

OSHA WHISTLEBLOWER STAKEHOLDER MEETING
October 13, 2020
Minutes

The OSHA Whistleblower Stakeholder Meeting was called to order by Rob Swick at 1:00 pm ET on Tuesday, October 13, 2020. The meeting was held via teleconference.

The following members of the public were present:

NAME	TITLE & ORGANIZATION
Adele Abrams	President, Law Office of Adele L. Abrams PC
Julie Alexander	Director of General Industry, Indiana Department of Labor
Jesse Ashley	Sr. Manager, EHS, SFC GSC
Danielle Avtan	Compliance Officer, PCIHIPAA
Daniell Barcena	N/A
Kurt Barry	N/A
Kimberly Barsa	Branch Chief, IRS Office of Chief Counsel
Henry Borja	Machine Union (IAM) Stores Safety Coordinator, United Airlines
Skyler Bouwkamp	Supervisor for Whistleblowers/Intake, IOSHA
Richard Bozek	Director, Environmental and Health & Safety Policy, Edison Electric Institute
Michael Brannon	Senior Counsel- Health, Safety and Environmental, Quanta Services, Inc.
Ariel Braunstein	Attorney, Morgan, Lewis & Brockius LLP
Deitra Brown	Assistant Clinical Director, Texas Children's Hospital
Valerie Butera	N/A
Scott Clausen	Associate, Morgan Lewis
Kevin Collins	Partner, Bracewell LLP
Trent Cotney	CEO, Cotney Construction Law, LLP
Javier Diaz	Assistant Attorney General, State of Alaska Department of Law
April Dickerson	Manager of Quality Assurance & Safety Compliance, RadNet Management, Inc.
Jasmin Eapen	Certified Registered Nurse Anesthetist, MD Anderson Cancer Center
Justin Edwards	Compliance and Career Development Manager, HVO
Karen Engle	Whistleblower and CSHO, Indiana Department of Labor
Robert Etnyre	N/A
Barbara Erwin	Safety, Security and Regulatory Compliance Manager, Omnitrans
Brandon Field	State of Alaska, Occupational Safety and Compliance Officer
Jim Frederick	Senior Consultant, ORCHSE Strategies, LLC
Karen Gentile	Community Liaison, Pipeline and Hazardous Materials Safety Administration

Jerry Gibson	Chief of Staff / Director of Safety, SMART Transportation Division
Charles Goetsch	Attorney, Charles Goetsch Law Offices LLC
Amanda Hall	Assistant Director, Kentucky Labor Cabinet
Matthew Helminiak	Commissioner of Labor and Industry, State of Maryland Department of Labor
Palmer Hickman	Director, Electrical Training Alliance
Richard Hoffmann	CEO, HFT Fire and Rescue Technologies and Equipment, LLC
Darrell Hornback	Director Health and Safety, International Chemical Workers Union Council
Michael Jordan	Management and Program Analyst, Federal Motor Carrier Safety Administration
Suma Joseph	CRNA, UTH Ciziks School of Nursing
Feby Kanatt	Psychiatric Nurse Practitioner, MedOptions Behavioral Health services
Lawrence Katz	Attorney, Coffey Kaye Myers & Olley
John Kenney	COO, Cotney Consulting Group
Dawn Kitko	Career Advisor, Commonwealth of Pennsylvania
Karl Kumli	Associate Attorney, Jackson Kelly PLLC
David LaRoss	Associate Editor, Inside EPA
Michael Littlefield	QC / Safety & Health, Quikrete
William Lowry	Community Liaison, Pipeline and Hazardous Materials Safety Administration
Lawrence Mann	Attorney, Academy of Rail labor Attorneys
Brad Mannion	Manager of Labor and Employment Policy, Associated Builders and Contractors
Shannon McCord	Student, UTHSC Cizak School of Nursing, Houston
Kara Maciel	Chair, Labor • Employment Practice Group, Conn Maciel Carey LLP
Shawn McKinley	Assistant General Counsel, SMART Transportation Division
Mike Marr	Safety Technical Resource Consultant Ohio BWC, Division of Safety & Hygiene
Josephine Martin	EHS Professional, self-employed
Lee Martin	Director, Whistleblower Office, IRS
Teresa Marzolph	Founder, Culture Engineered
Robert Myers	Partner, Coffey Kaye Myers & Olley
Tara Nixon	Labor Counsel, South Carolina OSHA
Alan Pertga	N/A
Angela Pickett	Community Liaison, Pipeline and Hazardous Materials Safety Administration
John Pietuszk	Discrimination Manager, Tennessee OSHA
Ana Popovich	Reporter, Whistleblower News Network
James Prothro	Program Manager/Community Liaison, Pipeline and Hazardous Materials Safety Administration
James Quigley	Senior EHS Coordinator, Northrop Grumman Corp.
Sean Quinlan	Community Liaison, US DOT

