

# OSHA 11(c) WHISTLEBLOWER STAKEHOLDER MEETING

May 14, 2019

Minutes

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

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The OSHA Whistleblower Stakeholder Meeting was called to order by Rob Swick at 1:00 pm on Tuesday, May 14, 2019.

The following members of the public were present:

<b>NAME</b>	<b>TITLE &amp; ORGANIZATION</b>
Debbie Berkowitz	Safety and Health Program Director, National Employment Law Project
Cooper Brown*	Director of Corporate Responsibility, Government Accountability Project
Angela Childers*	Reporter, Business Insurance
Robert Collette	President, Institute of Shortening and Edible Oils
Patricia Creech	Health and Safety Specialist, United Steelworkers
Shanna Devine	Worker Health and Safety Advocate, Public Citizen
Brandon Elvey	Vice President, Brotherhood of Railroad Signalmen
John Evans*	Intern, Conn Maciel Carey LLP
David Ewanick*	Field Safety Specialist, USS&E2
Karie Fox-Stanton*	Safety Program Manager, IES Communications
Felipe Franchini	N/A
Marcy Goldstein-Gelb*	Co-executive Director, National Council for Occupational Safety and Health
Claiborne Guy	Director, Employment Policy & Practices, Associated General Contractors of America
Brad Hammock	Shareholder, Littler Mendelson P.C.
Sherry Haskins*	HR Admin, Baker Brothers Electric, Inc.
Fatima Hussein	Reporter, Bloomberg Law
Randall Krocka	Administrator, Sheet Metal Occupational Health Institute Trust
Deidre Laws*	Chief OSHA Counsel, South Carolina OSHA
Tysen Lutz*	CSO, Apache
Robert Matuga	Assistant Vice President, Labor, Safety and Health, National Association of Home Builders
Tiffany McCleave	Attorney, U.S. Postal Service
Frank McGivern*	Safety Manager, Immutrix Therapeutics Inc.
Trever Neuroth	Associate, Jackson Lewis P.C.

Randy Norman	Representative, Brotherhood of Railroad Signalmen
Justine Parker*	Principal Consultant, CIH, Bureau Veritas North America
Travis Parsons	Associate Director, Occupational Safety and Health, Laborers' Health and Safety Fund
Abigail Potter	Manager of Safety and Occupational Health Policy, American Trucking Associations
Jeffrey Raymer*	Chief Operating Officer, Safety Alliance
David Reynolds*	Associate Editor, Inside EPA Newsletter
Steven Schrag	Co-chair, ConnectiCOSH
Peg Seminario	Safety and Health Director, AFL-CIO
Joseph Sirbak*	Member, Cozen O'Connor
Tina Stanczewski	Attorney, Law Office of Adele Abrams
Sean Stewart*	N/A
Joselito Sto Tomas	Industrial Hygienist, Government Printing Office
Fernando Tapia	Labor Safety and Health Coordinator, United Food and Commercial Workers
Katie Tracy	Policy Analyst, Center for Progressive Reform
Felicia Watson	Senior Counsel, National Association of Home Builders

Note: \* denotes attendees who participated via teleconference

The following U.S. Department of Labor (DOL) staff were present:

<b>NAME</b>	<b>AGENCY</b>	<b>TITLE</b>
Krisann Pearce	OSHA	Chief of Staff
Matthew Mimnaugh	OSHA	Special Assistant
Francis Yebesi	OSHA	Acting Director, Directorate of Whistleblower Protection Programs (DWPP)
Anthony Rosa	OSHA	Deputy Director, DWPP
Anthony Incristi	OSHA	Acting Division Chief, Division of Field Operations, DWPP
Christine Stewart	OSHA	Division Chief, Division of Policy, Planning, and Program Development, DWPP
Meghan Smith	OSHA	Program Analyst, DWPP
Yasmin Wardlaw	OSHA	Program Analyst, DWPP
Robert Swick	OSHA	Investigation Specialist, DWPP
Gail Swann*	OSHA	Management Analyst, DWPP
Phillippe Blancato	OSHA	Investigation Specialist, DWPP
Sarah Caudrelier*	OSHA	Acting Regional Supervisory Investigator, Region I
Tiffany Harrison	OSHA	Program Analyst, ROAD Detail, DWPP
Mark Lerner	SOL-OSH	Senior Attorney
Megan Guenther*	SOL-FLS	Counsel for Whistleblower Law
Kim Darby	OSHA	Writer-editor
Marlis Burbiek	OSHA	Writer-editor
Simone Walter	OPA	Public Affairs Specialist

