

**OSHA HEALTHCARE WORKER WHISTLEBLOWER STAKEHOLDER
 MEETING**
 May 18, 2022
 Minutes

The OSHA Healthcare Worker Whistleblower Stakeholder Meeting was called to order by Rob Swick at 1:30 PM ET on Wednesday, May 18, 2022. The meeting was held via Zoom.

The following members of the public were present:

First Name	Last Name	Job Title	Organization
Jessie	Atencio	Director	ADOSH
Paul	Augason	Safety Manager	Utah Department of Corrections
Chandra	Auguste	Safety Programs Coordinator	PATH
Jan	Aune	Attorney, Trial Attorney, and Owner	The Law Office of Jan T. Aune
Bethany	Bogges Alcauter	Program Director	National Center for Farmworker Health
Liliana	Calderon	Manager of Health and Safety Programs	IU Bricklayers and Allied Craftworkers
Kevin	Card	Assistant to the President for Workers Compensation	National Association of Letter Carriers AFL-CIO
David	Carey	Attorney	Carey Law
Carmen	Comsti	Lead Regulatory Policy Specialist	National Nurses United
Margaret	Daly	Advocate research student	N/A
Rocelyn	de Leon-Minch	Industrial Hygienist	National Nurses United
Samantha	Feinstein	Staff Attorney and Director, International Program	Government Accountability Project
Billie	Garde	Attorney	Clifford & Garde, LLP
Elizabeth	Geglia	Translator	N/A
Kelly	Gray-Eurom	Emergency Physician	American College of Emergency Physicians

Michelle	Grisat	Health and Regulatory Policy Director	National Nurses United
Erin	Grossmann	External Affairs Coordinator	American College of Emergency Physicians
Becca	Hallum	Associate General Counsel	GHA
Kelsey	Hanley	Compliance	Allay Consulting
Adam	Hartnett	Staff Supervisor Consultation/Whistleblower	Commonwealth of Massachusetts - Department of Labor Standards
Jill	Johns	Project Manager	Georgia Southern University
Matthew	Kaiser	Policy Analyst	Oregon OSHA
Vail	Kohnert-Yount	Attorney	Texas RioGrande Legal Aid
David	LaRoss	Senior Editor	Inside OSHA
Jennifer	Marchisio	Quality and Compliance Manager	Rainbow Kids Clinic
Cliff	Myers	Safety Director	Ak-Chin IC
Kimberlee	Perry	Commissioner	Labor Cabinet
Ana	Popovich	Reporter	Whistleblower Network News
Shakera	Robbins	Industrial Hygiene Consultant	CDC Foundation
Bruce	Rolfson	Reporter	Bloomberg Law
Anne	Springer	Safety & Health Specialist 4-DOSH Discrimination	Washington State Department of Labor & Industries
Roberto	Tijerina	Translator	N/A
Binh	Vuong	Contractor	Independent Contractor
Paul	Zaffuts	Principal	The Zaffuts Group

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

First Name	Last Name	Job Title	Agency and Division
Philippe	Blancato	Investigation Specialist	OSHA, Directorate of Whistleblower Protection Programs (DWPP)
Brian	Broecker	Senior Attorney	Office of the Solicitor, Occupational Safety and Health Division (SOL-OSH)
Andrea	Carlson	Investigation Specialist	OSHA, DWPP

Lily	Colon	Assistant Regional Administrator for Whistleblower	OSHA, Region IV
Chris	Covell	Investigator	OSHA, Region IV
Ryan	Himes	Assistant Regional Administrator for Whistleblower	OSHA, Region X
Nichelle	Engard	Regional Supervisory Investigator	OSHA, Region IX
Lemaya	Jones-Mullins	Regional Supervisory Investigator	OSHA, Region IV
Marisa	Johnson	Program Analyst	OSHA, DWPP
Meron	Kebede	Attorney	Office of the Solicitor, Division of Fair Labor Standards (SOL-FLS)
Mark	Lerner	Senior Attorney	SOL-OSH
Lee	Martin	Director	OSHA, DWPP
Jennifer	Nohl	Regional Investigator	OSHA, Region I
Anthony	Rosa	Deputy Director	OSHA, DWPP
Kristen	Rubino	Assistant Regional Administrator for Whistleblower	OSHA, Region I
Meghan	Smith	Program Analyst	OSHA, DWPP
Christine	Stewart	Policy Division Chief	OSHA, DWPP
Rob	Swick	Investigation Specialist	OSHA, DWPP
Nate	Terwilliger	Regional Supervisory Investigator	OSHA, Region V
Teri	Wigger	Assistant Regional Administrator for Whistleblower	OSHA, Region II

Rob Swick, Investigation Specialist, OSHA, DWPP

Rob Swick opened the meeting and thanked everyone for their participation.

