**TESTIMONY OF**
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**BEFORE**
**THE COMMITTEE ON EDUCATION AND LABOR**
**U.S. HOUSE OF REPRESENTATIVES**

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**Chairman Miller, Ranking Member Kline, and Members of the Committee**, thank you for the opportunity today to discuss the Miner Safety and Health Act of 2010, which would bring needed reforms to our nation's workplace health and safety laws. Every day in this country, 14 workers are killed on the job. Every day we encounter employers who put profits above the safety of their workers, children who have lost parents, or parents who have lost children from workplace injuries. Workers are fired for voicing safety and health concerns, companies subject workers to known hazards while the courts spend years deciding contested citations, and our nation's workforce protection agencies are plagued with outdated laws, tools, and penalties that make it difficult to deter safety and health violations.

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), which created the Occupational Safety and Health Administration (OSHA) and provided workers with the rights they needed to protect their safety and health on the job.

But today, 40 years after the Act was passed, American workers continue to face unacceptable hazards on the job. And while these hazards and working conditions have changed significantly, the law has not been substantially modified in those 40 years.

During the seven months I have been the Assistant Secretary of OSHA, explosions at the Kleen Energy power plant in Connecticut, the Tesoro refinery in Washington State, the Upper Big Branch mine in West Virginia, and on the *Deepwater Horizon* offshore oil drilling platform in the Gulf of Mexico have killed 54 workers. We add their names to a long list of recent disasters, like the explosions at the BP refinery in Texas, Sago and Darby mines in West Virginia and Kentucky, and the Imperial Sugar plant in Georgia that killed dozens of workers and injured hundreds more. But these are only the tragedies that make national headlines. What is not publicized are the more than 5,000 other workers killed on the job in America each year, the more than 4 million who are injured, and the thousands more who will become ill or die in later years from present day occupational exposures. Every day in this country we have a Sago mine disaster, every two days an Upper Big Branch, and every month the loss of a fully loaded Boeing 747. These tragedies happen in every corner of the country, usually one at a time, far from the evening news and the morning headlines.

Secretary Solis' vision for the Department of Labor is "Good Jobs for Everyone." Good jobs are safe jobs and we must do more to make our nation's workplaces safer. OSHA has already taken significant steps toward this goal. In April, the Labor Department released its Spring regulatory agenda which includes a new enforcement strategy – Plan/Prevent/Protect – an effort designed to expand and strengthen worker protections through a new OSHA standard that would require not

just the best employers, but every employer to implement an Injury and Illness Prevention Program tailored to the actual hazards in that employer's workplace. Instead of waiting for an OSHA inspection or a workplace accident to address workplace hazards, employers would be required to create a plan for identifying and remediating hazards, and then to implement this plan.

Essentially, through this common sense rule, also known as "Find and Fix," we will be asking employers to find the safety and health hazards present in their facilities that might injure or kill workers and then fix those hazards. Workers, those who are most directly at risk, would participate in developing and implementing these workplace safety plans and evaluating their effectiveness in achieving compliance.

While we believe this enforcement strategy will go a long way toward eliminating the "catch me if you can" mindset prevalent in corporate America, the workplaces of 2010 are not those of 1970 and the OSH Act, which has remained stagnant for 40 years, must be brought into the 21st century to ensure OSHA has the tools and authority to prevent safety and health violations.

I therefore greatly appreciate the work of this Committee in proposing legislation that would significantly increase OSHA's ability to help protect American workers. I want to congratulate you, Mr. Chairman, Congresswoman Woolsey and other cosponsors of the Miner Safety and Health Act for recognizing not only that the nation's 350,000 miners desperately need better protections to prevent any more Sago or Upper Big Branch disasters, but that this nation's 135 million workers in general industry who are covered by OSHA also need better, more up-to-date

protections. Clearly, whether a worker leaves home in the morning on his way to a mine or on her way to a refinery or construction site, every worker needs and deserves equally effective protections.

Title VII of the Miner Safety and Health Act provides critical amendments to the OSH Act that would increase OSHA's civil and criminal penalties, enhance whistleblower protections and victims' rights, and give OSHA the authority to require abatement of serious hazards even if and while the employer contests citations issued for them. These provisions, strongly supported by the Labor Department and endorsed by the Obama Administration, would enable OSHA to more effectively accomplish its mission to "assure safe and healthful working conditions for working men and women."

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. Federal OSHA and state plans combined have just over 2,200 inspectors, which translates to about one compliance officer for every 60,000 workers. OSHA needs more modern tools to ensure that employers are safeguarding the safety and health in our country's almost 9 million workplaces.

Today, my testimony will focus on the Title VII provisions of the Miner Safety and Health Act, which address significant weaknesses in current OSHA law, and how this legislation would address those problems by bringing OSHA into the 21st century.

