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April 14, 2014

OSHA Docket Office, Docket No. OSHA-2011-0859
ATTN: Katelyn Wendell, Program Analyst
U.S. Department of Labor, Room N-2625
200 Constitution Avenue NW.
Washington, DC 20210

BY FAX: (202) 693–1648

RE: Procedures for Handling of Retaliation Complaints under Section 402 of the Food Safety Modernization Act (Document ID OSHA-2011-0859)

Dear Ms. Wendell:

This letter contains my comments to the Procedures for Handling of Retaliation Complaints under Section 402 of the Food Safety Modernization Act (FSMA).

I am an attorney with some experience in handling whistleblower matters at the U.S. Department of Labor.

A. The FMSA is a remedial law and decisions under this law should be guided by that remedial purpose.

The "Summary and Discussion of Regulatory Provisions" recognizes "the remedial purposes of FSMA" in text referencing Section 1987.105 (Issuance of Findings and Preliminary Orders). The remedial purpose deserves a central billing. Foodborne illness kills about 3,000 Americans a year, and hospitalizes 128,000 more.[1] Congress passed the FSMA to protect people from getting sick and dying. When Congress passes a law to accomplish a remedial purpose, that purpose should be central to decisions about interpretation and application of the law. For example, in the recent case of *Lawson v.*

1 See http://www.fda.gov/Food/ResourcesForYou/HealthEducators/ucm095399.htm Another 48 million of us are sickened by foodborne illness each year.

FMR LLC, 2014 WL 813701 (U.S. Mar. 4, 2014), both the majority opinion and the dissent drew on the remedial purposes of the Sarbanes-Oxley Act (SOX).

The Administrative Review Board (ARB) has also relied on the remedial purpose of whistleblower protections. For example, the ARB has held that a food safety whistleblower can find protection based on a reasonable but mistaken belief that the CPSIA provided protection. *Saporito v. Publix Super Markets, Inc*., ARB No. 10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012). This holding is particularly important for the FSMA. Under the reasonable belief doctrine, an employee's "belief must be reasonable for an individual in [the employee's] circumstances having his training and experience." *Melendez v. Exxon Chems*., ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000); *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854, at 14 (ARB, May 25, 2011). As the large majority of the 20 million Americans working in the food industry will be unaware of the nuances of the Food, Drug and Cosmetic Act, the reasonable belief doctrine will be a significant component of the scope of protection. Helpfully, the Summary and Discussion recognizes that the reasonable belief doctrine will apply by saying, "a complainant's whistleblower activity will be protected when it is based on a reasonable belief that any provision of the FD&C, or any order, rule, regulation, standard, or ban under the FD&C, has been violated."

Through 21 U.S.C. 399d(b)(4), Congress gave the whistleblowers the option to "kick-out" to federal court if the Department has failed to issue a final decision within 210 days. The Summary and Discussion notes that, "The purpose of the "kick-out" provision is to aid the complainant in receiving a prompt decision." I believe this statement misses some of the other benefits of the "kick-out" provision. For example, by kicking out to federal court, whistleblowers can receive a jury determination of their damages. Of course, many other whistleblower cases can already be tried by juries, and the Department's policy appropriately seeks to make awards of compensatory damages comparable to those of other cases. *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10).

Congress is giving the Department of Labor the opportunity to demonstrate that it can be a better forum for whistleblowers than the U.S. District Courts. In a well-managed program, whistleblowers can find adjudications that are fair and in furtherance of the remedial purpose of the law. They should not have to educate the OSHA investigators or ALJ's about the applicable laws and their purposes. They should find professional attention that understands the common indicators of unlawful reprisals. They should receive determinations that are comparable to those of federal courts, but through a process that is cheaper, easier and focused on the particular needs of whistleblowers cases. While it is preferable to have determinations issue more quickly, having determinations that are correct is more important. If the Department can make its program the better option for whistleblowers, then the remedial purpose will be fulfilled.

