           Bob?

10           MR. KEATING: I just don't see why it would be  
11 that hard to have a suggestion that, "Do ensure that in  
12 any employment agreement or policy which relates to  
13 confidentiality of information, there is a carve-out  
14 for communicating and reporting with the government."

15           MR. MILLER: Right. That is what I was going to  
16 say, Greg. I was going to point out that perhaps a  
17 final bullet in that section, too, that would have  
18 something more affirmative that says there is nothing  
19 in these agreements that should preclude the reporting  
20 -- because you are talking about a speak-up culture.  
21 So you want them to speak up internally, but you also  
22 don't want to prevent them from speaking up externally.

1 And those agreements shouldn't have that language.

2 And then, if we take that affirmative approach  
3 in a best practices document, you are giving guidance  
4 to people to keep them out of trouble down the road in  
5 such agreements.

6 MS. TUCKER-HARRIS: I would like to say one  
7 thing. With respect to that, if there is something  
8 included in this document with respect to reporting to  
9 the federal government, federal agencies, or any  
10 regulatory agency, it shouldn't require the  
11 whistleblower then to tell the employer that they have  
12 reported it to B

13 MS. SPIELER: Oh, yeah, okay.

14 MS. TUCKER-HARRIS: It has a chilling -- this  
15 has the same chilling effect.

16 MS. SPIELER: So would that address your  
17 concerns, J.J.?

18 MS. ROSENBAUM: I mean I think it is a third  
19 concern, the question of whether you can mandate going  
20 to the company first, and giving them all the evidence.  
21 I mean I think Eric also raised this question, but  
22 there may be instances where that is not appropriate.

1 So I think there is sort of three issues.

2 I guess the fourth is -- sorry, but the fourth  
3 is when you finished B

4 MS. SPIELER: I am not sure I have got the three  
5 sorted out B

6 (Laughter.)

7 MS. ROSENBAUM: When you are departing, you  
8 know, signing a document that says, "I swear under oath  
9 that there were no issues I have not reported" --

10 MR. KEATING: See, I have a -- I guess I -- this  
11 is where we show that we have some disagreement,  
12 because I have no problem at all with something like  
13 that. Maybe it is not under oath, but why shouldn't an  
14 individual, as part of -- you know, as part of our  
15 commitment to best practices, we want to know about any  
16 problems. Why can't you say that I have flagged  
17 whatever problems I am aware of? I don't understand  
18 how that is retaliating against you, or even B

19 MS. SPIELER: Because some people leave so that  
20 they can talk.

21 MS. NARINE: But they are already leaving. So  
22 what if you do it during an exit interview?

1 MS. SPIELER: Yeah, well, I don't -- anyway, I  
2 guess I have a little bit of -- about this because of  
3 something that was put in front of my son when he was  
4 leaving a job. But let me throw out some language that  
5 I think is wider, but respectful: "Do ensure that no  
6 employment agreement, separation agreement, or policy  
7 would discourage or prohibit reporting to the  
8 government."

9 MS. NARINE: Yeah. I would add a few more words  
10 in there, but I can send them to you during the break.  
11 And codes of conduct, et cetera.

12 MS. SPIELER: I mean I think of those as  
13 policies, but fine.

14 MS. ROSENBAUM: I mean I think that what Greg  
15 suggested goes farther than that.

16 MS. NARINE: Yeah, I think it is B

17 MS. SPIELER: Oh, okay.

18 MS. ROSENBAUM: So B

19 MR. KEATING: It is just more concrete. You  
20 know what I mean? Because there is all sorts of what  
21 is "discourage," or, you know, I mean -- I don't know.

22 MS. NARINE: And I can send you the language

1 that SEC B

2 MS. SPIELER: How about during the lunch break,  
3 if people want to take a stab at drafting something,  
4 maybe J.J., you -- and Marcia, you could work with Greg  
5 on it and come back after the lunch break and see if we  
6 have something that there is sort of consensus -- we  
7 can reach a consensus on. Is that -- would that work?

8 MS. NARINE: Yeah, I just wanted to respond to  
9 some of the stuff that J.J. said, and also part of what  
10 Greg said. I think it is not uncommon, and I think it  
11 is appropriate for employers to be able to ask people,  
12 when they are leaving they have already quit, to say,  
13 "Can you let us know if you saw anything that is wrong  
14 that we need to take care of that you didn't already  
15 report," because it is not fair to hold companies  
16 responsible for not solving problems if we then say,  
17 "But employees don't have to tell us about them, and we  
18 will find out about it from the government."

19 And I feel very strongly about this issue. This  
20 is an issue that, when the SEC Dodd-Frank whistleblower  
21 issue came up, the reason that they have language that  
22 provides higher rewards if you go internally --

1 assuming there is a credible, functioning compliance  
2 program -- obviously, if there is not, then -- is  
3 because I spent time talking to the SEC, I testified  
4 before Congress on this issue. You cannot expect to  
5 have employers solve problems if they first learn about  
6 it because they get a report from the SEC or a  
7 plaintiff's lawyer.

8           So, to the extent that there is an issue -- but  
9 you also have to have some kind of process where  
10 employees feel like they are doing -- so if we have  
11 this 10-page document that is best practices, and we  
12 are trying to encourage reporting internally, I think  
13 it is inconsistent if we don't address somewhere the  
14 fact that when employers -- you know, you don't have to  
15 say it is forced.

16           I have never seen a, you know, blood oath. I  
17 have typically seen, you know, in an exit interview  
18 process, you know, "Have you seen any information?"  
19 Because if you look in the other context, by the way --  
20 let's take FCPA. Companies all over the world that  
21 have to respond and have to comply with the provisions  
22 ask employees and suppliers to certify that they have



1 not seen any conduct that is illegal. So it is not  
2 something that employees -- I mean -- and the different  
3 contexts might be different.

4           But to the extent that employees, you want them  
5 to speak up, I don't think it is inappropriate to say,  
6 "Including when you are leaving, if you have seen  
7 something that you did not report," there are ways that  
8 it looks, you know, onerous and frightening, but there  
9 are ways that you can do it that is in a way to be  
10 helpful to the employer.

11           MR. MOBERLY: So I think there is a nuance B

12           MS. SPIELER: Richard is next, and then Nancy.

13           MR. MOBERLY: There is a nuance between the two  
14 of these. And so, what you are saying sounds correct.  
15 But what it often bleeds over into in the provisions  
16 that I have seen are, "Affirm that you have not  
17 asserted any claim with the government about any  
18 illegal conduct that you have seen. Affirm that you  
19 have not told the government about any illegal conduct  
20 that you have seen." And that, to me, undermines the  
21 anonymity provisions in Dodd-Frank, and a lot of the  
22 anonymity -- either requirements or obligations under a

1 lot of these other statutes.

2           So, there seems to be a difference between "Tell  
3 us whether you have seen anything illegal, because we  
4 want to do something about it," and "Tell us that you  
5 haven't told the government," or, "Tell us if you have  
6 told the government."

7           MS. NARINE: And I agree with you. So I think  
8 the first two would be problematic. Unless I misheard,  
9 that is not the way I heard Tom Devine describe it  
10 yesterday. And so, to the extent that there is  
11 something that says it is not inappropriate for  
12 employers to ask people if they have seen something  
13 wrong that they didn't report, you know, employees may  
14 or may not tell the truth on that, but at least to ask.

15           I think it would be inappropriate to say, you  
16 know, "Affirm that you didn't report anything to the  
17 government that we don't know about." I think that is  
18 inappropriate. And I think, in a best practices  
19 document, I think we should say something about that,  
20 and that could be done very easily, either in the  
21 affirmative -- in the dos or the don'ts section.

22           MS. SPIELER: Nancy?

1           MS. LESSIN: So the issue that I have is with  
2 something that can have the appearance of being  
3 threatening or coercive, because there is still a power  
4 relationship. "I am leaving this company. I want a  
5 job somewhere else. And I want somebody to, you know,  
6 not give me a bad recommendation."

7           So, the question, "Have you seen anything," it  
8 is like -- if I say yes are you going to hate me? And  
9 so it is just -- there is a problematic power  
10 relationship that comes up in this. So, framing what  
11 employers can do to get information about making their,  
12 you know, workplace a better workplace where -- what  
13 are we saying -- there is a speak-up culture versus  
14 under the appearance of that, something that can be  
15 felt as coercive or threatening, I think we have to  
16 find a space in there.

17           MS. SPIELER: Okay. So, I am going to ask that  
18 the three of you -- Marcia, J.J., and Greg B

19           PARTICIPANT: That is what we get for speaking  
20 up.

21           (Laughter.)

22           MS. SPIELER: And anyone else who wants to join

1 them over lunch, see if you can come up with something  
2 about this, again with the caveat that this is not  
3 about responding to the petition for rulemaking in all  
4 of its intricacies, especially since most of us haven't  
5 read it carefully or at all. But rather, in thinking  
6 about this generic question of policies, programs, and  
7 agreements that may discourage people from reporting to  
8 government agencies, or reporting internally. I mean  
9 just anything in that sort of arena.

10           So, with that, are we done with number two, on  
11 which I have many notes now? But I thought it might be  
12 the most difficult, so -- we aren't scheduled to take  
13 lunch until 12:30. I would take -- we could move ahead  
14 into number three now. Yes? Okay.

15           All right. Number three, "Implementing a  
16 Retaliation Response System" is now open on the same  
17 ground rules.

18           (No response.)

19           MS. SPIELER: Maybe we can race through the rest  
20 of the document.

21           (Laughter.)

22           MS. SPIELER: Because I thought -- in a sense,

1 what you raised initially, I think, is germane here.

2 But you have already taken on the task of B

3 MR. FRUMIN: Yeah, I have a B

4 MS. SPIELER: -- of drafting something, so B

5 MR. FRUMIN: I have language I could tell you on  
6 this accountability question, which I just worked up,  
7 two different versions of it. The first that Bob  
8 Miller, Robert Miller, suggested, which is really  
9 short, but fine, "Appropriate consequences, i.e.  
10 discipline, penalties, et cetera, should exist when  
11 acts of retaliation are confirmed."

12 I will just reread that. "Appropriate  
13 consequences, i.e. discipline, penalties, et cetera,  
14 should exist when acts of retaliation are confirmed."  
15 So it is putting a fine point on the consequences.

16 A little longer version says, "Accountability  
17 for retaliatory actions should be" -- then I have three  
18 qualities -- "meaningful to the parties found to have  
19 retaliated; visible to the employees and organizational  
20 units involved; and" -- thank you, Marcia --  
21 "sufficient to serve as a deterrent to others within  
22 the organization." So B

1           MS. NARINE: I have a question about the visible  
2 part, although I said I make things visible. Not every  
3 company is going to feel comfortable -- I am not sure  
4 that every comfortable is going to be comfortable about  
5 that.

6           So what would we mean by visible? Would we say,  
7 "Eric, the retaliator, has now gotten a clawback of his  
8 \$100,000 bonus last year," or, "Just so you know, we  
9 had an instance of retaliation with a manager in the  
10 east region, and that manager has been appropriately  
11 disciplined," or something just broader that, "When we  
12 learn of retaliation, we take action"?

13          MR. FRUMIN: I don't know, but I just thought if  
14 the worker who was involved never heard about it, it  
15 undermines the legitimacy of the accountability goal.  
16 But I -- you know, it could be any range -- it could be  
17 any of those, all of the above, or something else.

18 But B

19          MS. SPIELER: Can you read it one more time?

20          MR. FRUMIN: Yeah, I will read it again. So,  
21 "Accountability for retaliatory actions should be" --  
22 the three key words are -- "meaningful to the party who

1 -- found to have retaliated; visible to the employees  
2 and units involved," like the other managers, and  
3 "sufficient to serve as a deterrent to others within  
4 the organization."

5 MR. KEATING: I like number one.

6 MS. SPIELER: What was number one?

7 MR. FRUMIN: Number one was "Appropriate  
8 consequences, i.e. discipline, penalties, et cetera,  
9 should exist when acts of retaliation are confirmed."

10 MS. SPIELER: So, Greg, you don't like the  
11 three-pronged approach?

12 MR. KEATING: I just prefer the simpler -- I  
13 think it B

14 MR. MOBERLY: Can I just ask, though? "Exists"  
15 seems very passive to me.

16 MR. FRUMIN: Well, "should be taken"? "Should  
17 be imposed"? We could, you know, make it more active,  
18 rather than B

19 MR. MOBERLY: I mean "imposed" --

20 MR. FRUMIN: Should be imposed, yeah. I think  
21 that is a good addition. Don't you agree?

22 PARTICIPANT: I agree.

1           MS. NARINE: I guess I would vote for number  
2 one, too, because I am concerned about the public  
3 shaming, whether very vague or -- I think there needs  
4 to be -- I am just concerned that some companies are  
5 going to be very uncomfortable saying, "Eric, the  
6 retaliator, has been punished. Everybody can be happy  
7 now."

8           Or, because I don't know what that might look  
9 like -- unless it is something -- so I will say, for  
10 example, we would say something like, you know,  
11 "Recently there was a violation of the policy against  
12 retaliation," you know, "and appropriate action has  
13 been taken against that person.

14           We want to make sure that all employees are  
15 aware of the policy, which includes but is not limited  
16 to X, Y, Z." That might go out in a region, that might  
17 go out -- you know, so people will sit there and say,  
18 "Where did this come from? Something must have  
19 happened," without naming the person. I think if the  
20 committee votes for option number two, I think we want  
21 to keep that visibility very, very high-level, so as  
22 not to cause other issues.



1           MR. BROCK: Well, even if you stay with number  
2 one, to keep it simple, could you not capture that by  
3 saying penalties should be imposed and appropriately  
4 noted, or appropriately communicated?

5           Because there is really a lot of value to the  
6 next person coming forward -- I mean I think it is a  
7 part of your point -- if it is known. But making an  
8 intelligent judgment about precisely how to make that  
9 known, you know, whether it is at the 20,000-foot  
10 level, or the -- naming the person versus saying, "We  
11 took action on this," or, "We are reissuing the  
12 policy," or whatever you say.

13           MR. MOBERLY: Could we take that last clause of  
14 -- the second one, the "sufficient to serve as a  
15 deterrent," because that B

16           MR. BROCK: Oh, that is good.

17           MR. MOBERLY: -- has some kind of vagueness  
18 about it that allows companies to -- I mean that is  
19 what you want, right? You want the punishment to be a  
20 deterrent, and your example could be a deterrent,  
21 right? "We took this measure, and" --

22           MS. NARINE: "This is a reminder that the policy

1 is" --

2 MR. MOBERLY: A reminder, right.

3 MS. NARINE: -- "X and applies to all levels of  
4 the organization," or whatever.

5 MR. MOBERLY: Right. But it doesn't get into  
6 the specifics of the public shaming, yes. So it should  
7 be imposed and sufficient to serve as a deterrent.

8 MR. BROCK: That have deterrent value.

9 MR. MOBERLY: Or have deterrent value, whatever  
10 it is.

11 PARTICIPANT: Add that, mm-hmm, right.

12 MR. BROCK: And then you keep it simple, and you  
13 get the idea that you don't want B

14 MR. KEATING: Yeah, I mean, but my only issue  
15 with that is that -- I mean it is sort of like the area  
16 of, like, sexual harassment and, you know, prompt and  
17 effective remedial action reasonably calculated to stop  
18 the harassment. That is going to depend on the  
19 circumstances, you know?

20 I mean -- and the same thing with retaliation.  
21 If you have got some rogue supervisor who has done  
22 something really nasty, you want to send a strong

1 message, and let everyone know. But if there is just a  
2 -- you know, a minor -- a much more minor infraction  
3 that doesn't warrant the sort of -- you know, so I  
4 don't have a problem at all with the consequences that  
5 serve an appropriate deterrent effect, under the  
6 circumstances. But just got to realize that these  
7 situations are all going to vary, depending on what  
8 happened, what the nature of the adverse action was.

9 MR. BROCK: What about B

10 PARTICIPANT: Can you read the B

11 MR. BROCK: What about proportionate deterrent  
12 value, somehow getting proportionality into it? Sorry  
13 about wordsmithing.

14 (No response.)

15 MS. LESSIN: Without that word, can you read  
16 what we have B

17 MR. FRUMIN: Right. So I added B

18 MS. LESSIN: -- now? What is the sentence?

19 MR. FRUMIN: I added the deterrents to the B

20 MS. SPIELER: Yeah, but read it, read it.

21 MS. LESSIN: So read it.

22 MR. FRUMIN: -- concept to the first one. So,

1 "Appropriate consequences (i.e. discipline, penalties,  
2 et cetera) should be imposed when acts of retaliation  
3 are confirmed and sufficient to serve as a deterrent."