Denisha Braxton	OPA	Public Affairs Specialist
Michael Mabee*	OSHA	Assistant Regional Administrator, Region I
Teri Wigger*	OSHA	Assistant Regional Administrator, Region II
Kristen Rubino	OSHA	Regional Supervisory Investigator, Region I
Rebecca Bowen*	OIG	Audit Manager
Renata Hobbs*	OIG	Auditor
Jennifer Roberts*	OIG	Auditor
Chris Silvern*	OIG	Special Agent
Mark Schwartz*	OIG	Audit Director
Anthony Streeter*	OSHA	Whistleblower Investigator, Region IV
Corey Wilson*	OSHA	Assistant Regional Administrator, Region VIII
Denise Keller*	OSHA	Regional Supervisory Investigator, Region V
Kevin Crain*	OSHA	Assistant Regional Administrator, Region VII
Richard Abernathy*	OSHA	Regional Supervisory Investigator, Region III
Paul Leary*	OSHA	Acting Assistant Regional Administrator, Region IX

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## **OSHA Speakers**

### **Kristen Rubino, Moderator**

Ms. Rubino welcomed people and gave the ground rules for the meeting:

- OSHA was in a listening mode for the meeting and would not be answering questions during the meeting.
- Speakers should limit their remarks to 10 minutes.
- When discussing a whistleblower case, participants should not state either the respondent's or complainant's name. They should speak generally about their experience without giving case-specific details.
- After all of the participants who signed up to speak have spoken, OSHA will open the floor for additional comments.

### **OSHA Chief of Staff, Krisann Pearce**

Ms. Pearce thanked everyone for attending. She noted that this is the third in a series of meetings seeking stakeholder input on OSHA's whistleblower program. The program has a big mission – ensuring that employees are protected from retaliation under 22 different whistleblower statutes.

It is so vitally important that employees feel comfortable bringing issues to the attention of their supervisors and management – and it is truly in everyone's best interest.

The meeting will focus on whistleblowers covered by Section 11(c) of the Occupational Safety and Health Act. The Occupational Safety and Health Act covers most private sector employees and the U.S. Postal Service

OSHA's goal today is to receive input on two important issues:

1. How can OSHA deliver better whistleblower customer service?
2. What kind of assistance can OSHA provide to help explain the whistleblower laws it enforces?

The agency will be listening carefully to what you have to say, as we want to improve our processes and our outreach for all members of the stakeholder community.

Ms. Pearce thanked everyone for attending and for their commitment to working with OSHA to help ensure these important protections for workers in this industry.

### **Francis Yebesi, Acting Director, Directorate of Whistleblower Protection Programs (DWPP)**

OSHA receives more complaints under Section 11(c) of the Occupational Safety and Health Act than it does under any other statute that it enforces. Last fiscal year, OSHA received a total of 9,566 new complaints for processing, of which 7,989 involved Section 11(c) of the Occupational Safety and Health Act (OSH Act). To help the public understand the rights protected under Section 11(c), OSHA is seeking your input to ensure that the relevant community has the knowledge to protect themselves from retaliation. Specifically, the agency is requesting help on how it can improve customer service and outreach. The agency's goal is to listen intently and learn from comments, suggestions, and experiences that are shared today.

OSHA will be taking notes on all input and will upload this information to [regulations.gov](https://www.regulations.gov) in the docket. In addition, OSHA will also upload any written comments you have to the docket for the record. There are copies of several informational materials, including fact sheets, available today. These materials have also been uploaded to the docket. People participating by phone may access these materials by going to [www.regulations.gov](https://www.regulations.gov) and typing osha-2018-0005 in the search bar.

### **Stakeholder Speakers**

#### **Debbie Berkowitz, Safety and Health Program Director, National Employment Law Project (NELP)**

Ms. Berkowitz explained that NELP is a 50 year old organization that advocates for policies for low wage workers. They work with unions, worker centers, faith-based groups, and community and national organizations. She worked for OSHA under the previous administration.

Ms. Berkowitz provided several suggestions for improving customer service. She noted that the program is underfunded and understaffed. She recommended reestablishing the Whistleblower Protection Advisory Committee (WPAC). Ms. Berkowitz believes that stakeholder meetings are not a substitute for the committee. The whistleblower program needs a lot of attention.

