

**Testimony of**

**Gregory Keating, Esq.  
Littler Mendelson, P.C.**

**Before the United States Senate  
Committee on Health, Education, Labor and Pensions  
Subcommittee on Employment and Workplace Safety**

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Good morning Chairman Casey, Ranking Member Isakson and distinguished members of the Subcommittee. Thank you for the invitation to be here before you today. My name is Greg Keating, and I am pleased to be speaking to you about the issue of whistleblower protections. I am a shareholder at Littler Mendelson, P.C. where I co-chair the firm's Whistleblowing and Retaliation Practice Group and serve on the Firm's Board of Directors. I am also author of the book, *Whistleblowing & Retaliation*, which is now in its Fifth Edition. In addition to my work with clients on whistleblowing and compliance-related matters, the U.S. Secretary of Labor appointed me in December of 2012 to serve as a management representative on the Occupational Safety and Health Administration's Whistleblowing Protection Advisory Committee ("WPAC").<sup>1</sup> I should note at the outset, however, that I am testifying not on behalf of the WPAC but rather in my capacity as an individual who has invested considerable time on whistleblower matters.

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<sup>1</sup> See Whistleblower Protection Advisory Committee, available at <http://www.whistleblowers.gov/wpac.html>. The OSHA WPAC "was established to advise, consult with, and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor of Occupational Safety and Health on ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA's administration of whistleblower protections."

Institute, Littler attorneys remain on the forefront of political and legislative developments affecting labor, employment and benefits policy and participate in hearings such as this in order to give a voice to employer concerns regarding critical workplace issues. In my own practice, I often counsel, advise and represent employers in whistleblowing matters, including specifically advising employers on how to structure and implement concrete mechanisms to ensure a culture of compliance. Nevertheless, the comments I provide today are my own, and I am not speaking on behalf of Littler Mendelson or the firm's clients.

While I recognize that the topic of today's hearing is whistleblower protections in the context of workplace safety specifically, I want to speak today even more broadly about compliance measures that can improve and sustain workplaces across many aspects of the workplace and corporate culture, including workplace safety. Specifically, I want to encourage this body to consider alternatives to increased penalties and deterrents in the whistleblowing context – alternatives that are, I believe, more effective and more likely to result in better, safer and more ethical workplaces for employees in America. In my work with and on behalf of employers, I find that, across regions and industries, employers of all sizes and stripes are eager to adopt and enhance measures that foster workplace cultures of ethics and compliance.

By "culture of ethics and compliance," I mean a workplace in which compliance with the letter and spirit of the law is both required and encouraged at every level of the organization; employees feel welcomed and encouraged to share concerns about possible non-compliance; and individuals who come forward in good faith to report possible misconduct or safety concerns can do so without fear of retaliation of any kind. Achieving this kind of culture would result in workplaces that are safer, more ethical, more fulfilling and more compliant with the specific laws, regulations and norms that govern particular industries. What is more, this culture can be

best achieved through a private-public partnership with the employer community, rather than an adversarial approach focused solely on liability, punishment and deterrence.

Employers are clamoring for guidance on how to create this culture of compliance, and many are piloting revolutionary new technologies and techniques to do so. What these employers need most from OSHA and the DOL is concrete guidance about how to create this kind of culture and stronger incentives to invest company resources in doing so. To have the greatest impact, this guidance would need to identify specific elements of a meaningful, high quality compliance program, identifying expected elements, audience targets and time frames for particular elements. It is my hope that we can not only provide this guidance, but that employers who invest in such measures will have those efforts taken into account in the liability and/or penalty phase of an administrative or judicial proceeding enforcing whistleblower protections. This incentive approach will serve as another important vehicle to foster awareness of whistleblower rights and transparency within the culture of corporate America.

In my role as WPAC member, I have expressed the view that, in addition to legislative remedies to protect whistleblowers from retaliation, we also need clear guidance on best practices for employers to understand how specifically to create a culture of compliance. This focus is consistent with OSHA's mandate and, indeed, Dr. David Michaels, the Assistant Secretary of Labor, OSHA has shared his hope that one of the important accomplishments of the WPAC will be to identify specific best practices to promote a culture of compliance. To that end, the Chair of the WPAC has created three working groups intended to focus on specific issues of paramount interest to the committee, one of which is a "best practices" working group that is charged with identifying and describing concrete measures employers can take in order to foster a culture of compliance and minimize the risk of retaliation.

The working group has had numerous meetings and has made significant progress in identifying such measures, and it is my hope that, at the next meeting in September, we can provide formal recommendations to the U.S. Secretary of Labor. Though I cannot yet speak to what those formal recommendations will be, I can provide just a few examples of measures that have a real impact on workplace culture and corporate compliance:

- ***Measuring and Improving Workplace Culture:*** It can be eye-opening for an organization to measure its workforce’s level of engagement and trust in its leaders. Employee surveys enable employers to measure the “tone” of the business and focus on areas that present opportunities for improvement. Based on the results of such surveys, employers can target specific reminders, policies and training to better reflect a strong commitment to ethical and *safe* practices. When employees are aware of and trust their organization’s values and commitment to ethics, they are much more likely to also trust internal reporting systems and, as a result, to come forward with any concerns.
- ***Training at all Levels:*** Effective training can enhance awareness, commitment to compliance and willingness to come forward with concerns at all levels of an organization. There are excellent new training products and programs that can be customized for employers of various sizes, industries and budgets.
- ***Integrated Complaint Management System:*** Employers can adopt a new, formalized system of receiving, investigating and responding to complaints, or they can examine and enhance existing procedures. The best way to foster and ensure trust in the internal reporting system is for the company to establish a track record of responding promptly, thoroughly and consistently to internal reports and to effectively protect employees who make internal complaints from any form of retaliation. A strong complaint management system can provide multiple avenues for submitting complaints – from hotlines, to web portals to frontline supervisors and human resources professionals. It is also important to ensure that different departments and stakeholders communicate effectively and appropriately, working in partnership to investigate and respond to reports of wrongdoing or unsafe working conditions. Employers can also provide a dedicated resource to whistleblowers in order to ensure that there are no signs of retaliation and that any adverse employment actions are thoroughly reviewed before making a decision affecting a whistleblower.
- ***Comprehensive and Effective Policies and Procedures:*** Employers can adopt new or revamp existing internal compliance policies and procedures, investigation procedures, safety plans and policies, and whistleblower and anti-retaliation policies. Although there is no one-size-fits-all policy, there are hallmarks of

effective policies and programs that could be communicated to employers, as well as guidance about how best to implement and enforce those policies.

It is my hope that OSHA will draft, disseminate and incentivize compliance measures such as these. Making employers more aware of specific, effective measures which they can adopt to enhance their workplace cultures will benefit not only those employers seeking this kind of guidance, but also the individuals they employ. The vast majority of U.S. employers have a strong commitment to operating safe, ethical and lawful workplaces and, with better guidance and stronger incentives, I believe they can and will continuously improve upon their efforts to do so. I thank you again for inviting me to testify here today, and I look forward to answering any questions you may have.

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