Incentivizing and Protecting OSH Whistleblowers

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Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, **ABA J. on Lab. & Emp. L.** (forthcoming 2017), available at SSRN.

At the heart of Emily Spieler's incisive critique of the whistleblower protections of the Occupational Safety and Health Act (OSH Act) is a basic design question: How might a society enforce workplace safety mandates? On one hand, a top-down government inspectorate might proactively investigate occupational hazards and punish violating employers. On the other, workers who are ill or injured, or who have knowledge of safety risks, might take bottom-up enforcement action through a private lawsuit or other direct action. Or there might be combinations of the two: workers might feed complaints and tips to government, while retaining (or not) some right to take action on their own. In all cases, workers play a central role: as tipsters, complainants, witnesses, litigants. Here is where law and policy makers face a second set of design choices. Given workers' key role in enforcement, how might they be incentivized to take action, and protected against the downside risks of doing so?

Spieler's subject, Section 11(c) of the OSH Act, seeks to protect workers who make safety complaints or otherwise participate in investigatory and enforcement proceedings under the Act. Though the OSH Act contains no private right of action – placing it closer to the top-down end of the enforcement spectrum – worker complaints and worker-provided information are nevertheless central to the agency's investigation and enforcement activities. And as Spieler's careful analysis reveals, Section 11(c) falls far short of incentivizing or protecting those workers. However, Spieler offers a way forward at the state level, and so her article simultaneously identifies a suite of problems and offers at least a partial fix.

Drawing on data on the processing and outcomes of 11(c) claims, Spieler identifies four major design flaws. First, workers who claim retaliation for activity protected by the OSH Act must proceed through an opaque, often dead-end administrative exhaustion process, and have no private right of action. Workers must first file a complaint with the relevant regional OSHA office. If the regional investigator finds merit and cannot facilitate settlement, the complaint is referred to the regional office of the Solicitor of Labor (SOL), which decides whether to litigate the claim in federal district court. As Spieler observes, SOL decisions are "entirely non-reviewable," and unlike the Equal Employment Opportunity Commission's litigation decisions about employment discrimination charges, workers have no right to proceed to court on their own after an SOL decision. Spieler's data reveal that about two-thirds of 11(c) complaints were screened out by regional OSHA investigators in FY 2011-2015, and the SOL declined to pursue almost sixty percent of the referrals that it received in the period from 1996-2008.

Second, workers must initiate an 11(c) claim within an extremely short, thirty-day statute of limitations period. As Spieler observes, federal antidiscrimination and wage and hour statutes allow much longer time periods, and "every whistleblower law passed after 2000 allows at least 180 days for filing with the appropriate administrative agency." Given that OSH Act whistleblowers may themselves be recovering from occupational illness or injury, the thirty-day complaint period almost certainly suppresses claims.

Third, 11(c) does not provide for preliminary reinstatement for terminated workers upon a determination that their retaliation claims are non-frivolous – an option offered by other recent whistleblower statutes and the Mine Safety and Health Act of 1977. Thus, even workers with meritorious

claims can be left jobless during the pendency of a retaliation investigation.

Fourth, workers must satisfy a high standard of proof, establishing that retaliation was a "but for" cause (though not necessarily the sole cause) of the adverse action they experienced. Like the statute of limitations, this standard departs from other whistleblower laws, which require proof only that retaliation was a "contributing factor" in the employer's decision. And like the other flaws that Spieler identifies, this high standard of proof makes 11(c) claimants' uphill climb even steeper.

Spieler's data reveal a final problem with the design of the 11(c) scheme: of the claims settled at the initial OSHA investigation phase between 2009 and 2015, the average worker recovery was only $7300. Though we do not know from Spieler's data the value of these workers' original claims, or their possible recovery via litigation, it seems clear, in Spieler's words, that these amounts are "unlikely to reflect the full value of lost wages" or to be "large enough to discourage employers from unlawful retaliation." Taken together, Spieler's analysis shows how these shortcomings leave terminated workers with little incentive to go to OSHA to enforce their rights against retaliation; bad-actor employers have little incentive to refrain from retaliation.

Against this bleak backdrop, Spieler does note several bright spots in 11(c) claims processing and enforcement. During the Obama Administration, the SOL began taking action on substantially more 11(c) referrals, and OSHA has implemented various training and policy improvements around retaliation issues. Whether any of these reforms survive in a Trump Administration Department of Labor is anyone's guess. However, Spieler notes one additional area of promise that may be somewhat insulated from federal executive branch politics. Under the OSH Act, states may design and implement their own occupational safety and health plans that equal or exceed the protections offered by federal law. Twenty-one states have done so. These states are therefore free to change the structure of their OSH whistleblower protections. In doing so, they can draw from the menu of design choices in place in other areas of whistleblower and employment law, even beyond those that Spieler identifies: a private right of action for retaliation claims after administrative exhaustion, double or treble damages, attorneys' fees, class and collective action mechanisms, extended statutes of limitation, and preliminary reinstatement. Further, as Spieler points out, even states without OSHA state plans might recognize a state-law cause of action for wrongful termination to protect whistleblowers who are fired after raising safety concerns. Given perpetual federal inertia, and what is likely to be outright hostility to workplace regulation in a Trump Administration, states should take Spieler's critique to heart and design a better system for incentivizing and protecting OSH whistleblowers.

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