

OSHA WHISTLEBLOWER STAKEHOLDER MEETING  
May 19, 2021  
Minutes

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The OSHA Whistleblower Stakeholder Meeting was called to order by Rob Swick at 1:02 pm ET on Wednesday, May 19, 2021. The meeting was held via teleconference.

The following members of the public were present:

<b>NAME</b>	<b>TITLE &amp; ORGANIZATION</b>
Adele Abrams	President, Law Office of Adele L. Abrams PC
Cliff Ali	RCC, New York State Insurance Fund
Cristin Benhardt	Staff Attorney, Virginia Department of Labor & Industry
Robert Bergdall	Risk Control Consultant, New York State Insurance Fund
Debbie Berkowitz	Worker Safety and Health Program Director, National Employment Law Project
Amal Bouhabib	Attorney, Southern Migrant Legal Services (SMLS)
Denise Bowyer	Volunteer, Nebraska Solidarity for Packing Plant Workers
Ariel Braunstein	Attorney, Morgan, Lewis & Brockius
Cristin Casey	Chief Prosecutor & Civil Rights Division Director, Oregon Bureau of Labor & Industries
Scott Clausen	Morgan, Lewis & Brockiu LLP
Helen Cleary	Director, Phylmar Regulatory Roundtable
Thomas Dash	Whistleblower Investigator, Virginia Department of Labor and Industry, VOSH
Lisa Davis	Student, MCC
Mike Elliot	Rail Safety Advocate
Samantha Feinstein	Staff Attorney, Government Accountability Project
Michael Felsen	Massachusetts Coalition for Occupational Safety and Health MassCOSH
Brandon Field	
MK Fletcher	Safety and Health Specialist, AFL-CIO
Jacqueline Garrick	Founder, Whistleblowers of America
Wenton Gurtin	
Marcy Goldstein-Gelb	Co-executive Director, National Council for Occupational Safety and Health
Debora Gonzalez	National Health and Safety Coordinator, National Day Laborer Organizing Network
Sulma Guzmán	Policy Director & Legislative Counsel, El Centro de los Derechos del Migrante, Inc.
Joanna Hall	Owner and Founder, Ultrasafe Ultrasound Diagnostic Services, LLC
Stacey Hayes	Paralegal, Holland & Hart LLP
Peter Hird	Secretary/Treasurer, Iowa Federation of Labor, AFL-CIO
Kevin Holmgren	1st Responder ND, Kenmare Ambulance Service
Patti Huber	Assistant Chief, DIR: Labor Commissioner's Office
Gary Huddleston	Director of Feed Manufacturing and Regulatory Affairs, American Feed Industry Association
Bobbi Jo Hurst	Employee Health Nurse, Association of Occupational Health Professionals in Healthcare
Fatima Hussein	Reporter, Bloomberg Industry Group
Michael Jordan	Management and Program Analyst, Federal Motor Carrier Safety Administration
Ron Kaminkow	General Secretary, Railroad Workers United

Brandi King	Employee Health and Safety, Novozymes
Sam Knight	Journalist, District Sentinel / Means TV
Jeff Kurtz	Former Union Officer and Former State Representative
James Laing	Research Analyst, Massachusetts DPH, Occupational Health Surveillance Program
Sandra Lannert	Manager, HACI
Grace Lee	Assistant Attorney General, State of Alaska
Rick Leschina	LR, Brotherhood of Locomotive Engineers and Trainmen
Nancy Lessin	Senior Staff for Strategic Initiatives (retired), United Steelworkers-TMC (retired)
Elizabeth Leiserson	Attorney, Southern Migrant Legal Services
Sarah Martin	Associate, Littler Mendelson P.C.
Melanie Stratton Lopez	Supervising Attorney, El Centro de los Derechos del Migrante, Inc. (CDM)
Karen Lynch	Supervisory Program Manager, US Department of Transportation, Pipeline and Hazardous Materials Administration
Brad Mannion	Manager of Labor and Employment Policy, Associated Builders and Contractors
MC	
Donna McEntee	Director, Skillsoft
Debra Coyle McFadden	Executive Director, NJ Work Environment Council
Kevin Martin	
Lee Martin	Internal Revenue Service
Eduardo Martinez	Senior Counsel, Securities and Exchange Commission
Jessica Martinez	
David Michaels	Professor, George Washington School of Public Health
David Mulligan	Community Liaison, US Department of Transportation, Pipeline and Hazardous Materials Administration
Tania Murillo	Attorney, New Orleans Workers' Center for Racial Justice
Maria Alvarez Navarro	Seafood worker
Jacob Ogilvie	Owner operator, Sitka mobile marine
Militza Pagán	Staff Attorney, Shriver Center on Poverty Law
Tricia Patel-Burch	Policy Analyst, Oregon OSHA
Angela Pickett	Community Liaison, US Department of Transportation, Pipeline and Hazardous Materials Administration
John Pietuszka	Whistle Blower Discrimination Manager, Tennessee Department of Labor & WFD/TOSHA
Julie Pittman	Legal Fellow, El Centro de los Derechos del Migrante, Inc.
James Prothro	Community Liaison/General Engineer/Program Manager, US Department of Transportation, Pipeline and Hazardous Materials Administration
Sean Quinlan	Community Liaison, US Department of Transportation, Pipeline and Hazardous Materials Administration

