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U.S. Department of Labor - OSHA

Whistleblower Protection  
Advisory Committee Meeting

1:34 to 5:17 p.m.

Wednesday, September 3, 2014

U.S. Department of Labor - OSHA

200 Constitution Avenue

Room C5517

Washington, D.C. 20210

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1 ATTENDEES:

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3 Whistleblower Protection Advisory Committee:

4 EMILY SPIELER, Northeastern University

5 School of Law, Chair

6 NANCY LESSIN, Steelworkers Charitable and

7 Educational Organization

8 CHRISTINE DOUGHERTY, Principal Discrimination

9 Investigator, State of Minnesota

10 RICHARD MOBERLY, University of Nebraska

11 College of Law

12 AVA BARBOUR, International Unions, UAW

13 MARCIA NARINE, St. Thomas University

14 School of Law

15 ERIC FRUMIN, Change to Win

16 JON BROCK, Emeritus Faculty Member, University

17 Of Washington

18 KENNETH WENGERT, Kraft Foods Group

19 BILLIE GARDE, Clifford & Garde, LLP

20 GREGORY KEATING, Littler Mendelson, PC

21 DAVID EHERTS, Actavis Pharmaceuticals

22

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1 ATTENDEES (continued):

2

3 DR. DAVID MICHAELS, Assistant Secretary of  
4 Labor for Occupational Safety and Health

5

6 Directorate of Whistleblower Protection Programs:

7 NANCY SMITH, Acting Director

8 ANTHONY ROSA, Deputy Director

9 MEGHAN SMITH, WPAC Liaison

10 LAURA SEEMAN

11 ROB SWICK

12 KATELYN WENDELL

13 LAURA GIVENS

14 CLEVELAND FAIRCHILD

15 BRIAN BROKER

16 VIET LY

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1 ATTENDEES (continued):

2

3 Also Present:

4 RICHARD RENNER, Kalijarvi, Chuzi, Newman  
5 & Fitch

6 MARK LERNER, Solicitor's Office, OSHA

7 MEGHAN GUENTHER, Office of the Solicitor,  
8 Fair Labor Standards Division

9 KIRK SANDERS, OSHA

10 RICK INCLIMA, Brotherhood of Maintenance of Way  
11 Employees Division, Teamsters Rail Conference

12 BRUCE ROLFSEN, Bloomberg BNA, Occupational  
13 Safety and Health Reporter

14 JOE SIRBAK, Buchanan Ingersoll

15 DAVE KITTRESS, LRP Publications

16 KIM NELSON, OSHA, Toledo Office

17 CONNIE VALKAN, CN Railroad

18 RON JOHNSON: Jones Day

19 ANDREA HYATT, BNSF Railway

20 SUSAN LINDHORST, Union Pacific

21 STEVE MITCHELL, United Auto Workers Local 974

22 CHARLES SHEWMAKE, BNSF Railway

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1 ATTENDEES (continued):

2

3 Also Present (continued):

4 ROB SWAIN, Department of Labor

5 ROBERT MILLER, U.S. Department of

6 Transportation, Federal Motor Carrier

7 Safety Administration

8 KIMBERLY DARBY, OSHA Office of Communications

9 MARY BRANDENBERGER, OSHA Office of

10 Communications

11 DINKAR MODAKAM, Association of Flight

12 Attendants

13 NICOLE COLEMAN, Nuclear Regulatory Commission

14 LISA JARRIEL, Nuclear Regulatory Commission

15 PHIL STAUB, Washington Metropolitan Area

16 Transit Authority

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

2 MS. SPIELER: Hi. I would like to call  
3 this meeting to order. My name is Emily Spieler.  
4 I'm the chair of this federal advisory committee,  
5 the Whistleblower Protection Advisory Committee,  
6 and this, as, I think, most of you know, is the  
7 third meeting of the full advisory committee. In  
8 the interim, three subcommittees have been  
9 working hard on a number of important issues, and  
10 much of our meeting tomorrow will be devoted to  
11 the discussion of the current status of the work  
12 of those committees.

13 Today we will have a series of  
14 presentations with questions from people sitting  
15 up here, but first there are two things we have  
16 to take care of. First, the mandatory safety  
17 briefing, from Rob.

18 MR. SWICK: [Speaking off mic.]

19 MS. SPIELER: Or you can come use this  
20 one.

21 MR. SWICK: Good afternoon, everyone. I  
22 am Rob Swick. I am with the Directorate of

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1 Whistleblower Protection Programs. Thank you for  
2 coming here today. Just a quick word about the  
3 building. Here in the Frances Perkins Building,  
4 there are two kinds of emergency events that  
5 could occur, the first of which is a shelter-in-  
6 place. If we get that sort of alarm, we will  
7 stay exactly where we're at. The second kind is  
8 an evacuation. We are going to go, like  
9 kindergartners, straight out that door, to the  
10 stairs right around the corner, and we'll follow  
11 the procession out, and we'll try to account for  
12 everybody there.

13           We are on the fourth floor. You can get  
14 refreshments up until three o'clock upstairs at  
15 these elevators, to the sixth floor here. This  
16 corridor down here, I believe until four, you can  
17 get refreshments at the snack bar. There are  
18 soda machines somewhere. I dare you to find  
19 them. And with that, if you have any questions,  
20 please feel free to reach out to me, and any  
21 other of the members of DWPP -- hands, DWPP  
22 people -- out there, if you need assistance.

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1 Thank you, Emily.

2 MS. SPIELER: Sure. Second, I want to  
3 make sure, it is the practice of this committee  
4 that everybody introduces themselves. So what  
5 I'm going to ask is that starting with Nancy  
6 Lessin that we have the members of the Advisory  
7 Committee introduce themselves. We will then go  
8 to the OSHA leadership and staff, and then to  
9 everyone else in the room. So, Nancy, if you  
10 could start.

11 MS. LESSIN: Nancy Lessin. I'm with the  
12 Steelworkers Charitable and Educational  
13 Organization, and I represent labor on the  
14 committee.

15 MS. DOUGHERTY: Christine Dougherty. I  
16 am a safety and discrimination investigator for  
17 the State of Minnesota, and I represent the state  
18 plan states.

19 MR. MOBERLY: I'm Richard Moberly. I'm a  
20 professor at the University of Nebraska College  
21 of Law, and I'm a public representative.

22 MS. BARBOUR: I'm Ava Barbour. I am an

1 attorney at the International Union UAW, and I  
2 represent labor on the committee.

3 MS. NARINE: Marcia Narine. Professor,  
4 St. Thomas University of Miami, former deputy  
5 general counsel and compliance officer,  
6 representing management.

7 MR. FRUMIN: Eric Frumin. Health and  
8 Safety Director for the Labor Union Federation  
9 Change to Win, and I represent labor.

10 MR. BROCK: Jon Brock. I'm a retired  
11 professor of public policy. I'm a public member  
12 of the committee.

13 MR. WENGERT: Good afternoon. Ken  
14 Wengert from Kraft Foods, and I'm representing  
15 management.

16 MS. GARDE: Billie Garde, partner at  
17 Clifford and Garde. I represent employees.

18 MR. KEATING: I'm Greg Keating. I'm a  
19 shareholder of Littler Mendelson, and I represent  
20 management.

21 MR. EHERTS: Dave Eherts, Vice President  
22 EHS at Actavis, and I represent management.

1 MS. SPIELER: Thank you. And now, Dr.  
2 Michaels, do you want to introduce yourself now  
3 or would you like to hold off?

4 DR. MICHAELS: I'm David Michaels,  
5 Assistant Secretary of Labor for Occupational  
6 Safety and Health.

7 MS. SPIELER: And now --

8 MS. SMITH: I'm Nancy Smith, and I'm the  
9 Acting Director for the Directorate of the  
10 Whistleblower Programs.

11 MR. ROSA: I'm Anthony Rosa. I am the  
12 Deputy Director for the Directorate of the  
13 Whistleblower Programs and I'm WPAC's designated  
14 federal official.

15 MS. SPIELER: Okay. So for everyone  
16 else, why don't we just go up and down?

17 MR. SWICK: There is a reminder. There  
18 is a sign-in sheet for observers, and media in  
19 the back. Oh, it's making its way around. Very  
20 good. Okay. Here we go.

21 MS. SPIELER: Rob, before you do, let's  
22 ask Louise to introduce herself.

1           MS. BETTS: I'm Louise Betts with the  
2 Office of the Solicitor, and I'm counsel to the  
3 committee.

4           MR. RENNER: Richard Renner, attorney at  
5 Kalijarvi, Chuzi, Newman & Fitch. I represent  
6 employees.

7           MR. LERNER: Mark Lerner. Solicitor's  
8 Office, Division of Occupational Safety and  
9 Health.

10          MS. SMITH: Meghan Smith, Directorate of  
11 Whistleblower Protection Programs.

12          MS. GUENTHER: Meghan Guenther, Office of  
13 the Solicitor, Fair Labor Standards Division.

14          MR. SANDERS: Kirk Sanders, Chief of  
15 Staff of OSHA.

16          MR. INCLIMA: Rick Inclima, Director of  
17 Safety, Brotherhood of Maintenance of Way  
18 Employees Division, Teamsters Rail Conference.

19          MR. ROLFSEN: Bruce Rolfsen, Bloomberg  
20 BNA, Occupational Safety and Health Reporter.

21          MS. GIVENS: Hi. I am Laura Givens. I'm  
22 with DWPP.

1           MS. SEEMAN: Laura Seeman. I'm the  
2 Division Chief for Field Operations for the  
3 Whistleblower Programs.

4           MR. SIRBAK: Joe Sirbak. I'm a  
5 shareholder at Buchanan Ingersoll, and I  
6 represent employers.

7           MR. KITRESS: Dave Kittress. I'm a  
8 reporter with LRP Publications.

9           MS. NELSON: Kim Nelson. I'm the Area  
10 Director in the Toledo, Ohio Office.

11          MS. VALKAN: Connie Valkan, CN Railroad.

12          MR. JOHNSON: Ron Johnson, Jones Day. We  
13 represent employers.

14          MS. HYATT: Andrea Hyatt, BNSF Railway.

15          MS. LINDHORST: Susan Lindhorst, Union  
16 Pacific.

17          MR. FAIRCHILD: Cleveland Fairchild,  
18 Program Analyst with DWPP.

19          MR. BROKER: Brian Broker, Program  
20 Analyst with DWPP.

21          MR. MITCHELL: Steve Mitchell, United  
22 Auto Workers Local 974.

1 MR. LY: Viet Ly, DWPP.

2 MR. SHEWMAKE: Charles Shewmake, BNSF  
3 Railway.

4 MR. SWAIN: Rob Swain, Counsel for Legal  
5 Advice with the Office of the Solicitor, DOL.

6 MR. MILLER: I'm Bob Miller with the U.S.  
7 Department of Transportation, Federal Motor  
8 Carrier Safety Administration.

9 MS. DARBY: Kimberly Darby with OSHA's  
10 Office of Communications.

11 MS. BRANDENBERGER: Hi. I'm Mary  
12 Brandenberger, Deputy Director, OSHA Office of  
13 Communications. I was going to slip in the back.

14 MS. SPIELER: Rob, I don't think you  
15 actually introduced yourself.

16 MR. SWICK: Rob Swick, Directorate of  
17 Whistleblower Protection Programs.

18 MS. SPIELER: So, we are delighted that  
19 there's broad interest from both the labor and  
20 employee side in the activities of this  
21 committee, and we do hope that the work that we  
22 are doing, both between committee meetings and

1 when we're here, face-to-face in Washington, is  
2 beneficial for OSHA, for the Department of Labor,  
3 and for the work that's done on a day-to-day  
4 basis by everyone outside.

5 I'm going to turn this over to Dr.  
6 Michaels now.

7 DR. MICHAELS: Thank you, Chairman  
8 Spieler. First, I'd like to thank all of you,  
9 the members of the Whistleblower Protection  
10 Advisory Committee, for all your work, and to  
11 offer a special thanks to Emily, the chair of the  
12 committee, and also to the work group chairs,  
13 Dave Eherts, of the 11(c) Work Group; Jon Brock,  
14 Best Practices and Corporate Culture Group; and  
15 Eric Frumin of the Transportation Industry Group.  
16 I know how hard the chairs and all of you have  
17 worked, and I'm very grateful, and I speak on  
18 behalf of OSHA and the Labor Department, thanking  
19 you for that.

20 We're fortunate to have Tom Perez as our  
21 Secretary of Labor. He really is a champion of  
22 worker safety and of all of the issues that we're



1 really talking about here, and he brings many  
2 years of fighting against discrimination, and  
3 really inspires us in this work that we do. You  
4 have met, but I want to reintroduce our new  
5 permanent Deputy Director of the Whistleblower  
6 Protection Programs. That's Anthony Rosa. We're  
7 very pleased that he's joined our staff  
8 permanent. And you've met, and, again, I want to  
9 thank you, Nancy Smith, who was our Acting  
10 Director. They'll be here and they'll be able to  
11 answer your questions. They'll be presenting, as  
12 well.

13           And I also want to thank your staff.  
14 There's a terrific staff in the Directorate of  
15 the Whistleblower Protection Programs, and the  
16 Solicitor of Labor. You've met most of the  
17 permanent staff of the Directorate. They're here  
18 today. It's a small program. They do great  
19 work.

20           Since I last addressed this committee,  
21 we've continued to strengthen and improve our  
22 Whistleblower Protection Program. As you know,

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1 this is a responsibility that we take very  
2 seriously, so I wanted to begin by focusing on  
3 the improvements that we've made since we last  
4 met, and providing some perspective over the 5  
5 years since I began here at OSHA.

6 First, I think our Whistleblower  
7 Protection Program really is getting stronger.  
8 From 2009 through June 30th of this year, OSHA  
9 has issued approximately 3,700 merit  
10 determinations, recovering over \$119 million in  
11 damages for whistleblower complainants, and  
12 reinstated 389 whistleblowers to their positions.

13 In 2013, we more than doubled the number  
14 of merit determinations we issued in 2009. We  
15 went from 450 in fiscal year 2009 to 934 in  
16 fiscal year 2013. These 934 merit determinations  
17 include 74 merit findings, 860 settlement  
18 agreements, and awards of over \$25 million in  
19 total damages to complainants. That's an 89  
20 percent increase from the \$13.25 million in  
21 damages awarded in fiscal year 2009.

22 Now, in the first three-quarters of this

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1 year we're on a similar track. We've already  
2 issued 602 merit determinations and awarded  
3 approximately \$21.5 million in damages to  
4 whistleblower complainants. So, as you can see,  
5 our efforts our having results.

6 I want to review a few of the  
7 improvements we've made since our last meeting.  
8 Now, a significant concern has been our ever-  
9 increasing inventory of pending cases, including  
10 the overage cases, that we also call our backlog  
11 cases, which grew steadily from 2005 to 2012. To  
12 address this trend, we streamlined our procedures  
13 for documenting the outcome of complaints,  
14 whether they were withdrawn or settled, or if the  
15 party stopped cooperating with our investigation.  
16 These new procedures, and the new structure that  
17 we piloted, which I'm going to discuss next, have  
18 contributed to a significant reduction in the  
19 pending case inventory.

20 Over this last period, the last fiscal  
21 year or two, several regions piloted a new  
22 organizational structure, and we created a new

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1 position, an Assistant Regional Administrator for  
2 Whistleblower Protection. The new position  
3 allowed for direct caseload management and  
4 oversight of whistleblower investigations by  
5 subject matter experts, resulting in more  
6 efficient and more effective investigations under  
7 all of our statutes. Following the success of  
8 this pilot, we are now implementing this new  
9 structure and the position in every one of our  
10 regions.

11 We are also continuing to work closely  
12 with the agencies whose whistleblower provisions  
13 we enforce. We recently entered into a  
14 memorandum of understanding with the Federal  
15 Motor Carrier Safety Administration. This MOU  
16 provides for a better exchange of information  
17 between the two agencies and enables OSHA to  
18 access valuable data from FMCSA about the safety,  
19 fitness, and compliance history of commercial  
20 motor carriers and drivers' crash inspection  
21 history and their safety records. I know you're  
22 going to hear more about our work with our sister

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1 agency later on today.

2           We are working on a new policy memo  
3 clarifying the agency's position regarding the  
4 burden of proof required in whistleblower  
5 investigations. This memo will change the burden  
6 of proof to be based on reasonable cause that the  
7 violation occurred, which is a lesser burden to  
8 prove than a preponderance of evidence. OSHA and  
9 the Office of Solicitor of Labor have looked at  
10 this issue. I think we've come to a very valid  
11 conclusion. We're working on this policy memo  
12 and it should be completed shortly.

13           We've also had great success with our  
14 Section 11(c) appeals program. Faced with more  
15 than 200 outstanding appeal cases pending review,  
16 we implemented internal procedures to tackle the  
17 backlog. Now we're down to only 33 appeals  
18 pending review. Moreover, we've drastically  
19 reduced our response time to appellants from 279  
20 days in the first quarter of fiscal year 2013 to  
21 only 89 days last quarter. For each case, we  
22 also conduct two independent reviews to ensure

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1 the quality of our response. Complex cases are  
2 referred to our solicitors for further review and  
3 legal analysis, and if additional investigative  
4 work is needed, the case is remanded back to the  
5 field for further investigation. So I especially  
6 want to thank our staff here, who have worked on  
7 addressing this backlog program. Really, they've  
8 worked on it diligently, and I think with some  
9 great success.

10 Our national office has also been  
11 conducting onsite audits of our regional programs  
12 to ensure they're strong and effective. In the  
13 last few months, we've also developed a tool to  
14 increase the consistency and uniformity of self-  
15 audits conducted by each of the OSHA regions.  
16 The tool is designed to ensure that each region  
17 is following the Whistleblower Investigation  
18 Manual and using consistent metrics to evaluate  
19 regional performance.

20 So I want to use this moment to give you  
21 a few examples of some of our recent enforcement  
22 cases, that we look at as successes. Just last

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1 month, OSHA reached a settlement agreement with  
2 Gaines Motor Lines and two individuals, to  
3 compensate four former truck drivers who were  
4 fired for participating in an inspection audit,  
5 in violation of the Whistleblower protection  
6 provisions of the Surface Transportation  
7 Assistance Act. The settlement required the  
8 employer to pay more than \$260,000 in back pay  
9 wages, interest, and compensatory damage.

10           We've also been dealing with several  
11 11(c) investigations involving AT&T. These cases  
12 stem from AT&T's retaliatory practices against  
13 employees who report work-related injuries.  
14 Cases have already been filed in U.S. District  
15 Court and several newer cases are being  
16 investigated, as well. OSHA plans to continue to  
17 pursue AT&T and other companies' compliance with  
18 this basic worker right, the right to report  
19 work-related injuries.

20           In July 2014, the Department of Labor  
21 entered into a consent order in the amount of  
22 \$100,000 with McKees Rocks Industrial Enterprises

1 after we filed a lawsuit in federal court. Our  
2 investigation found that McKees Rocks fired a  
3 worker because they suspected the worker had  
4 called OSHA, triggering an investigation, an OSHA  
5 inspection. The order also required McKees Rocks  
6 to prominently display information on  
7 whistleblower protections at their facility,  
8 remove all disciplinary actions from the worker's  
9 official employment record, and provide  
10 prospective employers with a neutral reference  
11 for the worker.

12 In June of this year, we obtained a  
13 settlement from Crown Furniture after filing a  
14 lawsuit in district court. In this case, our  
15 investigation found that Crown Furniture fired a  
16 worker after he called OSHA to report safety and  
17 health hazards, including the presence of  
18 asbestos, mold, and rodents in the basement.

19 Last month, OSHA ordered Asphalt  
20 Specialists to pay nearly \$1 million in damages,  
21 including almost \$250,000 in back wages to  
22 drivers it had terminated for raising safety

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1 concerns, \$110,000 in compensatory damages, and  
2 \$600,000 in punitive damages, and to reinstate  
3 the drivers. These workers raised safety  
4 concerns after being directed to violate the U.S.  
5 Department of Transportation's mandated hours of  
6 service regulations for commercial truck drivers.

7           Also last month, we ordered a contractor  
8 for the Department of Energy's Hanford Nuclear  
9 Facility in Washington State to reinstate the  
10 environmental specialist who was fired in a  
11 retaliation for voicing nuclear and environmental  
12 safety concerns. On six different occasions, the  
13 employee reported concerns about lack of  
14 adherence to nuclear environmental safety  
15 regulations. OSHA ordered Washington River  
16 Protection Solutions to immediately rehire the  
17 employee and pay the employee \$186,000 in lost  
18 pay plus interest, \$24,000 in compensatory  
19 damage, \$10,000 in punitive damages, and  
20 reasonable attorney fees.

21           We still have a great deal of work ahead  
22 of us. The department's FY 2015 budget request

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1 for whistleblower programs reflects our  
2 commitment to continuing to build the program.  
3 This \$21 million request would support a total of  
4 158 full-time employees, 27 positions more than  
5 our current FTE level, which is 131 across the  
6 country.

7 I want to focus now on some of the areas  
8 where we really need your help, the concerns on  
9 which you and your work groups have focused.  
10 First, I look forward to your advice and input on  
11 effective means to change corporate culture  
12 around the issue of whistleblowers. OSHA is  
13 committed to providing and showcasing industry  
14 best practices that encourage employers to  
15 establish effective anti-retaliation reporting  
16 programs in their workplaces.

17 We'd like your assistance in helping  
18 employers embrace "a culture of ethics and  
19 compliance," as your advisory committee member,  
20 Greg Keating, called it in his recent  
21 congressional testimony. "This is a culture" --  
22 and, again, I'm quoting, because I absolutely

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1 agree with what Greg said -- "in which compliance  
2 with the letter and spirit of the law is both  
3 required and encouraged at every level of the  
4 organization. Employees feel welcomed and  
5 encouraged to share their concerns about possible  
6 noncompliance, and individuals who come forward  
7 in good faith to report possible misconduct or  
8 safety concerns can do so without fear of  
9 retaliation of any kind."

10           So I encourage your committee, especially  
11 the Best Practices Work Group, to play a really  
12 big role in this discussion. With your  
13 assistance in collecting best practices and  
14 making recommendations to OSHA, we can  
15 collectively effect a positive culture change  
16 that encourages employees to report their  
17 concerns and have their concerns considered -- as  
18 Greg said, "encouraged at every level of the  
19 organization that employees feel welcomed and  
20 encouraged to share their concerns." That's what  
21 we really want, and we want them to be able to do  
22 that without fear of retaliation, and we want

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1 employers to realize the benefits to establishing  
2 those programs. That's a big charge, and I'm  
3 looking forward to your help and advice on that.

4 I also very much look forward to the  
5 11(c) and Transportation Work Group ideas and  
6 recommendations. Section 11(c) complaints are  
7 the majority of OSHA's whistleblower  
8 investigations. As I testified before that same  
9 congressional committee session that Greg  
10 testified at last April, this section of the OSHA  
11 Act, 11(c), is in need of significant upgrades if  
12 OSHA is to fulfill its mission and protect  
13 workers who raise safety and health concerns. As  
14 such, I look forward to reviewing your  
15 recommendations on ways that this statute can be  
16 strengthened or ways that we can address the  
17 issue without changing the statute.

18 And I also look forward to the  
19 Transportation Work Group's recommendations.  
20 Over the last few years, retaliation complaints  
21 from rail workers increased faster than  
22 complaints under any other whistleblower statute

1 we enforce. OSHA has taken several steps to  
2 discourage railroad employers from continuing the  
3 policies that led to retaliation. For example,  
4 OSHA signed an agreement with the Federal  
5 Railroad Administration to collaborate to protect  
6 railroad workers from reprisal when they report  
7 safety violations to the government or report  
8 work-related injuries or illnesses to their  
9 employers.

