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2023-10-27

Lee Martin, Director, DWPP
OSHA, DOL
200 Constitution Ave NW
Washington, DC 20210

RE: October 24, 2023, whistleblower stakeholders meeting
Docket No. OSHA–2018–0005

Dear Mr. Martin:

Assistant Secretary Doug Parker was right when he told us on October 24, 2023, that it is "critically important" that employees can raise compliance concerns without fear. All manner of compliance issues affecting public health and safety, environmental protection, financial security and Civil Rights depend on employees coming forward with concerns about violations.

This letter follows up on, and supplements, my comments during the recent OSHA Stakeholders' Meeting on whistleblower protection programs.

A. OSHA statistics are less than persuasive about the odds of whistleblowers getting protection.

The annual statistical report of the Directorate of Whistleblower Protection Programs (DWPP) gives little reason for employees to believe that they will be protected if they complain to OSHA. These statistics are available at:
https://www.whistleblowers.gov/factsheets_page/statistics/FY2022

They show that in FY 2022, OSHA completed processing 2,071 whistleblower complaints under Section 11(c) of the OSH Act, 29 U.S.C. § 660(c). Of these, OSHA found merit in 17 – less than 1%. This datum is more troubling when one notices that DWPP receives more complaints under the OSH Act than it does under all other whistleblower laws combined.

I do see that about 25% of 11(c) cases are settled, but OSHA statistics do not show if those settlements provided substantial relief to the whistleblower. It would be helpful if OSHA's annual report would state the number of settlements for which OSHA determined that the whistleblower received full relief, specifying the number who receive reinstatement or its equivalent in the circumstances.

B. Federal whistleblower laws need to be modernized.

Section 11(c) of the OSH Act is antiquated. Congress enacted it in 1970 – before DOL had an Office of Administrative Law Judges (ALJs) that adjudicated whistleblower claims. Section 11(c) does not give whistleblowers any Individual Right of Action (IRA) the way modern whistleblower protection laws do.

I am hoping we agree that Congress needs to modernize the whistleblower protection in the OSH Act. It would be good if Congressional allies in both parties heard from all of us about the crushing outcomes whistleblowers face under Section 11(c). I wrote a letter on this issue that Scientific American published in December, 2010.
https://www.scientificamerican.com/article/letters-dec-10/

However, Section 11(c) is not the only law that needs improvement. The Food Safety Modernization Act (FSMA), 21 U.S.C. 399d, protects food workers when they raise safety concerns about food regulated by the Food and Drug Administration (FDA). However, there is no comparable law for workers handling food regulated by USDA, such as meat, poultry and processed eggs.

Indeed, one must wonder why Congress has not enacted one comprehensive law to protect whistleblowers who raise any manner of health, safety or other compliance issue. A streamlined statute covering all the whistleblower laws enforced by the Department of Labor and reflecting modern best practice standards would make it easier for companies to comply and for whistleblowers to understand. It would advance the Assistant Secretary's goal for this critical objective of persuading employees to come forward.

C. OSHA can mitigate some shortcomings in the law.

I suggest that OSHA provide whistleblowers with information about other claims available to them. These could include:

1. The NDAA, 41 U.S.C. § 4712, which allows complaints to the appropriate IG within 3 years of any retaliation for raising compliance concerns about any federal contractor or grantee violating any law (including the OSH Act) in connection with the federal funds.
2. The comparable law for companies funded by DoD and NASA is at 10 U.S.C. § 4701.
3. Federal employees (other than those at USPS, the FBI or in the Intelligence Community) have 3 years to file a complaint with the Office of Special Counsel.
4. Many states have whistleblower protections. I post a list of those I know about at: https://www.taterenner.com/stchart.php

I also suggest that OSHA enter into a Memorandum of Understanding (MOU) with the Office of Federal Contract Compliance Programs (OFCCP) to include the OSH Act among the laws for which OFCCP will investigate retaliation claims. Then, when whistleblowers such as Mr. Sitch (who spoke at the October 24, 2023, meeting and submitted comment number OSHA-2018-0005-0107) file complaints after the 30 day time limit, they could still file within OFCCP's 180 day time limit. Indeed, the MOU could provide that the initial contact with DWPP could

constitute an initial contact with OFCCP for computation of the timeliness of its complaint.

D. The DWPP poster should include information about meeting the applicable time limits.

For decades, OSHA's regulations under the Energy Reorganization Act (ERA) have required NRC licensees to post an OSHA notice about whistleblower protections. See 29 C.F.R. Part 24, Appendix A: https://www.whistleblowers.gov/sites/wb/files/era_poster_2011.pdf

This ERA poster contains helpful information including examples of subjects that would be protected under the law, adverse actions that would violate the law, and the time limit to file retaliation complaints with OSHA. The new DWPP poster does not have this information. I recommend that DWPP include it. At a minimum, workplace health and safety whistleblowers and environmental whistleblowers need to know that their retaliation claims could be lost if they do not file within 30 days.

E. The "reasonable belief" doctrine exemplifies the value of training.

UAW representatives Ross Baize and Matthew Uptmor called for more training on health and safety issues and whistleblower protections. I agree with them. In fact, I suggest that if employers had a better understanding of the "reasonable belief" doctrine, they would readily see the benefit of providing such training.

The "reasonable belief" standard "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). See also, *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854, pp. 14-15 (ARB, May 25, 2011). Whistleblower protections were "intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise." *Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 1002 (9th Cir. 2009) (SOX case).

The reasonable belief standard requires an examination of the reasonableness of an employee's beliefs, but not whether the whistleblower actually communicated the reasonableness of those beliefs to management or the authorities. See, *e.g*., *Knox v. U.S. Dep't. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006) (Clean Air Act case). See also, *Rhinehimer v. U.S. Bancorp Invs., Inc*., 787 F.3d 797, 812 (6th Cir. 2015) (SOX case) ("the reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience.").

Two cases show the difference employer training can make in whistleblower cases.

In one, the ARB has held that a food safety whistleblower can find protection based on a reasonable belief that the Consumer Product Safety Improvement Act (CPSIA) provided protection, even though that belief was wrong. *Saporito v. Publix Super Markets, Inc*., ARB No.

10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012). If Publix had trained Saporito on the scope of protection of the CPSIA, the outcome of this case could have been different.

In the other, *Day v. Staples, Inc.*, 555 F.3d 42, 58 (1st Cir. 2009), Staples repeatedly gave Day training about the law, and explanations of how its actions were in compliance. The Court agreed with Staples that Day did not have an objectively reasonable belief of a violation. The Court said, "[a] company's explanations given to the employee for the challenged practices are also relevant to the objective reasonableness of an employee's belief in shareholder fraud. As the district court observed, Day's complaints, which, assuming arguendo, initially reflected a reasonable concern, 'ceased to be reasonable after Staples' employees reiterated the rationales for the returns process, and assured Plaintiff that no fraud was being committed.'"

Training makes a difference.

F. Concluding remarks.

I appreciate that DWPP can now provide supporting statements for immigrants seeking U or T visas. The Wage and Hour Division (WHD) has long provided this protection for cooperating workers and DWPP's statements will benefit the cause of compliance, our immigrant communities and the justice of our nation. Thank you.

I also support the DWPP pilot program to permit whistleblowers to request a dismissal for the purpose of commencing proceedings with the OALJ. Of course, this option is not viable for workplace health and safety whistleblowers under Section 11(c) of the OSH Act.

Thank you for your attention to these matters. If your staff or anyone else wishes to explore any matters arising from my letter, I am available to talk.

Sincerely,

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