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July 14, 2010

Hon. Hilda Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

Dear Secretary Solis:

We are writing you as leaders of the nation's leading whistleblower protection and advocacy organizations to request a meeting with you to discuss the future of the whistleblower protection program now housed within the Occupational Safety and Health Administration (OSHA).

The U.S. Department of Labor has become the world's largest whistleblower protection organization; yet this function is handled as a collateral duty rather than as the vital stand-alone responsibility that it ought to be.

As you know, over the past decade, Congress has added to the whistleblower protection jurisdiction of your department by enacting a stream of far-reaching new whistleblower laws, including this year's health care law, consumer product safety rules, and corporate malfeasance safeguards. Since 1970 when it was created, OSHA has been mandated to police the prohibition against employer retaliation against workers who report health and safety violations and dangers. During the ensuing 40 years, Congress enacted 17 other whistleblower provisions covering complex pollution, energy production, and transportation laws, among others, for OSHA implementation. Recent examples include:

- The Patient Protection and Affordable Care Act of 2010, covering 12 million health care workers;
- The Consumer Protection Safety Improvement Act of 2008, covering 20 million workers involved in manufacture, labeling, distributing, and retailing products; and
- Sarbanes-Oxley Act of 2002 to control corporate fraud, covering 42 million financial workers.

Altogether, OSHA's whistleblower jurisdiction has grown by a staggering 75 million workers in just the past decade, nearly doubling its previous coverage. These numbers exclude the estimated 115 million workers already covered by the whistleblower provisions of the Occupational Safety & Health Act of 1970 – OSHA's main responsibility.

By contrast, the number of OSHA staff assigned to investigate worker reprisal complaints has remained relatively static. This yawning disparity between workload and resources inevitably leads to unconscionable and illegal delays, shoddy reviews, unmanageable caseloads and poor outcomes for workers. Thus, workers who risk their jobs to report serious dangers and major violations will, in effect, find nobody home at OSHA.

Unfortunately, the whistleblower protection program does not appear to be on the radar of the agency's leadership. **A 2010 draft strategic plan for OSHA makes no mention of whistleblower protection**, even in the summary of the agency's mission statement. In addition, the whistleblower protection program does not have its own budget but is subject to the whims of Regional Administrators who divvy up an enforcement budget for an array of labor violations.

This lack of direction and leadership is reflected in several recent reports which have raised significant concerns about the effectiveness of the whistleblower protection program under OSHA's auspices. For example, a 2009 Government Accountability Office (GAO) report highlighted a myriad of problems with the whistleblower protection program, in particular its lack of resources, quality control, and leadership. ("Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency" GAO-09-106).

Echoing the GAO report, a Government Accountability Project (GAP) report (Report No. 09-106) focused on OSHA's inability to adequately ensure the quality and consistency of investigations and outcomes. GAP attributes this problem to a flawed structure under which Regional Administrators have overall responsibility for whistleblower investigations and nearly unfettered discretion to handle them. No mechanism exists to make the Regional Offices accountable to the Office of the Whistleblower Protection Program (OWPP) at OSHA headquarters.

Yet OWPP itself has hardly served as a staunch defender of whistleblower rights both in and outside the agency. We have heard disquieting reports of OWPP investigators taunting whistleblowers.

Beyond the weaknesses of the program, however, is an entrenched culture of harassment within OSHA that renders the agency even more ill-suited to fulfill its statutory duties of whistleblower protection. Two egregious cases in which PEER has represented clients—one settled and one ongoing—epitomize a culture of reprisal and harassment that is entrenched within OSHA management. OSHA cannot possibly be a credible arbiter of private sector whistleblower cases if it has a poor record with whistleblowers within its own ranks.

Perhaps most indicative of the ineffectiveness of OSHA's whistleblower program is the dismal success rate for whistleblowers. GAO found that OSHA's report of a 21 percent success rate—a low rate in and of itself—could be vastly overstated, because, among other reasons, OSHA deems nearly all settled cases as "successful." Thus, OSHA actually found merit in only 3% of the cases in FY 2009 and for the first half of FY2010, according to OSHA figures. Of the few cases that proceed to an administrative law judge, whistleblowers win less than a third of the contested cases.

We appreciate that Assistant Secretary Michaels has initiated a review of OSHA's Whistleblower Protection Program and would welcome the opportunity to provide input. Given the program's long history of ineffectiveness, dysfunction, and hostility to whistleblowers, we believe a new national whistleblower office within the Department of Labor could best address the multitude of the program's failings and hope the review generates discussion of this recommendation.

A national Whistleblower Protection Office would have its own budget, programmatic identity, strategic plan, staff, and leadership. Establishing such an office is beyond the purview of the Assistant Secretary and can only be effected by the Secretary. The office would have the authority to standardize procedures and policies for investigations and outcomes, and provide much-needed oversight to the program. It could also transform the culture.

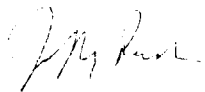
A national office would also act as a buffer between adjudicators and local employers so that investigators would be less accepting of employer claims. With autonomy and resources, the office would far better serve the needs of workers and whistleblowers. Section 11(c) complainants, who have no private recourse in the courts but are forced to rely on OSHA investigators and Labor solicitors who routinely fail to litigate 11(c) cases, would be especially well-served by a new national office.

As long as the whistleblower protection program remains part of OSHA, it will always remain a peripheral concern or an afterthought, given OSHA's mandates and priorities. The world's largest whistleblower protection organization deserves and needs more.

Madame Secretary, you have a historic opportunity to transform this heretofore collateral function into a world renowned whistleblower protection organization that could be a model for other nations.

We would welcome the opportunity to discuss the possibility of a new national whistleblower office with you at your convenience. Please contact Jeff Ruch at 202.265.7337 about this possibility. Thank you for your consideration of this request.

Sincerely,



Jeff Ruch
Executive Director
Public Employees for
Responsibility



Mark Cohen
Executive Director
Government Accountability
Project



Stephen M. Kohn
Executive Director
National Environmental
Whistleblowers Center

Cc: Dr. David Michaels