10 We also issued several widely publicized  
11 enforcement findings in the railroad industry,  
12 and we were very gratified and were very pleased  
13 when BNSF signed a voluntary accord, agreeing to  
14 revise several personnel policies that we found  
15 violated the whistleblower provisions in the  
16 Federal Railroad Safety Act. But there's more  
17 work to be done protecting not just railroad  
18 workers but workers employed across the  
19 transportation industry, and I look forward to  
20 your recommendations on where and how to most  
21 effectively and productively focus our efforts to  
22 achieve the greatest impact in this industry.

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1           So I thank all three work groups  
2 personally for all your passion, your dedication,  
3 and the time expended on these important program  
4 areas. I know you're not paid for this time by  
5 the Federal Government. We are very grateful for  
6 all the time, the effort, and the dedication that  
7 you put into this.

8           We're very excited to see this committee  
9 meet again, to provide your perspective, your  
10 insight, your recommendations, to help us  
11 maintain and improve our whistleblower protection  
12 efforts. Your research, your analysis, your  
13 recommendations will help strengthen our program.  
14 We're appreciative of your time, your interest in  
15 promoting worker safety, and the ability of  
16 workers to voice safety and health concerns, so  
17 thank you so much.

18           I'll be in and out of the meeting for the  
19 next day and a half, but I can answer a few  
20 questions, and, more importantly, I have two of  
21 our senior staff people who know far more than I  
22 do about the workings of the Directorate, and can

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1 answer your questions, as well.

2 MS. SPIELER: Do members of the committee  
3 have any questions for Dr. Michaels now? Thank  
4 you very much. I expect we may, in the course of  
5 the next day and a half.

6 DR. MICHAELS: Well, I will be back, and  
7 you will see me.

8 MS. SPIELER: Nancy.

9 MS. SMITH: It is my pleasure to be here,  
10 and I just want to echo what Dr. Michaels said  
11 about the appreciation that we have for this  
12 committee and the things that you can do for us,  
13 so we really appreciate it. I want to thank Dr.  
14 Michaels for his support for the program. We  
15 could not ask for a more dedicated individual,  
16 and he's been extremely helpful to us. So just  
17 as we acknowledge Secretary Perez, because he's a  
18 champion for worker and worker rights, Dr.  
19 Michael is, as well. I just wanted to  
20 acknowledge that and acknowledge the committee.

21 Just to tell you a little bit about my  
22 background, I am the Acting Director for the

1 Directorate of Whistleblower Programs. My  
2 permanent position is as Deputy Regional  
3 Administrator in the Denver Region. So I've  
4 actually been in management with Federal  
5 Government for over 30 years. I started with the  
6 Office of Personnel Management and moved to the  
7 Department of Labor, and in 1989, moved to OSHA.  
8 I've been involved in administrative programs,  
9 consultation programs, audits, and, in 2009,  
10 became the Deputy Regional Administrator. So  
11 this detail to this Directorate has been very  
12 exciting for me, and I'm just impressed with the  
13 staff of the DWPP office. I want you to know  
14 that you have a lot of individuals that care  
15 deeply about this program. We are very receptive  
16 to your comments, suggestions, recommendations.

17 And I especially want to thank your  
18 points of contact for the work groups, Meghan  
19 Smith, Rob Swick, and Katelyn Wendell. I know  
20 you all have done a lot of work preparing for  
21 this, and I want to thank you, as well.

22 I will be here through the end of October, and I

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1 want to help you in any way that I can, but we  
2 also wanted someone that could provide continuity  
3 for you, that would be here for your meetings,  
4 and so I'm happy that Anthony has joined the  
5 Directorate. He's here as the permanent Deputy  
6 Director, and, as he said, he is the designated  
7 federal official for this committee. So he will  
8 be your go-to person on policy and operational  
9 issues, but Meghan Smith is still the point of  
10 contact for logistics and the day-to-day issues.

11 I wanted to provide you some of the  
12 organizational issues, and then Anthony is going  
13 to talk a little bit about his experience, and  
14 talk about some operational issues. Dr. Michaels  
15 talked about the implementation of the ARA, or  
16 assistant regional administrator, for  
17 whistleblower programs that each of the regions  
18 will have. It was piloted in Regions 4 and 5,  
19 and then 2 began it, as well. And one of the  
20 things I want to really focus on and let you all  
21 know that we believe it provides for us is it  
22 gives someone at the operational level, to be

1 sitting there with the regional administrator and  
2 the other ARAs, to include whistleblower  
3 considerations in everything, whether we're  
4 talking about safety and health, whether we're  
5 talking about outreach of all of those things.  
6 So it gives that person a seat at the table, and  
7 it really frees up our regional supervisory  
8 investigators to spend more time with their  
9 investigators, to spend more time reviewing their  
10 cases, providing training. So we believe it is  
11 going to help the program in a very big way, and  
12 it really mirrors the enforcement programs,  
13 because in the area offices you have an area  
14 director and an assistant area director. So we  
15 believe it allows the regions to mirror the  
16 enforcement programs and it allows the  
17 Directorate up here to mirror the enforcement  
18 programs, as well.

19           The other thing I wanted to talk about  
20 was an imitative that we've begun, and it's the  
21 Alternative Dispute Resolution, and under the ADR  
22 program, when both parties in a complaint

1 investigation agree to seek early resolution, the  
2 investigation will be stayed or it could happen  
3 even before the investigation begins, when an ADR  
4 coordinator works with both parties to see if  
5 there can be some type of early resolution. We  
6 piloted those, as well, in Regions 5 and 9, and  
7 both of those regions were happy and thought that  
8 it did improve the program. So we're working on  
9 finalizing our ADR directive, which will provide  
10 specific instructions on the process and  
11 procedures. We believe that it's another tool  
12 for the investigators to have in complaint  
13 resolution, and we're very happy with this  
14 initiative.

15           In addition to that, we've been working  
16 with the Federal Mediation and Conciliation  
17 Service to develop ADR skills training curriculum  
18 for OSHA's whistleblower staff. FMCS, the  
19 Federal Mediation and Conciliation Service,  
20 hosted 20 of OSHA's whistleblower field staff  
21 members for a 3-day basic ADR skills course in  
22 August, and they'll be hosting approximately 15

1 whistleblower program staff members for a Train  
2 the Trainer session in September. As a result of  
3 these two training sessions and feedback  
4 gathered, FMCS will provide OSHA with an ADR  
5 training material so that OSHA may continue with  
6 that Train the Trainer in-house, and train our  
7 whistleblower staff for those skills in the  
8 future.

9           For training, we've established a lot  
10 around the training. We want to parallel  
11 whistleblower training track to what the COSHO  
12 investigators have. So we will have a permanent  
13 whistleblower training coordinator at our  
14 training institute in Illinois, and provide six-  
15 five [ph] task-specific courses for the  
16 whistleblowers, including interviewing and some  
17 of the basic courses that they take now. We're  
18 in the process of finalizing that training  
19 directive, and it should be completed shortly.

20           We're also exploring some avenues where  
21 we can provide additional training, either  
22 through WebEx LearningLink webinars that would

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1 really be just-in-time training, or on-demand  
2 training. For those statutes that we don't get  
3 that many complaints about, we don't want our  
4 investigators to be rusty on what that covers, so  
5 we want them to be able to refresh the  
6 requirements through a learning that they could  
7 tape into as needed.

8           Another thing that we've been doing is  
9 that we have been sending out national office  
10 people to be out in the field and meet the  
11 investigators, be in the regional office, kind of  
12 find out how it operates at the field level. It  
13 helps them understand what the needs, issues, and  
14 concerns are in the field, and share that  
15 information. So as we're developing procedures,  
16 we can look at it through a field perspective, as  
17 well as our perspective. And then we're hoping,  
18 in the upcoming year, to bring field staff into  
19 the national office so they can understand it  
20 from this side of the house, as well.

21           So those are a few of the organizational  
22 issues we started, and it's in process, so I

1 can't tell you that things have changed  
2 overnight, but we're very optimistic that these  
3 are steps that will improve the program on many  
4 different levels going forward.

5 I'm going to let Anthony introduce  
6 himself, tell you a little bit about his  
7 experience, and also talk about some of the  
8 operational issues that we've done.

9 MS. LESSIN: Can we ask some questions  
10 about what you said, or do you want to do it --

11 MS. SPIELER: What's your preference? If  
12 there's overlap between your presentations then  
13 it would make sense to wait. If there isn't, we  
14 could take them now.

15 MS. SMITH: I'm fine with either one.

16 MS. SPIELER: Okay. Go ahead, Nancy.

17 MS. LESSIN: I have a couple of  
18 questions. One is, you talked about this new  
19 structure with the dedicated whistleblower at a  
20 high level in a region, and you talked about it  
21 was piloted in Region 4 and in Region 5, and now  
22 will go out. We just, in our 11(c) meeting,

1 heard about enormous, enormous problems in Region  
2 5 currently. So I am concerned that something  
3 that was deemed to work well has allowed, I  
4 think, what we saw as very serious problems, to  
5 not only exist but continue. So you were in that  
6 meeting. I was wondering if you could reflect on  
7 that, and then I have one other question.

8 MS. SMITH: Okay, and I think we need  
9 more information. I know that you had asked,  
10 could we kind of find out were they aware of it,  
11 and all I can say is that we have asked for  
12 additional information. So I do believe that we  
13 will be able to be responsive to that, but I  
14 would prefer to wait until I had the whole story.

15 MS. LESSIN: The other question was about  
16 the alternative dispute resolution. I am  
17 wondering, there are times in different kinds of  
18 arenas where somebody is presented with, you can  
19 do alternative dispute resolution and get this  
20 done quickly, or it may take a really long time  
21 if we go the other way, so they're kind of pushed  
22 into something that may or may not bring about

1 justice. So I would like more information about  
2 this. I think that it can, at times, work well,  
3 but at times be very problematic, and one of the  
4 things that I'd like to see is some data, do some  
5 case comparisons. If you go the traditional  
6 route, what was the resolution, versus if you  
7 went to ADR with the push to get it done quickly,  
8 are people accepting less settlements than they  
9 might get through the other route? Is there data  
10 now that you can look at that and say this is at  
11 least as effective as, or there are differences  
12 here that we need to pay attention to?

13 MS. SMITH: We are looking at the  
14 information from those two pilots, but our intent  
15 is not to force anyone into one avenue or the  
16 other, but we are looking at that information, as  
17 far as comparing the results.

18 MS. LESSIN: Can that get shared?

19 MR. ROSA: And just to add, the way the  
20 ADR initiative worked was that at the onset of an  
21 investigation, when the notification letter is  
22 given out, the parties are given an opportunity



1 to decide whether they want to be part of this  
2 alternative approach. If both parties -- now, we  
3 have to have both respondent and complainant --  
4 if both parties agree, then, at that point,  
5 instead of going into a full-fledged  
6 investigation, we have a dedicated ADR  
7 coordinator who is not doing investigations, so  
8 is not even involved in enforcement, is not even  
9 necessarily involved in the details of the case.  
10 They're just trying to find a resolution to the  
11 conflict.

12 MS. LESSIN: And can you go back to the  
13 traditional way if you feel like this is not --

14 MR. ROSA: Yes. Yes. After a certain  
15 period of time, if the ADR coordinator believes  
16 that the case is not moving forward, then we make  
17 a decision, again, with consultation with --  
18 obviously, the decision is the regional  
19 administrator's decision to say, okay, this case  
20 is not moving forward and we're going to go back  
21 to a full investigation.

22 MS. SPIELER: Go ahead.

1           MS. BARBOUR: I actually also had a  
2 question about the ADR. You've answered some of  
3 it, in terms of how you've explained how it  
4 starts. I just have some detail-type questions.  
5 Does the complainant typically have someone to  
6 represent their interest there?

7           MR. ROSA: Well, the complainant always  
8 has the opportunity to have a representative if  
9 they wish. They don't necessarily have to, but  
10 they always have the opportunity to bring someone  
11 forward.

12           MS. BARBOUR: And from what you've found,  
13 have they typically had a representative, or is  
14 it too early to tell at this point?

15           MR. ROSA: It depends on the statute,  
16 really. It really depends on the statute.

17           MS. BARBOUR: What are the parameters for  
18 when you determine when ADR would be appropriate  
19 to offer or not? Is it offered in every case, as  
20 a matter of course, or are there some cases where  
21 you say this is not going to be appropriate?

22           MR. ROSA: I can't recall right now the

1 specifics in the directive. The directive was a  
2 pilot that was piloted in two regions, 5 and 9,  
3 and now we're in the process of moving it  
4 forward, and the final directive has not been  
5 finalized. We're taking basically all the  
6 feedback that was received from the pilots and  
7 we're working on a finalized directive at the  
8 present time.

9 MS. BARBOUR: Last question. So the  
10 parties discuss. They don't come to any kind of  
11 agreement. What happens with the information or  
12 what was said in that mediation? Is that carried  
13 on to the next phase, or is that something that's  
14 supposed to remain in their confidential?

15 MR. ROSA: That remains confidential.  
16 The purpose is that it doesn't have anything to  
17 do with the enforcement side of the house.

18 MS. BARBOUR: Thank you.

19 MR. ROSA: You're welcome.

20 MR. FRUMIN: So I've got a question for  
21 you, Nancy, about the closer integration between  
22 the whistleblower enforcement function and the

1 rest of the enforcement functions, particularly  
2 at the regional and area office levels, and this  
3 has to do with an issue that came up at a prior  
4 meeting here, when MSHA made a presentation about  
5 their anti-retaliation program. It's a very  
6 robust program and often involves miners who  
7 suffered retaliation after they were in contact  
8 with the agency, because that's a very vibrant  
9 relationship that miners have with MSHA  
10 inspectors.

11 MS. SMITH: Sure.

12 MR. FRUMIN: And I posed the question at  
13 that time, whether or not MSHA treated  
14 retaliation differently depending on whether or  
15 not the victim had been an informant or  
16 complainant with the agency, as compared to  
17 someone who is complaining to his or her own  
18 employer. Subsequently, I learned, and we don't  
19 have the details yet, but I learned that, from  
20 MSHA's standpoint, they, in fact, do treat, more  
21 severely, the retaliation cases when it involves  
22 a complainant or informant to the agency, that

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1 they are harsher with an employer when the  
2 victimization occurs subsequent to, or in  
3 relationship to, someone's exercise of their  
4 rights directly with the agency, which, to me,  
5 makes sense. There are obviously different  
6 opinions on the subject, that it makes sense.

7           So this leads me to ask you this  
8 question. It's one thing for the agency, for  
9 OSHA, to enhance the integration of the  
10 enforcement efforts at the regional and area  
11 office level, which is great, and to provide  
12 additional training for whistleblower  
13 investigators, but what I'm wondering, what, if  
14 anything, are you doing to provide additional  
15 training to regulator COSHOs about their need to  
16 better protect complainants and informants with  
17 whom they have contact in their investigations,  
18 and if there is any effort to do that, is there  
19 any difference in result, in terms of how the  
20 case is treated?

21           I'm not really expecting you to respond  
22 to that complicated question now, but I think it

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1 would be good for you all to look into that,  
2 either as a matter of practice or, potentially,  
3 actually, as a subject of study of your IMIS  
4 data, and let us know in the future, because  
5 these are important distinctions, and if you are,  
6 in fact, rolling out closer integration, some of  
7 the enhanced effort should be happening on the  
8 compliance COSHO side, not just on the  
9 whistleblower investigator side.

10 MS. SMITH: Definitely, and I will just  
11 say that most of the regions to have the  
12 whistleblower -- in the past it's been the  
13 regional supervisory investigator go the area  
14 office and really train the COSHOs on the  
15 whistleblower statutes, what to look for, and  
16 know the subtleties. I know, at least in our  
17 region, as we get new COSHOs, because you keep  
18 having a turnover, that's kind of a regular  
19 practice. So I believe the other regions do it,  
20 but I appreciate your comment and we will look  
21 into that.

22 MS. SPIELER: Greg.

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1           MR. KEATING: I an observation, and  
2 something I'd urge you to think about from the  
3 management perspective. I'm a management member.  
4 I would note that, as Nancy alluded to, and as  
5 you have mentioned, that this process, the  
6 process of handling a whistleblower case at OSHA,  
7 can often be one that goes on for a very  
8 significant period of time, and that's because  
9 you not only have the investigative phase, you  
10 then have the de novo trial before an  
11 administrative law judge, and then you have the  
12 review by the administrative review board, and  
13 then you have the potential for a case to be  
14 pulled and go to federal district court.

15           Each of these stages -- in my experience,  
16 I spend 90 percent of my time litigating these  
17 matters around the country -- each of these  
18 stages can take 6 months to a year. These cases  
19 can sometimes go on for 4 or 5 years, and on  
20 management's perspective, can obviously cost a  
21 lot of money and time in operational intrusions  
22 and investigations and depositions and testimony,

1 and on and on and on.

2           For that reason, I have been a big fan of  
3 the early ADR. I've actually participated in it  
4 on many occasions. It doesn't always settle, by  
5 any means, but I think it's a very good step, to  
6 try to see, can we avoid 4 or 5 years of -- and I  
7 would also note, on the individual's side, I can  
8 only imagine sometimes the stress and the anxiety  
9 of going through this process for years and years  
10 and years and years.

11           One thing that I've been thinking about,  
12 and that I'd ask you to consider, is something  
13 similar to a Rule 68, Offer of Judgment, and what  
14 I'm talking about is an employer saying, early on  
15 in the case, that they are willing to offer the  
16 individual \$50,000, whatever the number is, and  
17 the individual is free to reject that.

18           But if the individual rejects that, and  
19 then it goes on, and 5 years later the result  
20 that they attain is less than that amount, then  
21 there should be some sort of burden-shifting by  
22 way of attorney's fees being cut off at the time

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1 of the offer of judgment, or other attendant Rule  
2 68 relief. I think that's something that might  
3 be a good way of making sure that the process is  
4 fair on both sides, and forces both sides to  
5 think about whether they want to go through this  
6 long ordeal.

7 MS. SPIELER: Richard?

8 MR. MOBERLY: I have kind of a  
9 combination of the last two issues. I'm happy to  
10 see that there's more coordination on the  
11 underlying misconduct. I mean, we're all talking  
12 about the retaliation part, and I'd like us to  
13 think for a second about this underlying  
14 misconduct and this enhanced coordination with  
15 the enforcement division or with other  
16 administrative agencies, I think gets at that  
17 somewhat. But when it's combined with this ADR  
18 program, I wonder about that underlying  
19 wrongdoing, when 90 percent of the merit, or well  
20 over 90 percent of the merit determinations are  
21 actually settlements.

22 So I wonder if there's any willingness or

1 interest in looking at the underlying wrongdoing  
2 for those ADR settlement cases. Does that make  
3 sense?

4 MS. SMITH: I guess I'm not quite sure  
5 what you're --

6 MR. MOBERLY: So, a whistleblower  
7 complains about some illegal misconduct at the  
8 workplace. From what I understand, when you said  
9 there was enhanced coordination, the enforcement  
10 division will go look at the underlying  
11 misconduct. Your division looks at the  
12 whistleblower retaliation part of it. So I'm  
13 interested in that underlying misconduct, and I'm  
14 glad that there's enhanced coordination, but I  
15 worry when I see that over 90 percent of the  
16 merit determinations are actually settlements or  
17 done through this ADR process, that, through  
18 confidentiality agreements or confidential  
19 processes, that underlying misconduct cynically  
20 gets bottled off, less cynically goes away  
21 because the parties walk away happy. I just  
22 didn't know if there was any effort to look at

1 that underlying misconduct, even in those  
2 settlements or ADR contexts.

3 MR. KEATING: Just one question. It  
4 doesn't automatically.

5 MR. MOBERLY: I'm sorry?

6 MR. KEATING: It doesn't automatically go  
7 away, right?

8 MR. MOBERLY: Well, I mean, a lot of  
9 these settle with confidentiality agreements. In  
10 fact, almost all of them do. Does that make  
11 sense now?

12 MS. SMITH: It does. It does. I guess  
13 I'm like --

14 MR. ROSA: Well, we do look into --  
15 again, at the beginning of the investigation, we  
16 get a complaint and we give the parties an  
17 opportunity to try to settle before we even  
18 investigate, and if they decide to settle, a lot  
19 of times employers will settle whether or not --  
20 even, in some instances, they may have proof that  
21 there may be been employee misconduct. But  
22 because of the length of litigation and the cost,

1 that they would just probably -- you know, it's  
2 best for them to just proceed with trying to  
3 settle the case.

4 What we're looking for is the complaint  
5 resolution part, is what the ADR is focused on.

6 MR. MOBERLY: Sure, and I guess I'm just  
7 pointing out that there's attention there,  
8 between settling the individual case --

9 MR. ROSA: Yes. Understood.

10 MR. MOBERLY: -- and getting at the larger  
11 misconduct that was being reported.

12 MR. ROSA: Right. Understood.

13 MS. SPIELER: Anthony, did you have  
14 additional remarks that you wanted to make to the  
15 committee?

16 MR. ROSA: With regard to the operation,  
17 yes.

18 MS. SPIELER: Yeah. I think we should  
19 move to that and then we can come back to  
20 questions if there are additional ones.

21 MR. ROSA: Sure. Sure.

22 MS. SPIELER: Thank you.

1           MR. ROSA: Well, first and foremost, I  
2 wanted to thank the committee for the opportunity  
3 to address you. I was with you at the last  
4 meeting as Acting Deputy Director, and I'm glad  
5 to be here as a permanent member and to see you  
6 in the future and to work together with you.

7           Just to give a little bit of background  
8 about myself, I have over 23 years working with  
9 the Department of Labor, most of my time, pretty  
10 much 99 percent of my time, with OSHA. I started  
11 in 1991 in the Bayside, Queens area office, and  
12 from there I moved into a program analyst  
13 position in the New York regional office, and I  
14 covered a myriad of functions in the regional  
15 office, including state plan monitoring for over  
16 13 years, consultation programs. I did Susan  
17 Howard grants in the planning and support  
18 divisions. I was also a regional supervisory  
19 investigator for the whistleblower program,  
20 temporarily, in Region 2.

21           In 2006, I actually moved into the Office  
22 of Federal Contract Compliance Programs as the

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1 Planning and Support Director. I had a short  
2 stint there in OFCCP, and then I returned to  
3 OSHA. I went back into the State Plans Division.  
4 In 2008, I moved to Tampa, Florida, and I was  
5 there as a safety specialist, compliance  
6 assistance specialist in the Tampa area, and in  
7 2009, I moved over to Atlanta regional office,  
8 first to be the Technical 13 for the  
9 whistleblower program at the time, and for the  
10 past 2 years, until just last week, I was one of  
11 the two assistant regional administrators that  
12 piloted the new structure. As mentioned earlier,  
13 it was 4 and 5. Region 4 was one of the two and  
14 I was one of those.

15           And just to give you a little experience  
16 on that, it does give you an opportunity to sit  
17 at the table, and when you have team leaders that  
18 are on the compliance side, the assistant area  
19 directors they're called, or in whistleblower  
20 they're called regional supervisory  
21 investigators, when you're spending all your time  
22 reviewing case files, you don't really have the

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1 time to focus on the strategic planning and the  
2 goal mission-oriented functions of that position.

3           The ARA relieves that person from the  
4 day-to-day reviews of the case files and allows  
5 that person to look at the goals and the missions  
6 of the program, and that has allowed me to help  
7 develop a system in the region, and, at the same  
8 time, to have team leaders that were focusing  
9 directly on the day-to-day work. So that was a  
10 very unique experience, but now I'm here and I  
11 look forward to working with you.