Brenda Quintana	Worker Center Organizer, Massachusetts Coalition for Occupational Safety and Health
Nita Raju	Community Liaison, US Department of Transportation, Pipeline and Hazardous Materials Administration
Rebecca Reindel	Safety and Health Director, AFL-CIO
Melody Russo	Compliance Safety and Health Officer (CSHO) and Whistleblower Investigator (WBI), State of Alaska Occupational Safety and Health
Steve Sallman	Director of Health, Safety & Environment, United Steelworkers
Andrew Salvadore	VP Health, Safety and Environmental, Henkels & McCoy Group Inc.
Geoff Schweller	Assistant News Editor, Whistleblower Network News
Joseph Sirbak	Attorney, Cozen O'Connor
Emily Spieler	Edwin W. Hadley Professor of Law, Northeastern University
Kim Van Tran	Senior Deputy, State of California
Sabina Hinz-Foley Trejo	Organizer, New Orleans Workers' Center for Racial Justice
Catherine Twigg	Deputy Attorney General, Pennsylvania Office of Attorney General
Pedro, Vidal-Batiz	Detailer, Consumer Financial Protection Bureau
Kela Walkton	Safety Coordinator, Crane Interiors
Teri Watson	Senior Policy Analyst, Oregon OSHA
Richard Wong	Attorney-Advisory, US Department of Transportation
Bridget Zamperini	Safety & Security Specialist, US Department of Transportation, Federal Transit Administration

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

<b>NAME</b>	<b>AGENCY</b>	<b>TITLE</b>
Joseph Hughes, Jr.	OSHA	Deputy Assistant Secretary of Labor for Pandemic and Emergency Response
Ann Rosenthal	OSHA	Senior Policy Advisor
Leah Ford	OSHA	Chief of Staff
Anthony Rosa	OSHA	Acting Director, DWPP
Christine Stewart	OSHA	Acting Deputy Director, DWPP
Anthony Incristi	OSHA	Division Chief, Division of Field Operations, DWPP
Richard Abernathy	OSHA	Regional Supervisory Investigator, Region V
Luis Acevedo	OSHA	Regional Supervisory Investigator, Region VI
Philippe Blancáto	OSHA	Investigation Specialist, DWPP
Marlis Burbick	OSHA	Bilingual Writer, Editor, OOC
Dale Caldwell	OSHA	Program Analyst, DWPP
Andrea Carlson	OSHA	Program Analyst, DWPP
Steve Chumley	OSHA	Whistleblower Investigator, Region VI
Mary Cobb	SOL	Regional Solicitor's Office – Dallas – Region VI
Martha Collins	OSHA	Program Analyst, DWPP
Tim Crouse	OSHA	Regional Supervisory Investigator, Region V
Kim Darby	OSHA	Writer-editor, Office of Communications (OOC)
Niamh Doherty	SOL	Trial Attorney
Megan Eldridge	OSHA	Regional Supervisory Investigator, Regions IX & X
Uche Egemonye	SOL	Regional Solicitor's Office – Atlanta – Region IV
Nichelle Engard	OSHA	Whistleblower Investigator, Region IX
Kevin Fields	OSHA	Whistleblower Investigator, Region I
Angela Fisher	OSHA	Regional Supervisory Investigator, Region VI
Erin Fitzgerald	OASP	Senior Policy Advisor, OASP
Rosalynn Garcia	OSHA	Whistleblower Investigator, Region IX
Megan Guenther	SOL	Counsel for Whistleblower Programs, FLS Division
Larry Hall	OSHA	Whistleblower Investigator, Region VI
Ryan Himes	OSHA	Assistant Regional Administrator for Whistleblower, Region X
Marisa Johnson	OSHA	Program Analyst, DWPP
Lemaya Jones-Mullins	OSHA	Regional Supervisory Investigator, Region IV
Denise Keller	OSHA	Assistant Regional Administrator for Whistleblower, Region V
Arlene Lamont	OSHA	Area Director, Anchorage, AK
Adriana Lopez	OSHA	Economist, ORA-Safety, DSG
Michael Mabee	OSHA	Assistant Regional Administrator for Whistleblower, Region VI
Gen Maryash	OSHA	Whistleblower Investigator, Region I
William Matarazzo	OSHA	Industrial Hygienist/National Alliance Coordinator
Brian Morgan	OSHA	Whistleblower Investigator, Region X
Rosanna Nardizzi	OSHA	Whistleblower Investigator, Region VI
Mike Oesch	OSHA	Alternative Dispute Resolution Coordinator, Region VII

Tiffany Riddick	OSHA	Investigation Specialist, DWPP
Hillary Rivera	OSHA	Whistleblower Investigator, Region VI
Kristen Rubino	OSHA	Assistant Regional Administrator for Whistleblower, Region I
Meghan Smith	OSHA	Program Analyst, DWPP
Natalie Starks	OSHA	Regional Supervisory Investigator, Region III
Rob Swick	OSHA	Acting Division Chief, Division of Policy, Planning, and Program Development
Nate Terwilliger	OSHA	Regional Supervisory Investigator, Region V
Teri Wigger	OSHA	Assistant Regional Administrator for Whistleblower, Region II
Justin Williams	OSHA	Whistleblower Investigator, Region VI
Francis Yebesi	OSHA	Office Director, OFAP, DEP

## **OSHA Speakers**

### **Rob Swick, Moderator**

Mr. Swick opened the meeting and introduced Ann Rosenthal. He also noted that OSHA Chief of Staff, Leah Ford, would be listening to the meeting as well.