4 MS. NARINE: Can you say it one more time?

5 MR. FRUMIN: Sure.

6 MS. SPIELER: I think that last -- well B

7 MR. FRUMIN: "Appropriate consequences (i.e.  
8 discipline, penalties, et cetera) should be imposed  
9 when acts of retaliation are confirmed and sufficient  
10 to serve as a deterrent."

11 MS. LESSIN: Can you switch those?

12 MS. NARINE: I was afraid to say it, because I  
13 didn't want everybody to get mad.

14 MR. FRUMIN: You want to put the deterrent  
15 first, and then say B

16 MS. LESSIN: Yeah, because I think it --

17 MS. SPIELER: "Should be sufficient to serve as  
18 a deterrent" --

19 MR. FRUMIN: They have to be imposed first.

20 MS. SPIELER: Yeah, they have to be imposed  
21 first.

22 MS. LESSIN: Imposed and B

1           MR. FRUMIN:  Imposed when their -- when it is  
2 confirmed, and B

3           MS. SPIELER:  Be sufficient.

4           MR. FRUMIN:  And it should be "be sufficient to  
5 serve as a deterrent."

6           PARTICIPANT:  Okay, all right.

7           MR. FRUMIN:  Okay?

8           MS. SPIELER:  So, does that go in the first  
9 part, or in part three?

10          MR. FRUMIN:  Well, it was -- I thought it was in  
11 leadership, the first B

12          MR. MILLER:  It should be the last bullet in  
13 number one.  It goes to Eric's point that he raised  
14 earlier this morning about the fact that we talk  
15 through the leadership process about being  
16 knowledgeable and accountability B

17          MS. SPIELER:  Okay.

18          MR. MILLER:  There is no B

19          MS. SPIELER:  Okay.

20          MR. MILLER:  -- you know, granular level to that  
21 mid-management accountability, and saying that, if you  
22 do find it, do something about it.

1 MS. SPIELER: Fair enough.

2 MR. MILLER: Not wait for OSHA or somebody else  
3 to come in and do something.

4 MR. FRUMIN: When I get back into the grid, I  
5 will send this.

6 MS. SPIELER: Okay. So we were looking at  
7 number three. There was silence, so I turned to Eric.

8 (Laughter.)

9 MR. FRUMIN: I got a small point, which is  
10 really a question, not a -- but I just -- in the fifth  
11 bullet from the bottom, it starts with, "If a formal  
12 complaint has been filed." The last sentence of that  
13 says, "Rights of all parties in the filing should be  
14 preserved while this assessment occurs."

15 So, I was thinking about what that means. And,  
16 you know, the traditional labor management context,  
17 people suffer retaliation, they have a grievance  
18 procedure, and, theoretically, any harm they suffer  
19 from unjust discipline or discharge they recoup when  
20 they are "made whole." They may have, you know, washed  
21 their car and suffered all sorts of horrendous personal  
22 consequences. But too bad, American industrial

1 relations does not presume to keep people on the job  
2 while their case is under review.

3           So, the issue of reinstatement is a huge issue,  
4 even though it -- we have accepted a model which is  
5 pretty horrendous in most circumstances. On the other  
6 hand, temporary reinstatement is a big deal in these  
7 whistleblower laws. And it is becoming a bigger deal  
8 by the day in mining and some others. I don't know to  
9 what extent the directorate is dealing with this, as a  
10 practical question for those laws where you have that  
11 power. But, from a worker standpoint, preserving my  
12 rights -- you know, my right to keep my car, my right  
13 to pay my medical bills, that is a pretty big right.

14           So, I was just wondering whether any thought was  
15 given to the issue of reinstatement when you were  
16 talking about preserving rights, or not. I am not  
17 suggesting that we need to address that as a concept in  
18 a best practices document, because there is huge  
19 divides over that legally, ideologically, and  
20 otherwise. But I am just wondering whether that even  
21 came up.

22           MR. BROCK: I will tell you what this language

1 was intended to do. And there was some discussion  
2 about, you know, how to say this, and not overstate it  
3 or miss anything.

4           If someone files with OSHA, and a typical  
5 reaction -- not the only one -- is B

6           PARTICIPANT: Files a retaliation or a  
7 compliance complaint?

8           MR. BROCK: Retaliation complaint. That -- it  
9 is common for the employer saying, "Well, now we have a  
10 case in front of OSHA," or, "There is a case in front  
11 of a court. We" -- you know, then we just need to take  
12 our defense posture and do all the things we would do.

13           This is suggesting we really ought to try to  
14 work on it, really ought to try to solve it, and not  
15 just assume it is going to go off there, and all the  
16 bad things that come out of a nasty litigation will  
17 happen. And the issue that we came across that this  
18 attempts to address -- perhaps not very artfully -- is,  
19 well, if you try to resolve it, and you ask people for  
20 candor, rather than positioning, you have a better  
21 chance of solving if you get candor.

22           You also could have someone giving away their



1 case on either side, or, you know, somehow prejudicing  
2 the case, or missing a deadline and, therefore, losing  
3 their standing, and those types of things.

4           So, there -- you know, a variety of mechanisms  
5 that some of us are familiar with, and probably lots of  
6 things that all of us are not. For example, you could  
7 have -- you could say, "Well, we are going to try to  
8 solve it. Let's sign a mediation agreement so that  
9 what we say here doesn't violate that," or, "Let's  
10 freeze the clock on your existing claim, so you don't  
11 lose that claim." So it had to do with that.

12           To the extent that reinstatement might be  
13 possible, you should have that right preserved, too,  
14 and not have that excluded. I don't recall that we  
15 talked specifically about reinstatement. Somebody else  
16 might remember. I don't think we did.

17           So that is why that sentence is in there.

18           MS. SPIELER: Okay. Anything else on three?

19           MS. NARINE: So were you going to say it should  
20 be addressed, or not?

21           MR. FRUMIN: No, I am not asking -- I mean if  
22 you want to B

1 MS. SPIELER: He was curious.

2 MR. FRUMIN: I was curious, was flagging it for  
3 the committee as an issue.

4 MS. SPIELER: Number four, anti-retaliation  
5 training.

6 MR. FRUMIN: No comment. Already got my  
7 comments in on this one.

8 MS. SPIELER: You done?

9 MR. FRUMIN: I'm done.

10 (Laughter.)

11 MR. FRUMIN: Same stuff, different section.

12 MR. BROCK: That is why this is an integrated  
13 program.

14 MR. FRUMIN: It is yeah.

15 MS. SPIELER: Somebody had something earlier.  
16 Richard, was it you? Okay.

17 MR. KEATING: I would just note -- because I was  
18 going to say this earlier -- but in response to  
19 something Eric said, the goal -- at least on my end --  
20 one of the many goals of this document was that not --  
21 these six things don't exist in silos, okay?

22 So, one of the things that we are trying to

1 convey to employers is that you need to do a better job  
2 of making sure that the left hand knows what the right  
3 is doing, and that there is a circle of communication  
4 around this issue broadly, and specifically around this  
5 issue as soon as a complaint is filed. That sets in  
6 motion a number of different things that need to  
7 happen.

8           And where I have seen things go awry when things  
9 -- when employers have gotten into trouble, and  
10 justifiably so, is when that left hand didn't know what  
11 the right was doing, and there was a slip-up, and,  
12 therefore, a mistake made.

13           And so, on training, you know, going to back  
14 making this real, Eric, is, you know, many supervisors  
15 today understandably -- because they are out there,  
16 just working in a plant, or doing a job in an  
17 accounting firm and overseeing a bunch of -- they don't  
18 know what the standard for retaliation has evolved to  
19 under applicable precedent, both at OSHA and at the  
20 U.S. Supreme Court. And, by the way, it has changed a  
21 lot, and it is a real -- for those who don't know, I  
22 think more than 75 percent of them would answer the

1 question wrong, if they were given a blind test, as to  
2 what is retaliation. Okay?

3           And so, when we do training today -- and I have  
4 actually helped do both live training, and also help  
5 author the content for online training -- but one of  
6 the key components is educate front-line supervisors,  
7 so they know that adverse action, for example, or even  
8 the act of -- what is protected activity? Today it is  
9 a lot different than it was 10 years ago. And so, part  
10 of the goal here of each of these silos is, you know,  
11 so that we can create a better-integrated system.

12           MS. NARINE: I think, to add to that, then, we  
13 should add a bullet point that indicates that review  
14 and revise the training periodically, as the laws of  
15 standards change, because you don't want a situation  
16 where the company is just trotting out the same  
17 training they have been using for five years, and the  
18 manager is going, "I have already heard this," whereas  
19 something has changed.

20           And, even if it is not in addition to the  
21 training, whether that means send out, you know,  
22 something from -- whether it is HR, or legal, or

1 whoever does it -- say, you know, "A policy is going to  
2 change," or something, so they have to not just -- as  
3 these definitions and standards change.

4 MR. BROCK: Isn't that true also of some of  
5 these other components of the program, not just  
6 training? I am wondering if some more generic comment  
7 under number six B

8 MR. KEATING: I think -- couldn't it be in the  
9 introduction, maybe?

10 MR. BROCK: Introduction, or at the end, under  
11 program improvement.

12 MS. LESSIN: Leadership.

13 MR. BROCK: Yeah, so it covers more than one  
14 area.

15 MS. NARINE: Some of it is going to be revising,  
16 but some of it is going to be reminding. So, you know,  
17 sending something out on a periodic basis for somebody  
18 -- for people at different levels, whether it is at a  
19 supervisory level, the region level, the CEO level,  
20 because people need to hear the message B

21 MS. SPIELER: So it is a form of continuous  
22 training B

1           MS. NARINE: It is a continuous training and  
2 reinforcing of the existing rules.

3           MS. SPIELER: Nancy?

4           MS. LESSIN: It is more than that. Somebody has  
5 to track changes at the, you know, highest leadership  
6 level, so that they are aware that there has been a new  
7 decision, there is aware (sic) that there is the  
8 Fairfax memo. There is aware that -- you know,  
9 whatever it is. And then they have to translate that,  
10 you know, changes in however you want to say it, and  
11 then that may impact policies and training and -- you  
12 know, so they have to update and, you know, per those  
13 things.

14           So, it is -- one is you have to, you know, pay  
15 attention to this. And, second, you have to then  
16 translate it into your program

17           MS. NARINE: I think, to Nancy's point, that is  
18 typically within the job description of the compliance  
19 officer, which we talk about on page two. But to the  
20 extent that some entities don't have a chief compliance  
21 officer, or that managers basically had that as one of  
22 their 15 jobs that "By the way, you are also in charge

1 of this," there needs to be some mechanism for when  
2 laws change, or when rules change, to disseminate that  
3 down through the organization. And that is something  
4 that, by the way, should be conducted when there is a  
5 risk assessment. I used to ask people, "How do you get  
6 information about when the laws change?"

7           Some people might say, "I went to a trade  
8 association meeting, they talked about it there." But  
9 it is not coming -- you know, and "I," by the way,  
10 change the policies for my group," which had nothing to  
11 do with what corporate -- so I think there is something  
12 that has to be -- some systematic, you know, accurate  
13 way, and a timely way, to get information down, whether  
14 that means -- you know, if there is always going to be,  
15 you know, a monthly meeting for the people in the  
16 district, then somebody says, "By the way, I want to  
17 remind you, I hope you guys saw that memo and  
18 disseminated it out that these rules have changed," so  
19 not just the policy goes out, but in the monitoring and  
20 auditing, it will go there, as well. Are we monitoring  
21 and auditing how changes in policies are being  
22 communicated through the employee base?

1           MR. WENGERT: I think the other -- just to build  
2 off of that, too, you also have to build in change of  
3 people.

4           MS. NARINE: Yes.

5           MR. WENGERT: So if you do your training on an  
6 annual basis, but I get a new front-line leader a month  
7 after I just did the training, you are not going to  
8 wait 11 months until that person gets that indicational  
9 message. So how do you keep it current and B

10          MS. NARINE: Because you are going to bring your  
11 bad habits from your old company.

12          MR. WENGERT: Correct.

13          MS. NARINE: That didn't read the best practices  
14 memo.

15          PARTICIPANT: Been there.

16          PARTICIPANT: Got that, Emily?

17          MS. SPIELER: So, what I was thinking is that  
18 perhaps in the first section we need something that  
19 says something like -- this is not drafting, okay --  
20 that employers need a mechanism to track changes in  
21 public policy and laws, and to update internal  
22 training, auditing, and other internal policies and



1 practices.

2 PARTICIPANT: Great.

3 PARTICIPANT: Perfect.

4 MS. SPIELER: And then, that we probably need  
5 something in the training section that addresses Ken's  
6 concern, which I have not written, that says you need  
7 to address potential turnover -- thinking about your  
8 training.

9 MS. NARINE: And your first paragraph addresses  
10 the monitoring process, also?

11 MS. SPIELER: Hmm?

12 MS. NARINE: Your first sentence that you read  
13 had monitoring in there?

14 MS. SPIELER: It had auditing. I B

15 MS. NARINE: Yeah. That is part of it, yeah. I  
16 just wanted to make sure that was there.

17 MS. SPIELER: Anything else on training?

18 MR. FRUMIN: On training or on monitoring?

19 MS. SPIELER: I think I am on training.

20 MR. FRUMIN: Okay, I think I have got --

21 MS. SPIELER: Yeah, I moved to monitoring. I  
22 think it is time for lunch.

1 PARTICIPANT: I found a typo.

2 PARTICIPANT: Couldn't possibly be.

3 (Laughter.)

4 MR. FRUMIN: It is on B

5 MS. SPIELER: Wait, which page are you on now?

6 MR. FRUMIN: The training. Line B

7 MS. SPIELER: We were not really B

8 MR. FRUMIN: The third bullet from the bottom.

9 It starts, "What notice constitutes."

10 MS. SPIELER: Where? Wait. Are you on  
11 training?

12 MR. FRUMIN: "What constitutes notice," the  
13 third bullet from the bottom.

14 MS. SPIELER: Oh, from the bottom.

15 MR. FRUMIN: Yeah. So the end of the second  
16 line there is a letter A, which is a typo. It should  
17 say "and litigating a complaint."

18 PARTICIPANT: Wow.

19 MS. LESSIN: Eric read this document.

20 (Laughter.)

21 MS. SPIELER: So are we done with number four?

22 Okay. So there is a subgroup that is charged with

1 doing some drafting over lunch. And, otherwise, the  
2 others of you are free to have lunch as you please.

3           We will reconvene at -- I think it is 1:30.  
4 Yeah, 1:30, and at which point we will take up five and  
5 six, and review the suggestions that we have gone over  
6 before we have a vote.

7           And I am going to go try to make sense of my  
8 notes over the next hour.

9           (Whereupon, a luncheon recess was taken.)

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1                   A F T E R N O O N     S E S S I O N

2                   MS. SPIELER: Good afternoon. Okay. So, I am  
3 torn between just forging ahead and sort of pausing and  
4 finishing the work we started this morning. And I  
5 think we should do that, because it will be fresh in  
6 your minds.

7                   So, I have given you a series of addenda, one  
8 through four. The first one is the things we  
9 categorized as generic concerns we would like OSHA to  
10 pay attention to. The following three are specific  
11 language, suggestions for specific sections that we  
12 have already discussed. And I have asked that this be  
13 marked, the set of addenda, be marked as Exhibit No. 8  
14 for the meeting.

15                  Again, not intended to be a wordsmithing  
16 exercise. Obviously, I did this very fast. But does  
17 it hit the issues that you wanted covered is the  
18 question.

19                  So, we can start with addendum one. And there  
20 may be additions to it as we complete our conversation.  
21 This was merely a pause moment.

22                  Yes, Nancy?

1 MS. LESSIN: I am on addendum one, number one.  
2 And I actually think that there is a value to there  
3 being this broad-brush document B

4 MS. SPIELER: Oh, this was not to suggest they  
5 not issue a broad-brush B

6 MS. LESSIN: Okay. So that is how I read it.

7 MS. SPIELER: So it should be, "We also  
8 encourage" --

9 MS. LESSIN: Okay.

10 MS. SPIELER: Okay, "also."

11 PARTICIPANT: Additional?

12 MS. SPIELER: To develop additional materials.  
13 Sorry, Nancy, I just assumed that.

14 MS. NARINE: I have a question.

15 MS. SPIELER: Yeah.

16 MS. NARINE: On addendum three, section two.

17 MS. SPIELER: We are on addendum one now.

18 MS. NARINE: Oh, I thought we finished addendum  
19 one.

20 (Laughter.)

