Written Statement of
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U.S. House of Representatives Committee on Education and Labor

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International Worker Memorial Day

Chairwoman Woolsey, Ranking Member Ranking Member McMorris-Rodgers and Members of the Committee:

I am Celeste Monforton, an assistant research professor in the Department of Environmental and Occupational Health at the George Washington University School of Public Health & Health Services, and immediate past chair of the Occupational Health & Safety Section of the American Public Health Association.

Today, people around the globe are marking Worker Memorial Day, the day set aside to remember workers killed, disabled, injured or made unwell by their work, and to act to improve protections for the world's workers. In the U.S, if we compare our occupational fatality injury rate to those, for example, in Germany or Norway, their rates are 82% and 150% better than ours. [See Appendix A] We can do much better. Let's honor the men, women and young workers whose lives were cut short or irreparably harmed by on-the-job conditions by making needed changes to our nation's worker health and safety system. The Protecting America's Workers Act (H.R. 2067) is a step in the right direction. I appreciate the opportunity to appear before you today to discuss provisions of the bill, in particular those related to whistleblowers' and victims' rights.

Section 306: Victims' Rights

One of the most rewarding and enlightening experiences in my public health career was my involvement in the 2006 Sago mine disaster investigation. I came to understand and appreciate that family-member victims can make a meaningful contribution to the accident investigation process. There is no one more interested in finding the truth about the cause of an on-the-job death than a worker's loved one.

I heard then (and still hear today) that family members will impede the investigation, that family members have a conflict of interest, and that family members are too emotional to be useful in the fact-finding. My experience tells me that nothing is

further from the truth. With Sago, no one paid closer attention to details, pressed the investigators harder for answers, or raised the bar higher for mine safety reforms than those daughters, wives and brothers.

Putting oneself in the family members' shoes, you realize that dozens of people (people you don't know and have never met) are learning the circumstances that led to your loved one's death, but you—his parent, his wife, his child—are left in the dark. As I talked with family members in the early days of the Sago investigation, as these interviews were first taking place, I realized that we needed to balance the families' right to know with the needs and the legal responsibilities of technical investigators. Although not ideal for the families because they were forced to wait until all interviews were completed, we gave each family a complete set of the transcripts. Despite the unease and anxiety expressed by some, including the historically based assertion that such disclosures would impede the investigation, no calamity ensued. In fact, some of the family members devoted long days and nights to studying the transcripts and were able to alert us to inconsistencies in witnesses' testimony and identify topics deserving closer scrutiny.

It is my experiences working with the Sago miners' families and since that time providing advice and encouragement to other family-member victims that inform my views.

At the subcommittee's hearing on March 16, 2010, OSHA assistant secretary David Michaels indicated that OSHA:

> "…for the past 15 years has informed victims and their families about our citation procedures and about settlements, and talked to families during the investigation process."[1]

It's true that OSHA has a policy about sending a condolence letter and giving family members an opportunity to discuss the circumstances of their loved one's work-related death.[2] From my experience, however, the objective of that policy is vague, leading to vastly different experiences among family members depending on the OSHA area office or State Plan. Some of policy's failures are illustrated by the errors contained in the condolence letters sent by OSHA. For example, a letter sent to the wife of Ray C. Gonzalez, 54, by the OSHA area office expressing sympathy for her loss was sent to her in September 2004 shortly after he suffered severe burns at the BP Texas City facility. Mr. Gonzalez did not die, however, until November 12, 2004.

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[1] Assistant Secretary of Labor David Michaels. Written testimony before the Workforce Protections Subcommittee of the House Education and Labor Committee, March 16, 2010.
[2] OSHA. Field Operations Manual, CPL 02-00-148, page 11-12.

In addition, the letter mentioned her husband, Ray Gonzalez, in the first paragraph, but in the second and third paragraphs, it listed Mr. Maurice Moore, Jr., another worker who was fatally injured in the deadly incident. Gross and insensitive errors such as this do not give families much confidence in the quality of OSHA's work, let alone its accident investigation.