### **Ann Rosenthal, Senior Policy Advisor**

Ms. Rosenthal made the following remarks:

Good afternoon. I would like to start by thanking all of you for joining us today. This is the seventh meeting seeking stakeholder input on OSHA's whistleblower program, and the first one of the Biden administration, but it will not be the last. It is crucial 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:

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. What can OSHA do to ensure that workers are protected from retaliation for raising concerns related to the pandemic?

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.

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

## **Rob Swick**

Mr. Swick made the following remarks:

We will be taking notes on all of your input and will upload this information to [regulations.gov](https://www.regulations.gov) in docket osha-2018-0005. In addition, we will also upload any written comments you have to the docket for the record. You can send written comments until close of business on 5/26/2021 to [osha.dwpp@dol.gov](mailto:osha.dwpp@dol.gov). Materials for this meeting and past meetings can be accessed by going to [www.regulations.gov](https://www.regulations.gov) and typing “osha-2018-0005” in the search bar. Meeting minutes are also located on our webpage, [www.whistleblowers.gov](https://www.whistleblowers.gov).

As a result of comments we received at prior meetings, we have made several program improvements, including:

- Providing clearer instructions to the public on how to file whistleblower complaints, based on information received at the Trucking and Rail Stakeholder Meeting
- Updating internal training on correspondence, based on comments received at the Financial Industry Stakeholder Meeting
- Updating internal training, including an upcoming training on deferrals, based on input received from the Aviation Stakeholder Meeting

Before we begin, I would like to discuss the meeting and ground rules for participants:

- 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 5 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.

Finally, I would like to note that our first two participants are Spanish speakers. We are providing a translator for their statements.

## **Sabina Hinz-Foley Trejo, Organizer, New Orleans Workers' Center for Racial Justice**

Ms. Trejo explained that she is an organizer and advocate on health, safety, and wage issues in the seafood industry. Deportable guest workers are the majority in the seafood industry and don’t report concerns to OSHA due to limited rights. The COVID-19 pandemic revealed racial and ethnic disparities and amplified the lack of basic safety and health protections. Many workers have a fear of immigration retaliation when they report.

Ms. Trejo introduced an anonymous worker who provided the following information in Spanish. Her remarks were translated into English during the meeting:

Good afternoon, I’m a member of the Seafood Worker Alliance, and Center for Racial Justice. I am a worker that comes to work in the U.S. on a visa; I am also a whistleblower filer with OSHA.

I'm a single mother that came from Mexico to the U.S. out of necessity to find work. Unfortunately, the working conditions and living conditions are not good and the salaries are not good. I am always afraid of losing my job or being deported, and unable to return to work in the U.S. When someone raises their voice, they get replaced and are unable to return to the United States.

These are the threats and fears all H-1B and H-2 workers face that come to work in the U.S. We come here not knowing what are the worker rights or the language. We are very isolated and work in rural areas. I didn't even know what OSHA was or how to get help, or what my rights to a safe workplace were.

Out of fear and necessity, I haven't voiced concerns until it became life and death. When the pandemic began, there were not adequate safety protocols in the plant.

As a peeler, we work shoulder to shoulder in close proximity, in a small room without masks, without adequate ventilation, or other measures. We also live in employer dorms without quarantine. We have our own rooms, but there is not adequate distancing. If you were sick, the housing units did not meet safety and health standards.

At the start of the pandemic, we were told we could not leave the plant, and if we did, we would get sent to Mexico without pay. We felt trapped and without information or help for our safety and care. Totally impotent. After 3 months, the owners told us not to come to work if we were symptomatic. I raised my voice and said that I had seen people with COVID symptoms and they were sick in the dorms, but were not reporting symptoms because they were afraid of losing their salary. I had a lot of fear of getting sick and of opening my mouth because if we said anything we would be punished.

The threats became true and I got fired. The threat of deportation, not being rehired and the police, and being homeless without a job or salary or place to go and sick with COVID. The threat was true, they did not rehire me. Because I reported to OSHA I now have no salary, I'm in Mexico without work and unable to return to the states.

My coworkers that go to work know that the employers carry out their threats. As migrant workers wanting to defend our rights, we risk the ability to work in the United States if we raise our voice. My coworkers after seeing what happened to me are now more afraid to raise their voice.

We need a clear process; we need immigration reform and more protection. Thank you for listening.

**Melanie Stratton Lopez, Supervising Attorney, El Centro de los Derechos del Migrante, Inc. (CDM)**

Ms. Lopez explained that CDM is a binational migrant workers' rights organization in the U.S. and Mexico. The organization has filed 11(c) and FDA Food Safety Modernization Act (FSMA)



complaints. They represent many H-2B workers. She noted that OSHA needs culturally competent investigations. She introduced Maria Alvarez Navarro, who provided the following information in Spanish. Her remarks were translated into English during the meeting:

I'm an H-2B worker, and I'm going to share my experience of getting COVID-19 and getting fired. I made a complaint with OSHA, but I felt like people weren't really listening. I was very depressed, I felt they weren't giving me attention. We need better customer service. We are survivors of trauma and abuse. We need people who are trained in mental health who respond to our complaints at OSHA. Better treatment will encourage workers to speak up. My hope is that raising my voice will serve as an example to other workers and they will do the same. Thank you.

