



December 9, 2008

Memorandum

From Make It Safe Coalition, Tom Devine, tomd@whistleblower.org

Re: Transition recommendations for Labor Department whistleblower rights policy

Strengthening corporate whistleblower rights is a significant opportunity. There is an oft-reaffirmed mandate for a generic reform whose benefits range from consumer protection to law enforcement to accountability of spending such as bailouts. DOL's current administrative law system is broken, undermining its objective to challenge corporate misconduct. Its administration of whistleblower laws has become a rubber stamp for retaliation, signaling to employers that there is no accountability. The good news is that the breakdown is recent, there is a consensus for "best practice" solutions, and that model has passed every political test since 2006. We hope the Obama Administration will make a difference by promptly, visibly installing new leadership in key DOL positions, announcing a "best practices" mandate for interpretation of existing law, revising whistleblower protection regulations and supporting comprehensive legislative reform.

Two factors explain and illustrate the breakdown. (*See also* attached MISC congressional testimony and a subsequent public interest report.) 1) Despite a bi-partisan tradition, Bush administration policy has been crudely hostile to longstanding doctrines and precedent. OSHA "investigations" merely adopt whatever allegations employers make, officially echoing pretexts for retaliation. DOL policy also has ignored prior precedent, drastically shrinking broad mandates for protection such as the SOX whistleblower provision²) The statutory framework is hopelessly dysfunctional, a patchwork of arbitrary hit (and mostly miss) witness protection clauses tucked into 40 laws within the U.S. Code, usually environmental, consumer safety or fraud. No two are alike. The crazy quilt coverage creates common scenarios such as poultry workers with rights when disclosing water contamination but none when exposing fecally contaminating chicken going to market.

The political groundwork is laid for reform. Three "best practices" laws were enacted this Congress over active industry opposition for ground transportation workers, defense contractors, and 20 million employees connected with retail commerce. After over a year developing composite best practices whistleblower legislation, the House Education and Labor Committee proposed the Private Sector Whistleblower Protection Streamlining Act, HR 4047.

We recommend that the Administration –

1) exercise administrative leadership by -- acting quickly to announce a policy reversal mandating "best practices" interpretation of existing corporate whistleblower statutes to maximize relief consistent with the legislative intent of existing corporate whistleblower protection laws; and appointing an official to oversee implementation of the mandate, whose duties shall include a review of current rules and structures for implementation of corporate whistleblower statutes and who shall report directly to the Secretary;

2) immediately replace all non-career officials responsible for implementation of current corporate whistleblower statutes, including the Administrative Review Board, with subject matter experts who have a history of proven commitment for these laws' legislative mandate, and include these officials in the regulatory review of the Department's whistleblower program; and

3) visibly, actively support an expanded version of HR 4047, the Private Sector Streamlining Whistleblower Protection Act, to correct the loopholes in existing law created by the current Administration and to protect far broader range of whistleblower disclosures.