21 MS. SPIELER: Okay. Anything else on addendum  
22 one?

1 MR. FRUMIN: Yeah.

2 MS. SPIELER: Eric?

3 MR. FRUMIN: So, number two, on the non-union  
4 workplace, third line, "OSHA to think creatively and  
5 cautiously."

6 MS. SPIELER: You know what? I don't think they  
7 need to be told that.

8 MR. FRUMIN: I just -- on the record, I just  
9 feel more comfortable saying that than just "think  
10 creatively," you know. If you don't mind.

11 MS. SPIELER: Okay.

12 MR. FRUMIN: Thank you.

13 MS. BETTS: Are we making a revision?

14 MS. SPIELER: Yeah, we will -- of all people.

15 MS. NARINE: The rest of the committee thought  
16 that OSHA would be acting cautiously.

17 (Laughter.)

18 MR. FRUMIN: I heard the reverberations when I  
19 got out of here of people B

20 (Laughter.)

21 MS. SPIELER: I am sure SOL was B

22 PARTICIPANT: This is excellent, thank you.

1 MS. SPIELER: Anything else on that?

2 (No response.)

3 MS. SPIELER: Okay. Let's look at -- and I  
4 confess, when I got to my notes, I wasn't B

5 MS. SMITH: There has been a suggestion from the  
6 -- there we go -- from the peanut gallery that, on  
7 number two, was that supposed to be affinity groups or  
8 identity groups?

9 MS. SPIELER: I don't care, either way, because  
10 I was the one who said affinity groups. But I  
11 understand identity groups to mean the same thing.

12 MS. SMITH: Okay.

13 MS. SPIELER: Yeah. It could be -- okay.  
14 Addendum two, this is language to section one of the  
15 report. There were two. One came up early, one came  
16 up later. Adding two bullets, one of which would say,  
17 "Appropriate consequences (i.e. discipline, penalties,  
18 et cetera) should be imposed when acts of retaliation  
19 are confirmed, and be sufficient to serve as a  
20 deterrent."

21 And the second bullet that came up just before  
22 we broke for lunch, "Employers need a mechanism to



1 track changes in public policies and laws, and to  
2 update internal training, auditing, and other internal  
3 policies and practices."

4           PARTICIPANT: Emily, I thought that that bullet  
5 was supposed to be added to the third section on  
6 training, or B

7           MS. SPIELER: It is also something else in  
8 training.

9           PARTICIPANT: Okay.

10          MS. SPIELER: But, actually, I thought I heard  
11 -- Anthony said the same thing when I gave it to him to  
12 proof. But I thought I heard B

13          PARTICIPANT: No, you are right.

14          MS. SPIELER: -- people say that it should also  
15 be here.

16          PARTICIPANT: Should be? Okay.

17          MS. SPIELER: Yeah. Anything on that?

18          (No response.)

19          MS. SPIELER: Okay. Addendum three, best  
20 practices. This was, admittedly, the most complex, and  
21 I am not 100 percent sure I got it right.

22          In the bullet that currently reads, "Employers

1 should have a policy of no punishment," and so on,  
2 insert in the second sentence the language, "including  
3 changes in employee status or other retaliatory  
4 actions," and then the revised bullet is set out.

5           Greg, you had some concerns and I, frankly,  
6 didn't get them down carefully enough, and I just want  
7 to make sure that this meets your -- those concerns.

8           MS. NARINE: And if he doesn't, I have concerns,  
9 now that I have seen it in writing.

10          MS. SPIELER: Oh, do you?

11          MS. NARINE: Yeah.

12          (Laughter.)

13          MR. KEATING: You go ahead, and I will B

14          MS. NARINE: I think the language makes it look  
15 like these kinds of changes are per se retaliatory,  
16 when there could be legitimate business reasons for  
17 changes in hours, changes in duties, assignments,  
18 changes of vacations. So I think we need to add in  
19 that if it is not for some legitimate -- you know, non-  
20 discriminatory, non-retaliatory, legitimate business  
21 reasons, something like that.

22          Because, otherwise, it makes it look like these

1 things are -- these are examples of what could be  
2 retaliatory behavior, but we need to make it clear that  
3 they might be perfectly legitimate reasons that -- you  
4 know, they might be staffing needs, or might be  
5 flexible changes that have to come about, so B

6 MR. MOBERLY: How about just add "retaliatory"  
7 before "changes"? "Including retaliatory changes in  
8 employee status"?

9 MS. SPIELER: Marcia, I think that gets to it, I  
10 guess.

11 MS. NARINE: No, I will tell you why -- the  
12 reason I like some kind of phrase of "legitimate  
13 business reason," is that that is a phrase that  
14 employers are used to in other contexts, and I think it  
15 will make it easier for them. But, you know, I don't  
16 want us to belabor it for 20 minutes.

17 MS. SPIELER: Yeah. I don't think this should  
18 be the stumbling block to this document, frankly, so B

19 MS. NARINE: I think if the word "retaliatory"  
20 is added in, I think I am okay, as long as it --  
21 because the way it is written, it might look like B

22 MS. SPIELER: I am looking at other people who

1 haven't quite crossed that line yet. That is why I am  
2 pausing.

3           Greg? Ken?

4           MR. KEATING: Yeah, I mean, one of the things I  
5 was getting at earlier is the critical important thing  
6 that employers should have is they should -- that --  
7 not just that they should have a policy of no  
8 punishment, they -- employers should construct a  
9 framework to ensure that any changes in the terms of  
10 employment are adequately vetted and discussed, such  
11 that -- so that they are not in any way retaliatory,  
12 under the circumstances, and only motivated by  
13 legitimate -- in other words, it is not policy that  
14 there is no -- you need to do, as I said earlier, the  
15 left hand knows what the right is doing.

16           When you have an individual who comes forward  
17 and engages in protected activity, before you take any  
18 action that is going to change the terms and conditions  
19 of their employment, you need to have a pause button,  
20 and everyone needs to communicate and say, "Okay, is  
21 this legitimate, or is this in any way retaliatory?"  
22 Am I making any sense?

1 MS. SPIELER: Yeah. I am just wondering whether  
2 having a policy of no punishment for reporting concerns  
3 or incidents is inconsistent with that.

4 MR. KEATING: It is not inconsistent with it,  
5 but it doesn't flag what they really should be doing,  
6 which is B

7 MS. SPIELER: Okay, which B

8 MR. KEATING: -- stop.

9 MS. SPIELER: Yeah.

10 MR. KEATING: Communicate, and B

11 MS. SPIELER: Yeah, so B

12 MR. KEATING: -- make sure that you B

13 MS. SPIELER: So -- well, I am wondering if it  
14 is a separate bullet.

15 MS. BETTS: Yeah, it sounds like suggesting B

16 MR. MILLER: Or maybe amending that right before  
17 the -- "also punishment." Say something to the effect  
18 that, "While there may be legitimate business reasons  
19 for changes in employment," whatever the phraseology  
20 would be, "be alert that these changes could be  
21 considered retaliatory, and need to document," or  
22 something B

1 MS. NARINE: They need to properly document and  
2 vet it.

3 MR. MILLER: To document the business reason for  
4 what you are doing.

5 MS. NARINE: Might be a couple of dos or don'ts,  
6 but B

7 MS. SPIELER: Yeah, I was just going to say it  
8 does seem like something -- because it is more about  
9 process.

10 MR. MILLER: Right.

11 MS. SPIELER: So maybe it is a separate bullet  
12 that says something about it. I need help here.

13 PARTICIPANT: Maybe in the dos and don'ts.

14 MS. NARINE: Yeah, I think it would be in the  
15 dos and don'ts. "Do ensure that there is a documented,  
16 legitimate, non-retaliatory business reason for any" --

17 PARTICIPANT: Changes to terms and conditions.

18 MS. NARINE: -- "for changes in terms of  
19 conditions of employment that might be perceived as  
20 retaliatory."

21 PARTICIPANT: Right.

22 MS. SPIELER: Okay. So say it again. Slowly.

1 (Laughter.)

2 MS. NARINE: I knew you were going to say that.

3

4 MS. SPIELER: So this would be in the dos and  
5 don'ts.

6 MS. NARINE: Yeah, I think you could put it in  
7 the dos and don'ts, because I think it flows off of the  
8 "employer should have a policy of no punishment," so it  
9 kind of supplements what is already there.

10 But I guess "Do ensure" --

11 MR. KEATING: That there is a procedure in place  
12 to ensure that any changes in terms and conditions of  
13 employment are B

14 MS. SPIELER: Made for legitimate B

15 MR. KEATING: Not retaliatory, and consistent  
16 with legitimate business reasons.

17 MS. NARINE: Documented. Legitimate business  
18 reasons. They don't have to do it, it is a best  
19 practice. But I think the fact that you should be able  
20 to document it and show that it existed before this  
21 person made their OSHA complaint -- or, if it happens  
22 after the OSHA complaint, but you can document, "Hey,

1 we just lost, you know, this business, this part of the  
2 business, we can't -- we have to lay some people off,"  
3 there is something that shows -- as opposed to some  
4 manager saying, "I think this is what we need to do."

5 MS. SPIELER: Okay. So I am trying to figure  
6 out procedure here, frankly. That is the long pause.  
7 If we add that in the do column, are we okay with the  
8 "Be alert also to punishments for unrelated reasons,  
9 including retaliatory changes in employee status"?

10 MS. NARINE: Yes.

11 MR. KEATING: With that word "retaliatory" in  
12 there, I am okay with it.

13 MS. SPIELER: Okay. So let me just -- in order  
14 we have a full record, when we take a break we will  
15 type out this do and pass it out, okay? So it is an --  
16 it will be an additional B

17 MR. KEATING: I just -- sorry to belabor it B

18 MS. SPIELER: No, it is fine.

19 MR. KEATING: But I just don't understand why it  
20 isn't another check. I mean B

21 MS. SPIELER: It can be another check. I don't  
22 care whether it is in dos and don'ts or a check. I



1 just didn't think they could be quite crammed in  
2 together.

3 MR. KEATING: I agree.

4 MS. SPIELER: And so it can be a check, it can  
5 be a do. Somebody else could write it; I would be  
6 happy with that.

7 (Laughter.)

8 MS. SPIELER: But it -- yeah, I think it is a  
9 legitimate thing to say.

10 I paused also because, having just read a series  
11 of cases on this where people are disciplined for  
12 safety rule violation after an injury, I want to make  
13 sure, whatever we say about the procedure -- I mean  
14 "documented business reasons" -- a violation of a  
15 safety rule is a -- technically, non-retaliatory,  
16 unless it is. And it is retaliatory when it isn't  
17 evenly enforced.

18 And so, it seems to me, if you are going to talk  
19 about the legitimate business reasons, maybe you also  
20 have to say something about the, you know, legitimate  
21 reason that is consistently enforced. And that is why  
22 I am stuck on the drafting of this. I don't B

1           MR. MOBERLY: And the other thing is, you know,  
2 under Sarbanes-Oxley on a lot of these statutes, it is  
3 a contributing factor, is this B

4           MS. SPIELER: Right.

5           MR. MOBERLY: -- retaliatory motive. And so,  
6 you could have a legitimate business reason. But if  
7 one -- another reason is in retaliation, then you are  
8 still liable for retaliation. So it is not a but-for  
9 causation in these statutes.

10          MS. SPIELER: Yeah, yeah.

11          MR. MOBERLY: And so that makes that language a  
12 little bit more problematic, potentially, depending on  
13 what turns out to be B

14          MS. SPIELER: Okay. So somebody is going to  
15 have to take on the drafting of this, if you want to  
16 add it to the document. Why don't we put it aside for  
17 just the moment, and we will come back to it?

18                 And then, addendum four was the training piece  
19 that it should address external changes in legal,  
20 regulatory, and policy requirements, as well as staff  
21 turnover and need for refreshers. Training must,  
22 therefore, be continuous. That was that very last part

1 of our conversation.

2 MS. LESSIN: But did we do page four, the do  
3 list?

4 MS. SPIELER: Page four? Which page four?  
5 Yeah, well, that was in the -- oh, I am sorry, I  
6 skipped right over it.

7 Okay. So, in section two there were also  
8 suggestions about the do list, to add a new do,  
9 "Investigate reports of issues promptly, thoroughly,  
10 and with transparency, including responding to the  
11 employee who brought forward the initial concerns."

12 And in the do that currently reads, "Root out  
13 formal and informal incentives and value systems that  
14 encourage or allow retaliation, to add the phrase "or  
15 discourage reporting."

16 And then, there was several -- there were  
17 several comments about being -- keeping in mind the  
18 intertwined nature of reports of issues and  
19 retaliation.

20 Any concerns about any of that?

21 MS. NARINE: Then we had the new language that  
22 we drafted. I don't know B

1 MS. SPIELER: Yeah, why don't we finish this  
2 exhibit, and then we will come to yours.

3 MS. NARINE: I just didn't know if it was  
4 supposed to be in here or not.

5 MS. SPIELER: Yeah. No, it would go in there.

6 MS. NARINE: Okay.

7 MS. SPIELER: Okay. So, now, addendum four,  
8 section four -- there were no changes proposed to  
9 section three -- to add the bullet on training.

10 Jon?

11 MR. BROCK: I have one for that spot kind of  
12 related to no punishment. Later is fine.

13 MS. SPIELER: Okay. So, actually, I think we  
14 are done with this document, and we have two  
15 outstanding issues, the one we were just talking about,  
16 about how to deal with legitimate business reasons for  
17 discipline and the one that -- there was a work group  
18 over lunch on, with regard to agreements that suggest  
19 that people shouldn't come forward in some way.

20 Why don't -- Jon, if you have language, why  
21 don't you go ahead and share it with us?

22 MR. BROCK: We put out there -- I don't think it

1 is quite there -- "Employers should have a procedure to  
2 ensure that any employment status changes are  
3 undertaken for legitimate business reasons, and not  
4 motivated by retaliation."

5 MS. NARINE: Can you say that again, please?

6 MR. BROCK: "Employers should have a procedure  
7 to ensure that any employment status changes are  
8 undertaken for legitimate business reasons, and not  
9 motivated by retaliation." Close?

10 MS. NARINE: Yeah, or you could say legitimate  
11 and non-discriminatory, non-retaliatory business  
12 reasons, and -- I think both of them make sense.

13 MS. SPIELER: Would that meet your concerns,  
14 Greg?

15 MR. KEATING: I would be all right with that.

16 MS. SPIELER: Richard, does that meet your  
17 concern about B

18 MR. BROCK: Marcia, so you are suggesting B

19 MS. NARINE: Not retaliatory -- to say  
20 legitimate, non-discriminatory, non-retaliatory, again,  
21 because it flows with language that employers are used  
22 to, from a Title VII perspective. So it just -- it is

1 easy for them to build it in and flow it into their  
2 existing programs.

3 MR. BROCK: Yeah, no, I am just trying to  
4 capture it, because it is not language I am as familiar  
5 with as others of you.

6 MS. NARINE: So when you say B

7 MR. BROCK: So changes are undertaken for  
8 legitimate business reasons B

9 MS. NARINE: No, legitimate, non-discriminatory,  
10 non-retaliatory business reasons.

11 MS. SPIELER: Jon, read it one more time.

12 MR. BROCK: I am just going to get what she just  
13 said there.

14 All right. So, "Any employment status changes  
15 are undertaken for legitimate, non-retaliatory, non-  
16 discriminatory business reasons, and" --

17 MS. SPIELER: Period.

18 MR. BROCK: Period? Business reasons, period?

19 MS. SPIELER: To ensure B

20 MR. BROCK: Yeah, yeah, okay, I see.

21 MS. SPIELER: The whole thing, could you read  
22 the whole thing?

1 MR. BROCK: Got it.

2 (Laughter.)

3 MR. BROCK: "Employers should have a procedure  
4 to ensure that any employment status changes are  
5 undertaken for legitimate non-retaliatory, non-  
6 discriminatory business reasons."

7 MS. NARINE: Did you get to your question about  
8 the things that are consistently enforced?

9 MS. SPIELER: I mean we are getting down into  
10 how the legal argument would happen. I mean if it is  
11 non-retaliatory and non-discriminatory, presumably it  
12 is being enforced in a non-discriminatory manner. So  
13 -- right. So, yeah.

14 MR. BROCK: Okay. Should I read it?

15 MS. SPIELER: Okay, so we will type that up over  
16 the break and distribute it, so we have it clear in the  
17 record.

