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Ms. Beth Slavet
Directorate of the Whistleblower Protection Program (DWPP)
U.S. Dept. of Labor, OSHA
200 Constitution Avenue, NW, Rm N-4624
Washington, DC 20210

RE: DWPP Notice of Whistleblower Complaint form (Document ID OSHA–2012–0026)

Dear Ms. Slavet:

This letter contains my comments to the proposed DWPP Notice of Whistleblower Complaint form (Document ID OSHA–2012–0026).

I am an attorney with some experience in handling whistleblower matters at the U.S. Department of Labor. My web page is at: www.taterenner.com

The remedial purposes of employee protections will be better served with a form that encourages employees to file complaints.[1] As such, I ask the DWPP to join with me in seeking instructions that provide the necessary information as simply and directly as possible, and avoid language that is legalistic or off-putting. The first page is less inviting due to the large amount of text, and the emphasis on points that discourage employees from proceeding. It should start with the information for which a whistleblower might have sought out this form.

First, I suggest a substantial and appealing graphic image. Some whistleblowers do not like being called whistleblowers, so I would suggest a graphic that focuses on being fired or filing a complaint. This way, the front of the complaint form will not be so heavy with text.

Second, the most important information for whistleblowers considering a complaint is the time limit, especially for those that have a 30-day time limit. I suggest that the front cover have a chart that lists the time limits. For example:

1 I discuss the remedial purposes of the federal employee protections in my February 4, 2013, comments on Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges (Document ID DOL-2012-0007-0001).

Time limit	Law	Citation
30 Days	Occupational Safety and Health Act	29 U.S.C. §660, Section 11(c)
	Federal Water Pollution Control Act (FWPCA)	33 U.S.C. §1367
	Clean Air Act (CAA)	42 U.S.C. §7622
	Comprehensive Environmental Response, Compensation and Liability Act ("Superfund Law" or CERCLA)	42 U.S.C. §9610
	Safe Drinking Water Act (SDWA)	42 U.S.C. §300j-9(i)
	Solid Waste Disposal Act (SWDA); including the Resource Conservation and Recovery Act (RCRA)	42 U.S.C. §6971
	Toxic Substances Control Act (TSCA)	15 U.S.C. §2622
60 Days	International Safe Container Act (ISCA)	46 U.S.C. §80507
90 Days	Asbestos Hazard Emergency Response Act (AHERA)	15 U.S.C. §2651(b)
	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)	49 U.S.C. §42121
180 Days	Other laws enforced by OSHA, including STAA, ERA, SOX, FRSA, NTSSA, PSIA, CPSIA, ACA, SPA, FSMA and CFPA.	

The second paragraph of the first page summarizes this information, but it is the information in this chart that complainants need when they first inquire about making a complaint.

Third, the instructions should inform employees that they have a right to be represented by an attorney of their choice. "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." *Kent v. United States*, 383 U.S. 541, 561 (1966). The instructions could point out these items that would be helpful to employees considering a whistleblower complaint: (1) lawyers with experience in employment law matters have offices in every state,[2] (2) most laws enforced by OSHA provide

2 Indeed, these attorneys have an organization, the National Employment Lawyers Association (NELA). NELA has a web page (www.nela.org) where employees can find employment lawyers in their state.

for an award of attorney's fees as part of any order in favor of a whistleblower, (3) even an initial consultation with an attorney can be helpful to employees, (4) the Department of Labor permits lawyers from any state to represent employees in whistleblower matters arising anywhere, even in other states; so employees can look for attorneys anywhere in the country, (5) some private non-profit organizations can provide legal assistance or referrals to lawyers with experience in whistleblower matters, (6) Department of Labor regulations permit representation by non-lawyers, and union representatives, law students, and others can act as representatives, (7) OSHA does not pay for private attorneys, so the employee will be responsible for the initial arrangements with any private attorney, and (8) private attorneys vary greatly in their requirements for payment of fees, and employees would do well to shop around.

That use of the complaint form is not required is pushed back to page 3. The regulations (see 29 CFR 1983.103(b), for example) state:

> No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

Complainants should know that they can prepare a letter with the required information and that will suffice. Use of a simple letter may be more inviting for both the complainant and the respondent in participating in the investigation. The instructions state, "However, the information requested by this form should be provided." The regulations do not require descriptions of the protected activity or employer knowledge. All that is required at the complaint stage are (1) contact information for the parties, (2) a description of the adverse actions at issue, and (3) an allegation that the adverse actions were unlawful. The other items can be described as "requested" or "preferred," but not "required." They can be developed during the investigation. I suggest that the required items be identified as "required." They are questions 1, 2, 12, 15 and 21 on the proposed notice.