Other failures involve the appropriateness or usefulness of the information provided to a family. For example, Ms. Maureen Ravetta's husband Nicholas, 32, was killed on September 3, 2009 in an explosion at a U.S. Steel plant in Clairton, PA. Maureen recalls receiving a condolence letter from OSHA and knew that they were investigating the circumstances surrounding his death. In mid-March, she had been corresponding on the social networking site Facebook with other family members and wanted advice on how to find out the status of OSHA's investigation. Before contacting her, I did a little research and discovered that OSHA finished their investigation and closed the case on February 2nd (exactly six months after their investigation began.)

Tammy Miser of United Support and Memorial for Workplace Fatalities (USMWF) and I immediately called Maureen Ravetta to tell her what I'd learned about her husband's case. She was shocked to learn the case was closed and hurt that she didn't know it. She said something like:

> "I feel like a fool. I've been sitting around waiting for OSHA to call or let me know, and now I find out they closed the case 5 weeks ago."

I dreaded hearing, but anticipated her next question: "What did OSHA find?"

Regretfully, I explained that information I found on OSHA's website indicated that U.S. Steel was not cited for any violations related to her husband's death and no monetary penalties were assessed. I tried to explain both OSHA's investigation process and their focus on identifying violations of specific safety standards. I could tell that none of that was making any sense to her; she was numb from the news.

I asked if she had received a letter from OSHA following her husband's death and if it explained the agency's procedures. She recalled the letter, but said it didn't mention anything about a six-month deadline for issuing citations. Ms. Ravetta said:

> "Had I known about the six-month deadline, I would have picked up the phone on that exact date and called OSHA to hear what they found. Instead, I've been waiting for them to contact me."

She repeated again, "I feel like a fool."

No widow should feel incompetent for not comprehending OSHA's procedures. It should be OSHA's duty to make sure that family members understand their procedures, taking into account how shock and grief can affect our ability to process information. For some individuals, a simple letter may suffice, but for others, perhaps most, OSHA may need to follow up with a phone call, or to check in from time to time during the investigation and contest period to see if the family has questions or concerns. I hear about the luncheons and speeches that OSHA officials attend across the country throughout the year to keep trade associations and business groups apprized of OSHA activities. Surely, frequent and open communication with victims' families should take a higher priority.

At the subcommittee's hearing last month, the witness representing the U.S Chamber of Commerce asserted that involving family members "does not appear to be much value…
other than to sensationalize presumably already emotional and sensitive matters." That comment is terribly uninformed, particularly to the reality of what family members <u>can</u> offer to investigators. I would invite Members of this Subcommittee to speak to any of the family members present here today. They will impress you with their knowledge of factors that contributed to or caused their loved ones' deaths, and their suggestions for ways our worker injury and illness system can be improved.

I've reviewed the victims' rights provisions of the discussion draft of H.R. 2067. It will offer family members the following opportunities to be involved in the investigation process:

1. Meet with the Secretary's representative (e.g., OSHA official) <u>before</u> a decision is made to issue a citation or take no action. This is particularly important for those family members who may have information or physical evidence that may be germane to OSHA's investigation.

2. Receive any citations or other documents at the same time as the employer receives them. This should eliminate the situation experienced by numerous victims' families who learn through a news report that their loved one's employer received a citation and penalty (or none at all), rather than being informed directly by OSHA.

3. Be granted the opportunity to appear and make a statement before OSHA and the employer during informal and formal settlement negotiations. This will shine a light on the process, allowing victim's families the chance to observe how OSHA, DOL Solicitor's Office lawyers and company attorneys bargain over classification of violations and penalty amounts.

4. Be afforded the right to appear and make a victim's impact statement before the Occupational Safety and Health Review Commission (OSHRC) in those instances when a case proceeds to it for adjudication.

