**TESTIMONY OF DAVID MICHAELS**
**ASSISTANT SECRETARY**
**FOR OCCUPATIONAL SAFETY AND HEALTH**
**U.S. DEPARTMENT OF LABOR**
**BEFORE**
**THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS**
**THE COMMITTEE ON EDUCATION AND LABOR**
**U.S. HOUSE OF REPRESENTATIVES**
**MARCH 16, 2010**

**Chair Woolsey, Ranking Member McMorris Rodgers, Members of the Subcommittee**, thank you for the opportunity today to share the Department of Labor's views on the Protecting America's Workers Act (PAWA), particularly the issue of enhanced penalties.

Until 1970 there was no national guarantee that workers throughout America would be protected from workplace hazards. In that year the Congress enacted a powerful and far-reaching law—the Occupational Safety and Health Act of 1970 (OSH Act). The results of this law speak for themselves. The annual injury/illness rate among American workers has decreased by 65 percent since 1973, and while there are many contributing factors, the OSH Act is unquestionably among them. Employers, unions, academia, and private safety and health organizations pay a great deal more attention to worker protection today than they did prior to enactment of this landmark legislation.

But we cannot rest on our laurels. If we are to fulfill the Department's goal of providing good jobs for everyone, we must make even more progress. Good jobs are safe jobs, and American workers still face unacceptable hazards. More than 5,000 workers are killed on

the job in America each year, more than 4 million are injured, and thousands more will become ill in later years from present occupational exposures. Moreover, the workplaces of 2010 are not those of 1970: the law must change as our workplaces have changed. The vast majority of America's environmental and public health laws have undergone significant transformations since they were enacted in the 1960s and 70s, while the OSH Act has seen only minor amendments. As a British statesman once remarked, "The only human institution which rejects progress is the cemetery."

I therefore appreciate the work of this Subcommittee in proposing legislation that would strengthen the law and significantly increase OSHA's ability to protect American workers. The Administration strongly supports the goals of the Protecting America's Workers Act (PAWA). Many provisions in the Act would enable OSHA more effectively to accomplish its mission to "assure safe and healthful working conditions for working men and women," which is also a key component of Secretary of Labor Solis' vision of *Good Jobs for Everyone*. Jobs cannot be good jobs unless they are safe jobs. Stronger OSHA enforcement will save lives.

Because OSHA can visit only a limited number of workplaces each year we need a stronger OSH Act to leverage our resources to encourage compliance by employers. We need to make employers who ignore real hazards to their workers' safety and health think again. We need to bring OSHA into the 21st century. PAWA includes critical provisions that deal with significant weaknesses in the current law and more adequately ensure the safety and health of America's workers. Today, my testimony will focus on the key issue

of enhanced penalties for occupational safety and health violations, and then turn to some of the bill's other provisions.

Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. Those incentives are affected, in turn, by both the magnitude and the likelihood of penalties. Swift, certain and meaningful penalties provide an important incentive to "do the right thing." However, OSHA's current penalties are not large enough to provide adequate incentives. Currently, serious violations – those that pose a substantial probability of death or serious physical harm to workers – are subject to a maximum civil penalty of only $7,000. Let me emphasize that – a violation that causes a "substantial probability of death – or serious physical harm" brings a maximum penalty of only $7,000. Willful and repeated violations carry a maximum penalty of only $70,000 and willful violations a minimum of $5,000.

Currently, the average OSHA penalty is only around $1,000. The median initial penalty proposed for all investigations in cases where a worker was killed conducted in FY 2007 was just $5,900. Clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties – even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost than the message that a $5,900 penalty sends. We must not forget that a stronger message means stronger deterrence – and can therefore save lives.

