



## **Recommendation 87-2**

### **Federal Protection of Private Sector Health and Safety Whistleblowers**

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(Adopted June 11, 1987)

Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory actions by over a dozen Federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are beyond the Conference's current study),<sup>1</sup> have become known as whistleblowers. Under current statutes, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

In its examination of the current Federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.
2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

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<sup>1</sup> The Conference has limited its study to health and safety related disclosures because in this area a pattern of federal statutory protections has emerged with sufficient experience to allow a study.



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3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The Conference has concluded that this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer



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products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges does not yet publish its decisions (although it has recently announced plans to do so) and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interaction between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether Federal statutes do or should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

### **Recommendation**

1. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower



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complaints, Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.<sup>2</sup> The omnibus and any other whistleblower legislation should include:

- (A) A uniform definition of protected conduct;
- (B) A uniform statute of limitations of not less than 180 days governing the filing of complaints;
- (C) A uniform provision for remedies;
- (D) Assignment of preliminary investigative responsibility to the Secretary of Labor<sup>3</sup> for all private sector health and safety whistleblowing retaliation cases;
- (E) Authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of dispute Resolution);
- (F) Provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;
- (G) A grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and
- (H) A grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

2. Whether or not Congress enacts omnibus whistleblowing legislation, the Secretary of Labor should:

- (A) Promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

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<sup>2</sup> The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

<sup>3</sup> All references to the Secretary of Labor in recommendations 1(D)-1(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.



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(B) Transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) Develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(D) In accordance with the Freedom of Information Act, 5 U.S.C. 552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

### **Citations:**

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