At the subcommittee's hearing on March 16, 2010, the OSHA assistant secretary's testimony noted that the provision requiring OSHA to meet with family members before a citation is issued or to appear before parties in settlement negotiations "could be logistically difficult for victims and OSHA's regional and area offices." Under the current statute, OSHA has six months to conduct inspections, including fatality investigations. I find it hard to believe that during this six-month period, OSHA field staff would not be able to coordinate a time to meet or speak on the phone with the victim's family. In fact, some OSHA area offices already do this, and the affected families sincerely appreciate it.[3]

It's true that OSHA is under certain time constraints. There is a 15 working day time period in which the employer and OSHA may negotiate an informal settlement in lieu of a formal contest before the OSHRC. We know that many cases are handled through this informal conference process, with OSHA and the employer motivated to have the hazards abated and resolve the citations and penalties. This motivation compels the parties to identify a date and time to meet during this three-week window, whether in person or by phone.

It's only fair that family members who've lost so much because of workplace hazards have a chance to witness negotiations to reduce penalties and/or the severity classification of violations. PAWA would give the victim's family the right to be notified about these meetings and be given an opportunity to attend and make a statement during them.

Just as many employers will juggle their schedules in order to meet with OSHA during this pre-contest period, I believe family members would do the same. Ms. Deb Koehler-Fergen, whose son Travis was asphyxiated in a confined space incident in February 2007, told me:

[3] For example, Mrs. Diane Lillicrap, whose son Steven, 21 was killed on a construction site while disassembling a crane, was invited by the OSHA area director in St. Louis to meet with his entire staff. She was able to talk about her son, and share information that was potentially valuable to the front-line investigators. I understand the meeting was a valuable experience for all; sometimes we need very personal reminders of why we chose a career in public service. Her meeting with the OSHA St. Louis office took place a number of weeks before OSHA issued citations to the employer. It did not delay the investigation.

> "I would have done anything to be at a meeting between NV-OSHA and Boyd Gaming when they discussed Travis' case. If my boss told me I couldn't have the day off of work, I would have quit my job to be at that meeting."

I do not believe that the rights extended to family members under PAWA would be as "logistically difficult" as OSHA officials claim.[1]

Furthermore, OSHA may find that participating family members turn out to be their best allies for securing health and safety improvements. Family members may endorse the terms of the informal settlement if they believe that the employer's proposed corrective actions will substantially improve safety for their loved one's co-workers. In fact, the mantra I hear from family members more often than any other is this:

> "We don't want this to happen to any other family; we don't want them to go through what we've been through."

I believe that involving family members in finding solutions to workplace hazards has the potential to substantially advance occupational injury and illness prevention in the U.S.

I support PAWA's provisions to provide family members copies of citations or reports at no costs. I would go further and recommend that family members be given access to all documents gathered and produced as part of the accident investigation, including records prepared by first responders and state and federal officials. In addition, all fees related to the production of documents should be waived for family members. The release of this information should be prompt, and no later than the day that any citations are issued to the employer. Exceptions should be permitted when bona fide evidence demonstrates that a criminal investigation could be hampered by such release.

PAWA could go further and build on the provision for a family liaison contained in the MINER Act of 2006.[4] Congress should consider directing the Secretary to appoint a Department of Labor official to serve as a family liaison in cases of worker fatalities or serious injuries. Some OSHA area offices already make sincere efforts to provide information and timely updates to family members, but the agency's and the State Plan States' performance in this regard is inconsistent and needs to be improved. Family liaison requirements must be strengthened and must be elevated to statutory

[4] Section 7 of the Mine Improvement and New Emergency Response Act of 2006. Public Law 109-236.

duties of the agencies. Rights for family member and injured worker are too important to be contained only in policy.

Title II: Whistleblower Protections

I fully support PAWA's provisions to reform and improve the whistleblower protections in Section 11(c) of the OSH Act. I applaud Chairwoman Woolsey for her leadership on whistleblower protection legislation, and for this Subcommittee's focus on this critically important topic.

I agree that whistleblowing is a vital safeguard for our democracy and ensuring justice, and that individuals who stand up for what is right often suffer devastating personal consequences.[5] As we read the recent newspaper accounts of deaths and injuries in U.S. workplaces, and we hear President Obama emphasize that workers need to be empowered to report safety problems,[6] it's vital that we have the laws in place to protect whistleblowers.