12           As Dr. Michaels mentioned -- I'm going to  
13 go into some operational issues. As. Dr.  
14 Michaels mentioned with our, the Section 11(c)  
15 appeals program, we are actually moving away from  
16 the term "appeals," and we are beginning to use  
17 the term "administrative review," because,  
18 technically, that's what they are. They are  
19 administrative reviews under the procedures and  
20 practice that the agency has had.

21           One thing that we developed, in order to  
22 tackle the backlog of all these appeal cases, was

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1 an administrative review forum, meaning when one  
2 of the two reviewers -- if both reviewers believe  
3 that the appeal should be dismissed, the case is  
4 dismissed. But if one of the two believe that  
5 maybe additional information is needed, or  
6 there's probably something more here, then we  
7 have, internally, within the Directorate, an  
8 administrative review forum, and then we have a  
9 discussion whether we're going to send the case  
10 back to the region for additional information or  
11 whether we're going to send the case straight up  
12 to the full committee, which is including us and  
13 members of the National Solicitor's Office.

14           These discussions have really helped us  
15 in dealing with the backlog and getting these  
16 responses from the regions, in working with the  
17 Solicitor's Office, but it's also helped us in  
18 identifying areas for improvement. It's almost  
19 like an additional review of areas that maybe the  
20 investigator did not collect a certain piece of  
21 information. We got that information and what we  
22 are doing now, we are tabulating all that



1 information, that we're going to use it as a  
2 training tool, that's going to help the field  
3 investigators use it, so when they complete cases  
4 they have sort of a checklist of items that were  
5 noted missing in the appeals review, that now  
6 they can do it so that it doesn't get missed  
7 before the case is determined. This was  
8 something that have actually done in Region 4,  
9 when I was there, and it has been proven  
10 successful, together with the Solicitor's Office,  
11 because we worked together with the Solicitor's  
12 Office on that matter.

13           Then I wanted to mention, as you know, in  
14 December, we launched the e-complaint, the  
15 electronic whistleblower complaint form. As of  
16 yesterday, we have received 2,614 complaints.  
17 There are a percentage of those that are  
18 duplicates, because sometimes the complainant may  
19 not know that they filed, and then they file  
20 again, and sometimes we have two numbers but it's  
21 the same thing, but it's probably a small  
22 percentage of those. So it has added an

1 additional burden to the work that we already  
2 have, but it has proven to be beneficial for the  
3 public to have yet one more avenue of access to  
4 file a complaint. Many of them, actually, are  
5 coming in when the office is closed, which is  
6 usually the time that we're not in the office to  
7 take a verbal call, so it has been proven  
8 beneficial for the public to file their  
9 complaints. I get a lot of these on the  
10 weekends.

11           What we recently did in the Directorate,  
12 we sent a questionnaire to the field. Now,  
13 that's been launched for a period of time. We  
14 sent the questionnaire to the field to get their  
15 feedback -- what's working, what's not working,  
16 what can we do better with this form -- and we're  
17 tabulating that information in order to improve  
18 that form, so that it will be better. At the  
19 same time, we are also working on a Spanish  
20 version of the complaint, so that it is made  
21 available to people that cannot understand  
22 English.

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1           In terms of regulation, as you know, we  
2 are responsible for promulgating the regulations  
3 for the 22 statutes that we currently enforce.  
4 Since the last meeting we had in March, we  
5 published a regulation for the Consumer Financial  
6 Protection Act, also commonly known as Dodd-  
7 Frank. We refer to it as CFPA in our statute.  
8 That rule became effective upon publication and  
9 we are currently reviewing the comments we  
10 received, to public comments on that regulation.

11           We also have a number of other interim  
12 final rules, or IFRs, as we call them -- the Food  
13 Safety Modernization Act, the Affordable Care  
14 Act, Siemens Protection Act, Section 708 of the  
15 Sarbanes-Oxley Act, the National Transit System  
16 Security Act, and the Federal Railroad Safety  
17 Act. Those are currently all in IFR status, and  
18 we're working together with the Solicitor's  
19 Office in going through the comments of review  
20 and finalizing them. But although they are  
21 interim, they are in effect, so there's nothing  
22 that's not in effect.

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1           We are working, however, on the one that  
2 we don't have an interim final rule, which is our  
3 latest statute, which is MAP-21, Moving Ahead for  
4 Progress in the 21st Century.

5           In terms of -- I think Dr. Michaels also  
6 mentioned, with MOUs, most of our work is done on  
7 the statues and coverage that is not in OSHA, and  
8 for that we need to build good relationships with  
9 our partner agencies, and I'm very happy to see  
10 that we have Robert Miller here with us today,  
11 who's going to talk to us later about the MOU,  
12 and I was one of the original big advocates for  
13 this MOU, together with my colleague from Region  
14 6. We've been working on this for many years, so  
15 I'm very happy to see this MOU in place, and he  
16 will explain to you the benefits that it will  
17 bring to the agency.

18           I know at the last meeting we talked  
19 about referrals. There was, I guess, some  
20 confusion about how compliance officers will be  
21 referring to investigators, and back and forth,  
22 so we issued a memo, a policy memo that was

1 issued, that kind of clarified that compliance  
2 officers will be trained enough, as Nancy  
3 mentioned, to know when there's a potential  
4 whistleblower matter, and vice versa, once we  
5 have a whistleblower investigation, to  
6 automatically refer that to the safety side.

7           What we're also doing, in some instances,  
8 if the case warrants, is to do joint  
9 investigations, because many times we find it  
10 very beneficial that when we go together on site,  
11 we're showing a unified front in these instances,  
12 and one investigation will help the other  
13 investigation in those cases.

14           In terms of the manual, well, we all  
15 agree that the manual needs some work, so we're  
16 working on a number of chapters to update it.  
17 Specifically, we're working on two specific  
18 chapters. Chapter 6, which is the chapter that  
19 relates to damages, calculations, and settlement  
20 agreements. This chapter is helping us -- it's  
21 going to clarify the issues of how to do penalty  
22 calculations. We're working together with the

1 Office of the Solicitor, which is our eternal  
2 partner in terms of policy issues in the manual.

3           We're also working on a chapter -- it's a  
4 brand new chapter -- that we're going to  
5 consolidate everything that relates to  
6 information disclosure, whether it's nonpublic  
7 disclosures between the parties while the  
8 investigation is ongoing, or whether it's a  
9 Freedom of Information Act request, a Privacy Act  
10 request, or interagency sharing agreements that  
11 we have with our sister agencies.

12           And one last thing. Dr. Michaels did  
13 mention the reasonable cause memo, and we're  
14 working on that, and that should be out shortly.  
15 Thank you.

16           MS. SPIELER: Thank you. So, I think I  
17 cut short couple of questions and wanted to take  
18 them, and then we'll ask Mr. Miller to come up  
19 and talk to us about the new MOU, or am I wrong  
20 about that?

21           MS. BARBOUR: So this goes back to  
22 something that Nancy was talking about, the

1 sending national office staff to the regions to  
2 find out what the issues are and discuss that,  
3 and that's something we've been talking about, we  
4 were talking about this morning in the 11(c)  
5 subcommittee, what some of us perceive as a lack  
6 of consistency between the regions and sometimes  
7 a disconnect between things that the Directorate  
8 has been working on, a lot of progress that's  
9 been made at the Directorate of Whistleblower  
10 Programs that isn't necessarily always trickling  
11 down to the regions.

12           So I wondered if, what kind of  
13 information or data are you collecting from those  
14 visits, and then if that's something that would  
15 be sharable with the committee?

16           MS. SMITH: Well, I think, in general, we  
17 are getting general information about their  
18 concerns, et cetera, but we do, have instituted  
19 monthly calls with the regional supervisory  
20 investigators, so that we can share information.  
21 I think if you look at the majority of the  
22 initiatives that we've undergone, is to try to

1 get better consistency among the regions. So, we  
2 know that what happens in one region isn't  
3 necessarily what has happened in another region,  
4 but all of our efforts are really tuned towards  
5 that.

6 MS. BARBOUR: Okay.

7 MS. SPIELER: Can I just ask, have you  
8 considered, under the statutes where you get very  
9 few complaints, and you talked about buffing up  
10 skills -- have you considered having national  
11 experts on particular statutes, where there are  
12 few complaints, who would sort of be the person  
13 who stays up on issues under that statute?

14 MS. SMITH: That's certainly our desire.  
15 As our Directorate builds, we have the same issue  
16 that the regions have as far as kind of keeping  
17 positions filled, et cetera, but that is the goal  
18 that we want to --

19 MS. SPIELER: I wasn't necessarily  
20 suggesting that additional people be added to the  
21 Directorate as much as I know you have a  
22 coordinating committee around the country, you



1 have figured out ways to deal with some of the  
2 limited resources, and it just might make sense  
3 at some point to say, well, in Region 5 we're  
4 going to have someone who really is an expert on  
5 this statute, and if there are questions that  
6 come up around the country, call her.

7 MS. SMITH: Right. And we are  
8 encouraging our regions to do that, and share  
9 that, and make known, oh, this person is really  
10 good in this statute, or has a lot of experience  
11 in this particular statute. So it is one of our  
12 --

13 MS. SPIELER: Okay. That's great. That's  
14 great.

15 MS. SMITH: Thank you.

16 MS. SPIELER: Anything else? Mr. Miller,  
17 do you want to come up, take a seat, introduce  
18 yourself, talk to us a little?

19 MR. EHERTS: I have a fast question on  
20 the e-complaint program. Have you seen a  
21 plateauing off of the complaints, or are they  
22 still on the rise?

1           MR. ROSA: At the very beginning, we  
2 received quite a few. I thought, in the summer,  
3 there was -- I personally noticed, because I get  
4 an e-mail every time any complaint is filed, and  
5 I get them at three in the morning, or on a  
6 Saturday afternoon. And I have seen a little bit  
7 of a lull in the summer, so I'm kind of expecting  
8 maybe it will come back. But I have seen  
9 slightly, maybe a slow 5 to 10 percent less than  
10 what I've seen before, but we have seen a little  
11 bit a lull, but they are coming in, yeah.

12           MR. EHERTS: My experience in business is  
13 when you shine a light on one of these reporting  
14 systems, they tend to encourage reporting, and  
15 then when you respond and people see that action  
16 is being taken, that encourages even more, until  
17 you get to a point that action is being taken,  
18 just fixing an underlying problem, and then it  
19 starts to drop off, and I was just wondering  
20 where we were on that curve.

21           MR. ROSA: Well, in the very beginning --  
22 we started in December, and we didn't get that

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1 many in December or January. I'll have to say,  
2 around March, when we had the last meeting,  
3 March, April, May, we did have a tremendous  
4 spike. I mean, we would have monthly calls with  
5 the field, and they would say, "This is really  
6 taking too much of our time. We really have so  
7 many complaints coming in, with all the other  
8 complaints that we have, whether they're in  
9 writing or they're coming in by fax, or they're  
10 coming in by phone, we're getting all these  
11 complaints."

12 I have a feeling, at least my personal  
13 experience has been that it's kind of slowed down  
14 slightly, but I'm not going to rule that this has  
15 gone to a lull yet. I think it's a little too  
16 soon for that.

17 MS. SPIELER: Mr. Miller, you have the  
18 floor.

19 MR. MILLER: Good afternoon. My name is  
20 Bob Miller. I'm with the Federal Motor Carrier  
21 Safety Administration within the U.S. Department  
22 of Transportation. I'm the Office Director for

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1 Policy, Strategic Planning, and Regulations,  
2 which sounds a little bit odd. It's not the  
3 enforcement office. In my prior experience, I  
4 was a regional field administrator for our  
5 compliance and enforcement programs. Our office  
6 manages the audit liaison function, which has the  
7 OIG, the GAO, NTSB, and we already have a  
8 workflow process on OIG hotline complaints. So  
9 when the MOU -- which I'm going to speak to in a  
10 moment -- was developed, our agency made a  
11 decision to put the management of that function  
12 under my office, and one of my divisions to  
13 manage it.

14 As Mr. Rosa mentioned, we executed an MOU  
15 between OSHA and the Federal Motor Carrier Safety  
16 Administration earlier this summer. He was one  
17 of the primary founding fathers of it, along with  
18 one of my partners. What this MOU really does  
19 for us is it formalizes what has historically  
20 been an informal relationship in our field  
21 offices. Some field offices participated more  
22 actively with our OSHA partners. Some were less

1 active or didn't know who their local partners  
2 were. Mr. Rosa was fortunate to work with a  
3 woman in our office in Atlanta by the name of  
4 Lucy Johnson, and they had formalized their own  
5 working relationship on a lot of OSHA FMCSA-  
6 related issues.

7           So this MOU that we executed this summer  
8 was the culmination of that effort, and  
9 formalizes those relationships, and now it gives  
10 us a benchmark or a framework for us to work  
11 collaboratively in the future, across the nation.  
12 One of the other things that the MOU does for  
13 both agencies is it really addresses one of the  
14 findings of the recent GAO audit on collaboration  
15 on STAA whistleblower protection findings.

16           With regard to the MOU itself, there are  
17 really four key points to it, collaboration on  
18 investigation a key one. Obviously, OSHA has a  
19 role in the employment resolution issues with  
20 drivers who may or may not have been terminated  
21 for a safety-related issue, where we have the  
22 safety oversight of the industry, as a whole. So

1 what the MOU lays out is a communication strategy  
2 where, if complaints come into OSHA that are  
3 strictly a safety issue, without an adverse  
4 employment-related item, they will kick it over  
5 to us, for us to investigate from a safety  
6 perspective.

7           Similarly, if we get a complaint in one  
8 of our field offices, it will funnel back through  
9 us, to OSHA, where it's related to an employment  
10 adverse action. And where there a common, a  
11 duality, if you will, we can also work  
12 collaboratively on those investigations. So, in  
13 other words, if it's a safety issue with an  
14 adverse employment action, perhaps we will send  
15 in investigators together to do that  
16 investigation.

17           The other key aspect of it, as Mr. Rosa  
18 mentioned, was data-sharing. Within the MOU, we  
19 have some publicly accessible information about  
20 truck and bus companies. Some of you may be  
21 familiar, if you've been watching the paper at  
22 all lately, about transportation issue. The

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1 safety measurement system is one of our key tools  
2 for identifying safety performance issues with  
3 truck and bus companies, and making it publicly  
4 available to not only the industry to make  
5 decisions about selecting carriers for operation  
6 but also for the public to make decisions about  
7 who they want to do business with.

8           While that information is publicly  
9 available to OSHA, we also have a plethora of  
10 data behind the scenes, that we can special data  
11 runs about a specific company -- for example, the  
12 driver who may be complaining about it, an  
13 adverse employment action. We may be able to  
14 look at how many inspections has this driver been  
15 subject to. What is their safety performance  
16 been in the past, that might help with the  
17 investigative process on the OSHA side of the  
18 house.

19           So, within the MOU there is a data-  
20 sharing part. I know you all are starting your  
21 database with regards to monitoring these  
22 complaints, and we're going to get into a

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1 potential this morning, on the transportation  
2 committee. We had a discussion about possibly,  
3 sometime in the near future, doing some kind of a  
4 mix-and-match, if you will. Let's look at the  
5 history of the complaints that are coming in  
6 about these companies and let's see if there's  
7 any kind of commonality about the safety profiles  
8 of those companies, to see if there is any kind  
9 of findings we can come up with there.

10           The third issue is training. Shared  
11 training, about two things. I have to admit, our  
12 field staff don't know what OSHA does, as far as  
13 what their investigative processes and procedures  
14 are, and what their roles and responsibilities  
15 are. We do know Federal Motor Carrier Safety  
16 regulations and the hazardous materials  
17 regulations, because that's what our  
18 investigators do on a daily basis. So there are  
19 some cross-training opportunities there, where,  
20 in the future, as opportunities present  
21 themselves, we will provide training about what  
22 the Federal Motor Carrier Safety regulations are



1 and, similarly, OSHA staff can come out and speak  
2 to our field staff. We do have annual in-service  
3 training, so we could have the OSHA staff come  
4 out and explain the whistleblower process and the  
5 other enforcement programs within OSHA's  
6 capability.

7           In fact, last year, even before the MOU  
8 was in place, we sent one of our employees, Tom  
9 Yeager, over to headquarters here at OSHA to do  
10 some training on the hours of service, which is  
11 one of the key complaints that you get in the  
12 truck and bus industry, with regard to  
13 employment. And next week, Lucy Johnson will be  
14 down in Dallas doing some training with the  
15 regional OSHA staff on our regulations, so that,  
16 again, the sharing, the collaboration is already  
17 well in play.

18           The last piece of the MOU is annual  
19 reports. There is an agreement that we will  
20 share information on an annual basis that will  
21 help get a better understanding of the level of  
22 effort that both agencies are putting into this

1 work, as well as to get some summary data about  
2 what have been the outcomes. So each year, on  
3 March 31st, we will send an annual report to each  
4 other, kind of summarizing the activities.

5 Now I will say this. The MOU was  
6 executed a couple of months ago. We are still  
7 working out the kinks on the implementation, but  
8 as I mentioned earlier, many things are already  
9 in play, as far as the collaboration goes. As we  
10 work through those issues, one of the reasons I'm  
11 here today, my participation on the  
12 transportation committee, is to engage our  
13 stakeholders.

14 That committee already gave us a couple  
15 of good ideas this morning on some things we can  
16 do in our sharing, but I look forward to working  
17 with this committee, the WPAC, in the future, and  
18 I'm looking forward to a positive and productive  
19 relationship in the future. I can answer any  
20 questions you might have about the MOU.

21 MS. SPIELER: Before we do that, may I  
22 ask, will you be able to be present tomorrow when

1 the transportation subcommittee is reporting? Do  
2 you know?

3 MR. MILLER: I'm not sure yet. Bob asked  
4 me that this morning, and I'm going to check my  
5 calendar for tomorrow, because I do have some  
6 appointments, but I had committed today's time,  
7 but I can probably make myself available.

8 MS. SPIELER: Yeah, no, and we do  
9 appreciate it. I was just wondering, because  
10 since you had been part of the conversation this  
11 morning, I thought your perspective might be  
12 useful for us when we have those conversations  
13 tomorrow. And it looks, for your information --  
14 we can talk about it more over the break -- but  
15 Marcia is going to have to leave because of a  
16 family emergency and will be able to call in  
17 tomorrow afternoon, and we think that what we'll  
18 do is put the transportation committee report  
19 last, in order to accommodate her schedule, which  
20 is likely to be after lunch.

21 MR. MILLER: Okay.

22 MS. SPIELER: Richard, go ahead.

1           MR. MOBERLY: Thanks for coming in. I  
2 don't want to belabor the point I was making  
3 earlier, but this presents kind of an interesting  
4 opportunity for some specifics on how this  
5 collaboration might work to get at the underlying  
6 complaint of a whistleblower retaliation claim.  
7 If I understand this MOU correctly, a  
8 whistleblower makes a complaint about, let's say,  
9 hours of service, I think I heard you say, and is  
10 retaliated and gets fired for that. So they file  
11 a complaint under STAA with OSHA.

12           You have not heard, in your agency, about  
13 this hours of service complaint yet, so OSHA gets  
14 this hours of service retaliation complaint. Am  
15 I hearing you right that there is some  
16 understanding, and now the underlying hours of  
17 service complaint will come to you, and you will  
18 investigate that separately?

19           MR. MILLER: Yes. That's the general  
20 idea that we would look into the safety issue of  
21 the complaint itself. Again, our role would be  
22 the safety, if there's evidence to support that

1 there is a safety problem in the company. The  
2 complaint, in and of itself, may not lead to an  
3 immediate investigation, but, as I mentioned, we  
4 have a lot of data about companies.

5 I'll give you an anecdotal one. We  
6 received one just the other day. The driver  
7 said, "I was terminated because I refused to take  
8 a run. I was already out of hours. I refused  
9 the run and they fired me on the spot." OSHA  
10 sent that to my office. We looked at it. The  
11 company had a very high incidence of hours of  
12 service violations in their safety record.

13 You know, it doesn't meant that the  
14 complaint was validated from the employment  
15 perspective, but there is certainly a safety  
16 problem in our records. And we also noted that  
17 there wasn't an investigation conducted of that  
18 company in the very near past, so, therefore, we  
19 are going to send that out for an investigation.

20 MR. MOBERLY: Okay. And if the  
21 whistleblower and the company reach a settlement  
22 on the retaliation complaint, would you consider

1 yourself bound by any confidentiality agreement  
2 that that whistleblower might have, so if you  
3 wanted to investigate the underlying complaint  
4 and they said, "Gosh, I can't talk to you because  
5 I signed this settlement agreement"?

6 MR. MILLER: Well, it's an interesting  
7 question. From a legal perspective, I couldn't  
8 answer that question because I'm not 100 percent  
9 sure. But what I would tell you is that when we  
10 go in and investigate the company, we're not  
11 going to be looking at just that one driver's  
12 violation. So, in fact, one of our requirements,  
13 and much like OSHA's requirement -- or maybe not  
14 like OSHA's requirement -- we have to keep the  
15 complainant's identity confidential.

16 So when we go in and do a safety  
17 investigation, I cannot divulge who the  
18 complainant is at all, and, for the most part, we  
19 would likely sample 5, 6, 7, 10 different  
20 drivers' records. We may include that  
21 complainant's records in that, and likely we  
22 would, just to see if it would validate their

1 complaint. But from an overall safety  
2 perspective, we're looking at the company as a  
3 whole, and what are their safety practices, with  
4 regards to hours of service, not necessarily that  
5 specific driver and that specific incident. Does  
6 that make sense?

7 MR. MOBERLY: It absolutely makes sense.  
8 Thank you.

9 MS. SPIELER: Dave, did you have one?

10 MR. EHERTS: I had exactly the same  
11 question, so I think it's right. Just on the  
12 converse of that, would you give it any more  
13 attention because the original complaint was  
14 retaliated against?

15 MR. MILLER: The safety issue, in and of  
16 itself, is our primary mission, is safety.

17 MR. EHERTS: So they're fairly  
18 independent?

19 MR. MILLER: Correct. We get complaints  
20 outside the OSHA environment, where they're just  
21 saying, "My company is requiring me to violate  
22 the hours of service on a daily basis." They've

1 not been fired. They've not been threatened to  
2 be fired. They're just doing it because they  
3 want to stay employed, so there's really no OSHA  
4 role yet, because they've not had any. Perhaps  
5 they have not filed a complaint with OSHA, but we  
6 get those on a daily basis from a company, and  
7 then we look at the company's safety record and  
8 we say, you know, where there's smoke, there's  
9 fire.

10           If there's safety data that kind of  
11 supports it, it will get elevated. I mean, we  
12 have limited resources, as well, as far as how  
13 many companies. We have over 535,000 companies  
14 we regulate with about 325 field investigators,  
15 so do the math. It's not easy. But, at any rate  
16 --

17           MR. EHERTS: No. I think it's a model  
18 program, interagency. I think intra would also  
19 work, right?

20           MR. MILLER: Correct.

21           MR. EHERTS: So if there was a complaint  
22 of retaliation, I think it ought to be referred,



1 then, to the field office to investigate the  
2 original complaint --

3 MR. MILLER: Correct.

4 MR. EHERTS: -- and, conversely, if a  
5 complaint comes in to the field office, and  
6 they're investigating it, and they find out,  
7 subsequently, the employee is terminated, they  
8 should refer it right over to them, too.

9 MR. MILLER: Right, and I may have  
10 overlooked it because my notes are short. When  
11 we get complaints of an adverse employment  
12 action, regardless of whether or not we're going  
13 to investigate on the safety side, we are kicking  
14 it to OSHA for their investigation, because they  
15 obviously have the primary role for that. I  
16 apologize for not mentioning that earlier.