She applauded the administration for asking for increased budget, which would fund 131 positions. However, that number is fewer than the number of positions the agency had in 2016 –

135. The agency has decided to cut five supervisory positions. If the agency is committed to the whistleblower program, they should bring the number of positions back to 135. Although OSHA is authorized for 127 positions, only 114 are currently filled. These vacancies must be filled. The high number of vacancies and length of time investigations take means the directorate does not have support from administration it deserves and needs. The top to bottom review of the whistleblower program in the wake of U.S. Government Accountability Office (GAO) and Office of the Inspector General (OIG) reports had scathing criticisms of the program. At that time, staff that put together information indicating a need for 134 staff in the regions – Regional Supervisory Investigators (RSIs), technical investigators, etc. The number didn't include DWPP. The number needed is greater than the number in the current budget proposal.

Ms. Berkowitz recommended prioritizing filling vacant positions. The whistleblower program ends up in press when horrible things happen because of lack of staffing, not individual errors. There is no acceptable answer to not filling positions in a timely way.

The directorate must do a better job of redistributing cases among regions. Just as the Directorate of Enforcement Programs does, DWPP can move resources around. The program needs a more even distribution of cases. This is how OSHA traditionally works. As an example, in Texas, the agency brought in inspectors from all over the countries when it was needed.

Ms. Berkowitz went on to recommend greater consistency among the regions. The Whistleblower Investigations Manual (WIM) that DWPP publishes must be used by every region. Currently, she has seen inconsistent enforcement; almost identical facts are treated with different approaches by different investigators. OSHA needs to do more training to be consistent.

She was startled to find out that when a worker talks with a whistleblower investigator and files a complaint over the phone, the complainant never sees a written complaint. It's different than when an inspector gets a safety complaint. This must change. When a worker files a complaint over the phone, the investigator must be required to send the complaint back to the complainant. The complainant needs to be reviewed to make sure that it's accurate. There can be inaccuracies when complaints are just given over the phone.

If the complainant is going to be interviewed by a whistleblower investigator in person and the worker does not speak English, the agency must provide a translator. Companies should not retaliate because there is no enforcement.

Investigators should keep in better contact with complainants. There should be contact every three months.

Ms. Berkowitz is very opposed to the current proposal to centralize the program; centralization can make the situation worse. The proposal calls for a decrease in supervisory staffing. Rather, the agency needs an influx of staff. In 2010, the top to bottom report contained concerns about centralizing, including that it would be difficult to centrally manage large numbers of people. Case file managing, managing state plans, and supervising employees from a distance would be challenging. In the 2012 pilot program, Region I had the national office direct the program. It

failed because there were not enough resources. In addition, the agency would need to develop a new process for 11(c) appeals. The agency cannot have supervisors who supervise the investigators also supervise appeals. Ms. Berkowitz referenced a comment in the docket by Emily Spieler and noted that any appeals by the staff in DC should be more than just a review of the existing case file; more investigative steps should be conducted when necessary.

Ms. Berkowitz suggested that OSHA put more data on the website, including company names and information on settlements. She also recommended that the directorate should review a sample of cases for consistency. She also suggested an audit of each region.

A strong and functioning 11(c) program is necessary for every worker. Workers must know they can speak out.

### **Katie Tracy, Policy Analyst, Center for Progressive Reform (CPR)**

CPR is a nonprofit research and educational organization with a network of Member Scholars who work to protect health, safety, and the environment through analysis and commentary. The organization's Member Scholars provide research, analysis and commentary on issues related to the environment, health and safety. Ms. Tracy has monitored the OSHA 11(c) program. The program doesn't operate to its full potential because of the law and a lack of resources. She thinks some things can be done without many resources.

Ms. Tracy recommended that when the agency receives an 11(c) complaint, the investigator should assess whether it might also fall under another statute administered by agency or a statute that is more advantageous to the worker, such as one with a longer length of time to file. As the WIM states, OSHA determines under which statute(s) a complaint is filed. Even if the complainant files under wrong statute, the investigator needs to process on the right one. Investigators may follow this procedure in many cases; they need to process complaints under each statute that may apply. Investigators should receive additional training on the manual.

When OSHA receives a complaint orally and it is reduced to writing, the investigator should provide written complaint to the complainant and allow them time to address errors in complaint. OSHA should create online application so that parties can track a complaint throughout process.