Paula Rasmussen	Attorney, Hildebrand McLeod & Nelson
Gary Regulski	NA Regional PS&RC Manager, Axalta Coating Systems
Alan Rowe	Safety & Training Director, International Alliance of Theatrical State Employees Local 728
Melody Russo	Compliance Safety Officer & WB Investigator, AKOSH
P.S.	N/A
Steve Sallman	Assistant Director of Health, Safety & Environment, United Steelworkers
Susan Shamis	Safety Consultant, Ohio BWC Safety & Hygiene
James Stem	Executive Director, Academy of Rail Labor Attorneys
Edward Stern	Principal, Stern Research and Analysis
Gwen Thomas	State Plan Manager, South Carolina Department of Labor, Licensing and Regulation
Kim Van Tran	Senior Deputy, State of California - DLSE
Linda Tuhacek	Consultant, Self-employed
Teri Watson	Whistleblower Program Coordinator, Oregon OSHA
Marc Wietzke	Partner, Flynn & Wietzke, PC
Michael Wissig	EHS Manager, IFF / POWDERPURE
Paul Zaffuts	Attorney, The Zaffuts Group
Lavinia Zanaj	Director of Quality, Houston Physicians' Hospital
Jason Zuckerman	Principal, Zuckerman Law
Ezekial	N/A

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

NAME	AGENCY	TITLE
Loren Sweatt	OSHA	Principal Deputy Assistant Secretary
Francis Yebesi	OSHA	Acting Director, Directorate of Whistleblower Protection Programs (DWPP)
Anthony Rosa	OSHA	Deputy Director, DWPP
Christine Stewart	OSHA	Division Chief, Division of Policy, Planning, and Program Development, DWPP
Anthony Incristi	OSHA	Division Chief, Division of Field Operations, DWPP
Andrea Appel	SOL	Regional Counsel for Civil Rights, Region III
Philippe Blancáto	OSHA	Investigation Specialist, DWPP
Terry Brown	OSHA	Administrative Assistant, DWPP
Dale Caldwell	OSHA	Program Analyst, DWPP
Andrea Carlson	OSHA	Program Analyst, DWPP
Martha Collins	OSHA	Program Analyst, DWPP
Chris Covell	OSHA	Whistleblower Investigator, Region IV
Kevin Crain	OSHA	Assistant Regional Administrator for Whistleblower, Region VII
Michelle DeBaltzo	SOL	Senior Trial Attorney

Megan Eldridge	OSHA	Regional Supervisory Investigator, Regions IX and X
Jorge Gomez	OSHA	Compliance Assistance Specialist
Megan Guenther	SOL	Counsel for Whistleblower Programs, FLS Division
Ryan Himes	OSHA	Assistant Regional Administrator for Whistleblower, Regions IX and X
Marisa Johnson	OSHA	Program Analyst, DWPP
Denise Keller	OSHA	Assistant Regional Administrator for Whistleblower, Region V
Mark Lerner	SOL	Senior Trial Attorney, OSH Division
Adriana Lopez	OSHA	Economist
Michael Mabee	OSHA	Assistant Regional Administrator for Whistleblower, Region VI
Anthony Price	OSHA	Whistleblower Investigator, Region V
Tiffany Riddick	OSHA	Investigation Specialist, DWPP
Michael Rivera	OSHA	Regional Administrator, Region III
Antione Robinson	OSHA	Assistant Regional Administrator for Whistleblower, Region IV
Kristen Rubino	OSHA	Regional Supervisory Investigator, Region I
Jack Rudzki	OSHA	Regional Supervisory Investigator, Region III
Marisa Schnaith	SOL	Attorney
Meghan Smith	OSHA	Program Analyst, DWPP
Gail Stewart	OSHA	Management Analyst, DWPP
Rob Swick	OSHA	Investigation Specialist, DWPP
Paul Tanner	OSHA	Program Analyst, Directorate of Cooperative and State Programs
Nate Terwilliger	OSHA	Regional Supervisory Investigator, Region V
Teri Wigger	OSHA	Assistant Regional Administrator for Whistleblower, Region II
Cory Wilson	OSHA	Assistant Regional Administrator for Whistleblower, Region VIII