17 MR. EHERTS: No. that's perfect.

18 MS. SPIELER: Gregory.

19 MR. KEATING: Just really quickly.  
20 Anthony, am I right that you have similar MOUs  
21 with a number of other agencies?

22 MR. ROSA: That's correct.

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1           MR. KEATING: And do they share,  
2 generally, one of the four fundamental elements,  
3 which is this collaboration on investigation?

4           MR. ROSA: Actually, what we did in this  
5 MOU, as we've done with all the other MOUs, is  
6 that we formalized it, because we have had an  
7 established practice of always sharing a copy of  
8 the complaint when it came in, so that the sister  
9 agency can determine whether they're going to do  
10 an investigation or not. This formalizes that  
11 practice. What this does, it gives us the added  
12 benefit of getting access to the databases that  
13 we don't have access to, that would help us in  
14 the case.

15           As Dr. Michaels mentioned earlier, they  
16 have databases that talk about the safety fitness  
17 of the company, as well as it talks about the  
18 driving safety records of the drivers. That  
19 really helps us with, specifically, for example,  
20 on credibility issues. Is the driver a really  
21 safe driver? Did the company really prove their  
22 position that this is not a really good driver,

1 and that's why they took action, or vice versa.  
2 Did the complainant prove that this company is  
3 just a bad actor? So those databases are crucial  
4 for us in helping us determine that credibility  
5 part, and to test any pretext on either side of  
6 the house.

7 MR. KEATING: And is there anywhere on the  
8 very useful website where you could find the MOUs  
9 that your Directorate has with other agencies?

10 MR. ROSA: They should be. They are all  
11 on the OSHA.gov website, yes.

12 MR. MILLER: You know, to Anthony's point  
13 on the driver issue and the credibility issue of  
14 the driver, and the company, for that matter, is  
15 we do have that driver database. So, for  
16 example, if company has had 100 inspections in  
17 the last year and they had an hours of service  
18 problem, it could all be that one driver that had  
19 filed the complaint. And the company may say,  
20 "Well, that's why we fired him. He's constantly  
21 violating the hours of service," and you can look  
22 at it and perhaps he had had violations dating

1 back 6 months, 8 months in time, and then they  
2 finally terminated him now.

3           Again, that's just a scenario that could  
4 help them. And the terminology I'm using is  
5 triaging the complaint to see which direction  
6 they ought to go, which ones would be likely to  
7 be substantiated or not. So, again, the data is  
8 available, and we're willing to share.

9           MR. FRUMIN: So, interesting. Just FYI  
10 for the committee members, an interesting  
11 expansion of the anti-retaliation program under  
12 the Service Transportation Act is the recent  
13 congressional directive on FMCSA to include an  
14 anti-coercion principal in all of its new  
15 regulations, which doesn't even require the  
16 commission of a retaliatory act by the employer  
17 to trigger an agency action. It's retaliation  
18 prevention.

19           So, Bob's talked to us about it some.  
20 There's a Federal Register notice that took  
21 comments at close last month. I don't want to  
22 put you on the spot about it now -- I don't know

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1 how much time we have -- but it is an interesting  
2 approach that was mandated by the Congress, to  
3 say to an agency, not only do you need an anti-  
4 retaliation provision, which, in this case, was  
5 punted over to OSHA, but you, yourself, have to  
6 put a retaliation prevention provision in your  
7 regulations. So I encourage you to look at the  
8 anti-coercion proposal that FMCSA published.  
9 We'll get a final rule in a year, maybe, or  
10 something.

11 MR. MILLER: We are targeting, hopefully  
12 -- I don't want to put a timetable on it, but  
13 we're looking towards early 2015.

14 MR. FRUMIN: Right. So we'll have a  
15 definition of coercion in the trucking industry,  
16 which will then be used in forthcoming  
17 regulations as a prohibited activity, all at the  
18 service of preventing retaliation in the first  
19 place, and there's a whole back story to it and I  
20 don't want to take up the time. I just want to  
21 make people aware of it.

22 MS. SPIELER: Nancy.

1           MS. LESSIN: Can that, perhaps, be  
2   circulated?

3           MR. FRUMIN: Yeah, sure. If we have it,  
4   we'll do it. That's fine. Yeah. We'll send it  
5   around.

6           MS. SPIELER: Just one quick question,  
7   and it's more out of curiosity. STAA, I think,  
8   is the only statute that includes independent  
9   contractors as well as technical employees under  
10   its anti-retaliation provisions, and I'm  
11   wondering if that has any effect when you're,  
12   either on the retaliation investigation that's  
13   done on the OSHA side or on the communication,  
14   given that an independent contractor in the  
15   industry may drive for more than one company,  
16   presumably.

17          MR. MILLER: Well, from an investigative  
18   perspective, on our side, that is a common  
19   concern as to who is that independent owner-  
20   operator driving for at the time of either the  
21   complaint, the crash, or whatever the issue we're  
22   investigating. So it does add a level of

1 complexity to our investigations, but I think  
2 there's enough documentation the process,  
3 supporting documents, to figure out who they're  
4 working for. I'm not sure I'm answering your  
5 question.

6 MS. SPIELER: Well, I was just curious,  
7 because of the owner-operator drives for a number  
8 of different companies, which, presumably, many  
9 do but not all, then does that have any impact on  
10 the way you look at those data, because you were  
11 talking about looking at the driver's history and  
12 the employer's history, but when you're dealing  
13 with the many, many owner-operators out there who  
14 may be claiming retaliation by a particular  
15 company, right, I assume because they're not  
16 being asked back to drive again, so how do you  
17 process the data issues there?

18 MR. MILLER: All of our roadside  
19 inspections -- I was telling the group earlier  
20 this morning -- we do over 3.5 million roadside  
21 inspections per year, not our agency but our  
22 state partners, through our grant programs, 3.5

1 million inspections. All those inspections are  
2 tied back to a USDOT number. So even though  
3 they're an independent owner-operator, maybe  
4 driving for three different companies, at that  
5 time of inspection, through investigation at the  
6 time of inspection, it's determined who is the  
7 motor carrier they're working for at that time.

8 MS. SPIELER: Oh, okay.

9 MR. MILLER: So the outcome of that  
10 particular inspection would go to that company.  
11 Your question is well made when you look at a  
12 driver. We also have the converse opportunity,  
13 within our database, then, to look at a driver.  
14 One of the things we look for when we do  
15 investigations, are they driving for multiple  
16 companies? Their hours of service might look  
17 good for Company A --

18 MS. SPIELER: Right.

19 MR. MILLER: -- but they're also  
20 moonlighting with Company B, and we have that  
21 data possibly available to us, as well, during  
22 our investigations of an individual company. So



1 we can flip the data by driver or carrier,  
2 depending on which direction we need to go with  
3 our investigation.

4 MS. SPIELER: Thank you. Any other  
5 questions? We're going to take a brief break  
6 right now. When we come back, we actually have a  
7 lot to do. There are three different  
8 presentations, conversations, one about the data  
9 that's being kept by the Directorate, and where  
10 we are in terms of capacity to analyze it; a  
11 second presentation from a representative of the  
12 United Auto Workers regarding their experience  
13 on the ground, particularly with Section 11(c)  
14 investigations; and, third, a presentation from  
15 the NRC.

16 All of the subcommittees have finished  
17 their work, or finished it enough so that we will  
18 not need the 4:30 to 5:00 time for the  
19 subcommittees to reconvene. So after our break  
20 we may go a little longer on the other  
21 conversations. I know that Marcia will have to  
22 leave at 4:30 to catch her flight, and my

1 apologies to you, but we will probably continue  
2 at that point.

3 So I just wanted to frame the post-break  
4 time, and we'll take a 10-minute break now.

5 [Break taken from 2:54 to 3:07 p.m.]

6 MS. SPIELER: [In progress.] -- started,  
7 I would appreciate it. A couple of housekeeping  
8 matters before we get started. First, as a  
9 matter of formality, we need to make the agenda a  
10 formal part of our record, and it should be  
11 entered as Exhibit 1, as part of the record. I'm  
12 not going to read it. There are copies of the  
13 agenda in the back, if anyone hasn't seen it.

14 [Exhibit 1 entered into the record.]

15 And second, if there are people who have  
16 joined us since we did introductions at the  
17 beginning of the meeting, I'd really appreciate  
18 it if you would introduce yourselves.

19 MR. MODAKAM: Yes. I am Dinkar Mokadam.  
20 I'm with the Association of Flight Attendants,  
21 Communication Workers of America.

22 MS. COLEMAN: I'm Nicole Coleman from the

1 Nuclear Regulatory Commission, Enforcement  
2 Specialist, Acting ADR Program Manager.

3 MS. JARRIEL: I'm Lisa Marie Jarriel.  
4 I'm the NRC's Agency Allegation Advisor.

5 MR. STEUB: Phil Staub from WMATA's  
6 Office of Counsel here in D.C.

7 MS. SPIELER: Thank you. So the first  
8 subject for our first day post-break conversation  
9 is to take a look, have Anthony explain to us  
10 what's going on with regard to data collection on  
11 whistleblower complaints at OSHA, and to open it  
12 up for some conversation about ways in which the  
13 data may be useful for the committee's  
14 deliberations, and, also, what suggestions people  
15 may have for how OSHA may be able to make use of  
16 it in the future. So, Anthony, you're on again.

17 MR. ROSA: Thank you. Do you prefer I  
18 stay here or do you prefer I --

19 MS. SPIELER: Actually, it doesn't matter  
20 to me. It's fine for you to sit still.

21 MR. ROSA: Okay. Well, thank you. I  
22 appreciate, once again, the opportunity. What I

1 decided to do, since data, I notice, is of high  
2 importance to the committee, is to give you an  
3 overview of what our database looks like. And you  
4 all have a handout that should be, that was given  
5 earlier today. It says OSHA WebIMIS.

6 MS. SPIELER: And if this could be marked  
7 as our second exhibit, I would appreciate it.

8 [Exhibit 2 entered into the record.]

9 MR. ROSA: Yes.

10 MS. SPIELER: Thank you.

11 MR. ROSA: Just to give you a little  
12 background, the whistleblower program has --

13 [Simultaneous speaking.]

14 MS. SPIELER: No. It was handed out.

15 [Discussion about who needs the handout.]

16 MR. ROSA: Okay, by way of background,  
17 the whistleblower form, some people call it the  
18 OSHA 87 form. It was part of the overall OSHA  
19 database, going back for many years, in the  
20 former, or, in some parts, still existing NCR  
21 system. It used to be part of the NCR system,  
22 together with the OSHA 1, the OSHA 2, the 1(b)'s,

1 all the forms that are currently on the safety  
2 and health side. I say this because when I  
3 started in OSHA, I was the IT expert in Bayside,  
4 Queens, so I'm an IT person.

5           Before -- as you may have known, or  
6 possibly know, the safety and health forms have  
7 been recently migrated to OIS, OSHA Information  
8 System, but way before that, many years before  
9 that, the OSHA 87 form, and some other forms that  
10 were created for other programs, a VADS form for,  
11 I think, VPP, and other forms that were created,  
12 were basically migrated from the NCR system and  
13 put onto what we now have, the WebIMIS.

14           And we've had this for many years. It's  
15 basically taking the same exact form and putting  
16 it into this WebIMIS system. So although some  
17 people may think that whistleblower is still  
18 behind because we are on IMIS and everybody else  
19 in OSHA is on OIS, we actually migrated way  
20 before the safety and health side migrated from  
21 the NCR system.

22           There are some limitations to the

1 database, and I'm going to go over those with  
2 you, as I proceed. But when we log into the  
3 system, this is the screen that we get. The very  
4 first page is what we see on the screen. We have  
5 a few tabs on the top. It says Main Page, Oracle  
6 Reports, Online Help.

7 I clicked on Oracle Reports because I  
8 wanted you to see the full page. It gives you,  
9 on the far left, just below where it says WebIMIS  
10 you have Activities and Hours, Whistleblower, and  
11 Manage Profile. The one that's used the most,  
12 obviously, is the tab called Whistleblower,  
13 because that's where the form is. Activities and  
14 Hours is where the investigator enters the amount  
15 of time that they spend doing the work.

16 And then, to the right, you see a list of  
17 the available reports that we have on the system.  
18 At the end of this package, we have given you a  
19 sample of one of the reports, which is actually  
20 the data that we use to populate the performance  
21 statistics spreadsheets that are posted on our  
22 website, that recently, as requested by the

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1 committee, we have made it available both in PDF  
2 and in regular DOC format, so that you can  
3 download it in any way.

4           So the first thing that we do is we go  
5 into the system and we click on the term  
6 Whistleblower, on the tab, and you go into the  
7 following page, and then you initiate the form.  
8 The first thing that we do is we call it the  
9 Create Intake Form. The first thing is we look  
10 for the reporting ID, which is what identifies  
11 the office where the investigator is located. In  
12 this case, I left the reporting ID out, instead  
13 of sanitizing, because I wanted to explain that  
14 05 means that this is a Region 5 case, 229 is the  
15 identity for that particular region, and 00 means  
16 that it's federal and not a state plan. That's  
17 how the designation works.

18           Then you have a number of other fields,  
19 and in this particular, the way the copy came  
20 out, anything that has that black box next to it,  
21 it's actually a drop-down arrow, and a drop-down  
22 arrow gives you the city code, the investigator

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1 ID, complaint salutation -- Ms., Mrs., Mr. --  
2 first name, middle name, last name. You also  
3 will notice, in these fields, that anything that  
4 has an asterisk is a required field. If it  
5 doesn't have an asterisk, it's not required.  
6 Respondent name, company type, and then you go  
7 into the case type, complaint filed, date adverse  
8 action, and the method of filing -- by mail, by  
9 e-mail, by however the matter may be.

10           And you go into the next screen, on page  
11 3, and now you're getting a little bit more  
12 information, as you move on from the intake into  
13 the actual complaint part. We're still in the  
14 complaint phase. We're not in the docketed phase  
15 yet, of the complaint, because we have not  
16 determined whether we are going to docket this  
17 case or it's going to be administratively closed.  
18 Now, mind you, administratively closed cases only  
19 apply to three statutes. That's Section 11(c),  
20 AHERA, and ISCA. Those are the only three that  
21 we can administratively close. The other statutes  
22 we cannot do administrative closure.

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1           Then you see the name of the complainant,  
2 and now you have a case number. This is a  
3 system-generated case number, based on what you  
4 entered on the previous field. A 5 means that  
5 this is a case that is designated as a Region 5  
6 case. The next four digits is the city code that  
7 you entered on the previous field, and it  
8 identifies that city location. A 12 means the  
9 fiscal year that it came in, based on the date  
10 that you filed the complaint, so now, as of  
11 October 1st of this year, every complaint that's  
12 filed as of October 1st is going to have a 15  
13 number. And then 030 is the next sequential  
14 number that the system gives you.

15           An activity number is an internal number  
16 that the system gives you automatically. No  
17 particular purpose for the activity number unless  
18 you want to try to do any searches inside the  
19 system. We really rely on the case number.  
20 That's our identifier for purposes of tracking.

21           Then you have, again, the case type that  
22 you entered before. The investigator ID gets

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1 prefilled. Date filed complaint, the date that  
2 the complaint was assigned to an investigator,  
3 the allegation code, the allegation summary, and  
4 I'm going to go down this very quickly, because  
5 on the next page it's really going to explain it  
6 in greater detail. In fact, I ask that we move  
7 to the next page.

8           In this next page, you would see that now  
9 the case type -- this is a separate example,  
10 because I wanted to point out some of the  
11 limitations that we currently have in the system.  
12 Right now this is a case that apparently is from  
13 Region 1, because the first number on the top  
14 says Region 1, and it's an FY, fiscal year, 14  
15 case. It also shows that the case type is STAA,  
16 meaning that this is a surface transportation  
17 case.

18           The complaint was filed on May 1, 2014,  
19 and then, in the allegation code, you will notice  
20 that it has a drop-down, and these are the  
21 options that we have on the drop-down. Was it  
22 filed with another agency? Was it a refusal to

1 perform the work, meaning a work refusal issue?  
2 Was it filing with the primary agency or was it a  
3 complaint internal with management? Did the  
4 employee participate in a safety and health  
5 activity, whether it was inside with the company  
6 safety and health program or did they participate  
7 in a DOT inspection? Was this a specific  
8 allegation of reporting an accident or an injury,  
9 or did the person testify in a proceeding?

10           You have the investigator assign date,  
11 the date that the adverse action occurred. The  
12 adverse action types -- here, you have to click  
13 at least one of these types. You can click more  
14 than one, but at least one of these types has to  
15 be clicked on in order to have the complaint move  
16 forward.

17           Then you have the section called  
18 Statutory Implications. What happens in our  
19 system, and we're trying to work with our IT  
20 department to find a way to address this, is if  
21 we have a complaint -- and it happens, I don't  
22 want to say a lot, but it happens at some regular

1 intervals, especially in surface transportation  
2 cases, where you may have an allegation of a  
3 truck not being worked properly, but it's also  
4 the safety of the employee. So you may have a  
5 combination of statutes where it's STAA and  
6 11(c). The system does not allow us to have two  
7 case types. It only allows us to have one. So  
8 then we use statutory implications to click to  
9 click on the boxes of any other statute that may  
10 also apply.

11           The limitation that we have is for  
12 tracking purposes. This looks like a STAA case.  
13 It doesn't look like an 11(c) case. We know,  
14 because it says statutory implication, but when  
15 we want to report, and for statistical purposes,  
16 this is going to appear as a STAA case and it's  
17 not going to appear as an 119(c) case.

18           Also, when we go into the part down the  
19 road in the process where we look for appeal,  
20 it's only going to follow the appeal process for  
21 one of the two. It's going to always follow the  
22 one that says Case Type. So we're working right

1 now with our IT department and trying to have it  
2 where the system would allow us to access  
3 multiple case types, so that we could have  
4 multiple decisions and multiple follow-through to  
5 the end of the case, the cradle to grave, that it  
6 follows both of them.

7           Then you have, at the bottom, the  
8 administrative closure, reason for admin closure,  
9 details for that reason, and if it's actually  
10 administratively closed. And then you have that  
11 information note on the bottom, that if you are  
12 going to administratively close this, then all  
13 these other fields are required. But the system  
14 also has a check that will not allow us to close  
15 a case if it's not an 11(c), AHERA, or ISCA.

16           And, for procedural purposes, we need to  
17 get the complainant's consent in order to  
18 administratively close. We will not close, we  
19 are not supposed to close any case. I know we  
20 have a significant number of cases on 11(c) that  
21 are admin closures or what we call screenouts.  
22 We have received consent from the complainant to

1 do so. Otherwise, we will docket the case, and  
2 if we believe the case should be dismissed  
3 because it's untimely and no jurisdiction, we  
4 will then dismiss it, give a secretary's  
5 findings, and give that person appeal rights. So  
6 admin closures only apply when the complainant  
7 consented to it.

8           Once we have determined that the case is  
9 being docketed, we move to the next field. In  
10 the next field, now you have a series of other  
11 dates, below the statutory implication.  
12 Everything below there has changed. You have  
13 complainant notification date, the respondent's  
14 notice date, interview date, when the position  
15 statement was received, when the interviews were  
16 completed, and so on.

17           These new dates were added recently, as  
18 part of the department's customer service  
19 modernization project. I was part of the initial  
20 group that worked on this, a couple of years ago.  
21 We added these fields, and we're actually testing  
22 it right now in one of our regions. I believe

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1 we're testing it in Region 6. This is a  
2 Presidential initiative that we're working  
3 together in the department, together with the  
4 Office of Wage Hour and OFCCP in which the  
5 parties will have the ability to know, online,  
6 real-time, what is the status of their case.

7           So instead of having to call us, they can  
8 go online, get an identifier to make sure that  
9 the data is protected, because this is Privacy  
10 Act information. So that's why our data is not  
11 available to the public, because it's Privacy Act  
12 information, so only the parties that are  
13 entitled to the information can have access to  
14 it.

15           These fields have been created in order  
16 to populate where, in the pending phase, is the  
17 investigation. We're testing the system right  
18 now without these dates, because there were some  
19 complications in the programming of that system.  
20 But we have expressed to the programmers that are  
21 outside of OSHA, at the other department level,  
22 that once all these bugs have been fixed and the

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1 program is functioning, we want to add these  
2 dates, because this was the purpose of adding  
3 them to the system, plus we want to be responsive  
4 to the parties to know it's not just pending;  
5 it's pending somewhere.

6           Maybe it's pending review by the  
7 supervisor. Maybe it's pending review by the  
8 solicitor. Or maybe we're waiting to complete  
9 the interviews. But it's somewhere in the  
10 pending phase, instead of just one blanket term.  
11 So that's why those dates were added.

12           It has additional dates, for example, if  
13 the case is transmitted to the regional  
14 solicitor's office, and when it came back. That  
15 happens a lot with cases that we are looking for  
16 potential merit, and we're seeking the  
17 solicitor's office's review and legal analysis,  
18 if they want to pursue merit or not.

19           And the next page, now we move into the  
20 tab, and as we go along, you will notice that I  
21 was progressing through the tabs on the top of  
22 the screen. Each screen has a tab and we move



1 along. Now we're in the Determination tab, and  
2 on this particular case, you will notice that it  
3 has a series of entries. All say 7/20/2012, but  
4 just for purposes of us to educate on how this  
5 works, if this complainant kicked out, we have  
6 one of the provisions in some of our statutes  
7 that allows a complainant to kick out the  
8 district court. When does the complainant kick  
9 that out? Then we have if the district court  
10 dismissed, if it went to appeals, and how that  
11 appeal dismissed, and so forth.

12           The last entry, once all the process is  
13 completed, would say Final Determination. That  
14 would indicate that the case is closed. If the  
15 final determination does not say yes, then the  
16 case is technically still open, somewhere, in  
17 some appeal process, some review process  
18 somewhere, but once it has a final determination,  
19 it would say yes, and that would be the final  
20 date, and the case can now be filed away in the  
21 fiscal year in which it was closed, and then it  
22 goes to the disposition schedule with the

1 National Archives, and it goes through the  
2 process of that disposition of that record, in  
3 accordance to the final entry date.

4 MS. SPIELER: So I assume that if it goes  
5 to the ALJ level and then the appeal level inside  
6 DOL, it would be on here?

7 MR. ROSA: If it was there. For example,  
8 in this case, because the complainant kicked out  
9 --

10 MS. SPIELER: Yeah.

11 MR. ROSA: -- this is an example, it goes  
12 straight to the U.S. District Court.

13 MS. SPIELER: No, I understand that. I  
14 was just asking that if it's going to the ALJ,  
15 that would be on this page.

16 MR. ROSA: It would show the ALJ, and I'm  
17 glad you mentioned that, because we also have the  
18 docket number, and what we have been using in the  
19 field is we will put the docket number that the  
20 ALJ assigned, for tracking purposes. There are  
21 instances of multiple complaints coming maybe  
22 from the same person, and they may have separate

1 number assigned by the administrative law judge,  
2 so we want to make sure that the files and all  
3 the responses and documentation we receive from  
4 the ALJ are kept in the respective file. So we  
5 put the ALJ docket number, and the ARB docket  
6 number, as well, and if it goes to district  
7 court, we also put that number. So that docket  
8 field helps us track this all the way to grave,  
9 to the end of the case.

10 MR. KEATING: Anthony, if it gets kicked  
11 out and it goes to district court, how are you  
12 able to monitor the progress of the case once  
13 it's in federal district court? Do you actually  
14 watch the case?

