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November 1, 2010

David Michaels, PhD, MPH, Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

RE: Comments on Proposed Rules under STAA, OSHA-2008-0026

Dear Dr. Michaels:

A. Introduction

I submit these comments to the amended regulations at 29 CFR Part 1978, 75 Fed. Reg. 53544, adopted on Aug. 31, 2010. I am the Legal Director of the National Whistleblowers Center (NWC). I have been a lawyer for 29 years, and has practiced before the US Department of Labor (DOL) since 1996. I have handled over 20 environmental, nuclear and other whistleblower cases before the DOL.

B. The requirement of notice before filing in U.S. District Court is unsupported by the statute and contrary to the legislative purpose.

The purpose of the employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Employees can play an important role in protecting the public from environmental and nuclear safety dangers. They can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination. To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage*

Comm. v. Department of Labor, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

Congress enacted the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087, in an effort to assure the public that consumer products will be safe. The broad scope of protected activity evinces a clear purpose to protect employees whenever they raise concerns for safety. Congress included a provision for *de novo* review by a United States District Court in the event that the Secretary has not issued a final decision within 210 days after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant. Congress obviously wanted to expand the avenues of relief available to safety whistleblowers. The *de novo* process in district courts is available as an option for complainants, but is not required. As such, rules intend to accomplish the congressional purpose should respect the complainant's options, and work in their favor, not to their detriment.

The interim final rule adds a 15-day notice requirement that hinders complainants from seeking relief in district courts. We suggest that the Department would better serve the statutory goals by demonstrating that it is a superior forum for these specialized cases. The Department should compete on the quality of its determinations rather than sacrifice quality for the sake of speed. I urge the department to eliminate any requirement for notice in advance of filing in U.S. District Court. Specifically, I urge deletion of Section 1978.114(b).

C. Service of complaint and respondent's response.

In Section 1978.104(c), fails to specify what "other applicable confidentiality laws" might apply to a respondent's answer. To conduct a full and fair investigation, the Department needs to obtain the available responsive information from both parties. If one party does not have all the information submitted by the other, then that party cannot help the investigation by providing available information that would shed light on that matter. "Other confidentiality laws" might not apply to the non-public disclosures made in the course of an investigation.

Creating vagueness in the regulation on the conduct of the investigation will open the door to greater disparities within the national program. The practice among OSHA field offices is uneven on conducting transparent investigations. Respondents routinely receive a copy of the complaint once it is filed. Complainants will have a right to the response once OSHA closes its investigation and the complainant submits a FOIA request. Parties can also request unredacted versions through formal discovery before the ALJ. However, the complainant could assist OSHA in its investigation if the complainant has a copy of the respondent's response. Also, respondents should know that their response will not be confidential so they are not caught by surprise when their response is used as an exhibit in the ALJ hearing.

In an effort to promptly complete investigations, some investigators are inclined to accept whatever justifications for an adverse action that are offered by the employer without probing

whether such justifications are in fact credible. This approach cannot be considered an "investigation." To serve the critical objectives of these whistleblower protection statutes, OSHA investigators should provide a complainant with the respondent's submissions and should not close the investigation until the complainant has had an opportunity to respond.

D. Deciding cases on the merits.

I suggest modifications to Section 1978.110(a) that would further the goal of deciding cases on their merits. Specifically, the Department can allow a party to set out sufficient grounds for the ARB review, but then add additional grounds in the brief. I urge deletion of the sentence that says, "The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived." In appeals to the federal circuit courts, the process of writing the brief is when counsel is obligated to review the entire record to set out the assignments of error. To require that a party review the entire record to identify all the errors in less than ten business days (since the ten days run from the date of the decision, not the date counsel receives it) is unrealistic and unfair. In Section 1978.105(c), the Department allows 30 days to file a simple objection and request for *de novo* review. It is uneven that parties are allowed thirty (30) days to file a simple request for hearing, but less than ten (10) days to review the entire record to identify all the assignments of error. From time to time, each of us might be in a hearing or take a vacation that is longer than ten (10) days. I suggest that thirty (30) days would be a better time limit for Section 1978.110(a). At NWC, it is hard enough for us to find attorneys who will take whistleblower cases to the Department of Labor. Please do not make it harder on us. To the extent that the ARB needs to determine that there are good issues present for briefing, this goal can be achieved without limiting a party to assign only those issues identified in the petition for review. The Department can require that a party file a petition that identifies good grounds for the review, and then permit the party to raise additional assignments of error in their brief. This later alternative would still allow the ARB to screen the petitions for meritorious issues for briefing, and preserve the fundamental goal of deciding cases on their merits instead of adding more technical grounds to defeat claims.

If Department personnel or other interested parties have any questions about our comments, they are welcome to call on me.

Sincerely,

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