In 2008, testimony before a Senate committee revealed numerous examples of small fines in very serious cases. In New Jersey an immigrant worker was killed in a fall. The original penalty against his employer for failing to provide fall protection was $2,000 which was later reduced to $1,400. In Michigan in 2006 the initial penalty against an energy cooperative was just $4,200 when an employee died after a backhoe hit a gas line that exploded. The employer had violated standards for excavation and safety programs.

Monetary penalties for violations of the OSH Act have been increased only **once** in 40 years despite inflation during that period. Unscrupulous employers often consider it more cost effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem. The current penalties do not provide an adequate deterrent. This is apparent when compared to penalties that other agencies are allowed to assess.

For example, the Department of Agriculture is authorized to impose a fine of up to $130,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to $325,000 for indecent content. The Environmental Protection Agency can impose a penalty of $270,000 for violations of the Clean Air Act and a penalty of $1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job – even when the death is caused by a willful violation of an OSHA requirement – is $70,000.

In 2001 a tank full of sulphuric acid exploded at a Motiva refinery. A worker was killed and his body literally dissolved. The OSHA penalty was only $175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to $10 million – 50 times higher.

PAWA makes much needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as $250,000. For the first time there would be minimum monetary penalties for all types of civil violations. These increases are not inappropriately large. In fact, for most violations, they raise penalties only to the level where they will have the same value, accounting for inflation, as they had in 1990.

In order to ensure that the effect of the newly increased penalties do not degrade in the same way, PAWA also provides for inflation adjustments for civil penalties based on increases or decreases in the Consumer Price Index (CPI). Unlike most other Federal enforcement agencies, the OSH Act has been exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 39%. PAWA's penalty increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act almost 40 years ago. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept injuries and worker deaths as a cost of doing business.

We also recognize that OSHA has a role to play in using our own authority to establish penalty levels. OSHA has not adjusted its own penalty formulas over the last two decades. Therefore, in addition to our strong support of the necessary statutory changes that PAWA would make to OSHA's penalty structure, we are planning to implement long-overdue internal changes in our penalty proposal policies. These changes will be well-advertised so that all employers are aware of the new policies. However, OSHA believes any administrative changes we are able to make would still be inadequate to compel many employers to abate serious hazards. These steps are an effort to do the best with the outdated, antiquated tools we have. But we can only do so much within the constraints of the current OSH Act. This administrative effort is no substitute for the meaningful and substantial penalty changes included in PAWA.

Criminal penalties in the OSH Act are also inadequate for deterring the most egregious employer wrongdoing. Under the OSH Act, criminal penalties are limited to those cases where a willful violation of an OSHA standard results in the death of a worker and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction for a violation that costs a worker's life is six months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970 and are weaker than virtually every other safety and health and environmental law. Most of these other Federal laws have been strengthened over the

years to provide for much tougher criminal penalties. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. There is no prerequisite in these laws for a death or serious injury to occur. Other federal laws provide for a 20 year maximum jail sentence for dealing with counterfeit obligations or money, or mail fraud; and for a life sentence for operating certain types of criminal financial enterprises.

Simply put, serious violations of the OSH Act that result in death or serious bodily injury should be felonies like insider trading, tax crimes, customs violations and anti-trust violations.

Nothing focuses attention like the possibility of going to jail. Unscrupulous employers who refuse to comply with safety and health standards as an economic calculus will think again if there is a chance that they will go to jail for ignoring their responsibilities to their workers.

PAWA would amend the OSH Act to change the burden of proof from "willfully" to "knowingly." Specifically, Section 311 states that any employer who "knowingly" violates any standard, rule, or order and that violation results in the death of an employee is subject to a fine and not more than 10 years in prison. Most federal environmental crimes and most federal regulatory crime use "knowingly," rather than "willfully." This

would ease the burden of proof currently required for a criminal violation under the OSH Act because it is easier to prove a knowing violation than to establish willfulness under current cases.