18 Okay, so that brings us to the language the work  
19 group was working on over lunch.

20 MR. KEATING: Yeah, we came up with the  
21 following: "Ensure that any employment agreement or  
22 policy which requires confidentiality or non-disclosure

1 of information contains an express carve-out which  
2 makes clear that nothing precludes the individual from  
3 reporting or communicating with any government agency.  
4 Do not require employees to disclose that they have  
5 reported or communicated with a government agency."

6 MS. SPIELER: Discussion?

7 MR. KEATING: That was all J.J., by the way.

8 (Laughter.)

9 MS. SPIELER: I could hear the various voices in  
10 it, actually.

11 Okay, again, what I think we will try to do --  
12 you have it on your computer. Maybe you could send it  
13 to Anthony, and then he could print it.

14 (Laughter.)

15 MS. SPIELER: Okay. So then, we are ready, I  
16 think, to move on to monitoring, number five, page  
17 eight of Exhibit -- I think it was No. 7. It was  
18 seven, the best practices report was Exhibit No. 7.

19 Okay. So, under the same ground rules,  
20 concerns, suggestions, issues not addressed?

21 MR. FRUMIN: Is the discussion monitoring, or B

22 MS. SPIELER: Monitoring.



1 MR. FRUMIN: Monitoring. No, I am good.

2 MS. SPIELER: Marcia?

3 MS. NARINE: I have a suggestion. And it is not  
4 a wordsmithing, it is substantive.

5 MS. SPIELER: Okay.

6 MS. NARINE: But it is going to sound like  
7 wordsmithing.

8 (Laughter.)

9 MS. SPIELER: She said, defensively.

10 MS. NARINE: But since we just went through  
11 wordsmithing, I don't feel so bad about it now.

12 So, in the paragraph that says, "Incentives  
13 should, instead, reward management and employee  
14 behavior that supports the right to come forward with  
15 concerns, behaviors and results that support this can  
16 be observed and tracked," so tracking, to me, sounds  
17 like monitoring. But I think there needs to be a  
18 separate auditing, as well, of it.

19 So, we are tracking it kind of  
20 contemporaneously, but I think that we should be  
21 auditing how well we are doing on this. And I don't  
22 know if that comes up separately in independent audits,

1 and maybe it does. But I think, to the extent that we  
2 are -- I think it is a separate thing to -- it should  
3 also be audited, instead of just tracked. And if it is  
4 already encompassed in the auditing section, then I am  
5 fine. But -- because when you are auditing it, you are  
6 also looking at the inconsistent behaviors and results,  
7 which we also need to make sure of.

8           And then I have a question. The don't with the  
9 sharing results B

10           MS. SPIELER: Well, why don't we see if there is  
11 any response, thoughts, suggestions.

12           Bob?

13           MR. MILLER: If you want -- I would just say  
14 observe, track, then audit it. I think that serves the  
15 purpose B

16           MS. NARINE: Right, exactly.

17           MR. MILLER: This points to the next section,  
18 which is the auditing program, and make sure you are  
19 not just B

20           MS. LESSIN: "Observe, track, and audited."

21           MS. SPIELER: Right.

22           MS. NARINE: Yeah.

1 MS. BETTS: Do you want me to make those changes  
2 to Exhibit No. 7?

3 MS. SPIELER: Yeah. Yeah, I think it is close,  
4 but not over the line.

5 MS. NARINE: And it was just one word, so  
6 really B

7 (Laughter.)

8 MS. NARINE: It was a comma and two words, so B

9 MS. SPIELER: Okay. Anything else on  
10 monitoring?

11 MS. NARINE: I do have a question.

12 MS. SPIELER: Yes?

13 MS. NARINE: On the -- so on the don't, when it  
14 says -- the third don't, "Close investigations too  
15 quickly without resolving the issues, sharing results,  
16 and ensuring that the employee is satisfied with the  
17 fairness and the handling of the outcome," I think it  
18 is more of a philosophical issue. Because there might  
19 not be -- I don't know that you can ensure that the  
20 employee is satisfied with the outcome.

21 PARTICIPANT: Yeah, I was surprised the  
22 committee B

1           MS. NARINE: I don't remember those words, but I  
2 don't -- I think, substantively, if we tell employers  
3 that, "You have got to make sure that the employee is  
4 satisfied with the fairness and handling," I think  
5 sometimes they may never be satisfied, no matter how  
6 fair and" -- you know, so I think you want to ensure  
7 that it is a fair process, but I don't think that you  
8 can ensure the employee's satisfaction with the  
9 fairness and the handling of the outcome.

10           MR. BROCK: So, not to wordsmith, but to knock  
11 out "and outcome" is your suggestion?

12           MS. SPIELER: No, I actually think this is about  
13 communicating to the employee, instead of presuming the  
14 employee's satisfaction.

15           MS. NARINE: Yeah, so I think it is the -- no,  
16 it is actually a substantive concern about -- I think  
17 you want to ensure that the employee -- that the loop  
18 is closed. But it might be closed, and they still not  
19 be satisfied, because if they don't like the result,  
20 then they are not going to be satisfied, no matter how  
21 objectively fair the process is.

22           And then the second part, with sharing results,

1 I guess I just -- it doesn't have to be changed here.  
2 My concern with OSHA, again, would be to, as they are  
3 crafting something or looking at this, what is the  
4 level of -- what has to be shared, that an  
5 investigation occurred and appropriate action was  
6 taken? An investigation occurred and we fired three  
7 people?

8           Because some companies have very different ways  
9 about how they want to share that result. And  
10 sometimes it might just be, "We did the investigation,  
11 we were not able to corroborate your concerns, but X,  
12 Y, Z," or something like that. So, I think, just to be  
13 -- if it is sharing results, and I just saw that, it  
14 would make me, as an employer, concerned that I might  
15 have to share a report, you know, share internal  
16 investigation documents, et cetera. So that is what I  
17 am concerned about there.

18           MS. SPIELER: People are getting tired, I can  
19 tell. So --

20           MS. NARINE: We need more cookies, Eric.

21           MS. SPIELER: Actually, that would be -- oh,  
22 cookies and milk. That time?

1           Okay, so we have a suggestion on the table that  
2 we -- there be an amendment to the third don't in  
3 number five that would say something like, "and  
4 ensuring that" -- I don't know.

5           MS. LESSIN: Ensuring the fairness of the  
6 handling and outcome, and so take out the employee is  
7 satisfied.

8           MS. NARINE: Right, and the sharing results, if  
9 that language is kept in, I can live with it. I just  
10 need OSHA to be aware that my concern would be  
11 employers, if they just see that language as it is, I  
12 don't want them to throw the baby out with the baby  
13 water, so "We are not going to take this suggestion at  
14 all, because it means we have got to share our  
15 investigation results, and we don't want to do that."

16           MR. BROCK: I like Nancy's suggestion. Keeps  
17 the employer sharing the results, but you are not  
18 demanding that the employee approve B

19           MS. SPIELER: We took out sharing, didn't we?  
20 Oh, sharing results, and ensuring that B

21           MR. BROCK: That stays in B

22           MS. SPIELER: Yeah.

1 MS. LESSIN: Ensuring the fairness and  
2 handling B

3 MR. BROCK: Yeah, I like that.

4 MS. SPIELER: Okay.

5 PARTICIPANT: So where do we B

6 MS. SPIELER: That the -- and ensuring -- right,  
7 the fairness and the -- of the handling and outcome,  
8 and take -- Nancy's suggestion, take the employee out.

9 (Laughter.)

10 PARTICIPANT: Let the record reflect that was  
11 Nancy's suggestion. I just want the employee  
12 satisfaction B

13 (Laughter.)

14 MS. SPIELER: Well, I think in other sections we  
15 suggested that the loop should be closed with the  
16 employees.

17 PARTICIPANT: YES, yes, yes.

18 MS. SPIELER: So B

19 PARTICIPANT: We did.

20 MS. SPIELER: This is different. This is about  
21 monitoring.

22 MR. MILLER: I think it is a legitimate concern,

1 too. You cannot ensure someone's satisfaction.

2 MS. SPIELER: No kidding. Talk to any lawyer  
3 and find that out.

4 Okay. So on number five we have the amendment  
5 -- two amendments. One is on the second bullet. It  
6 now says, "Can be observed, tracked, and audited." And  
7 on the third don't it says, "Don't close investigations  
8 too quickly without resolving the issues, sharing  
9 results, and ensuring the fairness of the handling and  
10 outcome."

11 Okay, moving on to number six. Okay.  
12 Independent audit and program improvement. I bet Billy  
13 was really helpful on this.

14 MR. FRUMIN: Okay. So I didn't have any  
15 particular concerns about what was here. I think there  
16 was a typo in the bottom of the dos column, and with  
17 "as ways to also test" -- test what? I don't know. So  
18 maybe -- or maybe something that was -- maybe there was  
19 more words that could fit in that box, so B

20 MR. BROCK: That could be.

21 MR. FRUMIN: Yeah, so you have to just go back  
22 and look at the box, and see what is there.



1 MS. LESSIN: What are we testing?

2 MR. FRUMIN: You know B

3 MR. BROCK: To test -- isn't this where it said  
4 how -- to test how systems work?

5 MR. FRUMIN: All right, so it probably is --  
6 just fell off. It just ran out of space in the box.

7 PARTICIPANT: Margins?

8 MR. FRUMIN: Right. Okay, I am assuming that is  
9 fine.

10 But my general frame of reference for looking at  
11 this, unfortunately, these days is the sort of trail of  
12 horrors that has emerged from the CSR audits and, you  
13 know, phony corporate audits for compliance with all  
14 sorts of labor laws, and all sorts of situations which  
15 have -- had different purposes, some of which have been  
16 potentially legit, if misguided. Others have been told  
17 to "cover your butt." And now it has evolved under the  
18 pressure of the -- you know, the continuing exposes  
19 about abusive conditions. So companies who claim they  
20 had a fabulous system, you know, somehow missed the  
21 Bangladesh garment industry fire, so now they realize,  
22 you know, "Okay, gee, it might be a problem there."

1           And so, I am wondering whether you have given  
2 any -- you gave any thought to the lessons of the  
3 failures of well-meaning audit efforts when they were  
4 supposed to rely, at least in significant part, on  
5 interviews with workers, and all the problems of trying  
6 to do that in a either contentious environment, or an  
7 environment where a centrally-driven audit function is  
8 susceptible to massive errors, courtesy of low-level  
9 management non-cooperation, or -- you know, I mean,  
10 there has been a lot of pitfalls with audit functions  
11 that have emerged through the CSR auditing process that  
12 have been a serious problem.

13           So that was my main concern about this, whether  
14 any of that was taken -- because it is a real  
15 experience, and it touches pretty closely to -- on some  
16 of the issues we are dealing with here. This is  
17 certainly in the world of worker health and safety,  
18 blue-collar jobs. I don't know about, you know,  
19 Bangladeshi B

20           MS. NARINE: Well, that is what I was going to  
21 say, because I think that can't be part of the analogy,  
22 because that is a situation where there are numerous

1 levels of suppliers, where there is -- and so I think  
2 -- which exists in the United States, as well.

3 MR. FRUMIN: Yeah.

4 MS. NARINE: But it is in the B

5 MR. FRUMIN: Okay, you can take C.J. Seafood in  
6 Louisiana.

7 MS. NARINE: Right, so I think B

8 MR. FRUMIN: Or Wal-Mart's warehouse contractors  
9 in, you know, in Los Angeles. So I am just talking  
10 about the failures writ large. There is lots of  
11 places. You don't have to go to Bangladesh B

12 MS. NARINE: Right.

13 MR. FRUMIN: So just asking, one, whether those  
14 failures of that pretty highly-orchestrated audit were  
15 considered here at all. So that is a question.

16 The other thing -- my other concern in  
17 approaching this was the way that audits have been  
18 showing up in OSHA settlement agreements for compliance  
19 -- other, you know, settlement agreements, particularly  
20 in CSAs, for a long time. And you know, some of those  
21 probably were productive, some of the abatement  
22 activities, the audits, were probably productive, and

1 went a long way to helping both the employer in  
2 question and the OSHA both national and regionally,  
3 locally, to, you know, come to grips with a company  
4 that had widespread problems and, you know, where it  
5 was susceptible to an audit function to try to deal  
6 with it.

7           But the -- to think about -- I am just concerned  
8 that there could be a reading of this by OSHA that --  
9 the inclusion of audits in an enterprise-wide effort --  
10 which is a big policy from the solicitor's office and  
11 OSHA at the moment -- enterprise-wide efforts could be  
12 -- and retaliation issues -- like suppose you have a  
13 company with multiple retaliation cases. Maybe the  
14 BNSF, you know, examples -- I don't know if there is an  
15 audit function in the BNSF agreement.

16           But there could be an audit function written  
17 into these, into a broad-scale settlement agreement,  
18 which this might be seen as encouraging. And I don't  
19 know that we should be, at least implicitly, supporting  
20 that without acknowledging whether we have seen --  
21 whether we have looked at the lessons of audits in  
22 broad OSHA agreements.

1           You know, if you are dealing with a smaller  
2 employer, that is one thing, where you can sort of  
3 limit the damage that a misguided settlement agreement  
4 can cause. But, you know, this is intended to apply to  
5 large organizations. And if it were read by OSHA, the  
6 solicitor's office, as saying, "Well, we think the  
7 audit function really needs to be incorporated in  
8 enterprise-wide agreements on retaliation issues," you  
9 know, I would be a little concerned about whether that  
10 would be a misreading of the intent of this.

11           I am reading -- I am putting a lot into this  
12 that you probably never talked about, which is fine. I  
13 just wanted it sort of on the record that there are  
14 some pitfalls to handing this off to OSHA, given the  
15 way that OSHA uses policies in settlements that could  
16 have broad, very broad, implications.

17           MS. NARINE: So I have a couple of thoughts that  
18 -- because I don't think we did have this kind of  
19 discussion, but I think it is useful and helpful. So  
20 if you want to take some lessons from -- whether it is  
21 Bangladesh or others, I think one thing that there was  
22 a concern was in terms of suppliers and contractors,

1 and whether supplier contracts, which have labor  
2 provisions, fair work provisions, might be ILO  
3 provisions -- whatever kinds of things -- are actually  
4 being enforced, and whether or not, if people are doing  
5 certifications, there is any kind of auditing of that  
6 process.

7           So something to the effect of ensuring that  
8 either, number one, supplier codes of conduct and other  
9 kinds of codes which contain -- you know, either  
10 contain labor provisions, or if they do contain labor  
11 provisions, that they are actually audited and  
12 enforced, because it was clear that a number of  
13 companies knew there were issues going on in Bangladesh  
14 and other parts of the world, in the United States, but  
15 because of difficulties in supply chain issues, et  
16 cetera, either ignored it or said, "We will wait for it  
17 to get better," or relied on the word of those  
18 suppliers that things were going to change without any  
19 independent auditing.

20           The second issue, as we talk about independent  
21 evaluators or auditors, one of the things that also  
22 came up there and other places, as well, is that -- if

1 you look at Apple and their issues, they have changed,  
2 you know, to other auditors -- is that there is --  
3 perceived to be, at least by NGOs and others that look  
4 at this issue internationally, an inherent conflict of  
5 interest when the employer pays the auditor to do the  
6 audit.

7           And so, a number of initiatives have come about  
8 where industries will kind of put money toward a pool,  
9 and then the auditor will go out and do the audit, but  
10 it is not necessarily getting paid from, you know, Joe  
11 Smith Company or a Wal-Mart. They are getting paid  
12 from some kind of a pool.

13           So, if there is -- I am not saying that that --  
14 that is probably beyond the scope of what we are  
15 looking at. But I think we want to indicate that there  
16 could be perceptions of conflict of interest, in terms  
17 of the auditing, even if you are hiring an independent  
18 auditor, because that may not be any more independent,  
19 if you are paying somebody \$200,000 to go and audit  
20 your processes. They, number one, they want the  
21 business again. And, number two, they may not point --  
22 their language in the recommendations might be softer

1 than otherwise, because there is an inherent conflict  
2 of interest.

3           And then, second, the issue with the suppliers  
4 and the third parties. To the extent that they are  
5 managing labor or overseeing labor, to ensure that  
6 there is some kind of auditing and enforcement of what  
7 provisions already exist in those contracts. I think,  
8 to the extent that something like that could be added  
9 in here -- I can write four sentences on that, if you  
10 want, during the break.