15 MR. ROSA: We actually mark it as a final  
16 case, and most of the times we don't. But  
17 sometimes, when the district court does give us  
18 information, we can go back and update the  
19 system. But most of the times we have not gotten  
20 any responses back from the district court. This  
21 is just for example purposes. We have the  
22 ability to do that but we have not gotten

1 responses back. I mean, my experience has been,  
2 I've not gotten responses back as to the final  
3 outcome once it went to district court.

4 MR. KEATING: So my point is --

5 MR. ROSA: Except for 11(c), for example.  
6 The 11(c), we do.

7 MR. KEATING: My point is that you said  
8 earlier you won't mark it as final determination  
9 unless it's reached a real end point, like the  
10 appeals court has dismissed it. So,  
11 theoretically, you may have cases that just hang  
12 out there forever.

13 MR. ROSA: We have cases sitting there  
14 forever, yeah. We do have cases that sat there  
15 forever. We have cases that have gone all the  
16 way from the ALJ to the ARB to district court,  
17 and is being rounded all the way back down to the  
18 ALJ, and they go back 5, 6, 7 years, 8 years old,  
19 and they're still in the process. We keep those  
20 in a separate filing system, just for appeals, so  
21 they don't get mistakenly filed away at Archives.

22 MR. EHERTS: So you really don't know how

1 effective a kick-out provision would be.

2 MR. ROSA: If we don't get a response  
3 back, no. If we do have a case that has either a  
4 settlement and know the amount of the settlement  
5 -- because many of the cases have settlements  
6 that are confidential, especially at the ALJ and  
7 ARB level. I want to point that out. Most of  
8 the times they don't give us the specifics of the  
9 settlement.

10 But when we have settlements that are  
11 either the OSHA settlements, that are done in-  
12 house, or they're third-party settlements that  
13 OSHA has approved, or any other settlement that  
14 we have gotten this specific information as to  
15 the monetary amounts, we will enter that in these  
16 fields here. That would have the back pay,  
17 compensatory damages, punitive, interest. The  
18 system would automatically total.

19 If that settlement resulted in  
20 reinstatement -- as Dr. Michaels mentioned, we  
21 had 89 reinstatements, at one point -- it's a sum  
22 of these boxes that were checked for this, so

1 that's how the data is used to keep track of  
2 this. When we have collected \$25 million is the  
3 total amount that was collected here.

4 MR. MOBERLY: When did that start? You  
5 didn't go back and do, from 2002 and 2003? When  
6 did you start putting settlement information?

7 MR. ROSA: Well, we put in the settlement  
8 information the minute that we have the  
9 settlement signed.

10 MS. SPIELER: How many years ago?

11 MR. MOBERLY: Yeah. When did you start  
12 doing that with the database?

13 MR. ROSA: I always thought we were doing  
14 that. I mean, all the time I've been in the  
15 program, we've been putting the settlement  
16 amount, if we have the amount. I mean, I have  
17 cases, for example, that we've issued an order,  
18 and we put them out in there. Even though the  
19 amount hasn't been received, when there a merit  
20 finding, we still put the amount in there because  
21 that's what we awarded.

22 Now, a settlement may come back and say

1 the case has been settled at the ALJ level but we  
2 don't know the amount. We have to take that  
3 money out, because we don't know what the final  
4 outcome is. But we try to keep it as current as  
5 possible.

6 Now, in terms of how many years we've  
7 been doing this, as far as I know we have been  
8 doing this since I started in the program.

9 MR. MOBERLY: Okay.

10 MR. EHERTS: Can I ask a question going  
11 back just a little bit? I'm very interested in  
12 ways that we can, let's say, encourage employers  
13 to do the right thing without getting a regulator  
14 involved. So, if somebody files an internal  
15 complaint on an allegation of an unsafe work  
16 area, and then that person's retaliated against  
17 by the company, then he'll bring the claim to  
18 you? Right? Does Privacy Act implications  
19 prevent you from referring that, then, to a field  
20 office for investigation?

21 MR. ROSA: No. We refer those cases to  
22 the field all the time.

1           MR. EHERTS: Even though the original  
2 complaint never went outside, it just want to  
3 management? So they said to management, we have  
4 an unsafe work area. There's no railing here.

5           MR. ROSA: That is correct, but they have  
6 filed a complaint with us, and most of the times  
7 we refer that to the safety and health side for  
8 them to determine if they're going to --

9           MR. EHERTS: Right. But the complaint to  
10 you is retaliation --

11          MR. ROSA: Correct.

12          MR. EHERTS: -- not the original.

13          MR. ROSA: Correct.

14          MR. EHERTS: So you would investigate the  
15 original complaint, and then there's nothing in  
16 the Privacy Act that prevents you from referring  
17 that to a field office?

18          MR. ROSA: No. In fact, what we do is  
19 when we contact the complainant to initially  
20 screen, we would ask them, are you interested in  
21 us pursuing the safety and health matter as well,  
22 because we can refer it to the other side and



1 they can investigate that side. Most of them,  
2 they would say that.

3 MR. EHERTS: Regardless of what they say,  
4 I think you should because that would, let's say,  
5 demotivate an employer from retaliating.

6 MR. ROSA: Right.

7 MR. EHERTS: Knowing that something that  
8 could have been handled internally is now going  
9 to draw the attention of a field office, I think,  
10 would discourage them from retaliating in the  
11 first place.

12 MR. ROSA: Right.

13 MR. EHERTS: My whole side of this is I  
14 want to encourage employers to do the right  
15 thing, and so the bigger your hammer, the more  
16 likely they will.

17 MR. ROSA: Exactly. We have been sending  
18 those out to the area director in that particular  
19 office and say, "We received this complaint.  
20 They have some safety and health allegations.  
21 Take appropriate action," and they would take  
22 appropriate action. They would assign it to a

1 compliance officer that would also have a  
2 conversation with that complainant.

3           They will conduct the investigation  
4 whether it's an off-site investigation or an on-  
5 site inspection, depending on the severity of the  
6 item, or depending on -- there have been  
7 instances where, even though we may have felt  
8 that it could have been treated as an off-site  
9 investigation, we believed that it's a very  
10 strong whistleblower matter that the area  
11 director has sent a compliance officer out,  
12 together with the investigator. We've a few of  
13 those instances, at least in my region, where we  
14 have gone together at the same time.

15           MR. EHERTS: Good. I think that's the  
16 right thing. Now, does it automatically -- so if  
17 they click this complaint with management or  
18 participation of safety and health activities,  
19 does that automatically get sent to a regional  
20 office?

21           MR. ROSA: It automatically gets sent to  
22 the regional office, regardless of what they

1 checked there, yeah, because we want the regional  
2 office, the area director, to look at the safety  
3 and health concerns that are going on.

4 MR. EHERTS: Excellent. Great.

5 MR. ROSA: And the following screen, the  
6 following page, it has a screen that explains how  
7 the appeal process works for the 11(c), AHERA,  
8 and ISCA side, and that's managed here at the  
9 Directorate. When the appeal came in -- again,  
10 we're using the term "appeal" right now.  
11 Eventually we're going to move away from that and  
12 call it administrative reviews.

13 And then, at the next two pages, you will  
14 see them in more of a portrait format. Putting  
15 all that data together, this is what the case  
16 summary looks like, and I always encourage that  
17 every time you make an entry to the system, print  
18 this form, because this form gives you the total  
19 status of the case. It tells you where the  
20 complaint came, in, the local case number. This  
21 was an RFSA case. It came in in 2009. The  
22 allegation was a reported accident injury.

1 Complainant allegation was suspended. The  
2 company name, the complainant's information.  
3 Obviously, this is sanitized.

4           You will notice that this, for example,  
5 as Emily was saying earlier, this was a case that  
6 we had decided that it was a merit case. It says  
7 "Agency Litigation Merit." And then the  
8 respondent appealed the case. The ALJ dismissed  
9 it. The complainant appealed it. Then, from the  
10 ARB, it was remanded back down to the ALJ and  
11 then, at that level, the ALJ settled.

12           But you will notice that there is no  
13 monetary amount, because, at that point, the ALJ  
14 never shared with us what the amount was. So,  
15 the \$25 million that we mentioned earlier, or the  
16 \$119 million that we collected over the past 5 or  
17 6 years, you have to take into account that it  
18 excludes all of these cases that we did have, but  
19 we don't have that information so we can't add it  
20 into the system.

21           MR. EHERTS: And likewise, you wouldn't  
22 know if there was reinstatement?

1 MR. ROSA: Correct. Correct.

2 MS. SPIELER: How do you deal with issues  
3 of co-employment contracting, in terms of looking  
4 at the, sort of -- you have respondent company  
5 information, establishment details, parent  
6 company, controlling employer. Is that part of  
7 the investigation, if a complaint comes in, who  
8 you work for, where do you work? Is the  
9 investigator responsible for doing the corporate  
10 side review of who is this company?

11 MR. ROSA: The investigator needs to  
12 establish that there is an employee-employer  
13 relationship, first and foremost. Even on  
14 contractor issues, like on STAA, we need to  
15 ensure that there is an employee-employer  
16 relationship. We also need to ensure that that  
17 employer is their employer, because it could be  
18 that they are begin paid, or they are on payroll  
19 by a staffing agency, and not necessarily by the  
20 contractor, or they are part of a larger  
21 conglomerate of corporations, like in Sarbanes-  
22 Oxley cases.

1           In the past, with the Dodd-Frank  
2 amendment, we had to do that integrated employer  
3 test, because the initial version of SOX did not  
4 say that subsidiaries are necessarily covered,  
5 but we had to do this entire test, that took us  
6 quite a while to get to, but Dodd-Frank kind of  
7 helped us in that regard with regard to  
8 establishing that relationship.

9           So that's why there are two separate  
10 sections as to who is the respondent and who is  
11 the establishment that helps us determine who is  
12 the primary party that's responsible.

13           MS. SPIELER: So what happens if an  
14 individual works for a staffing agency at a work  
15 site that's, let's say, dangerous, and they  
16 complain to the work site company about the  
17 dangerous conditions, and they get fired by the  
18 staffing agency, okay. Presumably there was  
19 communication between the two entities. And then  
20 a complaint comes in on 11(c), and presumably the  
21 complaint is against the staffing agency, and how  
22 do you then loop in the site employer into both

1 the question of the safety concerns and the  
2 question of the retaliation?

3 MR. ROSA: For the most part, we would  
4 most likely, in most cases -- and I say this  
5 because I have not had a case but I don't know  
6 whether the other regions have done -- we will  
7 name both respondents. We would initially name  
8 both respondents and have them both provide us  
9 with statements. No, he's not my employee and I  
10 have nothing to do with it. Yeah, but he was my  
11 employee but I was following the direction of the  
12 host agency. Well, then we've got to include  
13 that whole, who's telling us the whole story and  
14 who's not telling us the whole story.

15 But firstly we do name, and we tell the  
16 complaint, "Most likely we're going to be naming  
17 both." And I have not had any pull-back from a  
18 complainant, where they say, "Well, I really  
19 don't want the other one, but I see what you're  
20 trying to do." Because we have had instances  
21 where the host agency would say, "Well, I just  
22 tried to find him or her another" -- the staffing

1 agency would say, "The host agency doesn't want  
2 him or her because they're a troublemaker in the  
3 plant, but I tried to find him another job, but  
4 there's no other place to place him, so I had to  
5 lay him off."

6           So we have to weigh in, well, is that  
7 true? Could you have put that person even in the  
8 office to work, or something else. So we do look  
9 into it, to make sure that we are covering both,  
10 because, technically, they're both responsible  
11 for that employee's safety. So if he or she is  
12 raising a safety concern and neither one is  
13 addressing it, that that's another issue, and, by  
14 the way, we would refer that to the health and  
15 safety side, and they may look into that  
16 investigation, as well.

17           And then, the last thing I wanted to  
18 mention is the four-page report that is attached  
19 to this document, and I just wanted, again, we  
20 can talk about data forever, because we have a  
21 number of reports, but I just wanted to give you  
22 a feel as to what one of the database reports



1 looked like. This is the Investigation Data  
2 Report, and this data mirrors what's already on  
3 the website.

4           Some of our information obviously will  
5 need to be sanitized. We didn't feel that this  
6 one needed any information to be redacted because  
7 this data is already public. It shows, for a  
8 particular year -- and this is for fiscal year  
9 2013, because the last chart that shows on our  
10 website is for fiscal year 2013 -- it kind of  
11 tells you how many cases were received, how many  
12 were completed, the timely response time, and so  
13 forth.

14           It also tells you how many were  
15 dismissed, what was the percentage of dismissal  
16 and the percentage of withdrawals, how many were  
17 merit cases, how many were kick-outs. In this  
18 case we showed 2 percent of all the cases last  
19 fiscal year, the complainants opted to kick out.  
20 It also tells you that 56 percent of these cases  
21 that were settled, as part of the total  
22 settlement merit rate, 56 percent of all the

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1 settlements were in-house OSHA settlements, using  
2 our standard OSHA template, while 36 percent were  
3 third-party settlements that OSHA approved.

4           Sometimes those can be rather lengthy  
5 settlements, because they may be tied in with  
6 other regulations and other statutes. And then  
7 it tells you the amount, as Dr. Michaels  
8 mentioned, the \$25 million, and the 86  
9 reinstatements. So the data that we have been  
10 giving you and that's available is coming from  
11 this particular report.

12           And then the last two pages are based on  
13 what Dave Eherts was just saying, where it tells  
14 you how many cases of the total cases that we  
15 received, how many of these were filed by -- what  
16 was the allegation. How many were filed by the  
17 primary agency and how many of those resulted in  
18 a merit or a settlement. Same thing. How many  
19 were filed by another agency, or how many were  
20 work refusals? How many of those were complaint  
21 internally with management? How many  
22 participated in the safety and health inspections

1 inside, and how many reported an injury? So you  
2 see 554 of these complaints alleged that they  
3 reported an accident or an injury, and 242 of  
4 them resulted in a merit or a settlement. And  
5 then the next page is the same information but in  
6 percentages.

7           So that kind of gives you an idea of what  
8 our data looks like and how we work. Again, one  
9 of the limitations we have is the case type,  
10 because we want to be able to track separately,  
11 parallel, the different statutes, and it doesn't  
12 give us a clear picture of how many 11(c) cases  
13 we have, if we have a number of those that are  
14 not being tracked as 11(c), because they're being  
15 tracked as STAA, for example. So that is one of  
16 the limitations that we have, and we're working  
17 with our IT department. Any questions?

18           MR. FRUMIN: Two questions. One is, it's  
19 covered in -- what we're looking on the page but  
20 you didn't discuss it much is the allegation  
21 summary. For instance, on the integrated  
22 document, the two-page listing of all the

1 different fields, so the allegation summary is  
2 about a third of the way down on the first page.  
3 It describes a little bit about what was going on  
4 that prompted the complaint.

5           Our work group has been in the process of  
6 obtaining this information now for all the  
7 transport-related cases for the last few years,  
8 and we'll be getting that in full form from the  
9 Directorate here shortly. And, as we discussed,  
10 particularly with regard to trucking, but also in  
11 rail, we're very interested in looking at these  
12 underlying circumstances for a number of reasons.  
13 You could imagine if half of all the trucking  
14 complaints had a reference to hours of service,  
15 for the reasons that Bob Miller was explaining  
16 this morning, it would give us a much more robust  
17 feel.

18           The coding that you mentioned is helpful,  
19 and, for instance, on the second page of the  
20 analysis you provide number of cases and  
21 percentage for reporting an injury, and for STAA,  
22 or under FRSA, it was 64 percent, and 79 percent

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1 of the merit cases, which sort of jives with what  
2 Charles Shewmake was saying was his hunch, or  
3 maybe he had these data separately, that the  
4 majority of the cases in rail are related to the  
5 occurrence of an injury and the special handling  
6 of rail injury cases under the Federal Employees  
7 Liability Act, so it's tied to the individual  
8 compensation question.

9           So, there are some things that are very  
10 important about the allegation information, but  
11 suffice it to say we are still flying blind, as  
12 public stakeholders, in understanding what's in  
13 those allegations, and we look forward very much  
14 to getting the information in a form that we can  
15 analyze, and working with you in prioritizing the  
16 analysis. We'll have it initially for the  
17 transport cases, and then, invariably, the  
18 interest will extend to 11(c), and then to other  
19 statutes, as well.

20           MS. SPIELER: So I would suggest that we  
21 table -- I think what Eric said is absolutely  
22 true. This has been incredibly helpful and I

1 want to thank you for doing it, and quite  
2 clearly. You've moved forward a lot since 2  
3 years ago, in thinking about data collection.  
4 I'd like to suggest to the rest of the committee  
5 that when we have our conversation about 24 hours  
6 from now, about next steps for the committee,  
7 that we might want to revisit this and think a  
8 little bit about what the potentiality is of  
9 looking at these data, working with you, because  
10 I know that generating reports from these things  
11 can sometimes be a little bit challenging inside  
12 the agency, but I do think it's a rich area for  
13 future discussion.

14 We're going to run behind if I don't move  
15 us forward, so, Nancy.

16 MS. LESSIN: What I would like, in order  
17 for that discussion that we're going to move  
18 into, if we can have this, just looking at this  
19 data, there's a wealth of questions that come up.  
20 But one of them has to do with refusal to perform  
21 a task, and clearly we see 33 percent in STAA, 1  
22 percent in FRSA, 3 percent in OSHA. Is that

1 related to what the statute says you have  
2 protection for?

3           For example, somebody is told to do a job  
4 and there's water pouring on an electrical panel.  
5 Is there a difference in the protection you have  
6 for refusing to do a task from STAA to FRSA to  
7 OSHA, and if so, if we could get that part of the  
8 statute, that would help me understand what we're  
9 seeing here. In FRSA, do you just not have  
10 protection for refusing to do a task where you  
11 have a lot of protection in the statute under  
12 STAA? In order to think about this and what  
13 would make better whistleblower protection,  
14 understanding, are these differences having to do  
15 with statutory protection or is it something  
16 else?

17           MR. ROSA: To a certain degree, some  
18 statutes have a little bit more flexibility, or  
19 have a little bit more expansion in terms of  
20 that. STAA, for example, in addition to saying  
21 that employee can refuse or can raise a concern  
22 that he or she believes is a potential violation,

1 they also have a provision in STAA that says the  
2 employee can refuse to do a job that he or she  
3 believes may cause harm.

4 MS. LESSIN: Yep.

5 MR. ROSA: Where AIR21 doesn't have that.  
6 AIR21 is specifically just if there's a potential  
7 violation.

8 MS. LESSIN: What does FRSA have?

9 MR. ROSA: I can't recall at the time.

10 MS. LESSIN: Can we get that?

11 MR. ROSA: Yeah, so that's in the  
12 statute. Yeah, sure.

13 MS. SPIELER: Okay. Great. So, Steve,  
14 are you here? So, our next speaker is Steve  
15 Mitchell, who is the Health and Safety Chair for  
16 United Auto Workers Local 974, and he, as Bob  
17 Miller spent his morning with the transportation  
18 committee, Steve spent his morning with the 11(c)  
19 committee, and we also asked him to come and talk  
20 to the full committee about the experiences of  
21 his local and that he has had with the OSHA  
22 Whistleblower Program, particular with Section



1 11(c).

2 MR. MITCHELL: Good afternoon. Thank for  
3 the opportunity to speak with you today. My name  
4 is Steve Mitchell. I'm the plant-wide safety  
5 chairman for United Auto Workers Local 974. I'm  
6 a 39-year employee at Caterpillar Incorporated.

7 The UAW has a long tradition of fighting  
8 for safer and healthier workplaces for everyone,  
9 and today we continue the fight for improvements  
10 in workplace safety. I welcome the opportunity  
11 to share my own experiences, as a health and  
12 safety representative who has attempted to use  
13 the rights granted under Section 11(c) of the  
14 Occupational Safety and Health Act to protect  
15 myself and my colleagues at work from employer  
16 retaliation.

17 Again, I'm a 39-year employee at  
18 Caterpillar. I'm proud of the products we make.  
19 If anybody needs a tractor, come talk to me after  
20 we're done. We make the best equipment in the  
21 world, and I can, with a certainty, personally,  
22 that I want the company and the work force to

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1 succeed, as does the United Auto Workers. I'm  
2 not here to speak badly about Caterpillar. I'm  
3 not here to speak badly about OSHA. I'm not here  
4 to speak badly about any investigators, area  
5 offices, or anything else. I'm here just to  
6 share my experience and describe some of the work  
7 that I proudly do every day.

8           If I didn't belong to a union, I'd be  
9 reluctant to be here today, because I would fear  
10 that I could be retaliated against for what I'm  
11 going to tell you, and a collective bargaining  
12 agreement is the only thing that keeps me safe,  
13 considering my experience with 11(c), and I  
14 shudder to think what non-union employees have to  
15 face.

16           So, in recent years at my local, we've  
17 filed 53 11(c) complaints, and we haven't had one  
18 complaint that's come in our favor through 11(c).  
19 Of those 53 complaints, there were 33 full-time  
20 employees. We had three settlements through the  
21 grievance procedure and arbitration that were  
22 somewhat favorable, in one case, and then

1 favorable in two other cases.

2 Nineteen supplemental or probationary  
3 members filed complaints. They are 0 for 19.  
4 Those folks do not have rights under just cause.  
5 Therefore, they were fired and their lives have  
6 changed. There are four people whose status I do  
7 not know because I was not involved in the  
8 complaints that were filed.

9 So almost to a person, people who have  
10 made these 11(c) complaints, who were disciplined  
11 or discharged expressed to me that they wish  
12 they'd never reported their injuries, and that's  
13 a sad state of affairs when you consider that  
14 your worst day at work of getting hurt just got  
15 made worse by potentially losing your job.

16 There have been some recommendations made  
17 by the 11(c) committee that I'd like to speak to,  
18 talking about a longer statute of limitations. I  
19 think that's a fabulous idea. One of the safety  
20 representative from my local was involved in  
21 filing a safety complaint regarding  
22 lockout/tagout. As the procedure is

1 contractually designed, he carried it forward.  
2 The complaint ended up going into the grievance  
3 procedure.

4           He was there with his union  
5 representative when he informed management of  
6 that. As soon as that meeting was over, the  
7 union representative was told that his services  
8 were no longer needed. My safety rep was then  
9 told that his job was eliminated, and he would  
10 receive a three pay-grade cut. That's a  
11 substantial pay cut for somebody, and it wasn't a  
12 coincidence.

13           The problem that we had with that case  
14 was that when we filed the 11(c) complaint, it  
15 was within 30 days of him being moved. It wasn't  
16 within 30 days of him being told that he was  
17 being disadvantaged.

18           In another case, a lady that we represent  
19 was at work. She was approaching the point in  
20 time where she was going to be hired full-time,  
21 literally within weeks of that, and she suffered  
22 a workplace injury, due to a recognized hazard, a

1 trip hazard. She fell. She broke her arm, she  
2 damaged her knee, and she lost her job. Because  
3 I got the complaint in late, she lost her house  
4 and she ended up living in her car. That  
5 shouldn't happen. She was hurt enough.

6 Reducing the standard of proof, most all  
7 of the cases that I've handed include situations  
8 where a violation of rules are being used as a  
9 pretext for taking discriminatory action against  
10 people. Normally it's a rule that's not enforced  
11 regularly. It's certainly not enforced in those  
12 particular work sites.

13 But after the injury happens, and we file  
14 an 11(c) complaint, if there is a discriminatory  
15 action taken, there are instances that are cited  
16 in the respondents' position statements, where  
17 over in this particular we have enforced that  
18 rule, or over in that building we've enforced  
19 that rule. It never happens to the person. It  
20 never happens to the person who has been injured.  
21 It's not in their work area.