When I worked at OSHA in the early 1990's, it was apparent to me, a newcomer to the Labor Department, that the 11(c) program was a step-step child of the agency. At that time, OSHA only had a few statutes to administer; now it's responsible for 17 whistleblower laws. Still, about 60% of all the complaints filed are related specifically to workers exercising their health and safety rights, rights allegedly protected under Section 11(c) of the OSH Act. Defending workers in these situations is essential to OSHA's core mission, yet this program continues to be treated worse than a second-class citizen. My characterization is based on investigations conducted by the Government Accountability Office (GAO), Congressional teams, independent researchers and individuals who have attempted to use the system on behalf of aggrieved workers.

PAWA's whistleblower provisions will substantially improve the protections and procedures for workers who raise concerns about safety and health problems. They will revise the law to make it comparable to other more modern whistleblower statutes. Most importantly, it will allow workers to pursue their discrimination case independently, if the Solicitor of Labor (acting on behalf of the Secretary) declines to take the case or fails to act in a timely manner. This private right of action is already granted to workers employed in the nation's mining industry,[7] and simple fairness

[5] Christy Carpenter, Introductory Remarks, "Anyone Can Whistle: The Essential Role of the Whistleblower in American Society," sponsored by the Government Accountability Project and the Paley Center for Media, February 17, 2010.
[6] Remarks by the President on Mine Safety, White House Rose Garden, April 15, 2010.
[7] Section 105(c) of the Federal Mine Safety & Health Act of 1977. Public Law 95-164.

warrants its extension to workers covered by the OSH Act. The whistleblower witness here today, Mr. Neal Jorgensen, is an excellent example of why individuals should not be held captive because of the Labor Department's failures. Whether the problems at the Labor Department are resource constraints, lack of interest, litigation anxiety or that their client is the Secretary, not the claimant, health and safety whistleblowers must be afforded a private right of action to pursue their case. PAWA would do just that, and this improvement is sorely needed.

The Subcommittee should consider a bolder reform to improve protections for whistleblowers. I support Chairwoman Woolsey's proposal from the 110th Congress, the Private Sector Whistleblower Protection Streamlining Act (H.R. 4047) to create a separate independent agency or bureau to administer all federal whistleblower statutes. From my 20 years of observing the administration of the whistleblower program at OSHA, it is subordinate to the agency's core mission, thus individuals with valid whistleblower complaints are relegated to a system without independent leadership and commitment. The small staff of investigators and program managers is responsible for 17 different statutes,[8] [and will soon (if not already) be adding the whistleblower provisions contained in "The Patient Protection and Affordable Care Act"[9]] yet it is constrained within a deep administrative hierarchy and a system riddled with "inadequate internal controls."[8]

At one time, I thought that the whistleblower protection functions delegated to OSHA could be at the heart of our worker health and safety protection system, but I no longer believe that is possible. Vigilant defense of workers who exercise their whistleblower rights—-especially on issues related to health and safety——is fundamental to an effective enforcement system. As Jason Zuckerman of the Employment Law Project warned that failing to aggressively investigate and pursue allegations of discrimination will embolden these lawbreaking employers.[10] I believe Congress should consider creating an independent bureau or agency to administer all the federal whistleblower statutes. With dedicated leadership, specialized investigators and skilled attorneys it could operate efficiently by focusing exclusively on the investigation and defense of valid whistleblower complaints.

Investigations of Worker Fatalities and Serious Injuries

[8] See GAO report " Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency," GAO-09-106; January 2009. http://www.gao.gov/new.items/d09106.pdf

[9] Public Law 111-148.

[10] Zuckerman JM. Submission to OSHA Docket 2010-0004, "OSHA Listens," February 28, 2010.

PAWA would direct OSHA to investigate worker fatalities and serious injury events, and require employers to notify OSHA promptly of these incidents. This is a needed improvement to the OSH Act; however, I recommend an important modification. Under the MINER Act of 2006, the law was changed to require miner operators to notify MSHA within 15 minutes of the time that the employer realizes that the death of an individual has occurred, or an injury or entrapment has occurred which has a reasonable potential to cause death."[11] Under OSHA's current regulations, employers are given 8 hours to report such events, potentially delaying the commencement of their investigation by a day or more. Worker deaths and life-threatening injuries would receive the public attention can spur much-needed regulatory reforms, if immediate notification were required of all employers, not just those in the mining industry.