11           MS. SPIELER: You are going to have a really  
12 busy break, I can tell.

13           Yeah, J.J.?

14           MS. ROSENBAUM: I would just add to the things  
15 that Marcia has said, that the other best-practice  
16 question that is coming up in these discussions is  
17 should the audit reports be public -- public-public, or  
18 should they be at least public to employees -- or at  
19 least be made available to current employees in such a  
20 way that they can assess whether they are accurate, or  
21 whether they want to engage in other conduct to further  
22 influence them B



1 MS. NARINE: And that is a very big trend. So  
2 Apple has published it, you know, Nestle is publishing  
3 some, Coca Cola are -- around the world, in terms of --  
4 so it lets -- it shows the good, the bad, and the ugly.  
5 And I think maybe a do from a best practice is, you  
6 know, "Be willing to publish your third-party audit of  
7 your labor practices," or something like that.

8 MS. SPIELER: Okay, this is a way more  
9 complicated conversation than we have been having in  
10 the other sections.

11 PARTICIPANT: Sorry.

12 MS. SPIELER: No, it is -- I think it is  
13 important.

14 So, I think the question is what do we do with  
15 this section? Is there some set of bullets that we  
16 could add to this that would not necessarily wordsmith  
17 it, but sort of say to OSHA, "Here are some additional  
18 concerns that need to be addressed when you are  
19 considering audits," or do we want to try to draft  
20 language for this document? What do you think?

21 MR. FRUMIN: It is a really complicated issue.  
22 I think trying to change this document, where it wasn't

1 part of the discussion, would be asking a lot. And I  
2 -- so I think it is worth coming back to separately.

3           And if we were trying to get into the substance  
4 of a best practice that actually takes that into  
5 account, but rather say that this -- you know, that  
6 there are other aspects of audits that were not  
7 considered as part of this, just to put that on the  
8 record, such as the lessons of CSR auditing, the --  
9 OSHA's experience with audits in the compliance world,  
10 both in individual agreements and CSAs, and the  
11 suitability of an audit requirement in a settlement  
12 agreement in 11(c) cases. Or -- excuse me -- in OSHA  
13 whistleblower case. You know B

14           MS. SPIELER: Marcia, you getting all this?

15           MS. NARINE: Yeah. I have some possible bullet  
16 points.

17           MS. SPIELER: Okay.

18           MS. NARINE: Do ensure that B

19           MR. FRUMIN: Just for context.

20           MS. NARINE: Huh?

21           MR. FRUMIN: Just for context.

22           MS. NARINE: So, "Do ensure that proper

1 safeguards exist to avoid perceived conflicts of  
2 interests with independent audits of labor. Do  
3 institute and enforce labor provisions and third-party  
4 and supplier contracts and codes of conduct. And do  
5 consider publishing results of any third-party" -- I  
6 didn't finish writing this one when you started, but  
7 "Do consider," but not -- you know, so consider  
8 publishing the results of independent third-party labor  
9 audits.

10 MS. SPIELER: I think there is something else  
11 that Eric is raising, which is -- and maybe not within  
12 the bullets, but as an overall concern to OSHA, which  
13 is essentially that the WPAC is concerned about the use  
14 of audits in a variety of settings, and we want OSHA to  
15 pay attention to the lessons that have been learned in  
16 a variety of other procedures.

17 MR. FRUMIN: Right. Sort of like the general  
18 comment B

19 MS. SPIELER: Yeah.

20 MR. FRUMIN: -- we had in the beginning there.

21 MS. SPIELER: Yeah.

22 MR. FRUMIN: Right. So, would you -- I mean

1 should I try my hand now to write that B

2 MS. SPIELER: Yeah.

3 MR. FRUMIN: Okay.

4 MS. SPIELER: So B

5 MR. FRUMIN: I mean did any folks have any  
6 concerns about the way I laid out these kind of  
7 cautions? Is there anything that -- before I write?  
8 Okay.

9 MR. BROCK: I just have -- I don't have any  
10 particular concerns about it, but in terms of, you  
11 know, whatever gets drafted, I think that we did have  
12 very much in mind the importance of the independence,  
13 and that degrees of independence would depend upon the  
14 sensitivity, the circumstances, and so on. So we did  
15 that. But this was also aimed at the willing, right?

16 MR. FRUMIN: Right.

17 MR. BROCK: And so the -- a lot of the questions  
18 you are starting to talk about are not unimportant, but  
19 they are just different, the compliance situations and  
20 so on.

21 But the place that is really -- lives in the  
22 middle of this that I think is -- we didn't discuss,

1 and maybe becomes part of some different future  
2 discussions, is to the extent that OSHA would point to  
3 a document like this to say, "This is what you should  
4 be doing as part of some other set of actions that they  
5 are taking," which, you know, has not been part of our  
6 discussions or recommendations up to this point, then  
7 it is especially important to have the appropriate  
8 cautions. And we did not discuss that. But we were  
9 focused on the willing, and more attentive to  
10 appropriate degrees of independence, perhaps not  
11 sufficiently expressed that way.

12 MS. NARINE: I think, to the extent that we are  
13 doing a best practices, and there may be -- we  
14 discussed this in the elevator -- there may be some  
15 companies -- or they are going to say, "Look at all the  
16 things we are doing. We meet the best practices."  
17 There is always something someone can learn, because  
18 they will sit there and say, "We have got independent  
19 auditors," but they may not be aware or attuned to the  
20 perception of possible conflicts of interest if you are  
21 paying the auditors.

22 PARTICIPANT: Right.

1           MS. NARINE: You know, so that -- so I think if  
2 there is some way -- I think we definitely need the  
3 general pronouncement. But I think just saying  
4 "independent auditors, check," might be a nice way out,  
5 either for someone who just wants the way out, or  
6 someone who may not even realize that these  
7 possibilities -- so they can go back and talk to their  
8 auditors, "Let's talk about how you do this, let's make  
9 sure you are not sugar-coating any recommendations or  
10 any reports," and that kind of a thing.

11           MR. BROCK: Yeah, so it seems to me that what we  
12 are saying is we want to make that clear, as a best  
13 practice. We don't want to try to walk this document  
14 into the compliance area, or get outside the willing.  
15 But the guidance to OSHA is, "And, by the way," this  
16 set of concerns that you raise. But let's not confuse  
17 those.

18           MS. SPIELER: I do think, though, that Marcia's  
19 suggestions belong in the document. I think that,  
20 given that it is addressed to the willing to forestall  
21 compliance interventions, I think a lot of people who  
22 want to do the right thing actually don't understand

1 the auditing process at all. And so, it is important  
2 to be -- have some clarity about that.

3           Okay. So we have now gone through the document.  
4 And we have several small tweaks that we have entered  
5 on the document itself, so I don't think -- and we have  
6 discussed -- I don't think we need to necessarily  
7 revisit, but we have several things now that were kind  
8 of in drafting that it would be really good, I think,  
9 for people to have in front of them, which means that  
10 this is going to take a little longer break.

11           So, Greg, you have the language on the -- okay.  
12 And it is now on flash drive.

13           Jon, you have the handwritten language.

14           MR. BROCK: I could put it on that flash drive,  
15 and B-

16           MS. SPIELER: Okay, that would be great.

17           MR. BROCK: I just have to find it.

18           MS. SPIELER: Marcia, you have the line that you  
19 just read --

20           MS. NARINE: Yeah.

21           MS. SPIELER: -- if we could get it onto the  
22 flash drive. And then -- are you going to write a

1 generic thing that we can add to the general  
2 instructions?

3           If we get it all onto one flash drive, we can  
4 print it out, have it in front of us, and then review  
5 it and vote on the document, as a whole, okay, with the  
6 revisions.

7           So, why don't we -- it is a little early, but  
8 let's take a 15-minute break, and get all that done,  
9 have the copies made, and return here, and we will  
10 close out the conversation about the best practices,  
11 and move on to next steps for the committee.

12           (A brief recess was taken.)

13   DISCUSSION OF  
14   NEXT STEPS FOR THE COMMITTEE

15           MS. SPIELER: Okay, we are going to get started,  
16 if people could take their seats.

17           I passed out on both sides, and toward the back,  
18 the additional addenda that we just printed off that  
19 were written during the prior part of the meeting. And  
20 I have also discussed with OSHA staff the various  
21 pieces of paper that are being entered into the record.  
22 And they have agreed to take the changes we have made,



1 including the addenda and the smaller changes that we  
2 agreed to during our conversations. And, assuming that  
3 it is voted and sent to them, they will then put it all  
4 into one document and get it back to us.

5           So, presumably, because we have been extremely  
6 careful up here about keeping track of the changes, it  
7 should be okay.

8           Okay. So, we have been through the entire  
9 document now, and we had several sections that we were  
10 going to add or tweak. And I -- and that is what you  
11 now have. It was taken from things that were written  
12 by Jon Brock, Eric Frumin, and Greg Keating, and J.J.  
13 and Marcia Narine. So, hopefully, it is exactly what  
14 you think you put on the flash drive.

15           MS. NARINE: I have already written, so that is  
16 why B

17           MS. SPIELER: Marcia -- okay.

18           So, addendum number five would be an addition to  
19 section two, the prevention section. It was the issue  
20 that we discussed this morning and a work group worked  
21 on over lunch, that we would add the following -- and I  
22 think it was in the do column that this belonged, but

1 if I am wrong, you should correct me.

2           "Ensure that any employment agreement or policy  
3 which requires confidentiality or non-disclosure of  
4 information contains an express carve-out which makes  
5 clear that nothing precludes the individual from  
6 reporting or communicating with any government agency.  
7 Do not require employees to disclose that they have  
8 reported or communicated with a government agency."  
9 Does that B

10           MS. NARINE: I thought that the "don't" was  
11 going to be a separate don't, because it actually  
12 separates -- it actually calls more attention to it.  
13 Because, even if you don't have a settlement agreement,  
14 or something like that, you might -- the don't still  
15 applies. So I think, if you are only looking at it --  
16 I think it applies, whether or not you have a  
17 settlement agreement, employment agreement. You just  
18 want to generally make sure that employees are not told  
19 they can't talk to B

20           MS. SPIELER: Ah, they were all together, and so  
21 I didn't know that.

22           MR. KEATING: My head is spinning.

1 MS. SPIELER: Yeah, mine too, Greg. Okay, I now  
2 understand what Marcia said. So B

3 MS. NARINE: Yeah.

4 MS. SPIELER: In the do column it should say the  
5 first sentence.

6 MS. NARINE: Right.

7 MS. SPIELER: And in the don't column B

8 MS. NARINE: Right.

9 MS. SPIELER: -- it should say, "Do not require  
10 employees to disclose that they have reported or  
11 communicated with a government agency."

12 MS. NARINE: Correct.

13 PARTICIPANT: Okay.

14 MS. SPIELER: Okay. This, by the way, was  
15 marked -- the set was marked as Exhibit No. 9. So the  
16 original document is Exhibit No. 7. The first set of  
17 addenda are Exhibit No. 8. And this set of addenda are  
18 Exhibit No. 9 for our records.

19 Okay. So, addendum 6 to section two, add the  
20 following: "Employees should have a procedure to  
21 ensure that any employment status changes are  
22 undertaken for legitimate, non-retaliatory, non-

1 discriminatory business reasons." We all okay with  
2 that?

3 (No response.)

4 MS. SPIELER: Okay. Addendum -- did I number --  
5 yeah, addendum seven regarding auditing the following  
6 dos. "Do ensure that proper safeguards exist to avoid  
7 conflicts of interest with independent auditors of  
8 labor practices."

9 MS. NARINE: It should be "for," instead of  
10 "with." That was one of my things, because I think it  
11 is not a B

12 MS. SPIELER: Oh, okay. So that is a B

13 MS. NARINE: That is my fault.

14 MS. SPIELER: Yeah, I know, because I just moved  
15 this onto a document. I did not edit. "Do ensure that  
16 proper safeguards exist to avoid conflicts of interest  
17 for independent auditors." Yes? Marcia?

18 MS. NARINE: Yeah, I think so. Yeah. Yes,  
19 "for."

20 MS. SPIELER: "Independent auditors of labor  
21 practices."

22 "Do institute and enforce labor provisions and

1 third-party and supplier contracts, and codes of  
2 conduct."

3 "Do consider publishing any results of third-  
4 party labor audits."

5 Okay, and B

6 MR. KEATING: I have a question, I am sorry. I  
7 am not sure that I exactly understand -- nor will some  
8 employer looking at this, or -- what do you mean by  
9 labor provisions? "Do institute and enforce labor  
10 provisions."

11 MS. NARINE: So provisions that discuss fair  
12 treatment of workers, that kind of thing. So we can  
13 make it more specific. So, provisions regarding fair  
14 treatment of workers? Would that be better?

15 PARTICIPANT: No. That is pretty narrow,  
16 actually, you know B

17 MS. SPIELER: Yeah. I think, in part, it is a  
18 kind of weird thing to say around the financial B

19 PARTICIPANT: Yeah.

20 MS. SPIELER: -- reporting issues, to talk about  
21 provisions B

22 MR. KEATING: I guess we can leave it B

1 MS. SPIELER: Well, I mean, because the  
2 conversation that we had was about -- focused in on the  
3 issues of what has gone on around labor problems. But  
4 it may be that the language for the purposes of what we  
5 are looking at should be something different than that.  
6 And I can understand Greg's hesitation about it.

7 We could just say, "Do institute and enforce  
8 provisions in third-party and supplier contracts and  
9 codes of conduct that are consistent with these  
10 principles."

11 MR. KEATING: I like that.

12 MS. NARINE: Yes.

13 MS. SPIELER: Okay.

14 MR. FRUMIN: Say that again.

15 MS. SPIELER: Okay. So take out "labor" in the  
16 second, and say, "that are consistent with these  
17 principles."

18 MR. FRUMIN: At the end, right?

19 MS. LESSIN: So the first one, you can just end  
20 that B

21 MS. SPIELER: Yeah.

22 PARTICIPANT: Right.

1 MS. LESSIN: It doesn't need B

2 MS. SPIELER: "Of third-party audits."

3 MS. NARINE: Well, I don't know that I would --  
4 well B

5 MS. SPIELER: Well, that is -- but it is under  
6 the B

7 MS. NARINE: Yes, okay.

8 MS. SPIELER: -- heading of best practices in  
9 this area. It is not -- we are not -- okay. So, let  
10 me reread this back to you.

11 "Do ensure that proper safeguards exist to avoid  
12 conflicts of interest for independent auditors."

13 "Do institute and enforce provisions in third-  
14 party and supplier contracts and codes of conduct that  
15 are consistent with these principles."

16 MS. NARINE: Right.

17 MS. SPIELER: "Do consider publishing any  
18 results of third-party audits."

19 MS. NARINE: Perfect.

20 MS. SPIELER: Okay?

21 MS. BETTS: Just a minute. Okay. So this one  
22 is not changed. Okay.

1           MS. SPIELER: Okay. The final one is actually  
2 an addition to the very first general comments  
3 addendum. This came from Eric.

4           "These recommendations were designed for willing  
5 employers, and were not intended to take into account  
6 the broad experiences of varying employers with CSR,  
7 Corporate Social Responsibility, and other audit  
8 programs for labor-related compliance. OSHA itself has  
9 had experience with audits and monitoring and  
10 compliance settlements, including corporate-wide  
11 settlements. These recommendations are not necessarily  
12 appropriate for inclusion in such settlements. OSHA  
13 should proceed cautiously with the development and  
14 inclusion of audit functions and settlements in  
15 whistleblower cases, especially in cases involving  
16 large employers."

17           MS. NARINE: Why do we have to say, "especially  
18 in cases with large employers"? Why would you single  
19 those out?

20           MR. FRUMIN: Because I think that the  
21 inclination at OSHA is to look at audits as  
22 particularly important in CSAs or other -- multi-unit



1 employers. That is the whole point. They can't go  
2 everywhere. And yet -- so that is the itch I think  
3 they want to scratch. I think it is actually -- now  
4 broad settlements are now goals for OSHA and the  
5 solicitor's office.

6           So it is -- that is a trend in the agency, it is  
7 clearly a policy, and we are just reflecting that this  
8 is a really early kind of development, and so we are  
9 trying to provide just a caution about moving too  
10 quickly with this terrific set of best practices. I  
11 mean it is an off-the-shelf document. Why wouldn't  
12 someone want to tack it on to a settlement agreement.  
13 You know? Seems obvious. Well, hold on a minute B

14           MS. SPIELER: Okay, Jon?

15           MR. BROCK: On that point, and looking  
16 particularly at the second sentence of the second of  
17 these points under number six, I don't -- we didn't  
18 contemplate their use, and don't know if it is  
19 appropriate with certain safeguards, or never  
20 appropriate.