22 I've got two cases where gentlemen were

1 being trained. They were learning a job and they  
2 got injured, and they were fired for violating  
3 work rules. One gentleman, in particular, he  
4 moved his family, his wife and eight children,  
5 from Oklahoma to Peoria, Illinois. They had to  
6 sell everything they had so they could make this  
7 move. He was a probationary employee,  
8 approaching the time when his probationary period  
9 was up.

10           As he was doing his job, a part fell out  
11 of a fixture, and when the part fell out of the  
12 fixture he reached out to grab it. Just in that  
13 moment, when he reached out to grab it, the part  
14 hit his hand. It didn't break the skin, it  
15 didn't bruise him, it didn't cut him. No damage  
16 whatsoever. But in that second, he told me that  
17 he, "Thought that I had just lost my job," and he  
18 asked his coworker, who was training him, "Well,  
19 should I report that?" and the coworkers was so  
20 afraid, he said, "If you don't report it, I'm  
21 going to report you, because we have a rule that  
22 everything has to be reported."

1           Once he reported the injury, he was  
2 discharged. His services were no longer needed.  
3 It was really tough to sit there and hand the guy  
4 Kleenexes in my office as he cried, and he talked  
5 about, "What am I going to do now? I've moved  
6 away from my family. We don't have any money.  
7 I've got girls in high school. What are we going  
8 to do?" He was fired for not letting the part  
9 fall.

10           Two weeks before the incident, he was  
11 told, in a standup meeting, as was everybody  
12 else, if something falls, go ahead and let it  
13 fall. Now, in that split second when that part's  
14 falling out there, a very, very expensive piece  
15 of machine hardware, he didn't have time to think  
16 about that. He thought he was doing the right  
17 thing, and he did, and he paid for it.

18           What he didn't know is that 2 weeks  
19 earlier, when he was told that he should let the  
20 parts fall, other parts had been falling out of  
21 this very fixture, and that within 24 hours they  
22 had a brand new one in his work area, so no parts

1 ever fell again, but he lost his job.

2           We had another gentleman who was training  
3 on a job and he was suspended for a work rule,  
4 that his supervisor never monitored, never  
5 checked, never audited, and it was amazing that  
6 they could come up with sheet after sheet after  
7 sheet where this individual had signed the safe  
8 job procedure, I'm not going to do this, I'm not  
9 going to do this, I'm not going to do this, and  
10 it had never been audited to see if he was in  
11 compliance, never once.

12           When I speak with one of the  
13 investigators, when I'm told, as a matter of  
14 fact, is that all the company would have to do is  
15 to show a single, nondiscriminatory reason that  
16 they took this action, a rule that is  
17 communicated and not followed, and once that  
18 happens, we don't have a chance. That's when the  
19 case gets dismissed.

20           The right to de novo reviews by  
21 administrative law judges is something, I think,  
22 that really needs to be done. In 2013, a line at



1 our foundry was eliminated. It didn't go away,  
2 but the work being done by UAW-represented people  
3 did. That job was sent out to a contractor and  
4 they continued to do that very same job in that  
5 very same spot on the floor, with the very same  
6 equipment that our people did.

7           The reason it was outsourced is because  
8 of high injury numbers and workers comp  
9 experience. This was told to the union official  
10 down at that particular place of employment. It  
11 was told to the members in a factory meeting.  
12 They were told that it's because you guys are  
13 getting hurt and our work comp costs are going  
14 up. They didn't fix the job. They just handed  
15 off the injuries to another employer. Those  
16 injuries are still happening.

17           This is the same facility that, if you  
18 look at the website, talks about them having a 50  
19 percent reduction in their recordable injury  
20 frequency in the last 20 months. That's an  
21 incredible achievement, and if you look up the  
22 word "incredible," you know what I mean. This

1 particular facility was perennially on the OSHA  
2 DART List, and now they're not. And they've  
3 outsourced jobs. People don't want to report  
4 injuries because they're afraid their jobs will  
5 be next.

6           When we had the investigation, witnesses  
7 that we had provided contact information for were  
8 not contacted. Information regarding workers  
9 comp numbers was not requested. When management  
10 focuses on recordable injury frequency, these  
11 trailing indicators, the absence of injuries does  
12 not indicate the presence of safety. They're  
13 chasing the wrong thing, and, I'm sorry, the  
14 unintended consequence of that is that people  
15 don't report injuries.

16           That's where the raises come from, that's  
17 where the performance incentives kick in, and  
18 that's really a shame, because these folks who  
19 had their jobs eliminated, the other people that  
20 are in there doing them are experiencing the same  
21 thing.

22           As far as the other recommendations, I

1 don't have specific instances. I do have some  
2 things I'd like to say about different  
3 investigations. We had a union rep who was very  
4 active in pointing out hazards. He was suspended  
5 for 30 days, a one-on-one discussion with a  
6 manufacturing engineer. No witnesses. He said,  
7 she said. My guy gets 30 days.

8           When we provided more than a dozen  
9 witnesses to testify to the character of this  
10 individual, folks who were literally within feet  
11 of where it occurred, where he was supposedly  
12 screaming and swearing at this man, they were not  
13 called. That's a problem. That investigation  
14 was not done correctly.

15           Last week, I was told of a complaint that  
16 one of my safety reps filed, an 11(c) complaint  
17 regarding steak dinners. I don't know how many  
18 of you have seen the pizza party video. It's  
19 great. It's on YouTube. If you've got a weak  
20 stomach, you probably don't need to watch it.  
21 There was a work group that received a steak  
22 dinner. They'd gone 3 years without a recordable

1 injury, and that's a wonderful thing. I mean, 3  
2 years and nobody being hurt -- but what does that  
3 tell everybody else?

4           When we filed the complaint, we were told  
5 that we didn't have a prima facie case, because  
6 there was no protected activity. Even if there  
7 was a protected activity, the protected activity  
8 was only by those people who had reported and  
9 were disadvantaged. It wasn't the chilling  
10 effect on everyone else. I don't know how many  
11 of you all have been a factory, but I can't tell  
12 you what I can get you for a cup of coffee, much  
13 less a steak dinner.

14           I sent an e-mail to the investigator,  
15 asking for clarification as to why they weren't  
16 going to pursue the complaint. I received a call  
17 from his acting supervisor. I was told that the  
18 union couldn't file a complaint in this case  
19 because 11(c) is only for individuals, and that  
20 OSHA didn't have any jurisdiction for  
21 investigating since there wasn't any protected  
22 activity. That was sort of troubling to me,

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1 because later on, he told me that Item 4 on the  
2 Fairfax Memo only applies to VPP sites. You all  
3 are experts on it. I'm just a welder. I'll be  
4 welding again on Friday. But if somebody can  
5 tell me that that Item 4 only speaks to VPP  
6 sites, I'll gladly apologize to this person, but  
7 I don't think so.

8 MR. EHERTS: I know and I can't explain  
9 that. I know where that comes from.

10 MR. MITCHELL: It's the reference.

11 MR. EHERTS: The reference to that comes  
12 from the fact that OSHA was enforcing it only at  
13 VPP sites. So if they went into a VPP audit and  
14 found that behavior at the company, they would  
15 withdraw the VPP certification. That's the way  
16 they were using the Fairfax Memo in the  
17 beginning.

18 MS. LESSIN: Not since the Fairfax --  
19 when the Fairfax Memo came out on March 12, 2012,  
20 that ended, so it's been 2 years plus that this  
21 has not been the case. So if somebody from an  
22 OSHA office said that, it goes to all kinds of

1 issues, including lack of training, lack of  
2 information. It's wrong.

3 MR. EHERTS: I'm missing your point.  
4 I've been to VPP meetings where they're saying  
5 that they took the Fairfax Memo and they can go  
6 out to a site that has VPP and do their audit,  
7 and if they find any of the practices there, they  
8 withdraw VPP. But I don't believe that they are  
9 enforcing the Fairfax Memo on a regular  
10 compliance visit. If they went to a site and saw  
11 the famous so many days without lost time, they  
12 wouldn't cite that company.

13 MS. LESSIN: If there is -- I mean, read  
14 number 4.

15 MS. SPIELER: I'm actually going to  
16 intervene here, as chair.

17 MR. EHERTS: Yeah. I was just trying to  
18 explain -- miscommunication.

19 MS. SPIELER: Because I think we need to  
20 focus in not on an argument over either VPP or  
21 even what Paragraph 4 of the Fairfax Memo says,  
22 which clearly doesn't say what you just said you

1 were told. In any event -- and sort of move  
2 ahead, because I think there will be questions  
3 for you, and we have another presentation.

4 MR. MITCHELL: Okay, and that's  
5 specifically the point that I made. I said that  
6 the VPP reference in there is to identify the  
7 types of programs that would be discriminatory,  
8 and if you read that letter it's very clear what  
9 they are, and it's pizza parties and all this  
10 type of thing, very similar to this. We are  
11 certainly not in any opposition to having  
12 somebody buy is a steak dinner, but if we're  
13 going to incent something, let's incent finding  
14 hazards, and correcting hazards, and doing things  
15 the right way, rather than encouraging people not  
16 to report.

17 One other troubling thing happened. I  
18 tried to -- I proposed a settlement agreement.  
19 In my complaints, I always fill out a designation  
20 of representative form so I'm involved, and I end  
21 up doing all this stuff either nights or  
22 weekends, because my regular job is working in

1 factory. I'm not a full-time health and safety  
2 person. I do this for the local.

3           But I asked for the investigator to carry  
4 forth a settlement proposal, for a neutral job  
5 recommendation for a return of 6 percent of this  
6 person's pension, which he lost as a result of  
7 retiring early, because of his 11(c) and  
8 experience, and reduce his suspension to a 5-day  
9 suspension, and just allow him to continue to be  
10 retired and make him whole the rest of the way.  
11 And the only thing I got was argument from the  
12 inspector, on my proposal. I would have hoped  
13 that he would have just taken that forward and  
14 had the management people look at it on its  
15 merits, not argue with me about it.

16           And then, lastly, a lot of our  
17 investigations, well, almost all of them now are  
18 handled by investigators who are based more than  
19 150 miles away from Peoria. We've had a number  
20 of health and safety compliance inspections.  
21 They actually come into the plant, and they look  
22 around, and they talk to people. That doesn't



1 happen with 11(c). All of our interviews are by  
2 phone. Everything is sent by e-mail. I find it  
3 very difficult to consider that a serious  
4 investigation when it's conducted from so far  
5 away.

6 I've had investigators from the Chicago  
7 area; from Lansing, Michigan; from Cleveland,  
8 Ohio; from Indianapolis, Indiana; and I live 7  
9 minutes away from the Peoria area office that has  
10 two 11(c) investigators, and I don't understand  
11 all of that. When I talk to those investigators,  
12 they are handling cases that are based in  
13 Indiana, while I might end up with a guy 160  
14 miles away. It doesn't make sense to me. The  
15 manual says that a lot of things that should be  
16 happening are not happening.

17 So that's pretty well all I have to say,  
18 unless anybody's got any questions.

19 MS. SPIELER: Questions? Nancy?

20 MS. LESSIN: It seems like there's a huge  
21 system failure. I mean, going back to Region 5  
22 being one of your pilot places that's going to

1 sort of do this in-depth, and have an extra  
2 person, and do all of this, and then, this is an  
3 example of what happens in that new improved  
4 system, there's a real disconnect.

5           A question is, are we looking at an  
6 outlier, or is this something that happens in  
7 particular pockets around the country, or is  
8 there some way to delve into this, to understand  
9 what's happening, and it seems like at every  
10 level there's failures. The fact that you're not  
11 getting somebody doing face-to-face, the fact  
12 that you're not getting witnesses even spoken to,  
13 to look into the allegations, the fact everything  
14 is being dismissed despite the Fairfax Memo that  
15 has a section about using safety rules as  
16 pretext, and a section about incentive programs.

17           So this implicates training issues, or  
18 who's setting the agenda here for all of this to  
19 happen. So I think my question is, what can be  
20 done about this, both in this instance of what  
21 we've just heard about 53, 54 cases, but also is  
22 this happening elsewhere, and would you see --

1 would anything that we've heard about in the IMIS  
2 system, would anything flag you to say, oh, my  
3 goodness, it looks like there's an issue here.  
4 One area, and all these complaints, and nothing  
5 is coming forward. Does that send up a flag?  
6 So, I think those are just some issues.

7 MS. SPIELER: Nancy, if you want to --

8 MS. SMITH: And I did want to thank Steve  
9 for the information you provided. We never want  
10 to hear that the perception is don't file a  
11 complaint because it's not going to go anywhere.  
12 So it is disheartening to us to hear that  
13 information, but we share your frustration with  
14 some of the limitations of the statute. We share  
15 your pain in that regard.

16 In regards to your questions about --  
17 and, again, from what I understand, the data that  
18 we were looking at was 2008 to 2013, and so we're  
19 hopeful that a lot of the initiatives that we've  
20 started, including the ARA and the training, et  
21 cetera, will not reflect, or will positively  
22 impact people's willingness and the results that

1 they get when they file.

2           So I think, on these specific instances,  
3 yes, there are things in that IMIS system that we  
4 could look at to say, should we have caught this  
5 earlier, or did we catch it early? So I think  
6 from our standpoint, we really want to take this  
7 information and delve into it, and see what the  
8 circumstances were. Was it the statute of  
9 limitation? Was it a training issue, or  
10 whatever? So, again, as I said, even though it's  
11 not news we want to hear, we appreciate it,  
12 because our goal is to improve the program, so  
13 with that we intend to take it and look at it,  
14 and go from there.

15           MR. MITCHELL: And it's like I said this  
16 morning. The record-keeping standards. Just  
17 because an injury occurs doesn't mean that the  
18 employer is at fault or the employee is at fault.  
19 We want to get the hazards corrected so that  
20 nobody gets hurt again, or gets a worse injury,  
21 and half of these cases, or 27 of them, are from  
22 2012 to date.

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1 MS. SMITH: Right.

2 MR. MITCHELL: So, it's been a learning  
3 experience.

4 MS. BARBOUR: I have some questions about  
5 data, some of which I know we're going to talk  
6 about tomorrow, but sort of coming off of  
7 Anthony's presentation and then what Steve has  
8 just presented to us. Is there a way -- does the  
9 system track, or can we get some of the data  
10 that, in the last four pages of the data set, by  
11 region, so that we would know how many cases  
12 filed, dismissed, all of those fields, but have  
13 it broken down by region, because I think that  
14 would help the committee, at least from my  
15 perspective, identify if there are -- I mean, you  
16 know, it's not going to be completely  
17 qualitative, but having that information does  
18 shed some light on are there particular areas of  
19 the country, or offices or regions where  
20 everything is getting dismissed, where there's a  
21 lot of success? One would expect that the  
22 quality of cases shouldn't be vastly different in

1 one region versus another.

2 MR. ROSA: I don't think there's a  
3 problem with that.

4 MS. LESSIN: The question that I have to  
5 the experts, Steve mentioned at the beginning  
6 that he feels protected being here because he is  
7 a union member and under a union contract. Is  
8 what Steve was doing here considered protected  
9 activity under OSHA 11(c)?

10 MR. ROSA: Yes. Absolutely.

11 MS. LESSIN: So, I guess what I would  
12 like to know is, should anyone touch a hair on  
13 your head, I just want it in the record that  
14 there will be people watching.

15 MR. MITCHELL: I just have to remember  
16 not to spit on the floor or something like that,  
17 right?

18 MR. MOBERLY: Going to Nancy's point  
19 about whether this is an outlier and asking for  
20 information, I'm assuming -- and we talked a  
21 little bit about this in our subcommittee  
22 meeting, about what standards investigators are

1 reviewed, or used when investigators are  
2 reviewed. I just wondered if that was written  
3 down, if you have standards and protocols for  
4 when investigators are reviewed, that we might  
5 have access to? I don't want the actual reviews,  
6 but here are the performance standards that we  
7 expect from investigators.

8 MR. ROSA: We can see if we can get that.  
9 I don't know how quickly we can, but we'll look  
10 into it.

11 MR. MOBERLY: Sure.

12 MS. SPIELER: Sure.

13 MS. BARBOUR: Just to follow up on that,  
14 I think we'd also want to know if those standards  
15 are being applied consistently, in every region,  
16 with every investigators, if that's possible.

17 MS. GARDE: Steve, I just want to thank  
18 you for the work that you're doing on behalf of  
19 the workers. It was brave for you to come here,  
20 and I appreciate the time and the risks you took  
21 to tell us those stories. I think we all hear  
22 them, but it's sobering to hear, and I want to

1 thank you for taking the time to come up here and  
2 make sure we heard real-life stories about real-  
3 life people.

4 MR. MITCHELL: Well, thank you very much.

5 MS. SPIELER: And I would extend that on  
6 behalf of the full committee. Are there other  
7 questions for Steve? The committee would welcome  
8 your presence tomorrow, or if you ever want to  
9 join the Section 11(c) committee, assuming it  
10 continues and has phone calls, you're welcome to  
11 call into those as well --

12 MR. MITCHELL: Thank you very much.

13 MS. SPIELER: -- and Nancy can keep you,  
14 or Ava can keep you up to date on when that's  
15 happening, because I think the information you  
16 bring to us is important in our thinking.

17 MR. MITCHELL: Thank you again for your  
18 time.

19 [Chorus of thank yous.]

20 MS. SPIELER: Well, I haven't been as  
21 good as I try to be in holding on to time here,  
22 but we are actually eager to hear about the NRC,



1 and our apologies that we're running late.

2 MS. JARRIEL: That's all right. Do you  
3 want to go right into it?

4 MS. SPIELER: I think yes. So we're  
5 switching gears here a little, these three  
6 different pieces of this post-break -- one  
7 entirely internal, one, I think, a little bit as  
8 a wake-up reminder about what goes on, on the  
9 ground, outside these kinds of rooms, and this  
10 third presentation is more akin to the  
11 presentations we had previously from other  
12 agencies that talk about the way they manage and  
13 think about retaliation and whistleblower  
14 functions. So we heard previously from both the  
15 National Labor Relations Board and the Mine  
16 Safety and Health Administration, and now we're  
17 turning our attention to the NRC as a place that  
18 has a quite sophisticated and developed approach  
19 to these issues.

20 MS. JARRIEL: Thank you.

21 MS. SPIELER: So if you could introduce  
22 yourself first, and if there's any paper that you

1 have that you want us to see, I think we also  
2 have to put it -- it's in front. This would be  
3 our third exhibit, and it should be part of the  
4 record of the meeting.

5 MS. JARRIEL: Everybody got a copy of the  
6 stuff that the 11(c) committee got earlier from  
7 Steve, so I don't know if that should be --

8 MS. SPIELER: This should be number 3.  
9 The top of the page says "Caterpillar Dispute  
10 With Worker Shows Tension in Injury Claims," and  
11 number 4 will be the NRC PowerPoint presentation.  
12 Thank you.

13 [Exhibit 3 and 4 entered into the  
14 record.]

15 MS. JARRIEL: No problem. Okay. So my  
16 name is Lisa Jarriell. I work for the Nuclear  
17 Regulatory Commission. I'm actually, my title is  
18 Agency Allegation Advisor, but what that means is  
19 I'm a senior advisor to the commission on policy  
20 matters associated with allegations and raising  
21 allegations, including allegations of  
22 discrimination. I help set policy for the

1 agency, and then I audit our staff how they  
2 implement that policy. I work in the Office of  
3 Enforcement. I have with me today a colleague  
4 who is Nicole Coleman, and she is the Acting  
5 Program Manager for Alternative Dispute  
6 Resolution Programs.

7 MS. SPIELER: Does she want to join you  
8 at the table?

9 MS. COLEMAN: Okay.

10 MS. JARRIEL: So, I've got some slides,  
11 and I'll briefly go through them. I'm going to  
12 go over the overview. I'm just going to give you  
13 a brief history of how we even got into  
14 discrimination allegation evaluation. I'll talk  
15 about our process, give you a few trends, and  
16 then some important activities we have under  
17 FOIA.

18 I don't want to bore you with the Energy  
19 Reorganization Act, but just to remind everybody  
20 it created the Nuclear Regulatory Commission and  
21 it's what gives us our authority to oversee the  
22 commercial use of nuclear materials. So that is

1 anything from nuclear reactors to nuclear  
2 medicine, and a whole variety of our licensees.

3           The oversight -- obviously, we have 100  
4 operating reactors and thousands of material  
5 licensees, and we can't possibly inspect against  
6 all the activities and all of those employees, so  
7 we do rely on the workforce to identify nuclear  
8 safety concerns, as well. It goes to the  
9 training and the processes they have on site, and  
10 our regulations concerning those.

11           We also recognize that they're not going  
12 to raise those nuclear safety issues if they  
13 don't have an environment in which to raise them  
14 safely, if they feel they're going to be  
15 retaliated against for raising issues. So when  
16 the act was amended, with Section 211, we also  
17 promulgated regulations in our Code of Federal  
18 Regulations, to protect employees against being  
19 retaliated against, at least, in part, for  
20 raising a nuclear safety issue or other protected  
21 activity. Next slide, please.

22           So those regulations are in 50.7, and the

1 corresponding regulations, part 50 regulates the  
2 reactors and all these other parts are other  
3 licensees, but basically it prohibits employers  
4 from taking an adverse action against an employee  
5 because they engaged in a protected activity, and  
6 most of the protected activity is raising a  
7 nuclear safety issue.

8           The regulations also empower us to take  
9 civil penalties, impose civil penalties if  
10 they're violations of these regulations, and I  
11 wanted to emphasize what I believe is really the  
12 difference between the Department of Labor and  
13 the NRC in this regard, because the Department of  
14 Labor, OSHA, does this same thing. It protects  
15 employees from raising these issues, under  
16 Section 211.

17           But it really gets back to our mission,  
18 and your mission. So the Department of Labor,  
19 OSHA's mission is to protect the laborer, protect  
20 the employee, and our mission is to protect the  
21 public from these nuclear materials, the public  
22 and the environment. So the basis of our

1 regulation really gets more to protecting a  
2 chilled work environment than it does protecting  
3 the individual. If one person raises a nuclear  
4 safety concern and is retaliated against for  
5 doing so, it can have a very negative, chilling  
6 effect on the work environment, and cause other s  
7 not to raise nuclear safety issues, which gets to  
8 nuclear safety, in general, and, therefore, our  
9 mission of protecting the public.

10           So the basis, although it's good to  
11 protect the one, we recognize the Department of  
12 Labor has that covered. Our interest in these  
13 regulations is really to protect the environment  
14 for raising concerns for everybody else, so we  
15 constantly are getting back to that environment  
16 for raising concerns in our regulations in this  
17 area. Next slide, please.

18           The vehicle for receiving a lot of these  
19 discrimination allegations is the allegation  
20 program. We formalized that in 1982. It  
21 happened to be about the time Three Mile Island  
22 was being cleaned up, and we were getting a lot

1 of nuclear safety concerns raised to us. So we  
2 put a formal program together in '82, and it  
3 operated well for a good 12 years until the IG,  
4 our Inspector General, came out with a report  
5 that said we weren't doing enough to protect  
6 whistleblowers from retaliation, if they raised  
7 these issues.

8           And the Commission directed a  
9 reassessment of the program, and in '94, we  
10 published a new reg, which included several  
11 recommendations -- I think there were 23 to 36; I  
12 can't remember exactly -- but it did a few things  
13 of interest. It first created this position, my  
14 position, the Agency Allegation Advisor, which is  
15 directed oversight of implementation of our  
16 program, to make sure we were doing everything  
17 that we could to protect the allegeders.