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, especially for large employers. 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.

Congress has increased the OSH Act's monetary penalties 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 OSHA penalties are compared with penalties that other agencies are allowed to assess.

For example, in 2001 a tank full of sulfuric acid exploded at an oil refinery in Delaware, killing Jeff Davis, a worker at the refinery. His body literally dissolved in the acid. The OSHA penalty was only $175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing EPA to assess a $10 million penalty for violating the Clean Water Act. How do we explain to Jeff Davis' wife Mary, and their five children, that the penalty for killing fish and crabs is so much higher than the penalty for killing their husband and father?

Other examples abound. The Department of Agriculture is authorized to impose a fine of up to $140,000 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 when a performer curses on air. 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.

The Miner Safety and Health Act 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. These increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept worker injuries and deaths as a cost of doing business.

Unlike most other Federal enforcement laws, 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. This has reduced the real dollar value of OSHA penalties by close to 40%. In order to ensure that the effect of the newly increased penalties does not degrade in the

same way, the Miner Safety and Health Act also provides for inflation adjustments for civil penalties based on increases or decreases in the Consumer Price Index (CPI).

Criminal penalties in the OSH Act are also inadequate for deterring criminal 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 willful crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have not been updated since the law was enacted and are weaker than virtually every other safety and health or environmental law. 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. It defies logic that serious violations of the OSH Act that result in death or serious bodily injury are treated as lesser crimes than insider trading, tax crimes, customs violations and anti-trust violations.

It is clear that nothing focuses attention like the possibility of going to prison. Unscrupulous employers who knowingly refuse to comply with safety and health standards as an economic

calculus, and cause the death or serious injury of a worker, will think again if there is a chance that they will be incarcerated for ignoring their responsibilities.

The Miner Safety and Health Act would amend the criminal provisions of the OSH Act, as it would also amend the Federal Mine Safety and Health Act, to change the burden of proof from "willfully" to "knowingly." Specifically, Section 706 states that any employer who "knowingly" violates any standard, rule, or order and that violation caused or contributed to the death of any 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 on prosecutors by harmonizing these worker safety provisions with similar (or comparable or analogous) crimes.

In the 1980s, we saw in Texas and California 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. Los Angeles County California also mounted an effective criminal prosecution program during those years. In addition, OSHA continues to work with New York State's prosecutors on similar prosecutions, even as recently as the Deutsche Bank case. The Committee has wisely included a provision stating that nothing in the Act shall preclude a state or local law enforcement agency from conducting criminal prosecutions in accordance with its own laws.

Good jobs are also jobs where workers' voices are an essential part of the conversation about creating safe workplaces. As my colleague Assistant Secretary Joe Main has testified, this

Committee heard powerful testimony from the mining community at its field hearing in Beckley, West Virginia about how important it is for miners to be able to come forward and report dangerous conditions in the mine before tragedy strikes. It is equally important that workers in other dangerous industries, like oil refineries, chemical plants, and construction, feel that same security in coming forward.

The OSH Act was one of the first safety and health laws to contain a provision – 11(c) – for protecting employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. Since OSHA cannot be at every workplace at all times, we rely heavily on workers to act as OSHA's "eyes and ears" in identifying hazards at their workplaces. This protection is fundamental to OSHA's ability to safeguard the workforce. If employees fear that they will lose their jobs or otherwise be retaliated against for actively participating in safety and health activities, they are not likely to do so.

OSHA's 11(c) provision is now 40 years old and is one of the weakest whistleblower provisions in any federal law. Last April you heard from a worker whose discrimination claim was upheld by OSHA, but because of weaknesses in the law, the case was never carried forward to litigation. At that hearing, Deputy Assistant Secretary Jordan Barab testified that he was outraged that in the year 2010, workers in this country still fear being fired or disciplined for exercising their rights.

The Miner Safety and Health Act strengthens whistleblower protections for workers in both mining and general industries. 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 to the worker or to other employees.

Additionally, the Act increases the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with most 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.

The Miner Safety and Health Act's adoption of the "contributing factor" test for determining when illegal retaliation has occurred is also a significant improvement in 11(c). The Act would employ this same test for whistleblower complaints in the mining industry as well, making both 11(c) and the Federal Mine Safety and Health Act consistent with other whistleblower statutes enacted since 1989, when the "contributing factor" scheme was introduced. 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 in the Miner Safety and Health Act, 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.

The Miner Safety and Health Act also allows complainants or employers to move their cases to the next stage in the administrative or judicial process if the reviewing entities do not make prompt decisions or rulings. For example, the Act would allow complainants to "kick out" to a hearing before an Administrative Law Judge (ALJ) if the Secretary has not issued a decision within 120 days from the case filing, and to district court if an ALJ or the ARB has not issued a decision within their 90-day time limits.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades. In addition, the Miner Safety and Health Act amends section 17(j) of the OSH Act to include an employer's history of violations of section 11(c) as a consideration in assessing civil penalties. This is also a long overdue change that underscores the importance of preventing the chilling effect of retaliation on workers.