Lee Martin, Director, OSHA, DWPP

Mr. Martin began by explaining that this is his first stakeholder meeting as the new Director of OSHA’s Directorate of Whistleblower Protection Programs. Previously, he was the Director of the whistleblower program at the Internal Revenue Service (IRS). Before that, he was the Deputy Director of the Office of Professional Responsibility for the IRS.

As you know, the COVID-19 pandemic stressed our healthcare system to its breaking point during the worst of the pandemic. Whistleblower cases from the healthcare industry began rising

in 2020. Healthcare workers remain on the front line. Mr. Martin noted that the agency especially hopes to hear from those folks in the healthcare industry on how we can improve.

Anthony Rosa, Deputy Director, OSHA, DWPP

DWPP has been working hard to improve the program through new processes and implementing changes based on feedback that OSHA has received at these meetings. Some of these improvements include the following examples:

First, we are nearing completion on a total overhaul of the Whistleblower Investigations Manual. The new manual will improve the quality and efficiency of investigations. Second, the whistleblower program has been able to hire a large number of new staff, as a result of funding increases in the FY21 and FY22 budgets. Third, we have been expanding the use of alternative dispute resolution in the regions, which leads to faster and better outcomes for complainants. Fourth, we have expanded and updated our outreach materials. Fact sheets, wallet cards, and more can be found on our website, www.whistleblowers.gov. Finally, we have information on how to prevent retaliation in the first place available on our website in our document entitled *Recommended Practices for Anti-Retaliation Programs*.

Rob Swick

Mr. Swick gave the ground rules for the meeting:

- Comments should reflect the commenters' experience with whistleblower cases.
- Limit 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.

Bethany Boggess Alcauter, Program Director, National Center for Farmworker Health

Ms. Alcauter explained that she would be speaking on immigrant workers in agriculture and construction. Whistleblower information is important to them. Her main point is that it's not so much about the mechanics of whistleblower laws but how they get implemented and limitations that OSHA has regarding immigrant workers.

Ms. Alcauter provided an example from a case on a farm. A worker filed a complaint. OSHA investigated the farm. There were several deaths from COVID-19. The employer started threatening the worker's life. An organization moved the worker to a safe house. The worker wanted to continue to provide info, but his employer knew about family members in Mexico. The worker was worried about threats. Inspectors need to know the realities that migrant workers face. Speaking out can be a life-or-death choice for them. Ms. Alcauter recommended that the agency consider having OSHA staff undergo different trainings about the realities that these workers face. Different groups have information on these issues and can help. There needs to be movement toward implementing this for staff.

Paul Augason, Safety Manager, Utah Department of Corrections

Mr. Augason spoke about State Plans, which have analogous laws but are not the same as Federal OSHA. He understands that Federal OSHA has monitoring and evaluation over state plans (FAME and CASPA) but doesn't think it's enough oversight or protection for workers in the state plans. He recommended that State Plans be required to follow federal OSHA guidelines.

Samantha Feinstein, Staff Attorney and Director, International Program, Government Accountability Project (GAP)

Ms. Feinstein noted that there is urgency to expand the whistleblower program due to COVID-19. She acknowledged the President's FY2023 budget included 25.79 million (20% increase) for whistleblower. This will add 63 new positions in the Whistleblower Protection Program. She hoped Congress will support this request, and that this will help speed up the investigation process.

OSHA needs to better protect workers' rights. Many workers are unaware of OSHA and whistleblower rights. Ms. Feinstein noted that, in many workplaces, the required OSHA poster is not posted in a common area. There should be a process for reporting these violations. There should be an audit regarding the notice requirements. It would be helpful to survey employees to determine how many have seen the poster before the place of employment is even inspected.

When OSHA shows up at the workplace, employees should be allowed to participate in a safe space. It's not enough to tell people that retaliation is prohibited. Employees can suffer long-term reputational harm due to whistleblowing. OSHA can't force an organization to have physical security.

If complaints are made to OSHA about how it handled a case, the regional office shouldn't investigate itself.

OSHA routinely finds against whistleblowers. The agency should expand the pilot program that if there is no decision made within 60 days, the complainant can request to close the case, so they can move on to a de novo ALJ hearing. Complainants are prisoners to OSHA's backlog of open cases.