18           It required us to periodically train our  
19 staff, so they understood how to intake  
20 allegations and how to treat the concerned  
21 individuals that were coming to us. And it  
22 directed us to create this policy statement,

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1 because we realized it wasn't enough just to have  
2 a regulation to prohibit discrimination, but we  
3 really wanted our employers to encourage people  
4 to raise issues. It's one thing to say you're  
5 prohibited from hurting them if they do, but it's  
6 another to say you should have a program that  
7 encourages them to participate, encourages them  
8 to find these things. Again, the agency and the  
9 public relies on the workforce to do this.

10           So we called it the Safety Conscious Work  
11 Environment Policy. However, most of us just  
12 refer to it at this point as the Environment for  
13 Raising Concerns policy statement. And then we  
14 inspect against that work environment aspect,  
15 when we inspect, as well, and that program  
16 directed us to do that. The policy statement  
17 actually came out in '96, and then, in 2005, we  
18 beefed it up with a little more how we really  
19 expect our licensees to create this environment  
20 for raising concerns. Next slide.

21           This is just a graphic out of an annual  
22 report that we prepare in the Office of

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1 Enforcement every year, about all the allegations  
2 and the trends and analysis of the trends that we  
3 see for allegations, and I just wanted to put it  
4 up there to show you that last calendar year we  
5 got more discrimination complaints than any other  
6 type of nuclear safety complaint, 17 percent of  
7 the concerns that came in, and we get about 500  
8 to 600 allegations with multiple concerns in  
9 those allegations every calendar year.

10           The next slide is very busy, and I'm  
11 going to take it piecemeal. This is the process.  
12 So I'm going to start at the beginning. You can  
13 change the slide. Just start at the very  
14 beginning. We get about, on average, 130 to 150  
15 complaints of discrimination each year, at the  
16 NRC. We get that through our allegation program.  
17 We get that through the MOU with the Department  
18 of Labor. About a little more than half of that,  
19 about 60 percent of those actually meet the prima  
20 facie case determination. Next slide.

21           And this, I'm sure you're all familiar  
22 with, but it's very similar to the other

1 statutes. The allegor has to have engaged in a  
2 protected activity. There has to have been an  
3 adverse action taken against the allegor. The  
4 person responsible for the adverse action has to  
5 have knowledge of the protected activity, and the  
6 protected activity was at least, in part, the  
7 reason for the adverse action.

8 I wanted to stop here and say that's  
9 another key difference in investigating these  
10 concerns, is the Department of Labor and OSHA is  
11 interested in making the employee whole, if  
12 there's merit to doing that. So, a determination  
13 can be made of a violation of Section 211 under  
14 OSHA, but then the next question is asked, is  
15 there reason to make that employee whole?

16 The NRC kind of stops at the violation of  
17 Section 211 stage, in our investigation. Once  
18 we've determined there's a violation, we're not  
19 there to decide whether the employee needs to be  
20 made whole or not. We've already determined this  
21 happened, and it, therefore, can have an effect  
22 on that environment for raising concern, and

1 that's when we go into the enforcement stage. So  
2 we're very interested in any violation you find  
3 or we find of Section 211.

4           And the next slide is just a definition  
5 of adverse action. I don't think that's very  
6 different from what other people use, but this is  
7 what we have in our directives. Okay, so going  
8 back to that messy slide, about 60 percent, I  
9 said, each year, are determined to have a prima  
10 facie case. At that point, we will offer the  
11 concerned individual, the alleged that has the  
12 prima facie case, an opportunity to engage in our  
13 alternative dispute resolution program.

14           That program -- we can change the slide  
15 now -- that program is a voluntary mediation  
16 between the employer and the employee. The NRC  
17 is not party to that mediation, but we do pay for  
18 the mediator and the mediator's travel expenses.  
19 So, if the alleged is interested in using ADR,  
20 mediation, our contractor, which is Cornell  
21 University, will contact the licensee to see if  
22 they're interested in mediation, and if the two

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1 parties are so inclined, we will arrange for a  
2 mediator to meet them wherever they want to meet  
3 that's convenient to both of them, and the NRC  
4 funds that.

5           The process is confidential in that we're  
6 not in the room, and what is said in the room is  
7 confidential, except, of course, if a nuclear  
8 safety issue is discussed, they're free to raise  
9 that. That's very important. One of our  
10 regulations, under the 50.7 and 30.7 and 40.7 is  
11 Section F, which prohibits -- we like to call it  
12 the gag order aspect -- it prohibits preventing a  
13 concerned employee from not speaking about  
14 nuclear safety issues. So the confidentiality is  
15 limited, in that if a nuclear safety issue  
16 arises, any party that hears it can share it  
17 outside that room.

18           If the parties reach settlement -- and,  
19 at any time, they can decide they don't want to  
20 do this anymore, the mediation -- but if they  
21 reach settlement, that settlement agreement  
22 that's signed by both parties is sent to the

1 Nuclear Regulatory Commission. As I said, it's  
2 confidential, so they can black out values if  
3 they're monetary settlements, and other  
4 information, but we're strictly looking at it to  
5 make sure there's not a gag order in that  
6 settlement, again, because our regulations  
7 prohibit that. And that's really the only reason  
8 we're looking at that settlement agreement.

9           If it doesn't have such a thing, and,  
10 therefore, it's approved by the agency, that  
11 action constitutes the last thing the agency will  
12 do with that discrimination complaint. It's been  
13 settled. We will not launch an investigation and  
14 we will not, therefore, be able to take  
15 enforcement, and it's settled.

16           MS. SPIELER: Into the discrimination.

17           MS. JARRIEL: Into the discrimination  
18 complaint. Obviously if there's a safety  
19 allegation that hasn't been resolved, we ask that  
20 of the allegor, and we'll keep that. The other  
21 part that we keep is if whatever adverse action  
22 was taken against the concerned individual has

1 had a chilling effect on others, we'll keep that,  
2 too, and investigate it.

3 MS. SPIELER: How do you determine  
4 whether the adverse action taken against one  
5 person has a chilling effect on others?

6 MS. JARRIEL: If the allegor alleges it  
7 and/or if we have other information through our  
8 inspections and our other allegors, and we're  
9 constantly looking for that. The volume of  
10 concerns we get, the type of concerns we get, the  
11 anonymity used when they raise concerns, and, as  
12 I said, we have an inspection procedure that goes  
13 and actually looks for chilled work environments.

14 MS. GARDE: How are you going to expect  
15 the licensee to do that?

16 MS. JARRIEL: Our policy statement is  
17 that they will establish an environment that's  
18 conducive to people raising nuclear safety  
19 issues. It's a policy statement. It's not a  
20 regulation, but we have tools that would offer  
21 are more painful than violations. We have  
22 something called a Chilling Effect Letter that is

1 a very public letter that says the NRC has lost  
2 confidence that you have an environment for  
3 raising nuclear safety concerns, and that can  
4 draw a lot of attention from Congress and  
5 stakeholders. When I worked in the industry, I  
6 got one of those letters, and I'm convinced  
7 that's what drove our stock value down for a  
8 while. It got a lot of attention.

9           So they're painful letters to get, and we  
10 send them very carefully, because we only send  
11 them if we're convinced the work environment is  
12 not conducive to raising concerns, recognizing  
13 that if we send that letter and we're wrong,  
14 we'll chill the environment. So we do a lot of  
15 analysis, interviews, inspections to make sure  
16 we're right about it before we send that letter,  
17 but we send one or two of those a year.

18           MR. EHERTS: I have a question. It kind  
19 of relates to something we do on the OSHA side,  
20 too. What effect would the publication of raised  
21 concerns at each one of the reactor sites have on  
22 the environment for raising concerns? So if the

1 NRC decided that we're going to publish, on a  
2 website, which reactors across the U.S. have the  
3 most raised concerns --

4 MS. JARRIEL: We do. It is publicly  
5 available.

6 MR. EHERTS: Right. Would that have a  
7 chilling effect at that site, on reporting more?

8 MS. JARRIEL: On reporting more?

9 MR. EHERTS: Right. So you said the  
10 stock value goes down whenever --

11 MS. JARRIEL: We send a public letter  
12 that the Federal Government has determined the  
13 work environment is not conducive to raising  
14 concerns. That can have an impact.

15 MR. EHERTS: Right.

16 MS. JARRIEL: But the raw number?  
17 Clearly if you're an outlier --

18 MR. EHERTS: Right. If you happened to  
19 be next to a site that a high number of reported  
20 concerns, probably not, right? I would say  
21 that's probably not a safe sight, naively. But  
22 having the right environment for raising the



1 concerns means it is a very safe site.

2 MS. JARRIEL: We produce a report every  
3 year. We publicize the number of allegations  
4 that come in, first of all, the total number that  
5 come in from on-site --

6 MR. EHERTS: On discrimination.

7 MS. JARRIEL: First of all, total number  
8 of all safety issues. A subset of those that are  
9 from on-site sources, so contractors and licensee  
10 employees, and anonymous. Any time we get an  
11 anonymous allegation, we assume it's from someone  
12 on-site. And then a subset of the total that are  
13 discrimination related, and then how many are  
14 still open, how many are closed and  
15 substantiated. So that's all publicly available.

16 Then we do a trend analysis every year on  
17 all that information, and clearly the first test  
18 is if there are a lot of allegations about one  
19 employer, then it could be that the work  
20 environment is not conducive to raising concerns  
21 internally, so we use that as in initial trigger.  
22 Oh, they got a lot. Southern California, before

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1 SONGS was shut down, had a lot of allegations  
2 that came in.

3           So we looked into it, pulled the string,  
4 did more interviews, determined if it really  
5 represents a chilled work environments.  
6 Sometimes -- and SONGS is another good example --  
7 sometimes employees will buckshot. They'll raise  
8 it internally. They're not afraid to raise it  
9 internally. They just want us to know. So  
10 that's why we have to look. It's not just the  
11 number. We have to look at the specifics.

12           MR. EHERTS: Right. So a good number of  
13 reports internally is a good metric.

14           MS. JARRIEL: Yes.

15           MR. EHERTS: Right. That's something you  
16 want to encourage.

17           MS. JARRIEL: Yes.

18           MR. EHERTS: That's not what you report.  
19 You report the number of ones that they feel they  
20 have to go to you to get --

21           MS. JARRIEL: But when we get a lot, then  
22 we go and look to see what the reporting

1 internally, as well, and we compare it. If ours  
2 are going up but theirs are going way up, maybe  
3 that's not as bad as if ours are going up and  
4 theirs are going down. So we do make that  
5 comparison.

6 MR. EHERTS: Exactly. Very good.

7 MS. JARRIEL: So this month, this  
8 process, we call it the early ADR or pre-  
9 investigation stage. It takes about 6 months  
10 from the offer to the allegor until the  
11 settlement. We get about a 58 percent, 60  
12 percent success rate in doing that. And the  
13 reason we do this, again, is because we believe a  
14 quicker settlement, and a settled discrimination  
15 case, helps protect that environment for raising  
16 concerns.

17 You know, litigation of issues or an  
18 investigation by us can take a long time, and it  
19 pits the parties against each other, and the  
20 rumor mills are starting, and it really can have  
21 more of a chilling effect on the workforce than  
22 if the two parties settle and everyone is happy.

1 MS. SPIELER: You put happy in air  
2 quotes, so I have a question about how often  
3 these settlements, if they involve dismissals,  
4 actually involve reinstatements?

5 MS. JARRIEL: Most of them involve  
6 dismissals.

7 MS. SPIELER: And do most of those  
8 involve reinstatements, because if the person  
9 from the work site --

10 MS. JARRIEL: No. They don't involve  
11 reinstatements.

12 MS. SPIELER: -- and something settles,  
13 it doesn't necessarily send a message back to the  
14 work site, unless the person walks back in the  
15 door.

16 MS. JARRIEL: Well, and even if they  
17 don't walk back in the door, they're still  
18 shopping at Walmart. They're still in the  
19 community for a while, and we've emphasized that.  
20 As a matter of fact, Cornell told us early on --  
21 and they deal with a lot of different  
22 organizations in mediation and a lot of different

1 industries -- they said the nuclear industry is  
2 very different, in their case, because the  
3 settlements don't always have to do with money,  
4 as often they can. They said the concerned  
5 individuals that you get are very concerned about  
6 the issue they raised, that they believe they  
7 were retaliated against.

8           So we've told the employers, our  
9 licensees, don't go to a settlement, don't go to  
10 our mediation with a lawyer and expect you're  
11 going to have a happy outcome. You have to have  
12 management there and represented, and you have to  
13 listen to what the person was really concerned  
14 about, that he believes he was retaliated  
15 against, and deal with that issue.

16           Senior management needs to listen to  
17 that, because that's the best outcome. We're  
18 only doing this, NRC's only engaged in this and  
19 paying for this, because we think it protects  
20 that work environment. So if you walk away with  
21 a disgruntled employee, still, even though you've  
22 written them a check, to help him pay for a

1 mortgage for a year until he can move, that's not  
2 protecting the work environment. That's not  
3 enough. You have to look broader to the actual  
4 nuclear safety issue and potential chilling  
5 effect to have a successful mediation. And if  
6 they don't, we hear it.

7 MS. SPIELER: So let me just follow up,  
8 and maybe I just have a bias here that I have to  
9 struggle against, and I've done most of my  
10 retaliation kinds of litigation in the  
11 discrimination realm and not in this realm where  
12 people are -- although often people are bringing  
13 forward broader concerns, in, I think, all of  
14 these realms.

15 But do you post something about the  
16 outcome at the workplace? I'm trying to figure  
17 out how -- you said, "Well, they still shop at  
18 Walmart," and I'm a little stuck on that. I'm  
19 wondering whether there's any communication back  
20 into the workplaces about the settlements and  
21 whether there's a way of communicating that  
22 people felt, I got fired but it's okay.

1 MS. JARRIEL: No.

2 MS. SPIELER: It's just a little hard for  
3 me to wrap my head around.

4 MS. JARRIEL: Part of our policy  
5 statement on the Environment for Raising  
6 Concerns, the Safety-Conscious Work Environment  
7 Policy Statement, is that -- 90 percent of it is  
8 about communication. So if you're going to take  
9 an adverse action, and it talks about preventing  
10 the chilled work environment -- if an employer is  
11 going to take an adverse action, for legitimate  
12 business reasons, many of our more sophisticated  
13 licensees have panels now where they'll make sure  
14 that it's legal, what they're about to do, and  
15 then they ask the question, even though we know  
16 it's legal, could it be perceived to be  
17 retaliatory or discriminatory, Section 211?

18 And if it could be perceived, and that  
19 you can't -- a lot of senior management, in the  
20 beginning, when we did this, would say, "Of  
21 course they're not going to perceive it be  
22 retaliatory. It isn't." No. That's in Reality

1 Land. Come over here to Perception-ville with  
2 us. Could they perceive it's retaliatory? Could  
3 a reasonable person think, he just raised a  
4 nuclear safety concern that cost hours on a job,  
5 and now we're moving him because he also stole a  
6 computer? And they don't know he stole a  
7 computer, because of privacy issues. All I know  
8 is he very publicly raised a safety concern.

9           Could they perceive that's why you're  
10 taking this action? And if you think they could,  
11 you have to communicate to that work group, or  
12 maybe even the whole site, that you're taking  
13 this action for a different reason. Maybe you  
14 can't say exactly, because of privacy issues, but  
15 you have to say more than your lawyers usually  
16 want you to say, to protect the many versus the  
17 one.

18           And the policy goes into that a lot, and  
19 we do a lot of training. I do a lot of training  
20 with senior managers through another organization  
21 called INPO, to ensure that they understand our  
22 expectations, that they maintain this work



1 environment while they do what they have to do  
2 with employees. That's always our focus.

3 MR. WENGER: That's what I was talking  
4 about earlier. You could take these actions but  
5 you've got to keep your eye on the ball about how  
6 you do that, and a good company will have a  
7 process that not just says, yes, that's okay.  
8 That guy flunked his drug test so we're going to  
9 terminate him, but making sure that there is an  
10 understanding that it isn't because yesterday he  
11 stood up in a meeting and talked about that  
12 safety issue.

13 That's a pretty sophisticated set of  
14 expectations for kind of normal HR, legal  
15 infrastructure that I think the NRC has done a  
16 good job on building those expectations for their  
17 licensees, and in order to play in that sandbox,  
18 they've got to learn how to do that right.

19 MR. KEATING: I'm just struggling,  
20 though, on how do you do that right, and balance  
21 the invasion of privacy lawsuit you're getting  
22 from the individual's lawyer. How do you say,

1 "Oh, no, he stole a computer."

2 MS. JARRIEL: Billie can answer that.

3 MS. GARDE: I can answer that.

4 MR. KEATING: Okay.

5 MS. GARDE: You going to really have to  
6 decide, are you running a nuclear plant or are  
7 you building sewing machines? What are you going  
8 to be more worried about, the privacy lawsuit or  
9 a potential series nuclear accident? That's a  
10 pretty quick question to answer, and then you  
11 have to have a discussion with your leadership  
12 team, that those are the decisions that you need  
13 to make. And you'll have CEOs across the country  
14 who will say, "I'll take the risk of a privacy  
15 lawsuit," --

16 MS. JARRIEL: Right.

17 MS. GARDE: -- or "I'll take the risk of a  
18 defamation case. Actually, it's true, so he did  
19 flunk a drug test. But I'll make that decision  
20 in terms of protecting the environment." The  
21 Supreme Court has upheld that reasoning,  
22 specifically in some pretty significant drug and

1 misconduct cases, where a company has the right  
2 to make a decision and publish that decision if  
3 it's in the best interests of the overall  
4 objective of the company. The Supreme Court case  
5 was a police department case, and it was a little  
6 bit different, but it's the same concept.

7           And so you have to have that discussion,  
8 and most of the time the general counsel and HR  
9 say, "No way. The Western world, as we know it,  
10 will come to an end if I publicize the reason why  
11 this person got terminated." But the fact of the  
12 matter is, if the termination is disconnected  
13 from the safety concern, you've got to give it  
14 your best shot to make sure that that workforce  
15 understands it wasn't connected. Some may not  
16 believe you, but most people will give you the  
17 benefit of the doubt if they know what the facts  
18 are.

19           And in a lot of companies, they're asking  
20 for the involvement of the person. So if you're  
21 going to get punished, not fired, I may ask you  
22 to stand up in front of your group and explain,

1 "I did this really stupid thing, and I want to  
2 make sure you understand what's going on here.  
3 I'm not being retaliated against for this. I'm  
4 here committed to making sure that we continue to  
5 operate safety."

6           And it's raising the bar, in terms of  
7 personnel-related actions and decisions, but in  
8 that industry, you've got to do that. I've seen  
9 it work in other places. It just takes the  
10 commitment of the CEO, that wants to make sure he  
11 or she does not have retaliation as a problem in  
12 their workplace, and they have an environment  
13 where people can raise concerns.

14           MS. SPIELER: Nancy?

15           MS. LESSIN: I have a comment and a  
16 question. The comment is just on this Safety  
17 Conscious Work Environment, which the Department  
18 of Energy, then, borrowed, because it learned it  
19 from the NRC, and we've found that it might help  
20 people sing Kumbaya together but it doesn't deal  
21 with power relationships, and it doesn't deal  
22 with structural kinds of things that we've been

1 talking about, in part.

2           They've started doing all, we call it  
3 squeegee, Safety Conscious Work Environment  
4 training, at DOE sites, and you can't sling a  
5 dead cat on a Department of Energy site without  
6 hitting one or multiple practices, programs, and  
7 policies that discourage workers from reporting  
8 injuries and illnesses. And all of this training  
9 about how to listen carefully, and how to be nice  
10 to each other, and sing Kumbaya has done nothing  
11 for removing these kinds of practices that are  
12 daily experiences of workers on Department of  
13 Energy sites. So I have real questions about  
14 Safety Conscious Work Environment as doing  
15 anything other than maybe tuning people up to  
16 sing together.

17           The specific question that I have has to  
18 do with trying to understand protection that  
19 workers have in a particular instance. In OSHA,  
20 if there's going to be an OSHA investigation of  
21 an OSHA-covered workplace, in a unionized  
22 workplace, that union can pick a walk-around

1 representative to go around with OSHA. Should  
2 that walk-around representative ever be  
3 retaliated against for that activity, that would  
4 be protected under 11(c).

5           With the NRC, I wanted to understand, in  
6 a unionized workplace, does a union-selected  
7 person have the ability to do a walk-around when  
8 NRC comes in to do an investigation, and would  
9 that person be protected under this for raising  
10 issues and then be retaliated against? And then  
11 I have one other question that's a follow-up to  
12 that, but let me just understand. Do you have,  
13 as part of the practice, that when NRC does an  
14 inspection, that inspector can be accompanied, in  
15 a union site, by a union-selected?

16           MS. JARRIEL: Our regulations require  
17 that the NRC have unfettered access to anybody or  
18 anything they need on that site, which is a  
19 little different than allowing people to go with  
20 us, because, often, an allegor might want to  
21 approach that inspector. So if you had a union  
22 steward following you around, it could prohibit

1 that person from feeling free to raise that  
2 issue, because they didn't want to tell the union  
3 steward, maybe, about it. So I'm not sure the  
4 right is that someone can attach themselves and  
5 go everywhere the inspector is as much as the  
6 opposite -- the inspector can talk to the union  
7 steward, the union steward can raise issues to  
8 the inspector.

9 MS. LESSIN: One of the issues -- and I'm  
10 looking at safety issues right now, not that  
11 somebody is reta--. And so, if the NRC is  
12 looking at a workplace --

13 MS. JARRIEL: Um-hm.

14 MS. LESSIN: -- having somebody from the  
15 union having rights to go around, point out  
16 things -- that's what, in OSHA, a walk-around  
17 representative would do-- and then that person  
18 would have protection. There is nothing  
19 equivalent?

20 MS. GARDE: The NRC doesn't look at  
21 industrial worker safety issues. They're looking  
22 at radiation safety issues, and they don't take

1 somebody with them.

2 MS. SPIELER: I'm trying to figure out  
3 exactly where the consonance is between what the  
4 NRC does and what OSHA does under the 22  
5 whistleblower laws, so that we can have a  
6 productive conversation here.

7 MR. MOBERLY: I think I can answer.

8 MS. SPIELER: Let me just finish, Dave.  
9 And so OSHA has 22 whistleblower laws and it  
10 isn't only 11(c) or only the health and safety  
11 piece that's enforced by OSHA, in general  
12 industry. So we're interested, really, in  
13 understanding how a program that protects people  
14 who come forward with concerns about retaliation  
15 functions at the NRC, and what we can learn from  
16 that.

17 So, and you said -- you start out by sort  
18 of limiting us to the 17 percent of the cases  
19 that involved discrimination, of which you say  
20 almost all involve dismissals.

21 MS. JARRIEL: I might have misspoke. Not  
22 all of them involve dismissals. What I mean to



1 say is almost all of them that do involve  
2 dismissals do not include reinstatement when they  
3 go through the ADR process.

4 MS. SPIELER: Okay. Okay. So you've  
5 limited us down to the 17 percent that are  
6 involved in discrimination, and I actually have  
7 no idea what those other 83 percent are, so I  
8 have no idea what exactly this sort of universe  
9 of what you look at is.

10 ATTENDEE: [Inaudible.]

11 MS. SPIELER: Yeah, I know, but I didn't  
12 know what those things were. I looked at the pie  
13 chart. So I don't know what -- so does  
14 falsification mean I'm alleging that there's a  
15 falsification going on by the company?