OSHA Speakers

Rob Swick, Moderator

Mr. Swick opened the meeting by noting that the agency would be taking notes on all stakeholder input and will upload this information to regulations.gov in docket OSHA-2018-0005. In addition, the agency will also upload any written comments you have to the docket for the record. Materials for this meeting and past meetings can be accessed by going to www.regulations.gov and typing “osha-2018-0005” in the search bar.

Mr. Swick also explained the ground rules:

- OSHA will be in a listening mode for this meeting; we will not be answering questions right now, but we may be able to provide responses later, depending on the question.

- Please limit your remarks to a maximum of five minutes.
- When discussing a whistleblower case, do not state either the respondent's or complainant's name. Talk generally about your experience without giving case-specific details.
- After all of the participants who signed up to speak have spoken, we will open the floor for additional comments.

Loren Sweatt, Principal Deputy Assistant Secretary for Occupational Safety and Health

Ms. Sweatt made the following remarks:

Good afternoon. I would like to start by thanking all of you for joining us today. This is the sixth meeting seeking stakeholder input on OSHA's whistleblower program. It is vitally important that all employees feel comfortable bringing issues to the attention of their supervisors and management, especially in light of the safety challenges presented in keeping employees safe from COVID-19.

Our goal today is to receive input on three important issues, though we understand you may also have issues related to COVID-19 that you would like to discuss:

1. How can OSHA deliver better whistleblower customer service?
2. What kind of assistance can OSHA provide to help explain the agency's whistleblower laws to employees and employers?
3. Are there particular whistleblowing issues in the healthcare, retail, and grocery industries that OSHA should be aware of?

We'll 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.

Please go visit www.osha.gov for our latest health and safety information.

Thank you again for being here, and for your commitment to working with us to help ensure these important protections for workers in these industries.

Adele Abrams, President, Law Office of Adele L. Abrams PC

Ms. Abrams noted that with over 25 years of experience, including whistleblower actions, one thing that has become clear to her is that many workers don't understand what their rights are or what they can report to OSHA. Employees may have a fear of reprisal, a fear of reporting retaliation against others, or a fear of testifying against the employer in favor of other workers. It is vital to communicate to workers that this is protected activity. OSHA should make sure that people know that all workers are protected, including health and safety professionals. Some safety and health professionals who try to affect change experience retaliation. People think if they are salaried that they don't have protection.

Regarding questions presented by the agency, the 30 day statute of limitations under Section 11(c) is too short. When that is coupled with no mandated training on worker rights, it's

especially problematic. Workers can blow by the first month without realizing it's an adverse action under 11(c). OSHA remedied this situation with 29 CFR 1904.35 and 1904.36. The statute of limitations under the Occupational Safety and Health Act (OSH Act) was effectively expanded to 180 days. It's limited to retaliation that is related to reporting an injury or illness. In addition, 1904.35 requires employers to train employees about their right to report work-related injuries/illnesses without fear of retaliation. The agency needs to make sure that anything under 11(c) can be reported under 1904.36. This means that no statutory amendment is necessary. Sanctions under 1904.36 are not limited to fining the employer for willful violations but include make whole relief, including back pay and restoration of employment. Going forward, if OSHA isn't going mandate it through a rule, there should be more encouragement to train people on worker rights.

One question posed is how to better deliver customer service. OSHA should look to the Mine Safety and Health Administration (MSHA); they've had mandated training on this for years. They have support materials on their website. There's no reason why the agencies can't pool resources.

Recording workplace violence is critical; it's the number one cause of death for women in the workplace.

Danielle Barcena, N/A

Ms. Barcena was an employee at a company. She raised concerns about the COVID-19 pandemic in March. Those concerns caused her termination. None of the issues she raised were addressed. Her removal serves as example that reporting is not safe. We're still in an emergency situation with a highly contagious and deadly virus. Countless complaints are being closed with no action. Ms. Barcena feels there is a difference between having rights and those rights being honored. OSHA has programs to educate employers, but when complaints aren't taken seriously, it diminishes worker rights. The risk for a whistleblower to come forward doesn't hold weight if actions are not taken. OSHA publishes the COVID-19 FOIA log. Employees are saying that employers aren't providing personal protective equipment (PPE), aren't enforcing social distancing, and aren't sharing information about coworkers who test positive for COVID-19. The lack of seriousness is causing a chilling effect in the workplace and reporting of concerns to lose weight.