The Miner Safety and Health Act also includes a section that would expand the rights of workers and victims' families. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and embrace their desire to be involved in the remedial process. Family members also provide useful information to OSHA inspectors about the culture and environment of a workplace and the events leading up to an incident that results in serious injury or death. The moving testimony of the families of the Upper Big Branch miners before this Committee in May and Jodi Thomas's testimony on the Kleen Energy explosion last month demonstrate how much family members have to offer MSHA and OSHA.

Although it is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements, we have found that some of these policies are not always applied consistently. The Miner Safety and Health Act would help us in this area by placing 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 appear and make a statement during settlement negotiations before an agreement is made to withdraw or modify a citation.

The Act also requires the Secretary to designate at least one employee at each OSHA area office to serve as a family liaison, similar to the program already in existence at MSHA. The OSHA family liaisons would keep victims informed of the status of investigations, enforcement actions, and settlement negotiations, and assist victims in asserting their rights. As we have seen at MSHA, the family liaisons have effectively enhanced victims' rights and involvement in the enforcement process. The last thing we want is to repeat situations when family members, like Miss Tonya Ford who testified before this Committee in April, find out about the tragic circumstances of their loved one's death from the media and not from OSHA. In addition to the helpful fixes in the Act, OSHA is also working administratively to incorporate suggestions we have received from victims on how to improve our enforcement process and better involve victims and their families.

One of the most significant changes that the Miner Safety and Health Act makes to the OSH Act is the provision that requires abatement of serious, willful, and repeat hazards during the contest period. Currently, if an employer contests an OSHA citation, that employer is not obligated to correct the hazard during the administrative contest period leaving workers exposed to serious or deadly hazards for months or years after the hazards have been identified.

The lack of any requirement for employers to abate hazards during the contest period also seriously undermines the effectiveness of OSHA's already low penalties. Largely because OSHA is pressured to negotiate away penalties in order to avoid employer contests and ensure that hazards are quickly fixed, the average current OSHA penalty is only around $1,000. The median initial penalty proposed for all investigations conducted in FY2007 of cases where a worker was killed 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. By giving OSHA the authority to require abatement during contest, we not only ensure that workers are protected immediately but also can hold employers accountable for keeping a safe and healthful workplace. We must not forget that the stronger the message OSHA sends, the better the deterrence and more lives are saved.

The Miner Safety and Health Act would enable OSHA to issue failure to abate notices to a workplace with a citation under contest, which would carry a penalty of up to $7,000 for each day the hazard goes uncorrected. This provision would greatly strengthen the right of workers in general industry 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.

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.

Additionally, the State of Oregon, which operates its own safety and health program, requires abatement during contest for serious violations. This provision was included in Oregon's original statute and has not been revised since 1977. Although attorneys have objected in State legislative hearings on due process grounds, there have been no court challenges of this provision

It is also important to note that the Miner Safety and Health Act guards the rights of employers by allowing an appeal to the Occupational Safety and Health Review Commission (OSHRC) regarding the requirement to abate during contest.

MSHA has long had a similar provision under its current law. It is now time that we protect general industry workers from known hazards during contest, that are just as deadly, as we do for miners.

Based on the long experience with this provision under the Mine Act, the GAO recommended that Congress require protection of workers during contests. 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, it seems clear that employee safety should take precedence.

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Mr. Chairman, an essential element of achieving Secretary Solis's goal of good jobs for everyone is to change the culture of safety in the American workplace. Under both the OSH Act and the Mine Act, employers are legally and morally responsible for the safety and health of their workers. The important reforms in the Miner Safety and Health Act go far in encouraging employers to accept this responsibility and giving OSHA and MSHA the tools we need to deal with employers who refuse.

In the months I have been at OSHA, I have spoken with children, spouses and parents of workers who have been killed on the job. They do not care about the specifics of the legislative process or the details of how one law compares with another. The only thing they want; the only thing they ask you to do is pass laws that contain the best possible protections, that prevent any other workers – whether mine workers, refinery workers, construction workers, or hospital workers – from losing their lives, from leaving their loved ones behind. We know we can provide these

workers with better protections. We know we can prevent many of these deaths, injuries and illnesses. In a civilized society, this level of death and injury on the job is simply too high a price to pay, especially when we have it within our means to prevent them.

We applaud the important work this Committee has done in drafting the Miner Safety and Health Act, and we look forward to working with you on this legislation as it advances through the legislative process. Thank you again for the opportunity to testify today. I am happy to answer your questions.