In addition, potential criminal liability is expanded to any responsible corporate officer or director, which addresses Federal court rulings that limited liability for OSHA violations to corporations and high-level corporate officials. This section is aimed at the small minority of corporate officials who have behaved irresponsibly, resulting in the death or maiming of their employees. OSHA currently has no penalties adequate to deter such conduct. The possibility of incarceration is a powerful deterrent. Twenty years ago the Inspector General of DOL noted that:

> There is a visible odium that accrues to being indicted, convicted and jailed. I submit that it is the specter of precisely this kind of disgrace which will add to the credible deterrent at the Department of Labor.

Because OSHA's criminal penalties are considered misdemeanors Federal prosecutors often regard these cases as a poor use of scarce time and resources. Since passage of the OSH Act in 1970 fewer than 100 cases have been prosecuted while more than 300,000 workers have died from on-the-job injuries.

In the 1980s, the State of Texas and Los Angeles County demonstrated that aggressive criminal law enforcement procedures improved occupational safety and health. In Texas, the number of trenching fatalities dropped dramatically when one county adopted a well-publicized criminal prosecution effort. In addition, OSHA continues to work with New York State's prosecutors on similar prosecutions, even as recently as the Deutsche Bank

case. The Subcommittee has wisely included a provision stating that nothing in PAWA shall preclude a state or local law enforcement agency from conducting criminal prosecutions in accordance with its own laws.

In addition to making much needed changes to the OSH Act's penalty provisions, PAWA would cover all public employees. There are more than 10 million Federal, State and local government employees who do not receive the full range of protections from the OSH Act. According to 2008 BLS data, the total recordable case injury and illness incidence rate for state government employees was 21% higher than the private sector rate. The rate for local government employees was 79% higher. Clearly, some public sector jobs are extremely dangerous. Public employees deserve to be safe on the job, just as private-sector employees do.

Twenty-six states and one territory now provide federally approved OSHA coverage to their public employees. Nonetheless, in 2008 there were more than 277,000 injuries and illnesses with days away from work among state and local governmental employees. I applaud the Subcommittee for addressing these issues. Realizing the fiscal difficulties that many states now face we would like to have further discussions with the committee about the details of this section.

Good jobs are also jobs where workers' voices are part of the conversation about creating safe workplaces. The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers—section 11(c). This provision protects

employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. This protection is fundamental to OSHA's capability for safeguarding the workforce. The creators of the OSH Act knew that OSHA would not be able to be at every workplace at all times, so the Act was constructed to encourage worker participation and rely heavily on workers to act as OSHA's "eyes and ears" in identifying hazards at their workplaces. If employees fear that they will lose their jobs or be otherwise retaliated against for actively participating in safety and health activities, they are not likely to do so. Achieving the goal of *Good Jobs for Everyone* includes strengthening workers' voices in their workplaces. Without robust job protections, these voices may be silenced.

In the 40 years since the OSH Act became law Congress has enacted increasingly expansive whistleblower protections, leaving section 11(c) in significant ways the least protective of the 17 whistleblower statutes administered by OSHA. There has been bi-partisan consensus for the past twenty-five years on the need for uniform whistleblower protections for workers in every industry. This Administration supports uniformity as well.

Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints, lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Federal Government filing an action in U.S. District Court. PAWA would strengthen section 11(c) by including the full range

of procedures and remedies available under the more modern statutes and by codifying certain provisions, such as exemplary damages and the right to refuse to work, which have been available but not expressly authorized by current statute. There is no reason that workers speaking up about threats to their safety and health should enjoy less protection than workers speaking up about securities fraud or transportation hazards.

PAWA strengthens these protections. It makes explicit that a worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions to employers or to a safety and health committee, or for refusing to perform a task that the worker reasonably believes could result in serious injury or illness. These protections are already implicit in the OSH Act, but PAWA would leave no doubt in employers' or employees' minds about these rights.