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

Ms. Abrams represents workers and employers. She has brought cases under various OSHA whistleblower statutes, including Section 11(c) of the Occupational Safety and Health Act (11(c)), the Surface Transportation Assistance Act (STAA), and Sarbanes-Oxley (SOX). She has also brought whistleblower cases under the Federal Mine Safety and Health Act (Mine Act). The statute of limitations should be 180 days or more. COVID-19 has brought whistleblower protections into high relief. There are problems with the disparity in protections. We can have no second class citizens with safety or with whistleblower rights. Miners get training on their rights as miners. OSHA only has a poster. Maybe workers can read it; maybe they can't.

Ms. Abrams stated that she would welcome clarification on what can be cited under 1904.35. Many people seem to think it's limited to illness and injury reporting. She reads it more broadly. The agency can order make whole relief as part of abatement and issue penalties.

MSHA has temporary reinstatement. This should be available under 11(c). She also recommended increased use of mediation services in OSHA and MSHA. There is a private right of action if MSHA does not take a case. There is no comparable private right of action under 11(c).

OSHA should revisit dual tracking with the National Labor Relations Board (NLRB). Maybe there can be work sharing between the agencies. She is pleased to see this issue being addressed by the new administration.

**Jaqueline Garrick, Founder, Whistleblowers of America**

Ms. Garrick explained that Whistleblowers of America (WoA) is a small non-profit for employees who have suffered retaliation. She expressed approval for OSHA's retaliation definition, as she believes it's more encompassing than other definitions and recommended that it be used across the government.

Ms. Garrick created the Whistleblower Retaliation Checklist (WRC). The WRC was created to assist employees in identifying the toxic tactics of retaliation in order to better recognize and treat the psychosocial impacts of retaliation. Ms. Garrick also recommended that OSHA partner

with the Substance Abuse and Mental Health Services Administration (SAMHSA). Ms. Garrick suggested that whistleblower retaliation effects are serious injuries under the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).

Ms. Garrick noted that whistleblowers need restorative justice. Award amounts for whistleblowers are low. Mental health parity falls short. Investigations need to be trauma informed and treated like physical abuse.

Customer service is the tip of the iceberg. By the time whistleblowers reach out to OSHA, they are traumatized. Employees must pay their own expenses while their cases are investigated. They are adjudicating on behalf of the public with their own money. Whistleblowers need more comprehensive tools to fight back.

The OSHA Whistleblower Protection Program should be its own program. OSHA should fund and conduct research between hostile work environment and things like suicide and homicide.

WoA has instituted a whistleblower advocate certification process. An advocate is mental support. WoA also created the Workplace Promise Institute and a campaign that promotes its values and ideals for the workplace through its 11 elements. OSHA should prioritize cases where people reported retaliation for reporting unsafe workplaces or protective gear.

Whistleblowers of America provided written comments which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

### **Andrew Salvadore, VP Health, Safety and Environmental, Henkels & McCoy Group Inc.**

Mr. Salvadore is a certified safety professional. He has worked in a variety of industries, including the utility industry for two major utility service providers. Mr. Salvadore has dealt with several cases in his professional career and recommended the need for better case handling. Investigators need to provide more frequent updates on case status. Some cases last a year or more. This should be a priority over safety stuff. There are legal fees to effectively manage these cases. The investigation results can be used by union reps, lawyers, civil attorneys, etc.

OSHA should educate workers on their rights and responsibilities. Current OSHA documents give the misperception that the employer has to provide a workplace free of safety hazards. Employees must also comply with applicable rules and regulations. If a worker does something intentionally wrong, they may be terminated because they did something that could kill a worker. Many times, employers have systems in place to protect workers, but it's an employee's responsibility to understand. FAQs don't list anything about worker responsibilities. If a rule hasn't been explained to the worker, that is understandable; but if an explanation has happened, it should be understood by employees that they bear responsibility. Rules should be in writing.

OSHA should provide examples of valid and invalid cases so a worker has a barometer, to give employees something to make them think twice about filing a complaint and to know if they have a valid complaint.

OSHA should do a yearly training, like the safety stand-down.

### **Mike Elliot, Rail Safety Advocate**

Mr. Elliot stated that the investigation and adjudication of Federal Railroad Safety Act (FRSA) complaints must improve. He noted that regional offices are overwhelmed, lacking adequate investigative and support staff. He recommended the investigations should be completed within six months, and investigators should have no more than 20 active cases at a time. OSHA should have enough resources that cases can be closed within a year. Mr. Elliot also noted that case files should go directly to the Administrative Law Judge (ALJ) for review and merit determination.

In addition, Mr. Elliot noted that witness confidentiality is paramount. Companies should not request to be allowed to access identities of confidential employee witnesses. He also recommended that individual managers should be fined and held accountable for participation in unlawful acts, where allowed by statute. OSHA should continue to seek subpoena power for witnesses and relevant evidence.