21           So, my inclination would be to have some sort of  
22 a caution, but -- that doesn't quite go this far.

1 Because maybe it is appropriate with B

2 MR. FRUMIN: Well, not necessarily. It doesn't  
3 say it is not appropriate, it doesn't say it is. Just  
4 like we didn't -- we are just -- we are not packaging  
5 this as something that can be taken for granted to be  
6 appropriate. So that is what "not necessarily" is  
7 trying to convey.

8 MS. NARINE: I think when you have "such" -- I  
9 think the words "such settlements" -- maybe I am being  
10 too formalistic -- is B

11 MR. BROCK: It kind of takes it off the table.

12 MS. NARINE: Yeah, that is B

13 MR. BROCK: I totally agree with the caution,  
14 but it seems to me to take it off the table. Maybe it  
15 should be, we just haven't considered B

16 MR. FRUMIN: I mean I don't intend to take it  
17 off the table. Some parts of it might be good. That  
18 is all I was trying to say. So if you can think of  
19 another way of phrasing B

20 MR. BROCK: Okay.

21 MR. FRUMIN: -- phrasing that, fine. I just  
22 thought "not necessarily" gave that kind of leeway.

1 But if I am misconstruing that phrase, then, you know,  
2 get out a smith and start wording it, or whatever.

3 (Laughter.)

4 MS. NARINE: I don't want to be that smith. But  
5 I read it the same way that Jon read it, and maybe  
6 because I am not as familiar with the area.

7 MR. FRUMIN: How about, "Recommendations might,  
8 but are -- not necessarily be appropriate." Might be,  
9 but are not B

10 MR. BROCK: You said these recommendations in  
11 compliance and other settings should be carefully  
12 considered.

13 MS. NARINE: Or should be considered on a case-  
14 by-case basis, or something like that, so that it is --  
15 Yeah.

16 MR. BROCK: Okay, so it is sort of like B

17 MR. MOBERLY: It is an issue, but we didn't  
18 reach any conclusion about it.

19 MR. BROCK: Right.

20 MS. SPIELER: You could take out the second  
21 paragraph, and just leave the first and third  
22 paragraphs, perhaps.

1           MR. FRUMIN: Well, but then -- my concern here  
2 is that this nice package B

3           MR. BROCK: The temptation will be there.

4           MR. FRUMIN: It certainly will, you know.

5           MS. NARINE: I am hesitant to ask the question,  
6 but can you give me B

7           MS. SPIELER: Why don't we say the committee has  
8 not considered B

9           MR. FRUMIN: Right, whether these are  
10 appropriate for -- how about that, okay? "The  
11 committee has not considered whether these are  
12 appropriate for inclusion in such settlements." There  
13 you go. Thank you, Richard.

14           MS. LESSIN: So that would be the second  
15 sentence of number two?

16           MR. FRUMIN: Right, right.

17           MR. KEATING: That is fine with me. I just  
18 thought one of them might be these recommendations "may  
19 not" be appropriate.

20           MR. FRUMIN: Well, if we step back even further,  
21 just say we are not saying whether they are appropriate  
22 or not. If someone wants to do that B

1 MR. KEATING: Yeah, I am okay with what we B

2 MS. SPIELER: So the WPAC has not considered  
3 whether these recommendations are necessarily  
4 appropriate, or are appropriate.

5 Okay. "So the WPAC has not considered whether  
6 these recommendations are appropriate for inclusion in  
7 such settlements."

8 MR. FRUMIN: Yeah, that ought to be really clear  
9 to people B

10 MS. SPIELER: Is that fair?

11 MR. FRUMIN: Yeah.

12 MS. SPIELER: Okay.

13 PARTICIPANT: And keeping the first and third  
14 paragraph.

15 MS. SPIELER: Yeah.

16 PARTICIPANT: All right.

17 MS. SPIELER: Okay. So, we have now completed  
18 our review of this document, and it is the revisions  
19 and addenda. Does the -- is it the will of the  
20 committee that we can vote on the entire package at  
21 this point, or do I need to go through the various  
22 revisions in B

1 (Laughter.)

2 M O T I O N

3 MR. FRUMIN: I move we vote on the entire  
4 package.

5 PARTICIPANT: Second.

6 MS. SPIELER: Okay.

7 PARTICIPANT: I seventh that.

8 MS. SPIELER: So the vote is on a full committee  
9 recommendation to the Secretary and Assistant  
10 Secretary, that they proceed with the development of  
11 guidelines regarding best practices relating to  
12 whistleblowing, as developed by the subcommittee, and  
13 as amended by our discussions today. Is that clear?

14 PARTICIPANT: Yes. Thank you for the B

15 MS. SPIELER: Motion? Is there a motion?

16 MR. FRUMIN: I move.

17 MS. SPIELER: Second?

18 MS. LESSIN: Second.

19 MS. SPIELER: All those in favor?

20 (A chorus of ayes.)

21 MS. SPIELER: Opposed?

22 (No response.)

1 MS. SPIELER: Abstentions?

2 (No response.)

3 MS. SPIELER: The motion carries unanimously.

4 I want to again thank the committee, which I  
5 think has B

6 (Applause.)

7 MS. SPIELER: -- done a spectacular job in  
8 really wading through a lot, listening to a lot of  
9 reports, learning a lot from each other and from  
10 outsiders, and the openness with which each of you  
11 approached this. And the leadership that was provided  
12 by Jon Brock, really, was both exceptional and  
13 terrific.

14 And I have to say, as well, that the staff, and,  
15 in particular, Meghan Smith, who staffed this  
16 committee, was B

17 (Applause.)

18 MS. SPIELER: So it is -- I am really delighted  
19 to be able to transmit this to the agency and to the  
20 department as a real work product from this committee.

21 I do -- and I will look forward to seeing the  
22 edited version, so that we can all have a single

1 document in hand that reflects these, I think,  
2 incredibly thoughtful and participatory conversations  
3 that we had today.

4           So, I know how energetic you all feel at this  
5 particular moment, but I do think that it is important  
6 for us to have a conversation about this point about  
7 next steps for the committee. So -- and I don't think  
8 we need another break, unless there is a motion --  
9 okay, good.

10           So, we currently have three subcommittees that  
11 have been charged by the Assistant Secretary with  
12 specific tasks. I, frankly, don't have the charges in  
13 front of me. And we could discuss our future work  
14 within the context of those committees. But I am going  
15 to suggest, instead, that we have a more far -- a  
16 broader conversation about potential things that the  
17 committee might be able to address in the coming 18  
18 months or 2 years.

19           And then, we will decide if some of those issues  
20 come within the current subcommittee charges, and we  
21 can just move ahead with them. Or, in the alternative,  
22 we will take those ideas back to the directorate and to



1 the Assistant Secretary for discussion, and come back  
2 to the committee about how we will proceed with them.  
3 Is that okay with you, Anthony and Eric and -- okay,  
4 okay. So B

5 MR. FRUMIN: Emily?

6 MS. SPIELER: Yes?

7 MR. FRUMIN: Just a point of information. Work  
8 group last fall pretty much decided that it had come to  
9 a plateau -- how shall we call that -- with its work.  
10 There -- members of it liked the opportunity -- Marcia  
11 and I were the only WPAC members on it. Most of the  
12 people on the work group were stakeholders -- labor  
13 management from rail, trucking, and -- oh, excuse me,  
14 Robert was on it, joined us about nine months -- so,  
15 most of them were not WPAC members.

16 They appreciated the opportunity to interact  
17 with OSHA, itself, and to have various discussions.  
18 And, you know, we produced some consensus  
19 recommendations. That was good. But I think we have  
20 run out of steam, in terms of what we can do as a  
21 consensus group, and even the sense of urgency about  
22 continuing to talk amongst themselves.

1           So, I don't think it is appropriate to keep the  
2 group as a continuing operation. And it would make  
3 sense to just, you know, report its contribution and  
4 leave it at that, and free up both of us on it, or at  
5 leave space for WPAC to have another work group, if  
6 needed, for something else.

7           MS. SPIELER: So can I just ask a question about  
8 that? Looking somewhat cursorily, I admit, at the data  
9 that we received yesterday, it did appear that the  
10 allegations under STA tended more than others toward  
11 work refusals, and the allegations under FRSA tended  
12 more than others toward retaliation after reporting an  
13 injury. And I wondered whether that raised any  
14 concerns for those of you who have thought about -- the  
15 three of you who have really thought about the  
16 transportation industries, and whether there was  
17 anything hidden in there that would be worth further  
18 explanation -- exploration.

19           I am not only asking you, Eric, but also Bob and  
20 Marcia.

21           MR. FRUMIN: Well, there is a lot to be learned  
22 from the information about, actually, a number of the

1 transportation statutes. Those two, obviously. Air-  
2 21, as well. We got three years' worth of allegation  
3 summaries. But it was a laborious process to try to  
4 come through it and find patterns that were  
5 interesting.

6           So, I would say yes, definitely, there is  
7 material to work with. Whether we have -- there -- the  
8 inquiry is useful, the hypotheses galore from the  
9 limited information we had. And when it is available  
10 in a form that would allow us to actually study it  
11 better, we should definitely do that, because there is  
12 a number of questions that are kind of leaping off the  
13 page. Right now we don't have that ability, and even  
14 the information that we had, which was all the  
15 allegation summaries, didn't seem to pique the interest  
16 of the stakeholder members of the committee. They  
17 were, like, "Okay, this is enough already."

18           But they had a lot of issues they needed to  
19 resort -- they wanted to talk about, but the work group  
20 didn't seem to be the place to do it. So there is a  
21 structural question, then there is the issues that we,  
22 as a full committee, including -- not the least of

1 which is DoT, whether it is FMCSA or others there --  
2 would want to dig into.

3           So, yes, we want to look at that. Hopefully,  
4 the information will be available in a form that will  
5 let us do that better. The MOU is running now with  
6 FMCSA, and there will be more coming out about that.  
7 So there is a lot of work to be done in transportation,  
8 it is just that that particular work group, that group  
9 of people, wasn't the, you know, horse to ride.

10           MS. NARINE: I will add to that. I think --  
11 because I know, toward the tail end, we were still  
12 waiting for the MOU, we were still waiting to get a lot  
13 of information. And so, I don't know if it was the  
14 composition of the work group -- of which I was a  
15 member, so I don't know if it was that group of people,  
16 including Marcia, but I think there was a concern about  
17 -- I don't know that the -- I think the mandate was  
18 clear. I don't know that we all wanted to work on the  
19 same mandate. Is that accurate?

20           PARTICIPANT: Yeah.

21           MS. NARINE: And I think we also were missing  
22 some information, and we were waiting -- a lot of

1 meetings were saying, "We are still waiting for this  
2 information."

3 MR. FRUMIN: Right, right.

4 MS. NARINE: And I don't know whether that was a  
5 reason for us to not work on other things that I think  
6 we could have worked on. So I don't know that that  
7 transportation group needs to be disbanded, as opposed  
8 to maybe rethought and kind of clear listings of  
9 priorities that OSHA would think would be useful. But  
10 I do agree that we probably cannot go farther with the  
11 work group that existed. Would that be accurate?

12 MR. FRUMIN: No, I think that is fine.

13 MS. NARINE: Yeah.

14 MS. SPIELER: Okay. Nancy?

15 MS. LESSIN: One of the things that I look at in  
16 the data is the sort of continuing -- in rail, the  
17 continuing cases about rail's being retaliated against  
18 when they report injuries and accidents. And I also  
19 know that this is an area that OSHA has done a bunch of  
20 things. It has, you know, this agreement with the FRA,  
21 it has had settlement agreements with, you know, large  
22 carriers. And one of the -- you know, is it making a

1 difference? It is wonderful that things are happening,  
2 but are those things being successful?

3           And some kind of really kind of looking at we  
4 had this problem -- there is actually a very strong  
5 statute right there, much stronger than 11(c), a strong  
6 statute, but we keep having cases. Have cases gone  
7 down, where we have had these, you know, settlement  
8 kind of MOUs, or whatever it is with BNSF?

9           You know, I think it is worth noting that there  
10 is still a huge problem. And is enough being done?  
11 And, you know, what else might need to be done?

12           MS. SPIELER: Is that something that you all are  
13 looking at?

14           MR. ROSA: That is something that we have been  
15 considering, exactly what you are saying, that, in  
16 addition to all the reports and the MOUs, we are still  
17 seeing -- especially on the railroad industry,  
18 specifically -- same issues with the same carriers.  
19 And that is something that we are having some  
20 difficulties working with.

21           But the other thing that we looked at with  
22 regard to the data is that this is something that we

1 are starting to look at now, is -- because we just  
2 looked at this about -- a few weeks ago -- is some of  
3 the data, it is still not -- because of the length of  
4 time it is taking the investigations, has the trend  
5 gone down, or are we still issuing cases prior -- you  
6 know, pre-accord, or pre these efforts that we have  
7 made?

8           So we are still looking to see maybe there could  
9 be a downward trend in the next year or two, once, you  
10 know, post the accord, and post all these -- you know,  
11 all these efforts that we have made. So that is where  
12 we are right now in the agency, on the railroad.

13           MS. SPIELER: I think it would be very  
14 interesting -- we can talk about this later, but it  
15 would be very interesting, I think, for us to hear a  
16 report on that, as you review it. Because this  
17 question of do the interventions matter is certainly  
18 one of -- a lot of interest to the committee.

19           MS. NARINE: And I will add I think part o the  
20 problem -- at least that I could see -- from the  
21 transportation subcommittee was that the rail issues  
22 were so critical, but we also believed that we needed

1 to look at trucking and all these other things,  
2 because, obviously, that goes into transportation.

3           So, whether there should have been a complete  
4 separate rail committee is just something to consider.

5           MS. SPIELER: Okay. So, moving on from  
6 transportation, Ava?

7           MS. BARBOUR: So -- and this is something that  
8 the subcommittee, I think, discussed a little bit, and  
9 we hadn't moved on to, but recognizing that, you know,  
10 the OSHA Act comprises still the largest number of  
11 whistleblower complaints, we haven't really dug into  
12 the state plans at all. And I think that is something  
13 that we really should take on.

14           And whether that is in the 11(c) subcommittee,  
15 whether that continues as a working group issue, or  
16 whether it is something that the full committee takes  
17 on, I think it is an area -- given the limitations that  
18 we have with 11(c), because we need congressional  
19 action to change the statute, looking at the practices  
20 within the states, and if there is areas of improvement  
21 and comparison that we can do, I think that would be  
22 useful.



1           MS. SPIELER: So, I guess I am turning to you  
2 again, Anthony. To what extent -- and I believe we had  
3 a conversation about this a couple of meetings ago, but  
4 to what extent can the agency put together information  
5 about the -- I think part of the reason we stalled, if  
6 I remember correctly, is that the agency -- you said it  
7 did not have the information, and then there was a  
8 question about how we would possibly compile it. I am  
9 not sure if I am remembering that or not.

10           But you made a huge amount of progress in  
11 building DWPP since we last had this conversation. And  
12 maybe this is a -- something we should hold until Mary  
13 Ann has moved more fully into her position, but it  
14 would be very useful, I think, to do what he was  
15 suggesting. But I think it would be difficult for the  
16 committee without assistance from the staff to really  
17 get the information together.

18           MR. ROSA: Well, I think that it is, first of  
19 all, very beneficial to work with Mary Ann as she comes  
20 on board, and bring her up to speed of what is going  
21 on.

22           And, with regard to data on the states -- and I

1 have had conversations with Christine Dougherty, who  
2 represents the state plans here -- we do have access to  
3 that data, because it is part of our data system. Even  
4 some of the state plans may have a separate database,  
5 they do download or upload that data to our system.

6           The one thing that we have to look and take into  
7 consideration, however, is the sensitivity of us giving  
8 out state plan data without the state plan's, you know,  
9 buy-in into it. You know, there is a state plan  
10 association board. And I just want to make sure that  
11 -- we want to make sure that the states are okay with  
12 us giving this information to this board.

13           MS. SPIELER: So -- this is interesting, because  
14 I am watching the facial expressions of people around  
15 the room.

16           MS. SPIELER: I see that, too.

17           MS. SPIELER: And I see some people out there  
18 who are nodding their heads, and I see our  
19 representative from a state plan shaking her head in  
20 puzzlement. It is all public information.

21           MR. ROSA: Yeah.

22           MS. DOUGHERTY: You know, every plan has to file

1 with the Fed on what they are going to do, what their  
2 numbers are going to be, what their expenditures are,  
3 what their plan is. Every -- I don't know how many  
4 years, but -- to get money.