PAWA is an improvement on OSHA's current law in significant ways. It protects employees who refuse work because they fear harm to other workers. It eliminates the requirements that no reasonable alternative to a work refusal exist, and that there be no time to contact OSHA. It requires only that a reasonable person faced with the same circumstances would conclude that performing such duties would result in serious injury or illness to him or herself, or other workers, and when practical, the employee has tried to obtain a remedy from the employer.

Additionally, PAWA would increase the existing 30-day deadline for filing an 11(c) complaint would to 180 days, bringing 11(c) more in line with some of the other

whistleblower statutes enforced by OSHA. Over the years many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. Increasing the filing deadline to 180 days would greatly increase the protections afforded by section 11(c).

PAWA's adoption of the "contributing factor" test for determining when illegal retaliation has occurred would be a significant improvement in 11(c). It would make 11(c) consistent with other whistleblower statutes that have also adopted the "contributing factor" scheme. This would enhance the protections afforded to America's workers and improve workplace safety and health.

The private right to enforce an order is another key element of whistleblower protections and has been included in most other whistleblower statutes enforced by OSHA. It is critically important that if an employer fails to comply with an order providing relief, either DOL or the complainant be able to file a civil action for enforcement in a U.S. District Court.

PAWA also allows complainants or employers to move their case to the next stage in the administrative or judicial process if the reviewing entities do not make prompt decisions or rulings. For example, PAWA would allow complainants to "kick out" to a District court if the Secretary has not issued a final order within the prescribed number of days from the case filing, or "kick out" from an OSHA investigation to a hearing before an

Administrative Law Judge (ALJ) if OSHA has not issued a decision within 120 days of the filing of the complaint.

The provision allowing employees in states administering OSHA-approved plans to choose between Federal and State whistleblower investigations would likely result in a significant increase in the number of Federal complaints. All 22 states that administer private sector plans currently provide protections at least as effective as Federal OSHA's, as they are required to do under statute. We have reservations about this provision, because we are not sure this provision would add much protection for workers in those states, and it would be a significant drain on OSHA resources and those of the Solicitor of Labor.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades.

The proposed legislation would prohibit employers from discouraging the reporting of work-related injuries and illnesses by employees. OSHA is strongly committed to accurate reporting of both injuries and illnesses. It shares the concern about under-reporting expressed by the Government Accountability Office and several academic studies. . Only if we have confidence in the quality of the data that we collect on workers' injuries and illness can we have confidence in our understanding of the scope of the dangers facing American workers and our targeted efforts to reduce those dangers. The agency believes that the most likely workplaces where under-reporting occurs are

those with low injury/illness rates operating in historically high-rate industries. We have initiated a National Emphasis Program to target these workplaces and check their records. PAWA's recordkeeping provisions would greatly enhance the effectiveness of our NEP.

PAWA includes a number of sections that would expand the rights of workers and victims' families. For the past 15 years OSHA has informed victims and their families about our citation procedures and about settlements, and talked to families during the investigation process. PAWA would ensure this policy is strengthened and made permanent, as well as increase the ability of victims and family members to more actively participate in the process.

It would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA, to receive copies of the citation at no cost, to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process. However, we do believe that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or to appear before parties conducting settlement negotiations. This could be logistically difficult for victims and OSHA's regional and area offices, resulting in delays in the negotiations and ultimate citation, which hurt the victim in the long run.

The rights of workers who wish to contest OSHA citations are expanded under PAWA. For the first time employees would be able to contest citations and modifications regarding the characterization of the violation (i.e., serious, willful, or repeated) as well as the adequacy of the penalty. This would result in providing employees more of a voice in the enforcement process and would provide a right for employees equal to the contest rights of employers.

One of the most significant changes to the OSH Act is the provision which requires abatement of serious, willful, and repeat hazards during the contest period. PAWA would enable OSHA to issue failure to abate notices to a workplace with a citation under contest. This provision would strengthen the right of workers to be protected from the most egregious workplace hazards.