Mr. Elliot recommended that FRSA be amended to remove the \$250,000 punitive damages cap. He also recommended a state participation program, which is similar to what the Federal Railroad Administration (FRA) has done for compliance inspections.

Finally, he noted that during the COVID-19 pandemic, the railroad industry forced employees to work when sick and without any relief from draconian availability policies.

Mike Elliot provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

### **Melody Russo, Compliance Safety and Health Officer (CSHO) and Whistleblower Investigator (WBI), State of Alaska Occupational Safety and Health**

Ms. Russo is a whistleblower investigator in Alaska. She recommended that the whistleblower program receive more funds, so that investigators can have a more manageable case load. She also recommended that there be more coordination between agencies, specifically agencies that register businesses. They should inform business owners of their anti-retaliation responsibilities. There should also be more resources for investigators that summarize commonly used case law references.

### **Joanna Hall, Owner and Founder, Ultrasafe Ultrasound Diagnostic Services, LLC**

Ms. Hall is a diagnostic medical sonographer. She filed a complaint stating she was terminated for requesting that her patients wear masks, during the COVID-19 pandemic. She wanted all to be safe in the ultrasound room. There is no space in the room for distancing, and sessions can last 20-120 minutes. Her goal is to do what she can to provide resources that are necessary to optimize safety in sonography. Things are not safe; there are issues with COVID-19 and musculoskeletal injuries. She noted that the agency has reached out to her to re-open her case. She appreciated that the agency is willing to do the work to get the right results.

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

Ms. Berkowitz explained that NELP is a more than 50 year old organization for improving policies for workers. Her comments focused on 11(c) complaints. NELP published two reports regarding OSHA's whistleblower program during the COVID-19 pandemic. The first report found that OSHA dismissed over half of the COVID-19 complaints right away. They could only do this because OSHA is publishing data for complaints during the pandemic. Typically, the program is run behind closed doors. There is no way for the public to find out how many complaints were dismissed, or bad employers. OSHA received over 11,000 complaints last year, but only over 3,000 were docketed. There's no way to track the system.

NELP issued another report finding that black workers are more likely than white workers to suffer retaliation. Black and Latino workers work in more dangerous jobs. Workers and OSHA must be able to hold employers accountable. Ms. Berkowitz noted that comments she made at previous stakeholder meetings are still relevant.

Ms. Berkowitz made the following recommendations for the program

1. Re-charter the Whistleblower Protection Advisory Committee (WPAC)
2. Change the way the program is run to achieve a more even distribution of cases. DWPP should run the program, not the regions, and request additional staff
3. Adopt a system where all cases are docketed and can be dismissed
4. Update the data system
5. The agency should provide translators and information in multiple languages
6. Prior to dismissal, investigators must conduct a full interview in a language the complainant can understand
7. Investigators should interview other witnesses
8. Investigators should provide workers with a written copy of their complaint if file via phone prior to submitting it to their employer
9. If the complaint raises health or safety issues, the complaints should be referred to a CSHO
10. Investigators should communicate at least bimonthly with complainants
11. Because immigrants are threatened, OSHA and DOL must establish clear guidance on worker immigrant protections.

**David Michaels, PhD, MPH, Professor, George Washington University**

Dr. Michaels noted that OSHA's Whistleblower Protection Program was under-resourced before the pandemic and was deluged during the pandemic. Workers across the country have paid the price. They were retaliated against and did not get justice. He agreed with Ms. Berkowitz's comments.

Dr. Michaels indicated that OSHA needs the help of Congress to get more resources. They need to change 11(c). The program needs to become a priority. Employees need to be informed of hazards.

In the short term, the program needs to catch up with the backlog, improve customer service, and get justice for valid complaints. The agency should reinstate WPAC.

The agency should experiment with different approaches. It should design some experiments and see what works best. What's important, is to think about how to do work more effectively and efficiently.

### **Emily Spieler, Edwin W. Hadley Professor of Law, Northeastern University**

Ms. Spieler is the former Chair of WPAC. She recommended that Congress amend 11(c) to make it at least as strong as the Mine Act. Most important is that the new administration needs to prioritize whistleblower programs. OSHA can't reach all workplaces. The only path to ensuring workplaces are free of hazards is effective enforcement. Ms. Spieler echoed many of Ms. Berkowitz's comments.

Ms. Spieler had suggestions relating to four categories: operational changes, WPAC, immigrant workers, and COVID.

#### *Operational Changes:*

DWPP and the safety side of OSHA need to work together better. There is inconsistent work across the regions. To combat this, DWPP needs strong leadership and responsibility across the country (including state plan states). The program needs more investigators and to increase transparency. For complainants who have a case with OSHA and for the public, DWPP should aggregate data and publish it. The regions fail to docket complaints; too many complaints are screened out, and there is little to no transparency in the process.

Investigators should have an in-depth review that is "culturally competent" with the complainants. Investigators should triage complaints. If a complainant alleges termination, it should be completed first because termination is especially hard on workers.

Cases should be expedited so they can go to the ALJ quicker for their review/investigation.

If a complainant alleges retaliation under multiple statutes, OSHA should docket under all statutes. Ms. Speiler admits this is the policy but is not always done.

