

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210



August 10, 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: LOREN E. SWEAT *Loren Sweat*
Principal Deputy Assistant Secretary

SUBJECT: Response to OIG's Draft Report "COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints during the Pandemic"

This memorandum is in response to your July 23, 2020, transmittal of the Office of the Inspector General (OIG) Audit Report, "OSHA Needs to Improve Its Handling of Whistleblower Complaints during the Pandemic." I appreciate this opportunity to provide comments on the findings and recommendations in the draft report.

Strengthening the Whistleblower Protection Program (WPP) continues to be one of OSHA's top priorities. I appreciate the OIG's recognition that the COVID-19 pandemic has significantly increased the number of whistleblower complaints OSHA has been receiving, adding to the challenge of completing investigations in a timely manner. I also appreciate the OIG's recognition that OSHA is constantly looking for ways to improve the WPP, including through the proper utilization of pilot initiatives and by seeking public input through stakeholder meetings.

OSHA is constantly working to strengthen the WPP, and has made significant progress since the OIG's previous audits of the program. As the data show, OSHA has already processed more than 50 percent of COVID-19-related complaints, with an average screening time of 10 days, which is below the Agency's FY 2020 Operating Plan performance measure of 13 days. In addition, OSHA continues to implement proven strategies to improve its efficiency and effectiveness, despite the added workload created by the pandemic. An example of this is the successful Alternative Dispute Resolution (ADR) Program. In addition, updates to the Whistleblower Investigations Manual (WIM) are close to completion, an update of which has not been done since September 2011. In the meantime, the agency continues to issue new guidance to investigative staff, strengthen our collaborative relationships with our partner agencies, and develop new customer service and outreach tools, including a formal Outreach Plan.

The OIG's draft report in multiple places uses a phrase to the effect of workers' reporting of "workplace safety violations, including those violations involving social distancing and personal protective equipment." We would recommend this language be refined as "potential violations." Whether a violation has occurred is a fact-intensive inquiry, especially under the general duty clause, which also requires a determination of whether reasonable means of abatement are available. Thus we do not believe it is accurate to state that an employee complaint, including one regarding COVID-19 guidelines, necessarily means a workplace-safety violation has occurred.

The OIG's draft report presents three recommendations. OSHA agrees with them. The following responses and/or action items outline OSHA's actions regarding these recommendations:

Recommendation 1: Fill the five current whistleblower investigator vacancies.

OSHA Response: OSHA agrees with this recommendation. The agency is focused on implementing proven strategies to improve the overall performance of its WPP. To this end, OSHA was approved to hire five ADR Coordinator positions in Regions that did not have ADR Coordinators in the FY 2020 budget. OSHA has filled two of these positions and is actively recruiting to fill the remaining appropriated vacant positions. This can take the form of a promotion, converting a position to ADR, or USA Jobs posting. OSHA regions are working to fill these positions quickly while still following all federal hiring procedures. As mentioned above, ADR has proven beneficial to the program and OSHA remains committed to ensuring that the parties have alternative methods to resolve complaints. Furthermore, OSHA has requested an additional ten whistleblower investigator FTE in the FY 2021 Budget request; these additional resources are critical to attaining OSHA's goal of improved customer service and worker protection.

Recommendation 2: Continue to monitor and evaluate the Region II triage pilot and consider extending the triage process to all regions to expedite screening whistleblower complaints.

OSHA Response: OSHA agrees with this recommendation. Just recently, on July 20, 2020, OSHA issued the first directive on developing, monitoring, and evaluating pilot programs, CPL 02-03-010, Whistleblower Protection Program Pilot Procedures. This OSHA Instruction provides standard procedures for developing, approving, implementing, and monitoring WPP-related pilots throughout the agency, as well as evaluation procedures at the end of a pilot. OSHA will ensure that the Region II triage pilot, and any other pilot, whether regional or national, follows the prescribed instructions provided in this directive and an evaluation will be conducted at the conclusion of the pilot.

Recommendation 3: Develop a caseload management plan to more equitably distribute whistleblower complaints received amongst investigators.

OSHA Response: As noted in the OIG's report, OSHA began a process, pre-pandemic, to address the disparity of whistleblower investigative workload across Regions. This process entails assessing regional workloads and reassigning cases across Regional boundaries in order to more effectively and efficiently complete whistleblower investigations. The resulting outcomes are improved customer service, reduced case inventories and reduced case backlogs, and improved/shorter investigative lapse times. This process began early this year. The agency plans to continue this process until a more reasonable balance exists across the Regions.

I appreciate, once again, the OIG's evaluation of OSHA's WPP, especially during the COVID-19 pandemic, and look forward to continue working together to further improve this important program.