5 MR. ROSA: Right.

6 MS. DOUGHERTY: And to say that you can't  
7 release that information B

8 MR. ROSA: I didn't say that we can't release  
9 it. I just said we want to make sure that we have the  
10 state plans agreeing, or at least we -- understanding  
11 that we are giving this information out to the board.

12 MS. SPIELER: So we can, clearly, have this  
13 conversation. But it may be that OSHA has the  
14 authority to tell them, as opposed to ask for B

15 MR. ROSA: That is true.

16 MS. SPIELER: -- for their permission.

17 MR. ROSA: Yes.

18 MS. SPIELER: I assume that has a political  
19 overtone, and would be -- definitely not in my job  
20 description.

21 MR. MILLER: I think the term would be make them  
22 aware that it is going to be provided B

1           MR. ROSA: That is what I meant. That is what I  
2 meant.

3           MS. SPIELER: Okay.

4           MR. MOBERLY: Should I just make a Freedom of  
5 Information Act Request?

6           (Laughter.)

7           MS. SPIELER: No, actually, we were joking about  
8 that the other night, because the data, of course,  
9 which was generated -- that we were given last Friday  
10 was generated in response to a FOIA. But we had not  
11 pressed for it, but -- because we did not want to add  
12 to your overworked staff's, you know, job duties. And  
13 you have a legal obligation, obviously, to respond to  
14 FOIA requests. And so it is a kind of odd situation,  
15 but we do view the committee as here to be of  
16 assistance to the agency, and not create additional  
17 headaches, unless they are useful.

18          (Laughter.)

19          MS. SPIELER: Nancy?

20          MS. LESSIN: So I just want to clarify. The  
21 state plan data on whistleblowers is only 11(c).

22          MR. ROSA: That is correct.

1 MS. LESSIN: It is not -- so it is only 11(c).

2 MR. ROSA: That is correct.

3 MS. LESSIN: So perhaps it would be the 11(c)  
4 committee, or maybe -- you know, whatever.

5 MS. SPIELER: Yeah, it may be. It may be.

6 MS. LESSIN: Okay.

7 MS. SPIELER: There is actually a -- this is a  
8 little bit of a digression, but there is some very  
9 interesting variations in the state plan statutes.  
10 There is also some very interesting variation among  
11 other -- all states, in terms of how the courts have  
12 looked at retaliation actions.

13 And so -- and I am not exactly sure where we can  
14 take that, but there may be -- particularly in the  
15 state plan states -- some interesting information about  
16 -- that would be useful, I think, to DWPP in digging  
17 down into it, and thinking about how to handle the  
18 complaints, administratively. So, I think we don't  
19 know until we see what we can -- what is available.

20 Ava?

21 MS. BARBOUR: Well, and to sort of piggyback on  
22 that comment, when I, you know made the suggestion just

1 now, I was thinking in terms of data that we could get  
2 that would be publicly available, but also work that  
3 we, as a committee, could do in terms of looking at the  
4 statutes and any case that exists in the states, and  
5 studying that, you know, which is not a burden on OSHA  
6 staff B

7 MS. SPIELER: Right, right.

8 MS. BARBOUR: We can do that ourselves.

9 MS. SPIELER: Richard, did you have your --  
10 okay.

11 Yeah, Greg, sorry.

12 MR. KEATING: Emily, I just had two things for  
13 going forward that I wanted to float.

14 The first is -- and I don't know just how -- I  
15 am going to look to Anthony, like we seem to keep  
16 looking to Anthony, for guidance, once I finish what I  
17 am about to say, whether this is doable or not. But  
18 Ava just noted that OSHA oversees 21 federal statutes.  
19 This committee, I think, has been a terrific honor to  
20 serve on, and I think we have made some great progress.

21 I also think it is clear that -- echoing  
22 something I said earlier, that, you know, one of the

1 things that has become apparent is there is this  
2 difference between many of the safety-related statutes,  
3 and some of the -- SOX being the primary, you know,  
4 fraud, financial fraud statute, which, again, I think  
5 you are going to see those numbers go up. I know we  
6 have seen a market uptick in the monetary recovery.

7           But what I am interested in is -- since the  
8 creation of Dodd-Frank, which, admittedly, is under  
9 another agency's jurisdiction, the SEC, this issue has  
10 doubled, tripled, quadrupled. It has become more and  
11 more of an issue for employees and employers in that  
12 space. And I know that it is an understatement to say  
13 that the SEC has been fairly aggressive in their  
14 initiatives in this area. And I know there is a memo  
15 of understanding with the SEC. When OSHA gets a SOX  
16 charge, I believe we share it with the SEC, if it is B

17           MR. ROSA: Well, I don't believe we have an MOU  
18 with the SEC. But we do -- as a matter of practice, we  
19 share a copy of the complaint with the Securities and  
20 Exchange Commission B

21           MR. KEATING: Okay.

22           MR. ROSA: -- as we do with any other partner

1 agencies.

2           MR. KEATING: Okay. I mean I throw out there  
3 whether there is any sense in trying to at least  
4 communicate with the SEC and collaborate over ways that  
5 OSHA is handling financial whistleblower actions, and  
6 the best practices we have just come up with, other  
7 ways in which there is alignment, as opposed to one  
8 agency kind of going in one direction, and another in  
9 another.

10           MR. ROSA: Well, actually, thank you for raising  
11 that. We have been engaging over the past four, five,  
12 six months in an active way -- we have been doing this  
13 for several years. But in a very strong, active way,  
14 we have been engaging not only the SEC, but all of our  
15 partner agencies. We have had meetings recently with  
16 Mr. Miller, with Federal Motor Carriers. We are having  
17 at least -- for each one of our partner agencies we are  
18 going to have -- we are proposing to have at least two  
19 meetings per year with our colleagues of each one of  
20 our agencies, whether it is the Department of Energy,  
21 whether it is the FAA -- we recently met with the FAA,  
22 actually.



1           So we are meeting with each one of our partner  
2 agencies, and we have actually -- now that we have a  
3 full staff in our directorate that we didn't have this  
4 time last year, that each one of our staff members has  
5 delegated authority to run with that particular agency,  
6 and be the point of contact for DWPP.

7           As was mentioned yesterday, we are also pursuing  
8 to ensure that there is linkages between our websites.

9     But when we have our meetings with our partner  
10 agencies, we are talking about the outreach  
11 opportunities of working together, we are talking about  
12 training -- you know, them training us, or us training  
13 them on the different aspects, or doing outreach  
14 together whenever we have the ability to do that.

15           We are also looking to -- and Bob Miller knows  
16 that we talked about this -- getting some of the desk  
17 aides that these agencies may have, because we are not  
18 the ones under the truck, we are not the ones sitting  
19 there on Wall Street. We are not the ones -- but at  
20 least, if we get an idea of what these partner agencies  
21 are doing that are educating their own investigators,  
22 then at least we get an idea and a vision of what that

1 complainant has gone through.

2           So, we are engaging all of our agencies, and  
3 that includes the SEC. And we are doing that at least  
4 -- we are having at least two meetings per year,  
5 sometimes three, if it is warranted.

6           MS. SPIELER: Greg, would it make sense to ask  
7 at some point to have someone come over from the SEC  
8 and B

9           MR. KEATING: I think so. If it is possible, I  
10 think so.

11          MS. SPIELER: Okay. So, I mean, that is  
12 certainly B

13          MR. ROSA: Absolutely, absolutely.

14          MS. SPIELER: -- something we could do for our  
15 next meeting, and -- as we have done with some of the  
16 other agencies, and then sees what develops from that.

17          MR. KEATING: If I may --

18          MS. SPIELER: Okay, and you had another one.

19          MR. KEATING: -- just one other one. And I --  
20 you know, I wanted to -- this is a best practices  
21 continuation. And I deliberately, you know, chose to  
22 wait until we had voted on the best practices

1 recommendation before raising this again, but I do feel  
2 strongly, personally, about it. And so I wanted to  
3 raise it again.

4           I mean we have made, I think, huge headway in  
5 identifying best practices and urging OSHA to consider  
6 them and provide guidance. I also believe that, you  
7 know, if employers are -- especially small and medium-  
8 sized ones -- if they are willing to go and really  
9 expend the resources, and can show that they adopt  
10 these policies, I think -- you know, we heard earlier  
11 from Dr. Michaels that there were, you know, 300 or 400  
12 and hundreds of thousands of dollar punitive award  
13 cases recently. There is individual liability in  
14 cases, there is criminal liability in cases.

15           And I think that OSHA -- not now, now we are  
16 asking you to just consider these and make them  
17 guidelines -- but I think that we should at least talk  
18 about whether there is some safe harbor for employers  
19 if they can show that they clearly committed to these  
20 principles, that that should be considered in, say, the  
21 punitive damage phase, or some sort of criminal or  
22 individual liability phase.

1           So, I am not suggesting we argue or talk about  
2 that now, but I think it should be put on the table for  
3 future discussion.

4           MS. SPIELER: Okay. And my guess is that,  
5 certainly in considering punitive damages, the issue of  
6 egregiousness includes, I would assume, some  
7 consideration of those kinds of practices now.

8           MR. KEATING: That is right.

9           MS. SPIELER: And maybe a more kind of complete  
10 conversation about how OSHA approaches those questions  
11 would be useful for us in thinking about the issue that  
12 you are raising. And, again, we could easily put that,  
13 I think, on the agenda for next time.

14          PARTICIPANT: Absolutely.

15          MS. SPIELER: I mean I don't know if you read  
16 the opinion that the judge just issued in the Fayed  
17 case in our district court. But he -- you know, he  
18 explicitly said no punitives, not egregious, and under  
19 the standards that exist. And you know, and I think  
20 that that is understood in most of the agencies and in  
21 litigation, but certainly worth exploring, as to what  
22 the parameters of that might be, and how we -- one

1 starting point, it seems to me, might be to talk about  
2 how OSHA thinks about it now, in the settlement  
3 process, and perhaps how SOL thinks about it in the  
4 settlement process on individual complaints in 11(c).

5           MR. ROSA: What I do want to say is that --  
6 especially my experience as a former assistant regional  
7 administrator in region four, when cases were brought  
8 up to me for review, that included, you know, the  
9 allegation of retaliation. We do look into whether the  
10 front-line manager, as we were discussing earlier, if  
11 the front-line manager was held accountable for taking  
12 that particular action. And I do recall a couple of  
13 cases, several cases, in which the manager was, for  
14 example, disciplined, or the manager was demoted or  
15 suspended. And we took that into consideration, you  
16 know, when we were calculating the damages in that  
17 particular case.

18           MS. NARINE: Is that a policy that is -- is that  
19 a practice? Is that just a kind of a general practice,  
20 or is that something that is actually a policy?

21           MR. ROSA: Well, I B

22           MS. NARINE: Like, is there, like, mitigation

1 creditors, or something more formal B

2           MR. ROSA: There is nothing very specific, but  
3 what we do is we look at the totality of the case, the  
4 totality of all the evidence that was gathered during  
5 the investigation, and we -- in a neutral basis -- and,  
6 you know, and the evidence is constantly swaying, but  
7 we are weighing it on a neutral basis.

8           MS. NARINE: So I am not going to speak for  
9 Greg, but I know we had some conversations and then we  
10 kind of came to impasses when we started talking about  
11 this is where I think there is a big labor management  
12 divide about the benefits of credits or mitigation or  
13 safe harbor.

14           But for those that weren't part of those  
15 discussions, I think, just very briefly, one of the --  
16 so I put myself in the hat of the person in charge of  
17 compliance for a whole company. And not every company  
18 has a thing like that. But they are not just thinking  
19 about the safety issues, they are thinking about every  
20 possible way where they can be, you know, charged by  
21 the government, or sued by somebody, or looked at by a  
22 regulatory agency.

1           And so, to the extent that I am keeping in my  
2 head, okay, there is mitigation credit for this, and  
3 there is not for this -- no, you want to have some kind  
4 of a consistent -- you should do things because it is  
5 the right thing to do. Let's put that on the table, on  
6 the record. But not everybody thinks that way. Right?  
7   And so, the question is, is a company, or is an  
8 employer intentionally or unintentionally going to put  
9 more emphasis on strengthening programs where they  
10 know, okay, under the federal sentencing guidelines, I  
11 am going to have this, so I need to make sure we do  
12 this?

13           So, is there some kind of way to make it more  
14 transparent as to this is going to weigh in your favor  
15 if you have adopted these kinds of things, et cetera?  
16 Because at some point I strongly believe that companies  
17 need incentive and penalties to do anything. And, to  
18 the extent that there is some way, whether it is a safe  
19 harbor or something -- or some kind of a -- some level  
20 of transparency as to how this is going to be weighed,  
21 that will, for many companies, dictate how much  
22 investment they are going to make into adopting any

1 kind of best practices.

2           So, I think, to the extent that that can be made  
3 a little bit more -- it doesn't have to be codified, it  
4 doesn't have to be an Act of Congress. But just  
5 something that makes it easier for people in compliance  
6 or safety or anything to say, "This is why we need to  
7 do this."

8           MR. ROSA: Sure.

9           MS. SPIELER: Yeah, I think this needs further  
10 conversation, obviously.

11          MR. ROSA: Sure, sure, sure.

12          MS. SPIELER: The -- you know, for an individual  
13 who has been terminated who is owed back pay,  
14 obviously, they are just owed that.

15          MS. NARINE: Right, of course.

16          MS. SPIELER: So the question is the -- what  
17 additional relief there is, and that varies under the  
18 statutes, and it varies in the way it plays out over  
19 the different statutes. I think it does require fuller  
20 conversation.

21          Nancy?

22          MS. LESSIN: So, rather than dive into that



1 conversation, I was going to go to another place. But  
2 when we do get to it, I do have a number of things to  
3 say. But B

4 MS. SPIELER: I am sure you do.

5 MS. LESSIN: So, if we are B

6 MS. SPIELER: Yeah, go ahead.

7 MS. LESSIN: -- kind of done with that, I am  
8 very interested in the beginning discussion we had on  
9 alternative dispute resolution, and very concerned that  
10 working means getting it done quickly, rather than  
11 justly, or something.

12 And so, the idea of looking at what happened in  
13 the two regions, where the pilots happened, what was  
14 the data there, what -- you know, how were cases  
15 resolved, and, if it is being expanded, what -- how it  
16 is going to work.

17 And the concern I have is, when you have a  
18 worker who is not represented, and you have a mediator,  
19 and you have an employer who has a whole bank of  
20 lawyers, what is the -- what does that really look like  
21 for the worker side of this, and the kind of imbalance  
22 of power, and how OSHA is going into this -- now we are

1 expanding it to all regions.

2           So I want to hear a lot more about both the  
3 pilots and the plans for going forward, and especially  
4 if you have -- you know, the more and more vulnerable  
5 workers who are involved in this, what does this look  
6 like? Who is representing them, and how does this  
7 work?

8           So, that would be one thing I would want to put  
9 on the table.

10           And the other -- there is actually two others.  
11 One is the data that we got, I think there is a  
12 discussion about why are things -- you know, why are  
13 things looking like they are working here, and not  
14 working there, and is there any advice that we can have  
15 on that. And if we add the state plan data, are we  
16 going to learn more?

17           But, again, sort of not just getting the data,  
18 but looking at the differences. And are there things  
19 that this region can learn from that region? Or is  
20 this just a -- it is an artifact because it really --  
21 this is -- these were the circumstances. So, anyway,  
22 there is the data issue.

1           And then the third one is if the new record-  
2 keeping rule goes through with some of the changes  
3 about dealing with practices that discourage injury  
4 reporting, there may be advice that this committee can  
5 give to OSHA, in terms of going forward with that new  
6 -- you know, what might compliance assistance look  
7 like, or what might -- you know, what is new, and is  
8 there anything we can help with?

9           So, those are a lot of ifs. But if that  
10 happens, there may be some things to look at.

11           MS. SPIELER: Okay.

12           MS. DOUGHERTY: I would just like to piggyback  
13 on your first one about the ADR. Is -- if you can even  
14 find out for us, you know, are we talking about  
15 employees that had some disciplinary action and  
16 remained at work? Are we talking about terminated  
17 employees that are going into the ADR? So they are,  
18 you know, losing income. Or people that -- you know,  
19 very often what I find is people lose a job, you know,  
20 half of them can find other work right away. So is it  
21 a matter of a disparity of earnings, then, that you are  
22 looking at with the ADR?