OSHA should refer cases to other federal agencies, especially when other agencies can provide better relief.

OSHA should also refer employers to *Recommended Practices for Anti-Retaliation Programs*.

#### *WPAC*

Ms. Spieler recommended that the agency restart WPAC.

### *Immigrant workers*

There must be cultural competency between investigators and complainants. The agency should start a task force (not just whistleblower but OSHA-wide) to focus on immigrant complainants. 11(c) is a weak statute. Any reference to safety or health should be referred to OSHA enforcement. OSHA should be aggressive in investigation and settlement negotiations. Although there has been improvement in integration with the Office of the Solicitor (SOL), the program should collaborate with SOL more.

### *COVID*

OSHA did not do its job keeping workers safe during the pandemic, this led to more whistleblower complaints. OSHA has not been aggressive enough in enforcement and has not done enough in its whistleblower efforts. OSHA should address workers concerns about “return to work” and offer guidance.

### **Amal Bouhabib, Attorney, Southern Migrant Legal Services (SMLS)**

Ms. Bouhabib suggested that there should be more clarity from whistleblower investigators and what they need to conduct an investigation. For example, it would be helpful if complainants knew what kind of information OSHA wanted and what kind of evidence is ignored, especially in “he said/she said” situations. OSHA should complete cases more quickly and have more transparency during the investigation process.

### **Debora Gonzalez, National Health and Safety Coordinator, National Day Laborer Organizing Network (NDLON)**

Ms. Gonzalez noted that the National Day Laborer Organizing Network (NDLON) with its 60 member day labor worker centers, community organizations, and thousands of day laborers looking for work on street corners nationwide, who as we say, have never been in the shadows, because there is no protection from the sun where we work. She noted that many workers have suffered threats, discrimination, harassment, retaliation, and even assault – verbal, physical, and also sexual – because of their skin color, their accents or where they were born. Some workers, mostly immigrants, have been excluded from pandemic relief.

The Department of Labor (DOL) needs to provide adequate protections for immigrant workers that have filed grievances, regardless of their immigration status. Ms. Gonzales described cases which are representative of the abuse suffered by immigrant workers. In Mississippi, workers with the Immigrant Alliance for Justice and Equity (IAJE Mississippi) are calling on DOL to repair the harms stemming from the ICE workplace raids in 2019. In Las Vegas, NV, workers with the Arriba Las Vegas Workers Center and the International Union of Painters and Allied Trades (IUPAT) are calling on DOL to protect those workers that DOL itself has identified as having suffered various labor violations at the hands of an abusive employer. In the Nevada case, workers suffered both Wage and Hour (WHD) and health and safety violations.

NDLON provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

### **Jeff Kurtz, Former Union Officer and Former State Representative**

Mr. Kurtz was a union officer until 2014 and a former Iowa State Representative. He noted that there are problems with FRSA. He recommended that WPAC be reinstated with more authority.

As a rail employee and a member of the union, he saw issues encountered by whistleblowers. For example, a member was disciplined for “low hours performance”. This policy was not defined by the company. A Trip Optimizer could cause a derailment, and the employee brought up safety concerns. The employee was disparaged, disciplined, and threatened with termination for “low hours”. However, the employee had a “spotless record” and Mr. Kurtz believes it was retaliation for his safety concerns. OSHA dismissed the case because the railroad had a “low hours” policy (even though Mr. Kurtz believes the “low hour” rule is bad policy). OSHA had no opinion on the “low hours” rule and could not take action based off the bad policy. OSHA should do more when a railroad has a bad policy/rule.

Another case that Mr. Kurtz is aware of involved an older, small lady. The lady was almost assaulted and contacted OSHA. OSHA tried to settle with complainant and respondent but wanted both parties to sign an agreement that allowed them to “accept no responsibility”. This was unacceptable and CP refused (on Mr. Kurtz’s advice) to sign the agreement.

Mr. Kurtz provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

### **Ron Kaminkow, General Secretary, Railroad Workers United**

Mr. Kaminkow has worked on several railroads and has witnessed a lot of retaliation. Railroad workers have found that FRSA is fatally flawed. In 2016, he was excited about FRSA but soon realized things got worse in the railroad industry. He wants substantial changes to the law.

Every time a FRSA case has merit, the railroad always appeals to the ALJ. This extends the time for the complainant because the ALJ has its own investigation process. In addition, Mr. Kurtz is concerned that the evidence and determination that OSHA gathered is not automatically a part of the ALJ case.

Mr. Kurtz recommended the following changes to FRSA:

- Workers should stay on the job until OSHA makes a determination.
- The \$250,000 punitive damages cap should be raised
- Managers who retaliate should be held accountable.

Mr. Kurtz also recommended that WPAC be restored, and there should be a railroad worker on the committee.

Mr. Kaminkow provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

**Samantha Feinstein, Staff Attorney, Government Accountability Project (GAP)**

Ms. Feinstein noted that she submitted written comments (which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>) and wanted to speak about a few of them in the meeting.