Injury and Illness Prevention Requires Abatement of Hazards

Under the OSH Act, employers are not required to correct a hazardous condition(s) until the citation(s) assessed by an OSHA inspector become(s) a final order of the OSHRC.[12] PAWA would change this situation and require abatement of hazards—-hazards that can kill or injure workers—-while the employer contests them. If a person gets pulled over for violating a traffic law, such as driving without a license, that person isn't allowed to get right behind the wheel and proceed to break the law just because s/he plans to challenge the ticket. Likewise, if a health inspector finds evidence of live rodents and roaches, or cross-contamination of raw and prepared meats, the restaurant owner has to fix the problem immediately if it wants to open its doors for business. The same should hold true when OSHA inspectors identify violations of health and safety standards.

OSHA inspectors should have comparable authority to that extended to their counterparts at the Mine Safety and Health Administration (MSHA). Under the Mine Act, when a federal mine inspector identifies a violation of an MSHA standard or regulation, mining companies are required to begin fixing the problem immediately. Employers in the mining industry have the right to challenge citations and penalties before the Mine Safety and Health Review Commission (MSHRC), but an employer's decision to litigate an inspector's finding and/or the proposed penalty does not give that employer permission to let workplace hazards persist. OSHA needs comparable authority, and PAWA would provide it. I strongly support this provision of PAWA.

[11] Section 5 of the Mine Improvement and New Emergency Response Act of 2006. Public Law 109-236.
[12] Section 10(b) of OSH Act.

Currently, an employer cited by OSHA has the right to contest four aspects of the citation: (1) the classification of the violation (e.g., serious, willful); (2) the OSHA rule, standard or statutory clause affixed to the violation; (3) the abatement date; and/or (4) the proposed penalty. Briefly, when an employer receives an OSHA citation and penalty, s/he has 15 working days to (1) accept the citation, abate the hazards and pay the penalties; (2) schedule an informal conference with the local OSHA area director to negotiate an informal settlement agreement; or (3) formally contest the citation and/or penalty before the OSHRC.

Instead of formally contesting one of these aspects, an employer may request to meet with the director of the local OSHA office for an informal conference before the 15-day period to file a notice of contest expires. The majority of employers who receive OSHA citations participate in informal conferences, and the majority of OSHA inspection cases are resolved this way. The adverse consequence, however, is that OSHA's managers in its local offices across the country often have to choose between levying a tough penalty or getting a hazard corrected quickly.

OSHA's area directors have the authority to reclassify violations (e.g., downgrade from willful to serious, serious to other-than serious); withdraw or modify a citation, an item on a citation or a penalty; and negotiate the proposed penalty. If both parties agree to the negotiated terms, the employer must then abate the hazard in the agreed-upon time period; if no agreement is reached, the employer will likely choose to formally contest it through the OSHRC system and can refrain from correcting the safety problem in the meantime.

When cases move through the OSHRC system, the administrative law judges and Commissioners typically reduce the penalty amount proposed by OSHA. (OSHA proposes a penalty amount, but the OSHRC determines the final penalty.) In practical terms, when a citation is contested, years can pass before an employer can be compelled to abate the workplace safety or health problem. Even if the employer doesn't succeed in its OSHRC appeal, they have bought substantial time (and saved money) by not correcting the hazard during the appeal process. Furthermore, by holding in abeyance the correction of hazardous conditions, these employers have gained an economic advantage over their competitors: employers who <u>do</u> obey OSHA standards and regulations.

OSHA's area directors offer penalty reductions and reclassifications of citations (e.g., from serious to other-than-serious) in order to compel prompt correction of the hazard. From a local OSHA manager's perspective, s/he would rather get the dangerous situation rectified so that workers at the site are protected from potential harm, rather than risk a chance that the employer will contest the citation and penalty.