OSHA believes this protection is critical. Too often hazards remain uncorrected because of lengthy contest proceedings—periods that can last a decade or more. A recent OSHA analysis found that between FY 1999 and FY 2009, there were 33 contested cases that had a subsequent fatality at the same site prior to the issuance of a final order. For instance, in 2009 OSHA cited a Connecticut company, T Keefe and Sons, after an employee fell to his death through an improperly guarded floor hole while working at a casino in Uncasville, Connecticut. The company contested the citation. Several months later another employee of that company fell through a similarly improperly guarded hole, and received permanent disabling injuries.

Obtaining speedy abatement is one reason why OSHA settles cases. But we must ensure that neither contests nor lengthy settlement negotiations leave workers exposed to the hazards found during the initial inspection. The only situation worse than a worker being injured or killed on the job by a senseless and preventable hazard is having a second worker felled by the same hazard.

This is not the first time that this issue has been before Congress. During hearings on comprehensive OSHA reform in the 102nd and 103rd Congresses, numerous examples were presented of employees being hurt or killed while an inspection was under contest. While those opposing this provision argued that employers would needlessly spend large sums on abatement for a citation that is later overturned, business representatives testified that even when there is a contest most employers abate hazards during the review process.

GAO also has recommended that Congress require protection of workers during contests based on experience with the Federal Mine Safety and Health Act, which does not automatically stay abatement during litigation. Similarly, various environmental statutes also require that violations be corrected when they are identified. In weighing the balance between employee protection and employer contest rights, employee safety should take precedence. PAWA respects the rights of employers by allowing an appeal to OSHRC regarding the requirement to abate during contest.

Under PAWA, for the first time, OSHA would be required by law to investigate all incidents resulting in death or the hospitalization of two or more employees. OSHA's current enforcement policy is to investigate all fatalities and incidents resulting in the hospitalization of three or more workers. It should be noted, however, that "investigate" does not necessarily mean inspect, giving the agency discretion in using its enforcement resources most effectively.

The provision requiring employers to take appropriate measures to prevent destruction or alteration of evidence in regard to such incidents would support OSHA's compliance staff efforts in the conduct of investigations.

The use of unclassified citations is prohibited by the bill. The agency has substantially reduced the use of these citations (in FY 09 OSHA issued 10 unclassified citations compared with 26 in FY 07). OSHA recognizes that unclassified citations may reduce the deterrent effect of its enforcement activities by removing the stigma of willful violations and undermining the potential for criminal prosecution. Nevertheless, the ability to use unclassified citations does increase our flexibility in certain rare situations, for example, in some cases where we may have trouble sustaining a willful citation in court, changing the willful citation to unclassified allows us to maintain the penalty. We hope to discuss this provision further with the committee.

*** * * ***

Madame Chair, I appreciate the thought and effort that has gone into the development of PAWA. I am reminded of the importance of your work by the compelling statement made by Becky Foster, the mother of a 19 year-old who was killed while working as a chipper attendant in the wood processing industry:

> These penalties will not give companies any incentive to create a safe workplace. It just seems so unfair to watch the news and see a story about a CEO or someone in a large company that does not follow some type of regulation regarding the books. They get fines of hundreds of thousands of dollars and have to fight in court to stay out of jail. What kind of system penalizes a company more for monetary issues than it does for taking the lives of hard working people? These fathers, sons, brothers, and uncles can never be replaced. Our lives have been changed forever.

A fresh look at the OSH Act and its relevance for the 21st century is indeed overdue. The Administration supports both the goals of PAWA and many other specific provisions. We note that several sections of this Act would present significant budgetary and workload challenges for OSHA and OSHA's support agencies at the Department of Labor, including the Solicitors' office, as well as the Review Commission, which we will need to analyze fully. I look forward to working with you as this bill advances through the legislative process to perfect it and ensure that we address the crucial issues in precisely the right way.

Thanks again for the opportunity to testify today. I am happy to answer your questions.