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Written Testimony of

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before the

Committee on Health, Education, Labor and Pensions Subcommittee on Employment and
Workplace Safety

United States Senate

**Workers' Memorial Day: Are Existing Private Sector Whistleblower Protections
Adequate To Ensure Safe Workplaces?**

April 29, 2014

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to present written testimony on the government's authority over whistleblowers rights and anti-retaliation provisions. I am Keith Wrightson, worker safety and health advocate for Public Citizen's Congress Watch division. Public Citizen is a national nonprofit organization with more than 300,000 members and supporters.

Public Citizen commends the subcommittee for taking up this critical issue. There are a number of statutory and common-law provisions aimed at safeguarding private-sector whistleblowers, and the Occupational Safety and Health Administration (OSHA) is charged with enforcing 22 of these statutes. Generally, these provisions provide that employers may not discharge or retaliate against an employee if an employee has filed a complaint or otherwise exercised any rights provided to employees.¹

As one part of OSHA's whistleblower responsibilities, the agency is responsible for the enforcement of 29 U.S.C. §660, Section 11(c) (1970), (hereafter 11(c)), an enactment that provides whistleblower and anti-retaliation protections to any employee who discloses an occupational health or safety violation. Unfortunately, the protections allotted to workers under 11(c) are grossly inadequate and not conducive to building a safe workplace because the statutory language denies workers protection after 30 days, prohibits access to jury

¹ Whistleblower statutes enforced by the Occupational Safety and Health Administration.
http://www.whistleblowers.gov/statutes_page.html, retrieved on (April 23, 2014).

trials and does not provide reasonable remedies to prevailing whistleblowers. As it stands today, 11(c) is in dire need of modernizing and its directive should provide workers with the strongest language possible.

Of particular concern under 11(c), is the 30 day statute of limitations that has been provided to employees who think they have been retaliated against for disclosing a workplace hazard. 30 days is simply not enough time for a worker to gather information and present a clear case to OSHA. This time restriction provision is troubling because it takes immense courage to stand up an employer to identify waste, fraud and or abuse, and a 30 day window could inhibit that courage.

In other, more recent, whistleblower and anti-retaliation legislative efforts, Congress agreed that this 30 day statute of limitations found in 11(c) was too short. For example, when Congress amended 49 U.S.C. §31105, the Surface Transportation Assistance Act in 2007, it provided a 180 day statute of limitations to employees who felt they had been discharged, disciplined or discriminated because they filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety regulation. This longer window provides the employee with adequate time to gather information for a clear case record. Another example can be found in Federal Railroad Safety Act 49 U.S.C. § 20109 (1970) (as amended by the 9/11 Commission Act of 2007 and The Rail Safety Improvement Act of 2008), wherein Congress provided employees the same 180 day statute of limitations.

11(c) has other problems beyond the issues with the statute of limitations. 11(c) also does not provide due process rights to workers and limits the worker to an initial investigation by OSHA and an administrative hearing by its Office of Administrative Law Judges. The ability to hold companies accountable for wrongdoing is critical to an injured person, and at present 11(c) denies the injured party access to court for a jury trial.

Access to the court is a cornerstone philosophy of our democracy. When Congress enacted the Sarbanes-Oxley Act they introduced jury trials to end the monopoly of administrative hearings, but unfortunately this right is only attainable after a 180-day administrative exhaustion period. In 2008 Congress also reaffirmed access to courts for whistleblowers by enacting 15 U.S.C. §2087, the Consumer Product Safety Improvement Act. Under this Act, whistleblowers can seek relief via a jury trial after a 210-day administrative exhaustion period or within 90 days of a final administrative ruling.

Another area of concern with 11(c) is the available remedies extended to workers who disclose waste, fraud and abuse. As laid out in the statute, workers will only be allotted reinstatement and back pay if they are *successful* in their claim. Comparatively, 49 U.S.C. §42121, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

(AIR21) (2001) calls for reinstatement, back pay, attorney's fees, and compensatory damages for workers who disclose waste, fraud, and abuse. The provisions allotted in the AIR21 are more appropriate and do not place the onus on the employee to provide their own legal funding if unsuccessful.

In addition to the limited statute of limitations period the lack of meaningful due process, and insufficient remedies, the so-called worker protections found in 11(c) are also neither comprehensive nor well enforced by government agencies and the courts.² 11(c) is in urgent need of reform. Workers who seek relief under this antiquated statute are both unlikely to receive it and face unnecessary challenges.

Sincerely,

A handwritten signature in blue ink that reads "Keith T. Wrightson".

Keith Wrightson
Public Citizen's Congress Watch

² Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weaknesses (August 2010). Government Accountability Office (GAO 10-722).