When OSHA investigates an 11(c) complaint, it should complete the investigation within 90 days. Delay in gathering evidence causes erosion of evidence and the inability to contact key witnesses. Workers who are fired from a job may need to relocate. Under Section 11(c), there is no other recourse. If an investigation is not complete in 90 days, the investigator should communicate the reason for the delay and when the case may proceed. A worker may lose confidence if not communicated with. If there is no confidence, they may not make safety complaints in the future. Frustration with the program may fester beyond DOL to government services more broadly.

Ms. Tracy recommended that OSHA should track trends and that OSHA should refer the employer to inspection if there is a merit case. In addition, she recommended that OSHA should

have more data. If a list of companies that commit retaliation was available, that would serve as a deterrent. It would also let people avoid companies with a toxic culture.

OSHA should bring back WPAC, as it provides a critical function.

Ms. Tracy argued that centralizing the program is a bad idea. Doing so would create new challenges. The proposed centralization may negatively affect appeals. If the proposal is adopted, the same director would supervise initial investigations and review. This would weaken program.

Ms. Tracy submitted comments on behalf of a coalition of stakeholders. The comments can be found in the meeting docket at <https://www.regulations.gov/docket?D=OSHA-2018-0005>.

### **Shanna Devine, Worker Health and Safety Advocate, Public Citizen**

Public Citizen is a national non-profit public interest organization. Previously, Ms. Devine worked for the Government Accountability Project (GAP). She has a decade of experience with whistleblower rights. Whistleblowers play a fundamental role in letting the agency know about problems. For employees to risk going forward, they need to know program will work. There is a fear of futility and a fear of retaliation. Ms. Devine also worked with CPR on the comments.

Ms. Devine first spoke about weaknesses in the law. OSHA enforces 22 whistleblower laws. Over the past 20 years, Congress has placed a lot under OSHA's jurisdiction. The older statutes have become outdated and largely ineffective. Under those statutes, the burden falls unduly on whistleblowers. Most complaints are filed under Section 11(c). Gross disparities cripple the ability of workers to work in a safe and healthy workplace. Under Section 11(c), there is no option for an administrative hearing or access to court. The law needs to be modernized. For example, under the FDA Food Safety Modernization Act, complainants have 180 days to file. Under Section 11(c), they have 30 days. Complainants may not learn that an action is retaliatory under 30 day window. Complainants have 180 days to file under other statutes. Those statutes have an improved rate of enforcement. It is incumbent upon agency to support the Protecting America's Workers Act (PAWA) or comparable proposals. Reforms include changing the filing time to 180 days, allowing for preliminary reinstatement, changing the burden of proof, allowing for a de novo hearing before Administrative Law Judge (ALJ) or a jury of their peers after complainants exhaust administrative reforms.

There are immediate actions the agency can take. In 2015, the OIG concluded there were several deficiencies in the whistleblower program. In 2016, OSHA made significant improvements to the WIM. OSHA can take concrete actions to insure compliance with the WIM.

In addition, Ms. Devine recommended that investigators receive annual training, or more frequently as changes in laws happen. She also recommended that audits of the program take place outside of DOL. Under Section 11(c) and other OSHA administered laws, there is no access to complaints for review; complainants need to submit Freedom of Information Act (FOIA) requests to get their files. There is no reason to put the burden on the complainant. OSHA needs to engage in quality control and provide complete and timely access to files.

OSHA should also enforce 29 CFR § 1904.35. Whistleblower and Safety staff need to coordinate. Employees need to know they can report. Under this provision, OSHA can cite employer on an employee's behalf, even if the employee did not file a complaint. It's an important tool that should be utilized.

Ms. Devine also asked OSHA to immediately fill vacancies, including adding multilingual investigators. OSHA should ask for increased budget. Finally, Ms. Devine recommended bringing back WPAC. Stakeholder meetings are not an adequate substitute for WPAC. WPAC advised on coordination with other agencies.

### **Tysen Lutz, CSO, Apache**

Mr. Lutz works for a general contractor. He has been through three Section 11(c) cases. His experience is that everyone was a disgruntled employee who was mad about being terminated. At the end of the day, his organization spent hundreds of dollars to get response back to OSHA for something that should have been handled at the job site level or Human Resources. For better customer service, a mechanism to try to separate true violations from not would be very helpful. With lots of Section 11(c) cases, if we can identify cases where the employee is just mad about his employment situation, we could send it back to the employer without going through process, which would be better for all. It would be better to communicate that rather than send the employee down the complaint path. When you go to the online complaint form, it doesn't give enough information as to when an employee should call OSHA and when an employee should not call OSHA.