1           So, if we can kind of give some categories for  
2 how these cases were actually filed and settled B

3           MR. ROSA:    Sure.

4           MS. DOUGHERTY:  -- and whether or not any of the  
5 -- you know, both parties come to the table and say,  
6 "Yes, we want this mediated," and the mediator is  
7 going, "Well, there is way more stuff going on here  
8 than we should be mediating."  Has that ever happened,  
9 that maybe the employee really does have a lot more  
10 that they could get by going forward, and they don't  
11 really understand that taking the, you know, one  
12 month's salary at this point -- probably not a good  
13 idea?

14          MS. NARINE:  I am sorry, I missed it.  What is  
15 the roll-out date for B

16          MR. ROSA:  It is not -- I don't know if I -- it  
17 has gone out yet.  The directive is in the clearance  
18 process right now.

19          And the one thing I wanted to clarify is that  
20 these individuals that are working are ADR  
21 coordinators.  They are not certified mediators.  These  
22 are OSHA staff.  So we are not -- have a contract with

1 an outside mediator. These are OSHA personnel that are  
2 moving from the enforcement side and to be coordinators  
3 and sort of the facilitators of the negotiations. They  
4 are not mediators. I want to make sure that is clear  
5 for the record.

6 MS. SPIELER: Richard?

7 MR. MOBERLY: I also want to follow up on  
8 something Nancy said, and that is just about the data,  
9 generally. And it seems like every -- so I think OSHA  
10 has made great strides in the type of data that it has  
11 accumulated and collected and produced for us, but it  
12 also seems like, whenever we have these meetings, we  
13 say, "Well, do you have this? And what about this?  
14 And how about this?"

15 And I just didn't know if it would be helpful if  
16 there was a group of people who worked with OSHA to  
17 say, "This is what an outside group would want,  
18 datawise, and what are your systems like? And what  
19 would it take to move from your systems to something  
20 more productive?"

21 MS. SPIELER: So, I actually have begun a  
22 conversation with DWPP on that question. And I think,

1 once Mary Ann has moved into her position formally, we  
2 will be able to have further conversations about it  
3 that -- and if it seems like we could do that, then we  
4 will see if David Michaels is willing to charge an  
5 additional group that specifically focuses on data  
6 collection issues. It is something that I am  
7 personally interested in, and do think that there are  
8 people on this committee who could be tremendously  
9 helpful.

10           So, we will see. I also know that the OSHA and  
11 DoL systems are -- could be better. And so, what we  
12 might think would be good might not exist, and so there  
13 needs to be a lot of coordination on that.

14           There were a couple of other issues that have  
15 come up in the past, and I just -- you may not -- given  
16 how tired you are, may not remember, but I just want to  
17 throw them out and ask if there are things that you  
18 have continued interest in, and -- so that I can work  
19 with the DWPP and Dr. Michaels on figuring out whether  
20 it makes sense for us to address them.

21           One is sort of parameters around training,  
22 internal training, and questions about that. And my

1 recollection, Marcia, is that that -- you had a lot of  
2 interest in that area early on, and I wondered whether  
3 there was continued interest in those questions, and  
4 whether people thought that that was something the  
5 advisory committee could be helpful on.

6 MS. NARINE: I mean I think that was very, very  
7 early on, so I guess maybe the only thing that might be  
8 helpful is any updates. When we first learned about --  
9 I think it was the first meeting B

10 MS. SPIELER: Yeah.

11 MS. NARINE: -- we learned about what kind of  
12 training was done, what kinds of resources were out  
13 there, and at the time it was discussed that a number  
14 of changes were occurring. So, rather than putting  
15 together a whole committee, or anything like that,  
16 maybe an update B

17 MS. SPIELER: Okay.

18 MS. NARINE: -- about, you know, since we first  
19 met two years ago, is there some improvement, is there  
20 something -- working on, these are some gaps in the  
21 training B

22 MS. SPIELER: Yeah.

1           MS. NARINE: Especially now that, you know, new  
2 structures have been put into place, maybe Bill's  
3 concerns are all obviated.

4           MS. SPIELER: Okay. Two other issues that kind  
5 of came up at this meeting that I just want to mention  
6 out loud, and see if there are people here who feel  
7 that this is something that really should be taken on  
8 by the committee.

9           One is the rulemaking application that Tom  
10 Devine talked about. We talked about it in the context  
11 of best practices. It is certainly -- it is not  
12 something I think the committee has to weigh in on, by  
13 any means. But if there is a feeling among committee  
14 members that this is something you really want to delve  
15 into, we could certainly discuss it.

16           I realize that most of you have not had a chance  
17 to look at the petition yet, and we could definitely  
18 simply postpone whether that is something that people  
19 want to be discussing, but I wanted to throw it out.

20           MR. KEATING: I think we should B

21           MS. SPIELER: Postpone it?

22           MR. KEATING: I think we need to read the



1 petition.

2 MS. SPIELER: Okay.

3 MR. KEATING: I haven't even had a chance to  
4 read it.

5 MS. SPIELER: And the second -- and here, this  
6 may be simply a report -- we got a public comment  
7 regarding preliminary reinstatement practices. And,  
8 obviously, that is not an 11(c) issue.

9 Anthony informed me during one of our breaks  
10 that there is, not surprisingly, a lot of OSHA policy  
11 on how preliminary reinstatement works under the  
12 statutes in which it is available. If the committee  
13 would like, we could also have a report next time on  
14 how preliminary reinstatement is handled by the agency,  
15 and then, if it becomes an issue that people want to  
16 discuss at greater length, we can put it on our future  
17 agenda. Is that -- okay. So we will add that to the  
18 report section of the meeting next time.

19 Eric?

20 MR. FRUMIN: Yeah, so I have a couple I wanted  
21 to add.

22 On the state plan question, I think it would be

1 appropriate to get a briefing from the directorate of  
2 state programs, the division at OSHA that oversees  
3 state plans and has primary responsibility for  
4 monitoring the 11(c) function in the states on their  
5 monitoring process. They did -- so every since the  
6 disaster in Nevada a few years ago, OSHA has been doing  
7 a lot more intensive monitoring of state plans now, on  
8 a biannual basis. And the 11(c) function was the focus  
9 of that in, I think, 2012, 2013, whatever.

10           So there is a -- there was a fairly detailed  
11 review at that time, and presumably some period of time  
12 has passed where that -- findings, the recommendations,  
13 the implementation, all that has had a chance to sort  
14 of ripen. So it would be good for us to find out, you  
15 know, who is minding the store, and what does the store  
16 look like these days. Has the stuff on the shelves  
17 expired, or whatever, you know? So that would be  
18 useful.

19           And, along -- and a companion to the point about  
20 the data availability, information from the states,  
21 because, you know, OSHA does look at it pretty  
22 intensively in some cases.

1           In close sort of -- closely related to that is  
2 the kind of dire situation in California. And I just  
3 wanted to mention that that is something that, if we  
4 were to hear from the CESP about their monitoring of  
5 states, that we get a special briefing on the situation  
6 in California. In fact B

7           MS. SPIELER: I am not sure everybody knows what  
8 you are talking about, so B

9           MR. FRUMIN: Sorry. So the California 11(c)  
10 program has been a focus of repeated criticism by the  
11 annual federal reviews for quite some time. It is a  
12 different program in that there is a separate agency  
13 under the broad state labor department, different from  
14 Cal/OSHA, which -- division of labor standards and  
15 enforcement, they do the basic wage and hour  
16 enforcement. They have responsibility for a number of  
17 anti-retaliation provisions under California state  
18 labor law.

19           So, the anti-retaliation 11(c) function was  
20 delegated to them. So the head of Cal/OSHA has no  
21 control whatsoever over their anti-retaliation program,  
22 even for people -- not even for -- for the people

1 involved with Cal/OSHA enforcement.

2           So that program has been suffering from serious  
3 problems that -- retaliation investigation, 11(c)  
4 complaints, and they have been suffering from serious  
5 problems for a very long time. This is not to take  
6 away from the tremendous efforts that the commissioner,  
7 Julie Su, and others there have undertaken on wage  
8 theft in California and, in some cases, even on safety-  
9 related retaliation, but that program has been in dire  
10 straits, and has been said to be in dire straits by the  
11 Fed OSHA state plan enforcement people for quite a  
12 while.

13           So, this isn't Wyoming. It is not Maryland.  
14 This isn't Nevada. Actually, this is California. This  
15 is the biggest state plan out there in one of the most  
16 important parts of the U.S. economy. And it is on life  
17 support. So, I think whether or not we get that  
18 briefing from DCSP on state plans overall, we should be  
19 getting a briefing from them on where the California  
20 situation stands. So, I think that is an important  
21 request, period. So that is one thing, just on state  
22 plans.

1           The other thing -- and I think we should ask --  
2 we should look into is the relationship between  
3 complainant activity under Section VIII, enforcement in  
4 general, and retaliation concerns. Whether it is in  
5 the intake process, when complaints are received  
6 initially by OSHA, wherever it is received, the area  
7 office, the 800 line, all the way through the  
8 inspection process and afterwards, there is an obvious  
9 concern about complainants themselves being the subject  
10 of retaliation, as compared to workers who do whatever.

11           And we could look at the OSHA 11(c) data and,  
12 filed with the primary agency is 338 out of the 1,800  
13 cases. You know, it is not a small element, 338 people  
14 reported filed their 11(c) complaint. There is --  
15 suffered their retaliation as a result of having filed  
16 a complaint with OSHA. Well, a complaint is a really  
17 important thing in the life of OSHA. It is 27 percent  
18 of all inspections. They are productive inspections,  
19 they are finding a lot of violations. And if workers  
20 who are -- file complaints are treated this way, and  
21 you know, whatever, 20 percent of the -- all 11(c)  
22 complaints B that is a big problem.

1           I have raised this question in the past "Do  
2 complainants get special consideration in whistleblower  
3 B- complainants with a primary agency get special  
4 consideration in whistleblower investigations or not?"

5           So when Derrick Baxter was here from MSHA and  
6 did a briefing for us, I asked him -- and somewhere  
7 there is a memo floating around at MSHA which says,  
8 yes, recovery in those cases pay 20 percent more, there  
9 is a 20 percent premium when you are settling or  
10 resolving complainants under the Mine Safety Act. That  
11 has been their experience. So, somehow, the agency is  
12 taking this into account, looking at them more  
13 seriously.

14           So, for the little -- you have people who are  
15 data-hungry. I did ask -- I was never able to get the  
16 actual -- he said that number one time.

17           So, just to make a long story short, I think it  
18 is a -- it is important that we look -- we focus in on  
19 the complaint process under Section VIII of the Act,  
20 and where the retaliation issues play out with the  
21 complainants, and how that affects the agency's  
22 practice in the field, the area offices, and the

1 regions regarding the inter-relationship of these two  
2 really important functions.

3           Are we protecting complainants adequately? Are  
4 we preventing retaliation against complainants  
5 adequately? Are we intervening to stop that so we  
6 don't end up with, you know, more TRO applicants B

7           MS. SPIELER: Yeah.

8           Nancy?

9           MS. LESSIN: Can I -- I want to add one thing to  
10 Eric's piece about California, just for when we are  
11 going to do this. My understanding is it is not -- so  
12 there is Cal/OSHA, and then whistleblower goes to this  
13 different agency. But when you look at the Fairfax  
14 memo, that is going to workers comp, the Fairfax  
15 issues. As I understand it, if you have been  
16 retaliated against for reporting an injury, that gets  
17 kicked out now to yet another agency.

18           And so, it just seems like we really should take  
19 a look at what is going on here, and is it at least as  
20 effective as -- I believe is the word, because the  
21 sense that I get from, you know, those that we  
22 represent in California and others, is not so much.

1 MS. SPIELER: Okay. We have a list. It has an  
2 even 10 items on it, a number of which are really  
3 "Let's get some more information to the committee so we  
4 can consider what to do next."

5 Anything else? Christine?

6 MS. DOUGHERTY: I just wanted to -- when Eric  
7 was talking about the reports that are done, and the  
8 audits that are done, I looked at the most recent audit  
9 reports from the state plans that I could find online.  
10 And what type or depth of audit that you get out of  
11 federal OSHA as a state plan depends on who is doing  
12 the audit.

13 I think that we need to be looking at maybe if  
14 there are standards for these groups doing the audits,  
15 and how are they looking at the programs. Are they all  
16 following the same script, and do they all look at the  
17 same issues? Because if you look at those reports, the  
18 discrimination stuff might be one line that says they  
19 had X amount of cases this year. What does that help?  
20 Nothing.

21 So, there needs to be maybe some standards for  
22 the auditors themselves. And, if there are standards,



1 what are they, and why isn't that appearing in the  
2 report itself?

3 MS. SPIELER: And that is something I think this  
4 committee could help with.

5 J.J.?

6 MS. ROSENBAUM: So, on November 20th of last  
7 year, when President Obama issued a series of executive  
8 actions around immigration, there was the creation of a  
9 committee on the enforcement of labor and immigration  
10 law, which the Department of Labor sits on, along with  
11 the EEOC, the board, the Department of Homeland  
12 Security. I think those are all the agencies.

13 And one of the charges there is to clarify the  
14 process by which workers who have brought forth serious  
15 labor disputes, including whistleblower disputes, can  
16 make sure that their immigration status, or fears of  
17 immigration enforcement don't interrupt their ability  
18 to bring that complaint forward, or to be free of  
19 retaliation.

20 I think it is a really important issue for a  
21 subset of workers on a subset of the statutes here, but  
22 it would be helpful to hear a report back on how OSHA

1 is thinking about that issue in that context. I  
2 believe that someone has been participating from OSHA  
3 in the committee. And I do think, in terms of  
4 enforcement of the statutes for many workers, fear --  
5 both workers who may be working on a status, also  
6 workers who are on temporary visas, whose visa is tied  
7 to their employment, and who, if they suffer  
8 retaliation, would have to return to their home  
9 country, even if the retaliation is later found to be  
10 illegal. Immigration status is an issue in the context  
11 of making sure that the statutes can be enforced.

12 MS. SPIELER: So, again, something I think that  
13 we should begin a conversation about at our next  
14 meeting, and then see where it takes us.

15 MS. LESSIN: We have a five-day meeting.

16 (Laughter.)

17 MR. FRUMIN: When is our next meeting?

18 MS. SPIELER: We don't -- and I am not sure what  
19 staff is thinking, actually. So we will be in touch as  
20 quickly as we can.

21 And we may -- given how hard it was to find  
22 government rooms in D.C. the last couple of days, I had

1 a conversation with someone that -- suggesting that  
2 maybe they would reserve a block of rooms nearby the  
3 point that the date is picked, so that we wouldn't be  
4 as dispersed as we were this time. So the -- we are  
5 going to work on the logistics, probably in the next  
6 few weeks, and we will be in touch.

7           Jon, you had your hand up?

8           MR. BROCK: Yeah. This probably is already  
9 assumed, but the other part of the Assistant  
10 Secretary's charge to the best practices effort was to  
11 look at dissemination. There were probably a few of  
12 those issues on the list that came up today. And you  
13 may want to help to form that agenda. But B

14           MS. SPIELER: Yeah, definitely. Definitely.

15           MR. BROCK: We still have some work to do.

16           MS. SPIELER: Right.

17           MR. BROCK: There were a lot of good ideas that  
18 got put aside.

19           MS. SPIELER: Yeah. Okay. I think that I will  
20 be working with Mary Ann and Anthony in the next month  
21 to sort of figure out how we are going to move this  
22 forward, and figure out when the next meeting will be,

1 and we will be in touch.

2           Again, before we adjourn, I want to thank the  
3 ARAs for joining us today.

4           (Applause.)

5           MS. SPIELER: It was -- I think it is -- as you  
6 can tell from the participation on this committee,  
7 people think the work you do is really important. And  
8 we are also delighted that your positions now exist.  
9 So this committee is really set up to assist the  
10 Department and the agency in thinking through and  
11 becoming more effective in the enforcement of  
12 whistleblower issues. And the more you can bring those  
13 forward and bring those forward to the directorate, the  
14 more we will be able to be helpful.

15           So, thank you for coming and listening, and I  
16 hope that you will continue to bring issues forward  
17 that we can help address. And a thank you to the rest  
18 of the D.C. staff for being incredibly patient, I  
19 think, with the work groups, and for assisting us in  
20 this meeting and then, of course, for the -- to the  
21 members of the committee, who -- I think this has been  
22 an incredibly productive and engaged meeting, and I

1 want to thank you all for your level of participation  
2 and commitment to the issues.

3           And, unless anyone else has anything they want  
4 to say in closing, I will declare the meeting  
5 adjourned. Thank you very much. Five minutes early.

6           (Applause.)

7           (Whereupon, at 3:55 p.m., the meeting was  
8 adjourned.)

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