James Quigley, Senior EHS Coordinator, Northrop Grumman Corp.

Mr. Quigley works in manufacturing. He noted that the whistleblower program is the end of the line. OSHA should improve its business assistance efforts. He has suggested bringing in a Cal/OSHA representative for on-site consultation purposes, but most employers don't welcome this type of intervention. Having worked on the regulatory side, he knows the value of such assistance to help employers achieve greater compliance. OSHA needs more compliance assistance for educating employers on whistleblower protection provisions and better outreach for the business unit, generally.

Michael Wissig, EHS Manager, IFF / POWDERPURE

Mr. Wissig works in food manufacturing. He has brought health and safety programs to industry. He has noticed that when companies complete acquisitions, as soon as you have the ability to deal with health and safety through other avenues, employees become aware of OSHA and the whistleblower program. It's often retroactive. A disgruntled employee may feel that his job is less stable. However, most of the claims he has seen have had merit. Only a few were outside the bounds of normal operation. All were from employees disgruntled about past actions. Nothing scheduled for future operations. Protection timelines should be increased.

There aren't services in the field that are getting the word out that employees have these protections. OSHA should target places that educate their employees on the program. Often, he has seen the interaction that, if a problem is noticed and action is taken, that's when employees feel empowered to make whistleblower claims. They usually don't want to make trouble but don't trust whoever is directly representing them.

Information on whistleblower complaints is difficult to find out, such as exactly what the complaints are and which industries. The complainant should be anonymous but the information surrounding the complaint should be made available to all people in the industry.

Steve Sallman, Assistant Director of Health, Safety & Environment, United Steelworkers

OSHA's whistleblower staff had heavy workload prior to the COVID-19 pandemic. The pandemic has only increased staffing issues. Workers must be able to report issues without putting their jobs at risk. No one should have to choose between their job and their family. Legal rights should, but don't often, protect safety rights. The meat packing industry is an example. The government published a news release, reminding employers that retaliating against employees is illegal, but this does little to help workers. Employers know there is a small chance they will be punished for whistleblower infractions. Mr. Sallman recommended going to the National Employment Law Project website and reading their analysis of OSHA data. Most complaints are closed without investigations. OSHA needs more whistleblower staff and an administration to back them. OSHA must do its part to ensure safe workplaces.

Richard Hoffmann, CEO, HFT Fire and Rescue Technologies and Equipment, LLC

Mr. Hoffmann recounted incidents in which he was a whistleblower and problems he encountered.

Justin Edwards, Compliance and Career Development Manager, HVO

Mr. Edwards noted that one of the things employers have to do is educate employees. This requires a culture change. Employees should be trained that 1) they have a voice and 2) if you "see something, say something". Employers should educate their employees (employers should be willing to go to MSHA/OSHA for training materials) and knowledge on the front end is a lot less headache than on the backend.

Marc Wietzke, Partner, Flynn & Wietzke, PC

Mr. Wietzke is a rail labor attorney. He noted that, in 2008, Congress passed amendments to the Federal Railroad Safety Act (FRSA). Previously the rail industry was undercounting the injuries. The FRSA helped the safety culture in the industry. The “forces in power” are still at work, going against a safety culture. Courts have been reading the Title VII burden shifting analysis from *McDonnell Douglas v. Green* into FRSA. The statute did not intend this, but courts have a hard time believing *McDonnell Douglas* isn’t there. OSHA should make this explicit.

Reporting about a safety condition and following a treatment plan are protected activity, but this does not have to be just a treatment plan for a workplace injury. For example, you can take a painkiller for a non work-related injury and report that (and the safety issue it may cause) to your employer and not have a fear of retaliation. The courts do not always agree with this interpretation.

Mr. Wietzke also noted that OSHA needs more investigators.

Edward Stern, Principal, Stern Research and Analysis

Mr. Stern submitted comments to the docket regarding updating the definitions of intimidation and harassment, which are available at <https://www.regulations.gov/document?D=OSHA-2018-0005-0055>.

Mr. Stern also recommended creating an interactive tool to help the business community understand their obligations under the whistleblower laws enforced by OSHA.