### **Peg Seminario, Safety and Health Director, AFL-CIO**

Ms. Seminario noted that rights under Section 11(c) are core protections, especially for workers who are not unionized. When the law was passed, it was revolutionary. Mechanisms for enforcement are incredibly weak. The burden is on us to try to protect these rights. The problem with the program is that it has not gotten the support that it needs. Whistleblower protections are not as easy to enforce as safety standards. Ms. Seminario was pleased to see that a number of years ago, the administration responded to reports coming from IG and GAO. Dr. Michaels elevated the program.

One of the most important things is ensuring the right to complain in the workplace. There are lots of people in acting capacity in agencies. There is no permanent head of this office. Permanent leadership is an important way to build programs. Ms. Seminario agreed that the resource issue is critical. The agency enhanced the program and created a budget line item. The agency needs to fill open positions. People need to be properly trained regarding the laws and programs and understand what the Whistleblower Protection Program is about. The agency should include workers and unions to come in and tell them what it is like to be on the other side.

Ms. Seminario is worried that OSHA's backlog has increased. The agency needs resources and staff to be able to address that. The kind of complaints they hear in the unions is the frustration of lack of contact with the investigator, where the case is, and why it is not moving. Ongoing communication is critical, especially under Section 11(c) because we're the only game in town.



Average time for last fiscal year for case completion was 271 days. OSHA needs to keep high priority cases moving.

Ms. Seminario asked where we are on improving data collection in the IMIS system. The agency should create a system that allows us to track individual cases. This is critical for cases we do not investigate. Two-thirds of the cases are not docketed. Ms. Seminario also echoed the comment about better coordination with enforcement.

Ms. Seminario also recommended reestablishing WPAC. Before any major reorganization takes place, we need to figure out how to improve the program. Given all of the other deficiencies, take a look. She also recommended improving the website and translating the complaint form into other languages.

### **Steven Schrag, Co-chair, ConnectiCOSH**

Mr. Schrag provided examples of whistleblower posters throughout his presentation. These can be found in the meeting docket at <https://www.regulations.gov/docket?D=OSHA-2018-0005>.

Mr. Schrag provided many examples of whistleblowers, including cases where whistleblowers received large judgments. He also described going into a workplace and finding that employees didn't report incidents of violence because they were worried about retaliation. He recommended requiring front line supervisors to ensure no retaliation be included in every citation.

Mr. Schrag compared the current OSHA poster with one from 1979. He believes that the current version is too small and doesn't adequately explain worker rights. If OSHA wants to make Section 11(c) more real, it should require the old poster in the workplace. Only three workplaces were cited for not posting the poster last year. OSHA should enforce the standard for putting up the poster.

Under the OSH Act, the agency should ask employers to hand out materials. The Secretary has the authority to do this. OSHA should require that employers give out materials once a year. Mr. Schrag also asked OSHA to keep in mind that real people are affected by whistleblowing. He noted that there can be a chilling effect when employers retaliate against employees who speak up.

### **Felipe Franchini**

Mr. Franchini was a whistleblower at a government facility. He provided the perspective of a complainant who has navigated the OSHA whistleblower process. He felt like guidance was lacking for where he should file his case. Mr. Franchini noted that when whistleblowers believe the process fails them that no one will want to raise nuclear safety issues.

Mr. Franchini believes the whistleblower program is a disgrace; few whistleblowers get anything out of it. OSHA should look at whistleblower cases, including his own, and learn from them.

**Fernando Tapia, Labor Safety and Health Coordinator, United Food and Commercial Workers (UFCW)**

Mr. Tapia spoke for UFCW and the National Council for Occupational Safety and Health. Mr. Tapia noted that things can get complicated fast for workers, especially if they want to file a whistleblower complaint and happen to be undocumented. Retaliation silences the entire workplace, not just the individual. It can lead to hazards going unchecked. How to connect inspections with 11(c)? Need to convey consequences. Need to get involved in rights.

Vulnerable workers have high fatality rates. The whistleblower process needs to be worker friendly and easy to navigate. The agency can not let cases fall through the cracks. Employees need representatives and advocates involved. It's important to have interpretation available and translated material. Investigators have no need to inquire about immigration status.

The agency needs to get Susan Harwood grants for Section 11(c). In closing, the agency needs a comprehensive approach and should reinstate WPAC.

Ms. Rubino adjourned the meeting at 2:25 pm.