OSHA needs better outreach/publicity. For example, OSHA posters are not posted in public places, if this happens there should be penalties in place if employers do not. Only a small percentage of cases have a positive impact for complainants. OSHA should expand the pilot in place that allows that, if there is no decision within 60 days the case should go to ALJ. OSHA should have better communication with complainants, the investigator should have a “clarification” interview with complainants. She believes that respondents have the option to rebut but complainants do not have the ability to rebut. OSHA has closed cases without warning complainants. Complainants should be allowed to rebut the evidence. Investigators should have better training and should be subject matter experts in the statutes they work on. Final orders should contain and explain all the elements in the *prima facie* allegation. Complainants need better mental health understanding and access.

**Nancy Lessin, Senior Staff for Strategic Initiatives (retired), United Steelworkers-TMC (retired)**

Ms. Lessin served on WPAC and recommended that it return. Ms. Lessin’s comments focused on 11(c). Ms. Lessin noted that 11(c) was crafted to protect workers against employer retaliation, but these protections have failed workers for decades. The COVID-19 pandemic exposed 11(c)’s shortcomings.

Secretary Walsh should ask Congress to make four changes to 11(c)

- Extend the complaint filing deadline from 30 to 180 days.
- Grant workers a private right of action so they can take their case to court if OSHA rejects their case or the solicitor refuses to pursue it.
- Provide for a terminated worker’s preliminary reinstatement when OSHA determines the case has merit.
- Change the standard of proof to establish retaliation from a “but for” to a contributing factor standard.

OSHA should promulgate an emergency temporary standard (ETS) to protect workers from COVID-19.

OSHA can issue an enforcement directive establishing policy that 11(c) prohibits employers from retaliating against workers who raise concerns not just with employers or the government, but via social media and to the press; that permits workers to utilize their own PPE when appropriate, protective PPE is not provided; and that reinforces workers’ rights to refuse to



engage in work that poses imminent danger to their health, including where they lack proper protections and can be exposed to COVID-19.

OSHA should listen to other comments made regarding whistleblower protections for immigrant workers.

OSHA should put recommendations made by WPAC into place. OSHA should also rescind the October 11, 2018 memo, Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. §1904.35(b)(1)(iv). Regarding the larger issue of all 25 whistleblower statutes OSHA now enforces (including the two recently added), serious concerns remain about the adequacy of funding and staffing for OSHA's Whistleblower Protection Program, as well as how it can best function structurally.

Ms. Lessin provided written comments, which can be found here -

<https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

**Brenda Quintana, Worker Center Organizer, Massachusetts Coalition for Occupational Safety and Health (MassCOSH)**

Ms. Quintana was speaking on behalf of the Immigrant Worker's Center which works with low wage workers and immigrants. She regularly sees workers who do not know their rights or are afraid to speak up. It takes time for workers to report, even to the center, so a 30 day filing period is not enough and should be extended. Complainants should be more supported by OSHA.

Ms. Quintana worked with a worker to correct issues, including safety and health, and the worker was retaliated against (fewer hours), but it was justified by the respondent because of the pandemic. Adverse actions can include fewer hours or demotion, not just termination. She wanted workers to participate in the meeting, but the stakeholder meeting was during the middle of the day, so they couldn't.

**Marcy Goldstein-Gelb, Co-executive Director, National Council for Occupational Safety and Health**

Ms. Goldstein-Gelb noted that workers are forced to remain silent regarding workplace hazards. Employees are scared to speak up, especially immigrant workers who have the threat of deportation. After the Hard Rock Hotel incident in New Orleans, a witness was picked up and deported. This should not have happened, and DOL should have been proactive to bring the worker back to the U.S.A.

The Inspector General highlighted a range of concerns with the whistleblower program. Ms. Goldstein-Gelb worked with a worker who was forced to take a drug test; the worker refused. So, she was fired. After complainant filed with OSHA, OSHA contacted employer quickly, and the complainant was rehired. This was a success story. Another worker filed a complaint, and the investigator asked their immigrant status, so the worker was fearful. She talked to the region, and they agreed to not ask about immigration status in the future. However, there are inconsistent responses across the country.

She recommending bringing back WPAC to ensure critical input from stakeholders. She also recommended that OSHA create strategic partnerships with organizations across the country, not just at the national level.

Workers must have confidence that their investigator will help them. OSHA needs translators and cultural sensitivity and trauma sensitivity training. OSHA needs more protocols to protect workers regarding their immigration status, and OSHA should let the public know that immigration status doesn't matter – anyone can file an 11(c) complaint.

OSHA's whistleblower program needs more staffing and staff who are reflective of diversity and speak multiple languages. Ms. Goldstein-Gelb is supportive of changes to 11(c) that require legislative changes, such as extending filing deadlines.

She requests simultaneous interpretation during stakeholder meetings and asks OSHA to hold the meetings in a more convenient time for workers, not the middle of the day.

### **Debra Coyle McFadden, Executive Director, NJ Work Environment Council**

Ms. McFadden noted that if workers are afraid to report to OSHA or speak up about safety concerns, more workers will die or be injured. Companies feel emboldened to retaliate against workers.

Essential workers were asked to put their lives on their line during the pandemic, and if they spoke up about safety and health issues, they were retaliated against. This got so bad that, in April 2020, the American Nurses Organization put out a notice about nurses raising safety and health concerns, especially wearing personal protective equipment (PPE).