Lawrence Mann, Attorney, Academy of Rail labor Attorneys

Mr. Mann submitted comments to the docket regarding recommendations relating to the FRSA, which are available at <https://www.regulations.gov/document?D=OSHA-2018-0005-0056>.

Mr. Mann wanted to emphasize that railroad workers don’t know their rights and have a fear of reporting. Companies do not train their employees on worker rights.

April Dickerson, Manager of Quality Assurance & Safety Compliance, RadNet Management, Inc.

Ms. Dickerson noted that the safety culture is good in her company. They encourage employees to report issues and have a hotline. She has found that employees will report safety issues to OSHA without telling the company about the issue first. She believes that this is sometimes done for revenge, and it can take a long time to prepare a response to the agency. She recommended that OSHA intake staff ask employees who are reporting safety issues whether they have informed the company of the issues. If they haven’t, the employees should be encouraged to report the unsafe condition. This would lead to faster resolution of the hazard, and employers would spend less time on frivolous complaints.

Open Floor

Brandon Field, State of Alaska, Occupational Safety and Compliance Officer

Mr. Field works in safety compliance with the State of Alaska. He is a trained whistleblower investigator. From a regulatory viewpoint, Alaska shares the same challenges in whistleblower investigations with the Federal Government, even though state plans only review 11(c) cases. Whistleblower investigators are assigned a lot of cases. The cases are not quick to resolve. Some complainants decide that it will take too long to complete a case and they will lose too much waiting while the investigation is going on. More resources should be allocated at the national and state level. There should be more resources at the federal level so it can trickle down to the state level.

P.S., N/A

P.S. dealt with mold in the workplace, has health conditions now, and believes that OSHA did not take the complaint seriously. P.S. was wrongfully terminated by the company, which felt orchestrated. Her employer calculated it was cheaper to fire her than do remediation. She is not going through the whistleblower investigation process currently. P.S. created a petition to strengthen title 8, which will be denied.

Adele Abrams, President, Law Office of Adele L. Abrams PC

Ms. Abrams recommended that OSHA look to MSHA. OSHA may want to look at MSHA for future legislation. MSHA can hold individual supervisors personally responsible if they engage in whistleblower retaliation. They can be fined. The OSH Act doesn't hold people responsible, except criminally, in some cases. It would be interesting if the Department of Labor (DOL) could take a look at the efficacy of supervisor culpability under 11(c).

There is a gap in worker protections for temporary workers and workers in the gig economy. They're classified as independent contractors. Some companies improperly classify everyone as an independent contractor. OSHA should make clear that employers can't retaliate against their own employees or an employee from a staffing agency. If someone raises a concern that there is no PPE, and they're from a staffing agency, they may not have other jobs they can be deployed to. The employee may also not know about her rights.

Ms. Abrams also noted that there is concern about whiplash in policies OSHA put out regarding 29 CFR 1904.35 and 1904.36. Previously, OSHA took a position that an employer couldn't require a drug test simply because an employee sustained an injury. But in a 2018 memo, OSHA shifted back to allowing employers to drug test workers at any time, which is problematic since employers are often looking for reasons to fire workers. Ms. Abrams also stated concerns about the chilling effect on workers who use medical cannabis. Furthermore, OSHA's current stance on safety incentive programs has shifted as stated in a 2018 memo compared to previous policy.

Ms. Abrams remarked that since OSHA didn't promulgate an emergency temporary standard, the agency needs to articulate protections for COVID-19 exposure conditions in the workplace. She

also recommended that the agency continue to work with the NLRB and tell employees who are retaliated against for their race or gender to file with the EEOC. Finally, Ms. Abrams noted that the agency needs more whistleblower staff and that a private right of action under Section 11(c) would be useful.

Melody Russo, Compliance Safety Officer & WB Investigator, AKOSH

Ms. Russo noted that case load allocation is problematic for whistleblower investigators and the workload should be spread out more evenly across investigators. It can be difficult to do meaningful work before a lot of time goes by. She would like to have guidelines on how many cases there should be per investigator and what the turnover rate should be. Many cases involve small employers and Ms. Russo tries to educate employees and employers. She hopes there will be more collaboration between DOL and small businesses.

Rich Hoffman, CEO, HFT Fire and Rescue Technologies and Equipment, LLC

Mr. Hoffmann provided additional details on the whistleblower incidents he has been involved in.