OSHA's inspectors and local managers are truly in a difficult position because the citations and penalties are linked to hazard abatement. The principle of prevention must be enshrined in our workplace OHS regulatory system. This means providing OSHA the authority to compel immediate abatement of hazards that are known to contribute to serious injury, illness or death. We can't make advances in preventing harm to workers when our system forces local OSHA staff to bargain with employers for worker protections that they are already required to implement. The informal settlement process should not only expedite abatement of the hazard, but also give OSHA leverage to require employers to implement measures that go above and beyond what is required by OSHA.

Further, PAWA discussion draft, provides employers with a right to seek an expedited review of abatement if they believe it is unwarranted. This due process protection will ensure that employers are not forced to make investments where they can argue it is unnecessary. This is intended to prevent a backlog of cases before the OSHRC and avert the situation now experienced by the Mine Safety and Health Review Commission.

Civil and Criminal Penalties

Ultimately, our nation's health and economy would be served best by an occupational health and safety regulatory system that prevents work-related injuries and illnesses. In a regulatory system like OSHA's, penalties must be severe enough to compel violators to change their behavior, and to deter lawbreaking by those who might be tempted to flout safety and health regulations in an effort to increase production or cut costs.

Our occupational health and safety (OHS) regulatory system should require the equivalent of "points on their permanent record." Employers who flagrantly, willfully or repeatedly violate laws designed to protect workers from injuries and illnesses should see their finances and reputations suffer. Our system should take advantage of the times when such employers are caught, and capitalize on these grievous situations for their value as a deterrent for companies nationwide. It may not deter other bad actors, but it will catch the attention of those who might be tempted to cut a few corners when under pressure.

I believe the majority of employers respect worker health and safety laws and intend to comply with them. At times, however, competing forces color their judgment, and they break a rule because the likelihood of causing harm is low, as is the risk of getting

caught. Responsible employers know that workplace OHS standards are based on lessons learned and have a public health and safety purpose. But, from time to time, when certain competing forces weigh on them, they make a calculation. They weigh the risk of suffering harm or causing harm to another and the likelihood of getting caught breaking the law.

The deterrent effect of OSHA's penalty system could be amplified to outweigh the influence of competing forces. This is particularly relevant today; the U.S. needs an effective system to prevent occupational injuries and illnesses, but OSHA's responsibilities are grossly mismatched with its budget and resources. I strongly support PAWA's provisions to increase OSHA penalties and ensure they are adjusted regularly for inflation. I also endorse the proposed criminal provisions, especially the classification from misdemeanor to felony, and the extension to include serious bodily injuries, not just worker fatalities. OSHA's penalty calculation should also include a specific factor that assesses the economic benefits reaped by an employer for violating health and safety regulations, which will level the economic playing field for firms that invest in progressive, effective OHS labor-management systems.

The OSH Act places a duty on employers to provide safe and healthy workplaces,[13] but it imposes no obligation on them to address hazards on a company-wide basis. Congress should mandate such a duty on large companies. When a serious hazard has been identified by OSHA at one facility, the firm should be required to conduct an audit to determine whether the same hazard exists at other facilities. If comparable hazards or violations are found at another site, citations for those violations should be classified using the new category of "reckless disregard." The corresponding civil penalty should be hefty (e.g., $220,000 as provided in the MINER Act of 2006).[14]

I appreciate the opportunity to appear before you today, and would be pleased to answer any questions you may have.

[13] Section 5(a) of OSH Act.

[14] Under the Miner Act of 2006, Congress created a new violation category called "flagrant" representing "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." A civil penalty of up to $220,000 can be assessed. Since the law was passed, MSHA has used the "flagrant" classification 92 times with assessed penalties totaling $14,552,400.

APPENDIX A

Comparison of Fatal Injury Rates for Selected Nations (2005-2007)

	2005	2006	2007
Canada	6.8	5.9	6.3
France	2.7	3.0	3.4
Germany	2.4	2.5	2.2
Norway	2.1	1.3	1.6
Russian Federation	12.4	11.9	12.4
Sweden	1.6	1.6	1.7
United States	4.01	4.01	4.01

* per 10,000 workers

Source: International Labour Organization (ILO), LABORSTA