16 MS. JARRIEL: Yes. They're falsifying  
17 quality assurance documents.

18 MS. SPIELER: Okay. So OSHA law, the  
19 OSHA whistleblower laws include environmental  
20 hazards, they include food hazards, they include  
21 -- so there is a range of things that OSHA and  
22 this whistleblower committee is looking at, that

1 don't only have to do with individual retaliation  
2 around safety but also have to do with public  
3 welfare concerns and situations where someone has  
4 come forward to raise a concern and has suffered  
5 retaliation.

6 MS. JARRIEL: I understand.

7 MS. SPIELER: Do all of these involve  
8 someone suffering retaliation?

9 MS. JARRIEL: No. All of those involve  
10 nuclear safety, period. We only take concerns  
11 that involve, within our purview of oversight.

12 MS. SPIELER: Okay. So those are  
13 complaints about safety but not complaints about  
14 retaliation.

15 MS. JARRIEL: Right, just 17 percent.

16 MS. SPIELER: And the discrimination, the  
17 17 percent that you call discrimination are cases  
18 in which someone has come forward and there has  
19 been an employment retaliation involved.

20 MS. JARRIEL: Yes.

21 MS. SPIELER: Okay.

22 MS. JARRIEL: For raising one of the

1 other issues.

2 MS. SPIELER: So the other 83 percent  
3 would be akin to someone calling OSHA and saying  
4 you need to do an inspection?

5 MS. JARRIEL: Right.

6 MS. SPIELER: But then presumably not  
7 within the whistleblower concern, in terms of  
8 retaliation? I just want to make sure --

9 MS. JARRIEL: An allegation is very  
10 simple. It's a statement that something is  
11 inadequate, that something is within the NRC's  
12 purview --

13 MS. SPIELER: Okay.

14 MS. JARRIEL: -- and we don't know the  
15 answer. That's all a person has to raise, and  
16 we'll bin it in our allegation program and  
17 inspect that.

18 MS. SPIELER: Okay. So let me take us  
19 back to focus on how you manage the cases that  
20 actually involve retaliation that come within  
21 your purview --

22 MS. JARRIEL: Right.

1 MS. SPIELER: -- those 17 percent, which  
2 is where you were initially focused, and you  
3 said, of those, about 60 percent you conclude  
4 there is at least a prima facie case --

5 MS. JARRIEL: Right, and we offer --

6 MS. SPIELER: And of those --

7 MS. JARRIEL: -- of all of those --

8 MS. SPIELER: -- 58 to 60 percent get  
9 settled. I think that's what you said. That's  
10 what I wrote down.

11 MS. JARRIEL: About, no. About a third -  
12 - I'll tell you. So we're on this slide right  
13 now that's up there. So about 60 percent we  
14 offer early ADR to, so we're talking 75 a year,  
15 about. Of those, about a third agree to  
16 mediation. Remember, it takes the two parties to  
17 agree. It's voluntary. So both the allegor has  
18 to want to do it and the employer wants to do it.  
19 And of those, a third, or 24 cases, 58 percent of  
20 14 actually reach settlement.

21 So the others that don't want mediation  
22 request an investigation by our investigators,

1 and these are badged individuals that can put  
2 people under oath, and take sworn testimony, and  
3 subpoena documents and personnel, and are more or  
4 less, although looking into a civil penalty, are  
5 creating a criminal docket that we can turn over  
6 to the Department of Justice for criminal  
7 prosecution. But we're looking at it from a  
8 civil point, and the investigator is trying to  
9 determine if our regulation, and Section 211 of  
10 the ERA, has been, that allegation was  
11 substantiated.

12 MS. SPIELER: Okay. Great. Thank you.  
13 That's helpful.

14 MR. EHERTS: I feel there's a huge  
15 learning from this model, for us, because,  
16 typically, how have those 17 percent of  
17 retaliation, of discrimination are handled  
18 impacts this climate, because, in terms of the  
19 rest of the company. I think that's a huge  
20 learning for us. And as an EHS vice president in  
21 the company, my biggest concern is this  
22 environment for raising concerns.

1 MS. JARRIEL: Right.

2 MR. EHERTS: I don't want anything that  
3 OSHA does to impact that environment. I want all  
4 the information to come to me, so I have the  
5 ability to handle these issues before they turn  
6 into serious injuries and fatalities.

7 MS. JARRIEL: Right.

8 MR. EHERTS: So I'm very, very concerned  
9 that employees have this environment. So, for  
10 instance, the Fairfax Memo is very important to  
11 me, because anything that we do that would  
12 discourage an employee from reporting an injury  
13 or an unsafe work condition, to me, is very  
14 important. I want to make sure these employees  
15 feel actually free. In fact, I want them to be  
16 rewarded for bringing information to me. So I  
17 just don't want to protect this environment. I  
18 want to enhance it.

19 MS. JARRIEL: Um-hm.

20 MR. EHERTS: So I am very concerned with  
21 things that OSHA does, for instance, where it  
22 might have a chilling effect. So if OSHA

1 publishes the number of minor injuries at a site,  
2 and the neighborhood around the site feels that  
3 that's a bad employer because a lot of people are  
4 reporting these minor incidents or they're  
5 reporting a lot of concerns about hazard  
6 workplace, that would chill the effect of  
7 reporting, to me.

8           So I think that's the big learning here,  
9 is that protecting this environment for reporting  
10 internally is a key. So I want OSHA to have a  
11 big hammer when it comes to whistleblower  
12 protection, because I want companies to be very  
13 concerned that things aren't reported to OSHA.  
14 They're reported to us, personally, and that we  
15 then respond, and then people see our response  
16 and report more, and so that we enhance this  
17 environment, is the point. I think this is a  
18 fantastic model for that, and I think we should  
19 all learn from it.

20           MS. JARRIEL: Thank you. So the ones  
21 that don't --

22           MS. SPIELER: Let's let the presentation

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1 be completed and then, if there's time, we'll  
2 have additional questions.

3 MS. JARRIEL: So we're going to get to  
4 the enforcement side of things now. So we've  
5 tried to let the parties resolve the  
6 discrimination concern amongst themselves. The  
7 ones that fail during mediation or the ones where  
8 the parties didn't want to engage in mediation go  
9 right to investigation. Remember, they've  
10 already met the prima facie so the investigations  
11 can hit the ground running and start their  
12 investigation. About 4 percent of those are  
13 actually substantiated. It's very difficult to  
14 find proof to substantiate those concerns. So  
15 the one or two that we substantiate each year go  
16 through the enforcement process.

17 The first thing we do in the enforcement  
18 process is --

19 MS. SPIELER: Can you remind us, how many  
20 total did we start with?

21 MS. JARRIEL: We started with 130, but  
22 not all had prima facie. Only 75 or so had prima



1 facie. So we're down to one or two that actually  
2 are substantiated, and what we do is we engage  
3 the employer with an apparent violation choice  
4 letter. We give them a choice. We think we've  
5 found a violation of Section 211, and we're  
6 thinking about imposing a civil penalty, and you  
7 have a choice.

8           You can come in and talk to us about it  
9 at a pre-decisional enforcement conference,  
10 which, in the case of discrimination concerns is  
11 non-public, although we do invite the allegor to  
12 listen and then speak to us, not the employer.  
13 You can just write us and tell us if you agree or  
14 disagree or have any issues -- give us your side  
15 of the story in writing. Or, you can engage in  
16 what we call post-investigation ADR. That is  
17 voluntary, also.

18           This time, it's between the regulator,  
19 ourselves, and the employer, and the allegor is  
20 not invited but the allegor is contacted, from  
21 us, so that we can tell them we're engaging in  
22 this, and to get some ideas from them about what

1 they think strong corrective actions should be,  
2 what would help the work environment for others.

3           At that point, the parties share the cost  
4 of the mediator. We're still using Cornell, and  
5 that process, from that point, when we send the  
6 choice letter to an agreement, is about a 9-month  
7 process. Mind you, that's after the  
8 investigation's already happened, and the  
9 investigation can take a year to a year and a  
10 half, depending on the number of interviews, the  
11 number of documents, and the availability of  
12 those, whether we have to subpoena them or not,  
13 and all that.

14           So we go to ADR at that point, and if  
15 they don't want to go to the ADR at that point,  
16 they can go on and we impose the penalty, so  
17 we're back on the last piece. We impose the  
18 notice of violation and the civil penalty, and  
19 they have a second opportunity to go to ADR with  
20 us. And if they don't want to do that and we  
21 impose the CP, and then they have a dispute about  
22 paying that, they can come to us again.

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1           The purpose of the ADR, in this case,  
2 from the NRC's standpoint, is to -- maybe the  
3 licensee doesn't want to admit there was a  
4 violation. What we want to see are actions to  
5 correct what we believe is an apparent violation,  
6 and so we'll negotiate. We'll take the notice of  
7 violation away, or maybe we'll reduce the  
8 penalty, the civil penalty, but here's what we  
9 want to see in exchange, and what we typically do  
10 is we'll get corrective actions, not just for the  
11 one plant where the violation happened but the  
12 fleet of plants that the licensee owns.

13           So it's very much more comprehensive, the  
14 corrective actions we get, and involves many more  
15 things that we want to throw in the kitchen sink.  
16 So we like ADR, at this stage, because we get  
17 more comprehensive corrective actions, and we  
18 have yet not to settle in there.

19           MS. GARDE: Let me throw out an idea for  
20 this committee. While this is all going on at  
21 the NRC, the Department of Labor is also going  
22 on, conducting its investigation, relying -- the

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1 interface, the investigators between the NRC and  
2 the DOL interface, sometimes one waits for the  
3 other. Sometimes they share information --

4 MS. SPIELER: That was the piece I was  
5 confused about. Thank you.

6 MS. GARDE: -- so that there's an  
7 interface going on between the Department of  
8 Labor investigation and the NRC's investigation.  
9 Sometimes the Department of Labor will find in  
10 favor of an employee and the NRC will not, so  
11 there are, occasionally, different decisions,  
12 although that's not that frequent, but there are  
13 occasionally different decisions. And the NRC's  
14 consistent position is that, in some cases, in  
15 making the worker whole.

16 That's the Department of Labor's job.  
17 Our job is to look at the work environment, but  
18 there's a recognition that those two pieces are  
19 intertwined. So they've been doing a lot better  
20 job, both agencies, working together over the  
21 last couple of years. For a while it was a real  
22 mess.

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1 MS. JARRIEL: Yeah.

2 MS. GARDE: But it's gotten better, so  
3 there's more working together when they both get  
4 to investigation. If they settle early -- so  
5 they take ADR -- it's very usual that a company  
6 will settle with me on behalf of the worker and  
7 then they'll go and settle with the NRC. They  
8 want to just take care of the whole thing. But  
9 those lawyers will know it's a two-step process.

10 MS. SPIELER: So before I open this up,  
11 let me just make sure that -- because I don't  
12 want to walk away confused. So, there are  
13 analogies here between the intersection. The NRC  
14 has a particular issue around nuclear safety,  
15 which is a particularly big hazard, but it's kind  
16 of a big hazard to me when I'm in front of an  
17 interstate truck and I'm worried about whether  
18 its brakes are working or not, and I, actually,  
19 because of some prior experiences, never travel  
20 in front of an interstate truck on a downhill  
21 slope, on an interstate.

22 OSHA is often intersecting with other

1 agencies, where their mission is a safety  
2 mission, or an environmental hazard mission, or a  
3 food safety mission, or a consumer product safety  
4 mission, and the piece that DOL has is this  
5 individual who has faced discriminatory action  
6 and has to be made whole.

7           So I think it goes back to Dave's point  
8 that what is special about the NRC is its mission  
9 to prevent chilling effects from these  
10 activities, and the question I would ask is, are  
11 there things that we can learn on the chilling  
12 effect component that would be informative,  
13 particularly around the issues of best practices,  
14 and telling companies how to function within this  
15 realm?

16           So I just ask that question generally --

17           MS. JARRIEL: Sure.

18           MS. SPIELER: -- for you to answer, and  
19 then I'm sure there are questions that other  
20 people have.

21           MS. JARRIEL: Sure. We do a lot of  
22 outreach with our licensees, and engage often in

1 public discussion about this work environment,  
2 environment for raising concerns, and what our  
3 expectations are. We have a policy statement but  
4 we do a lot more, as far as training the  
5 regulated body to what that means and what,  
6 really, our expectations are for them. We have  
7 promulgated our expectation that they'll have --  
8 we call them executive review boards, but these  
9 boards that before you take an action against an  
10 employee, ask yourself, make sure not just the  
11 one is asking these questions, or HR is asking  
12 these questions, but have a small board of people  
13 that asks, "Is this really legal?" from all the  
14 laws.

15           Are we discriminating against them  
16 because they're over 50? Let's make sure that's  
17 not happening. Let's make sure that we're not  
18 violating Section 211. But then, even  
19 afterwards, the key question is, even though we  
20 know we're doing something legal, could it have a  
21 chilling effect, and what can we do to mitigate  
22 that chilling effect?

1           We never really want people not to take  
2 adverse action against an employee that needs to  
3 have adverse action taken against them. This  
4 isn't the tail wagging the dog. That second  
5 question isn't, oh, it might chill so, therefore,  
6 we can't take disciplinary action. We just ask  
7 that they mitigate the consequences of that  
8 disciplinary action on everybody else at that  
9 site, so it doesn't chill them.

10           We have recently, in the last couple of  
11 years, proceduralized and very much documented  
12 how we, the NRC, determines whether a work  
13 environment is chilled, and everywhere we look,  
14 and all the questions we ask, and these trends  
15 we're looking for. So we have a document that's  
16 publicly available on our website, and the  
17 website is listed in this presentation, that you  
18 could find that goes to -- it's called Chilling  
19 Effect Letter Guidance. That's that public  
20 letter we send that says we think your  
21 environment is chilled; fix it. Again, this is  
22 not a regulation, so when we say fix it, it's a

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1 request, not a requirement, but no one has ever  
2 said no. They address them.

3 I'm trying to think what else we do, from  
4 the chilling effect aspect.

5 MS. WENDELL: I just want to throw in  
6 here. Maybe we should have framed this before we  
7 started, but ERA is the only statute, really,  
8 where we have another agency investigating  
9 exactly the same issue. We have Section 211 of  
10 ERA, as does NRC, so it's just a really unique  
11 relationship.

12 MS. JARRIEL: And I'll just correct one  
13 thing you said, Billie. We used to defer,  
14 sometimes, to OSHA's investigation, but the  
15 commission direction back in '94 killed that and  
16 said we can no longer defer to DOL. So we'll  
17 finish our investigation, and if a DOL  
18 investigation is still ongoing, we'll leave the  
19 allegation open. We'll tell the allegeder we  
20 didn't or we did substantiate the concern and  
21 take whatever enforcement we're going to take,  
22 but we also leave it open and we get your answer,

1 and if there's new and different information that  
2 we didn't have in ours, then we'll consider that.

3           So if maybe we didn't find for the  
4 allegor, and didn't substantiate the allegation,  
5 but we'll say we're going to leave it open and  
6 follow DOL, and then we'll review that. There  
7 have been cases where we've taken enforcement  
8 based solely on the Department of Labor, or a  
9 court case.

10           MR. ROSA: And in some instances, we were  
11 actually considering kind of doing the same  
12 thing. In fact, I'm very pleased to have you  
13 here, because one of the things I've been working  
14 on and struggling is trying to get more  
15 understanding about the NRC's process because, as  
16 Katelyn said, it's practically identical. The  
17 process that we have, there are a lot of  
18 similarities between the ERA process that we have  
19 with OSHA and the process that you have.

20           The remedies are different, obviously.  
21 Our remedy is to make whole the complainant, and  
22 your remedy is to make sure that the company

1 complies with the law, and any fines that you may  
2 find, it's towards the company --

3 MS. JARRIEL: Right.

4 MR. ROSA: -- and not to make anything  
5 towards the complainant. So I'm very pleased  
6 that you're here and I would to continue the  
7 conversation on this particular area.

8 MS. SPIELER: Richard.

9 MR. MOBERLY: Someone may have said this,  
10 but I am trying to figure out the legal authority  
11 for what you do and where it comes from. So, we  
12 have the ERA and you have Section 211, and then  
13 there's this language under these regulations for  
14 protecting the environment for raising concerns.  
15 You have on this slide here, protects the  
16 environment for raising concerns. That's  
17 language in your regulation dealing with Section  
18 211?

19 MS. JARRIEL: No. That's language in a  
20 policy statement the NRC has, that is associated  
21 with our employee protection regulation. We do  
22 have regulations that protect the employee, and

1 that last bullet is just to say the whole reason  
2 we have those is not to protect the employee, but  
3 to protect the chilling effect that will happen  
4 if someone retaliates against them.

5 MR. MOBERLY: And that policy statement,  
6 the authority from that is under 211, though?

7 MS. JARRIEL: Yeah. It's associated  
8 with. Again, it's a policy statement, so there's  
9 no regulatory authority associated. We cannot  
10 find a violation against our policy statement.  
11 It is just an encouragement of our licensees to  
12 meet that policy statement.

13 ATTENDEE: [Speaking off mic.]

14 MS. JARRIEL: 10(c) of our 50.7 prohibits  
15 retaliation -- discrimination, we say -- against  
16 an employee for engaging in a protected activity,  
17 as defined by Section 211.

18 MR. MOBERLY: And the hammer, or the  
19 carrot or the stick, or however you want to put  
20 it, for them to comply with this environment,  
21 once you find, is --

22 MS. JARRIEL: Is a letter. So it's --

1 MS. GARDE: It's a policy statement.

2 MS. JARRIEL: It's a policy statement --

3 MR. MOBERLY: Right.

4 MS. JARRIEL: -- where we just encourage.  
5 It's a long statement that says here's what we  
6 expect. You're prohibited from retaliating, but  
7 we want you to go beyond that. We want to  
8 actually people to raise questions.

9 MR. MOBERLY: And they fall in line for  
10 this.

11 MS. JARRIEL: And if they don't, because  
12 we inspect against it --

13 MR. MOBERLY: Okay. So I guess what I'm  
14 trying to figure out is, so in the OSHA  
15 environment, I'm trying to think of a legal  
16 reason why OSHA could not issue a similar policy  
17 statement based on its anti-retaliation  
18 provision, requiring similar environments for  
19 raising concerns, similar investigations, similar  
20 mean letters, or whatever. I mean, is there a  
21 reason? You don't have specific statutory or  
22 regulatory authority. You've issued this policy

1 and now you're investigating under it --

2 MS. JARRIEL: Right.

3 MS. GARDE: Let me answer that. I have  
4 always thought that the world would be a better  
5 place if each of these statutes' regulator had a  
6 companion like 10(c) of our 50.7, so they could  
7 also send out mean letters, so that they could  
8 expand it. But at bottom, if you look back at  
9 the history of these laws, all of these laws,  
10 Congress talked about the chilling effect.

11 They put these laws in place not just to  
12 make individuals whole but to make the work  
13 environment one in which people could raise  
14 concerns. It's just the way in practice this has  
15 worked out, is the Department of Labor looks at  
16 these as individual causes of action, and  
17 individually making the worker whole, and hoping  
18 that doing that will ultimately make the work  
19 environment better.

20 My experience has been, in all industries  
21 except the NRC, it works that way almost as a  
22 cost of doing business, like EEO case. It hasn't

1 had the same effect in the trucking industry or  
2 under the Pipeline Safety Improvement Act, but it  
3 could.

4 MR. MOBERLY: That was my question.

5 MS. GARDE: Yeah. It could.

6 MR. MOBERLY: Issue a similar policy  
7 statement and take a broader view in the same  
8 way.

9 MS. GARDE: Same way. Same model.

10 MS. SPIELER: Nancy.

11 MS. LESSIN: I want to go back to my  
12 original question, because I think there maybe  
13 was confusion. Maybe not. But I was talking  
14 about not an NRC investigation of wrongdoing  
15 having to do with retaliation, but when NRC does  
16 an inspection to find out if there are problems  
17 that are going to harm the environment, is there  
18 a policy that allows a walk-around representative  
19 from the workforce to accompany, and would that  
20 person then be protected?

21 Would it be seen as protected activity if  
22 they were to say, "Look over here. We have

1 problems over here. Look over here." I mean,  
2 this just goes to nobody knows best where the  
3 bodies are buried than those who dig the holes.  
4 Workers often know where the weak links are, or  
5 what's being glossed over. And in the nuclear  
6 environment, I think workers are very important  
7 key for the NRC.

8 MS. JARRIEL: We totally agree. They're  
9 a very, very important key. And so to answer the  
10 second part of your question, yes. Anybody,  
11 whether they're a union or otherwise, that says,  
12 "Look over here. Look over here," is protected  
13 under our regulation and Section 211, for raising  
14 a nuclear safety issue. Look over here at this  
15 OSHA issue, we wouldn't take it.

16 MS. JARRIEL: No, I'm not talking about  
17 that.

18 MS. JARRIEL: But are they allowed to be  
19 part of that inspection? No. No. The NRC has  
20 the authority to inspect against their  
21 regulations. We don't include workers in those  
22 inspection.



1 MS. GARDE: Or management.

2 MS. JARRIEL: Or management.

3 MS. LESSIN: So no walk-around rights the  
4 way we see under OSHA?

5 MS. JARRIEL: No.

6 MS. SPIELER: Okay. So I'm going to pull  
7 us back in again, because I'm not sure walk-  
8 around rights are really under our purview,  
9 interesting and important as they may be. Are  
10 there other specific issues now? I think there  
11 have been a couple of things that have come out  
12 of this conversation that we may want to mull  
13 about tomorrow, but I also am attentive to the  
14 time and I know that, in particular, some of the  
15 people who are staffing this meeting probably  
16 have right to go home, and this is the  
17 Department of Labor.

18 So unless there are really critical  
19 questions that we should direct here, I would  
20 suggest we continue the general conversation  
21 tomorrow, that we adjourn for the day, and that  
22 we reconvene tomorrow morning at 8:30, as

1 promised.

2           Let me just say a couple of things about  
3 that. We'll reconvene at 8:30 and we'll take up,  
4 as I said before, I believe, the work group  
5 conversations in the order of the 11(c)  
6 committee, followed by best practices, followed  
7 by transportation. Our lunch break will be  
8 early, 11:45 to 12:45. We need to reconvene here  
9 before 1:00, because although it's not on the  
10 agenda -- am I allowed to say this? -- there is a  
11 chance the Secretary of Labor, Tom Perez, may  
12 stop by, and it would be at 1:00. So we need to  
13 be back in our seats before 1:00.

14           The last thing is that I asked Katelyn if  
15 she could -- the 11(c) committee made some  
16 changes to the recommendations that were  
17 previously circulated this morning, and I thought  
18 it would be importance, since we were taking them  
19 up first thing tomorrow morning, that we hand  
20 them out tonight so that you would have a chance  
21 to take a look at them before we talk about them,  
22 since I hate, almost more than anything, being

1 handed something and told that I should be able  
2 to react instantaneously to it.

3 MS. LESSIN: Are you talking about the  
4 statutes tonight, a copy of the statutes?

5 MS. SPIELER: Which statutes?

6 MS. WENDELL: [Speaking off mic.]

7 MS. SPIELER: Oh. I wasn't imagining you  
8 would be able to do that tonight, frankly.

9 MS. JARRIEL: I just want to let you know  
10 that I'm leaving brochures about our alternative  
11 dispute resolution, both pre-investigation and  
12 post-investigation, that explain a little better,  
13 and point you to the website.

14 MS. SPIELER: And Lisa, I'm sorry. I  
15 didn't say, first, thank you for coming. It  
16 actually was incredibly informative, and I think  
17 will form the basis of future conversations.  
18 And, further, thank you for staying late.

19 MS. JARRIEL: Oh, no problem.

20 MS. SPIELER: Okay. Adjourned.

21 [Whereupon, at 5:17 p.m., the meeting was  
22 adjourned.]