Speaking of compensatory damages, the Secretary has held that if the record supports a finding of emotional distress damage, the Department must award these damages, even if an employee did not seek professional counseling. *Blackburn v. Martin*, 982 F.2d 125, 132, 133 (4th Cir. 1992); *Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4, Final Order on Compensatory Damages by SOL, p. 3 (August 16, 1993). It would be helpful if the Summary and Discussion for the final rules informed the public of this holding. By having adjudicators who are familiar with the harms whistleblowers suffer and the comparable awards for compensatory damages, the Department of Labor can spare parties the expense of retaining expert witnesses.

B. Deciding cases on the merits would further the FMSA's remedial purposes.

There is just one provision of the interim rules that could work against the remedial purpose of the law. This provision is in 29 C.F.R. § 1987.110(a) and states, "The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived." I appreciate that the Administrative Review Board (ARB) has a legitimate need to review a petition for review to assure that it identifies issues that are worthy of full briefing. This need can be fully met by modifying this sentence to state:

> The parties should identify in their petitions for review the legal conclusions or orders to which they object so that the Administrative Review Board may determine that the review presents issues worthy of full briefing.

It would be helpful to the public record if the Department of Labor would explain in its discussion of the final rules how it believes the remedial purpose will be furthered by the current text of 29 C.F.R. § 1987.110(a). In my requests to the Department to change the corresponding rules for other whistleblower laws, the Department has issued only conclusory statements of its policy, and not any explanation of why its rule will better serve the purpose of the law.

In the analogous appeals to the U.S. Courts of Appeals, some circuits (including the Third and DC Circuits) require appellants to file a Civil Appeal Information Form that contains a space to indicate the issues expected to be raised on appeal. This information can be helpful to the Court in processing the case before the briefs are filed. Parties are allowed thirty (30) days to submit a notice of appeal, and usually some additional time to file the Information Form. Significantly, parties are not bound to the initial statement submitted on the Information Form. I can recall cases where I have dropped issues as I get to writing the principal brief. In some cases, it is appropriate to raise additional issues that become apparent upon reviewing the transcript or record.

The proper adjudication of whistleblower matters would be enhanced if parties and their counsel can prepare their briefs, and select their issues, thoughtfully. Imposing a time pressure on advocates is counterproductive. When faced with the unusually short time limit of fourteen (14) days to submit a petition that must list all issues, advocates are likely to overselect. To preserve issues and avoid missing a meritorious claim, they are likely to list every issue that might conceivably apply. While counsel could choose to drop issues between the petition and the brief, requiring counsel to list all the issues in the petition makes it more likely that counsel will then face pressure to brief those issues. Clients and opposing counsel can sometimes exert pressure to keep issues on the table when they might otherwise have been abandoned in favor of more significant issues. Litigation is done best when it is done most thoughtfully.

Even worse, some whistleblowers or their counsel may find the task of reviewing the record to identify all appealable issues so consuming that they miss the short deadline for filing the petition for review. This was a factor in the unfortunate outcome in *Prince v. Westinghouse Savannah River Co*., ARB No. 10-079, ALJ No. 2006-ERA-1, Decision and Order Denying Motion for Reconsideration (ARB Feb. 2, 2011), *aff'd* by Fourth Circuit in Case No. 11-1322, *cert. denied,* 01/14/2013. The outcome of the *Prince* case discourages private attorneys from taking whistleblower cases. A forum with a reputation for deciding cases on the merits will encourage private attorneys to practice in that forum. Too many whistleblowers go without representation because there are not enough attorneys familiar with this area of the law who will offer affordable terms for representation. This will be particularly true for the low-

income whistleblowers who will be more dominant among the FMSA caseload.

I understand that the ARB may, upon timely motion, extend the time for submission of the petition for review, or extend the time for submission of the statement of legal issues to be raised. However, this possibility is not stated in the rules, and most parties and practitioners will not be familiar with this ARB practice. While it would be an improvement to explain in the regulation itself the option of making a motion to extend the time for a petition for review, eliminating the provision for waiver of issues would be more consistent with the remedial purpose of the FMSA, and the normal practice for appeals under the Federal Rules of Appellate Procedure. Indeed, it would be helpful if the Department's comments on the final rules stated directly that since the FMSA, like other whistleblower laws, is a remedial law, decisions under this law should always be made with an eye toward furthering its remedial purpose.

Thank you for your attention to my comments.

Very Truly Yours,

Richard R. Renner
Attorney at Law