Immigrants are especially retaliated against. Their immigrant status should not matter to an employer. She noted that 11(c) should be updated by Congress, and it should be a priority for the Administration. The agency should enact an ETS.

The government should provide additional funding for investigators (state and federal) and consideration for additional language and diversity. The program should provide training to organizations. The agency should utilize social media to reach young workers in multiple languages.

Ms. McFadden recommended the following changes to 11(c):

- Allow immediate reinstatement, if it looks like it will be merit
- Filing period should be 180 days not 30 days
- Reduce the burden of proof (it should be contributing factor, not “but for”)
- Allow for a private right of action

OSHA's whistleblower program should have a real time tracking system and more transparency with complainants. OSHA should review whistleblower cases on an annual basis for trends and

publish the findings. She also recommended that the agency bring back WPAC and communicate in a language the worker understands.

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

Mr. Sallman stated that workers must be able to report hazards and be involved in safety activities without putting their jobs at risk. While legal rights should, but often do not, protect workers refusing unsafe work; no one should have to choose between their job and their safety.

OSHA's Whistleblower Protection Program is underfunded and understaffed. The Inspector General outlined this in its August 14, 2020 report. Mr. Sallman noted that whistleblower staff have an increased workload as a result of the pandemic. They have a demanding and stressful job overcoming the amount of work involved to conduct a thorough investigation and at the same time, overcome the backlog of cases. OSHA should consider redistributing cases among various regions. OSHA clearly needs additional resources and staffing to better serve stakeholders and should immediately fill vacancies throughout the whistleblower program, including adding multilingual investigators. If a complainant is going to be interviewed by a whistleblower investigator and a worker does not speak English, the agency must provide a translator. Understaffing and increased workload makes it difficult for investigators to stay in better contact with complainants. There is a real frustration due to lack of contact with the investigator; workers and their representatives need to know where their cases are, and why it is not moving.

Mr. Sallman explained that many of his union's members are covered under 11(c), but they may not know if actions taken by their employer are retaliatory under the 30-day window. This statute and other older ones have become outdated and ineffective. Currently, his union has one member who has 180-days to file a complaint under the Surface Transportation Assistance Act (STAA). This statute has a much improved rate of enforcement and allows for union representatives to resolve matters with the employer and possibly avoiding a whistleblower complaint being added in an already overburdened system.

OSHA should revisit enforcement with 29 CFR § 1904.35. Whistleblower and safety staff need to coordinate. The agency could also look at working more closely with the National Labor Relations Board. Whistleblower laws must protect workers, or hazards will go unreported and uncontrolled.

OSHA should revisit the whistleblower website and translate this into other languages. The agency could start working more closely with unions and labor coalitions, COSH groups, family support groups, and more, to do outreach and education. Mr. Sallman also recommended reinstating WPAC.

Mr. Sallman provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

## **Denise Bowyer, Volunteer, Nebraska Solidarity for Packing Plant Workers**

Ms. Bowyer noted that her organization has been actively engaged over the last year in a state coalition made up of union, policy, legal, and community organizers, with the goal of passing Enforceable Temporary COVID -19 Safety Measures for Meatpacking Workers which included fines, LB 241. With unrelenting pressure from the packing plants, that bill failed yesterday. For our packing plant workers, this is all the more reason to have OSHA issue temporary emergency standards and ensure a core program is in place at OSHA for worker's to report violations.

OSHA must do much more to ensure that all workers can exercise their right to a healthy and safe workplace. Such an environment does not exist. In her role, she helped secure workers' stories about the safety violations taking place in beef, pork, and poultry plants across the state. Most of these stories she gathered spoke to the need for enforceable COVID-19 protections, although other long-term issues have been magnified.

Ms. Bowyer noted that robustly enforcing workplace protections is an important enforcement strategy to protect ALL workers and prevent the erosion of standards. She provided several quotations from workers regarding unsafe working conditions.

OSHA's Whistleblower Protection Program should also ensure that every worker has access to protection from immigration enforcement actions that threaten to undermine their ability to exercise their rights.

Ms. Bowyer explained that in her capacity as a union representative, she spoke out on TV about people being forced to work sick, while they wait on test results. She was barred from going into the plant for over a month.

OSHA should have clear guidelines, standards, enforcement, and fines. This includes an ETS to address the ongoing health and safety issues around COVID-19. This is a growing concern. As of today, the plants are still checking temperatures. If you have a temperature, you are told to get a COVID-19 test. If you do not have COVID-19, you are docked points; if those points push you past your limit, you are fired. Workers should not be punished for adhering to a company policy.

Soon, the temperature checks will go away, and people will work while they are sick with COVID-19, its variants, and other illnesses. We need enforceable guidelines to protect workers.

She made the following recommendations for the whistleblower program:

- Restart WPAC
- Fill all vacant whistleblower positions for investigators and request additional staff
- OSHA should work with DOL and the Department of Homeland Security to create a process to provide concrete protections for whistleblowers while they are asserting their rights, such as protections from deportations and temporary work permits.
- Collaborate with strategic partners of worker organizations

Ms. Bowyer provided written comments, which can be found here - <https://www.regulations.gov/document/OSHA-2018-0005-0060/comment>.

Mr. Swick opened the floor for additional comments. As there were none, he adjourned the meeting.