Ms. Feinstein also requested that it should be a rule that OSHA has a clarification interview with complainants. She has observed that this is not happening in reality.

OSHA should alter the due process letter procedures and let the complainant rebut just as the employer has an opportunity to rebut a potential Merit finding. Either both sides can comment or neither can. Ms. Feinstein also noted that OSHA investigations would be more effective if whistleblower investigators were specialized.

Ms. Feinstein noted that OSHA should apply the appropriate legal standards for burden of proof. She has seen Secretary's Findings with no details. The Secretary's Findings should explain which elements were met and should contain material facts.

Finally, Ms. Feinstein noted that OSHA should prioritize better mental health services and support for whistleblowers, due to the issues they face regarding their whistleblowing.

Kevin Card, Assistant to the President for Workers Compensation, National Association of Letter Carriers (NALC)

Mr. Card noted that, due to the physical nature of their work, letter carriers have the highest rate of injuries among federal employees. Retaliation for reporting injuries is an ongoing problem for members. The right to report is essential for maintaining safe workplaces. Section 11(c) of the Occupational Safety and Health Act is important to members for several reasons. Since 2013, new letter carriers are hired as non-career employees who have 90 – 120 day probationary periods. During this period, the probationary employees are considered at will and can't file grievances. Probation is stressful. Over 50% don't make it past probation. In any office, there's a sentiment that probationary employees shouldn't report injuries because doing so leads to separation. For probationary employees, the whistleblower program is the only one to challenge retaliation for reporting injuries. Thanks to 11(c) enforcement, probationary employees who were separated were later reinstated after filing whistleblower complaints.

During the last two years, letter carriers kept working. Despite taking precautions, over 34,000 contracted COVID-19. Most got minor symptoms, but some had severe symptoms. Over 100 postal workers died. The American Rescue Plan afforded presumptive exposure to letter carriers and others. Over 18,000 filed COVID-19 claims with the Office of Workers' Compensation Programs (OWCP). The law allowed up to 45 days of continuation of pay. Most letter carriers live from paycheck to paycheck. It's a bridge for when they miss work. Despite protection, managers retaliate by refusing to pay continuation of pay for COVID-19 absences. The Post Office and OWCP are aware of the issue. Postal facilities are like small communities. Workers who think they won't get paid will be more likely to show up sick to work. Section 11(c) should expose this retaliation and provide workers with protection after reporting injuries. There should be broad interpretation of Section 11(c).

Kelly Gray-Eurom, Emergency Physician, American College of Emergency Physicians

Dr. Gray-Eurom spoke as a representative of emergency physicians. Emergency physicians have played a central role in the pandemic. Throughout the pandemic, she heard from physicians who were threatened, silenced, or terminated because of safety concerns. This set of circumstances isn't new but were highlighted in a very public way during the pandemic. She knows that emergency physicians and healthcare workers get threats while providing care when they raise patient safety concerns.

Most doctors working in a hospital are covered by medical staff bylaws that have due process. Most emergency doctors are independent contractors. They are employed by a group or staffing company, and that company has the contract for emergency services. Most contracts require the emergency room doctors to waive their due process rights. If they raise valid patient safety concerns, under the terms of the contract, they can be let go. There's no due process, and they are vulnerable to termination.

There is a potential for workplaces where physicians are empowered to speak up if they see patient safety issues. Many emergency doctors don't have these same protections. It shouldn't matter how they are employed. We need to make sure that all who work in the healthcare space have the same protections across the board. It's in the best interest of the patients for physicians to feel empowered to report safety concerns.

Dr. Gray-Eurom supports due process rights for emergency room physicians. She wanted to help make OSHA aware of the issues. She asked the agency to work with doctors to create the safest environments. She supports legislation that requests the Department of Health and Human Services to require due process rights for physicians, regardless of contracts. She is concerned that language in contracts circumvents protections for physicians and urged OSHA to release standards about what can and can't be included in contracts regarding due process when raising certain concerns.

One of the challenges regarding personal protective equipment (PPE) early in the pandemic was what healthcare workers could wear and not wear. Facilities were concerned with employees using personal PPE, which resulted in a lot of confusion. It would have been helpful if OSHA had issued guidance permitting healthcare workers to use their own PPE. OSHA should provide guidance about using additional resources (such as personal PPE) during pandemics or other times when PPE is in short supply. Overall, OSHA needs to allow flexibility.

Rob Swick announced that comments could be submitted through June 1st and adjourned the meeting.