The space in the instructions devoted to how the complaint can be disclosed to the public, and will be disclosed to the employer, are important for whistleblowers to know, but do not need prominence on the first page. Similarly, the description of OSHA's process, and how a complaint might be dismissed if a complainant is non-responsive, can wait until the second page or later. The time limits, the complainant's flexibility with the permissible forms of making a complaint, and the advisability of consulting legal counsel are more important, especially for the first page.

I suggest that it would be helpful if complainants knew that they need to list in the complaint all the adverse actions they want to challenge, but they do not need to include all the evidence that will support their case. The complaint is sent to the employer upon filing, but the evidence is managed by the OSHA investigator, at least until the investigation is closed. The complainant should plan on presenting claims in the complaint, and evidence to the OSHA investigator. I would therefore omit the statement that, "If there is any particular evidence that supports your allegation, include the information in your description."

The instructions should inform employees that they can supplement their original complaint with information provided to the investigator during the investigation. In *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB July 31,

2012),[3] the ARB explained:

> Administrative complaints filed with DOL are informal documents that initiate an investigation into allegations of unlawful retaliation in violation of, in this case, the Environmental Acts. In fact, the complaint filed with OSHA, the investigative arm of the whistleblower complaint process, is often filed by a complainant acting without the assistance of counsel. [Footnote omitted.] ***
>
> In making this assessment, OSHA can supplement the complaint with additional information, including interviews with the complainant, to determine whether the complaint alleges facts that demonstrate a prima facie showing of a violation.30

Footnote 30 begins with this citation:

> *See* 29 C.F.R. § 24.104(e)(2) ("The complaint, *supplemented as appropriate by interviews of the complainant*, must allege the existence of facts and evidence to make out a prima facie showing . . . .") (emphasis added).

I suggest that the instructions inform employees that they may supplement their complaints during their interview with the OSHA investigator. The instructions can also inform employees that their interview statements to OSHA are not routinely shared with the employer, although the employer may obtain the statements during litigation before the ALJ. This would be a more encouraging message to whistleblowers than the text in bold on the front of the proposed first page.

On page 2, the information in the first paragraph about public sector employees is incorrect for laws other than the OSH Act. For example, the Safe Drinking Water Act applies almost entirely to state and local government employees. So, this issue should begin with a recognition that the form is used for multiple laws, and the extent to which they apply to public employees varies. See *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 03-002, -003, -004, -064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013; 2002-CAA-003, -018; slip op. at 12-13 (ARB May 31, 2006) (holding that the Department of Justice has determined that the federal government has waived sovereign immunity under the CAA, SDWA, and CERCLA but not the TSCA). The last paragraph in the public employee section recognizes this point, but many state and local government employees could be seriously misled before they get to this paragraph. I suggest that the first paragraph in the public sector section say:

> The federal laws with employee protections have different applications to public sector employees. Some laws, such as CAA, SDWA and CERCLA, apply to all public sector employees. Others may apply to state and local government employees, but not federal employees. The OSH Act applies to the USPS, but other federal employees have additional protections under other laws and procedures.

Part 5, certification, correctly notes that submission of materially false information to government agencies is a crime. However, complainants are not required to submit a

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3 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/CAA/08_059A.CAAP.PDF

certification that the allegations of a complaint are true. The certification can have the unintended and undesirable effect of facilitating the use of the complaint as evidence. Pleadings are not evidence, and the use of pleadings as evidence adds an undesirable level of formality and consequences for making a complaint. Particularly as employers use complaints to make arguments based on allegations that are not included in the complaint, they will create pressure on complainants to add more information to complaints. Complainants can feel an unnecessary pressure to make their complaints too long. Since a complaint is meant to commence an investigation, and not to serve as the investigatory statement, I suggest deleting the certification from Part 5.

By focusing on issues and areas where I think there are opportunities for improvement, this letter may create the unfair impression of concern about the creation and use of a complaint form. Actually, the development of a complaint form will add a sense of the government's seriousness about counteracting retaliation that deters employees from engaging in protected activities. It represents the growth and development of the DWPP program and that can further the remedial purposes of the law.

Thank you for your attention to my concerns.

Very Truly Yours,

Richard R. Renner
Attorney at Law