



March 2014

# WHISTLEBLOWER PROTECTION PROGRAM

## Opportunities Exist for OSHA and DOT to Strengthen Collaborative Mechanisms

# GAO Highlights

Highlights of [GAO-14-286](#), a report to congressional committees

## Why GAO Did This Study

Transportation workers who “blow the whistle” on prohibited practices can help ensure that their employers comply with federal laws. Within the Department of Labor, OSHA investigates whistleblower claims, filed by transportation employees who believe their employers have retaliated against them for reporting unlawful practices. The Moving Ahead for Progress in the 21st Century Act (MAP-21), required OSHA to establish protections for auto industry employees and required GAO to review OSHA’s efforts and transportation-related whistleblower claims. GAO examined (1) steps OSHA has taken to include auto industry employees in its whistleblower program and the extent to which OSHA collaborated with DOT components to address potential safety violations, and (2) the number of transportation-related whistleblower claims in the last 6 years and stakeholder-identified factors that may affect those numbers. GAO compared agency documents against key practices for collaboration, and interviewed federal agency officials and stakeholders representing transportation modes covered by these statutes to identify factors that may affect the number of whistleblower claims reported by OSHA.

## What GAO Recommends

OSHA and DOT should evaluate their current and in-process MOAs and incorporate key practices for collaboration. Neither agency agreed or disagreed with the recommendation. OSHA stated that it believes its MOAs incorporate key practices, but GAO continues to believe the MOAs can be strengthened.

View [GAO-14-286](#). For more information, contact Lori Rectanus at (202) 512-2834 or [rectanusl@gao.gov](mailto:rectanusl@gao.gov).

March 2014

## WHISTLEBLOWER PROTECTION PROGRAM

### Opportunities Exist for OSHA and DOT to Strengthen Collaborative Mechanisms

## What GAO Found

The Occupational Safety and Health Administration (OSHA) has taken steps to include auto industry employees in its Whistleblower Protection Program and has coordinated with the Department of Transportation (DOT) on whistleblower issues, but interagency collaborative mechanisms could be strengthened. Among other steps, OSHA is developing procedures for how it will investigate claims from auto employees and estimates most of its efforts will be completed in 2014. OSHA documents its collaboration with DOT’s component agencies on whistleblower protections by developing memorandums of agreements (MOA), and currently MOAs cover aviation and rail employees; the agencies are considering developing MOAs to cover other transportation sectors such as commercial motor-carrier employees. Officials from both OSHA and DOT believe it is important to identify or refer potential claims of retaliation and safety violations to each other. In September 2012, GAO concluded that collaboration is critical when meaningful results that the federal government seeks to achieve require the coordinated efforts of more than one federal agency. Among others, key practices of effective collaboration include clearly delineating roles and responsibilities and monitoring progress. OSHA and DOT officials agree that following GAO’s key practices would be beneficial. However, the agencies have an opportunity to strengthen current and future MOAs by clearly delineating roles and responsibilities, and determining how the agencies’ efforts will be monitored and evaluated. For example, the current MOAs do not clearly define agency roles and responsibilities with respect to developing training on whistleblower issues and regional coordination. Defining such responsibilities could help ensure beneficial training occurs and the agencies avoid miscommunication and inconsistent whistleblower processes involving referrals between the agencies’ regional offices. Additionally, since the agencies have not developed or documented how they would monitor referrals, neither OSHA nor DOT can assess whether the referral process is working as intended. By monitoring and evaluating the outcomes of referrals, the agencies would have more assurance that they are addressing the safety violations and claims of retaliation raised by transportation-related employees.

The number of transportation-related whistleblower claims filed with OSHA has increased in the last 6 years—from 508 in fiscal year 2008 to 821 in fiscal year 2013—and GAO’s interviews with transportation industry stakeholders identified several factors that might affect those numbers and how they could be interpreted. These factors include multiple avenues to address safety issues, employee awareness of whistleblower protections, and statutory whistleblower provisions, among others. The identified factors are not mutually exclusive and could either increase or decrease the number of whistleblower claims. For example, officials representing three transportation modes noted that multiple safety-reporting mechanisms, such as anonymous hotlines, can indirectly affect whether employees file whistleblower claims since employees are less likely to face retaliation when reporting safety issues anonymously. Regarding statutory whistleblower provisions, the statute covering rail employees provides the largest number of protected activities, and this protection, according to rail industry officials, has enabled rail employees to file more whistleblower claims than other transportation employees.

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# Contents

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Letter		1
	Background	4
	OSHA Has Initiated Efforts to Include Auto Employees in Its Whistleblower Program, but Has Opportunities to Enhance Collaborative Mechanisms with DOT	9
	Transportation-Related Whistleblower Claims Have Increased, and Stakeholders Identified Various Factors Potentially Affecting the Number of Claims	16
	Conclusions	25
	Recommendation for Executive Action	26
	Agency Comments and Our Evaluation	26
Appendix I	Differences in the Transportation-Related Whistleblower Statutes	28
Appendix II	Objectives, Scope, and Methodology	29
Appendix III	Disposition of Whistleblower Claims from the Office of Administrative Law Judges and Administrative Review Board	35
Appendix IV	Comments from the U.S. Department of Labor	37
Appendix V	GAO Contact and Staff Acknowledgments	39
Related GAO Products		40
Table		
	Table 1: Government Officials and Industry Representatives We Interviewed	31

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## Figures

Figure 1: Information on Department of Transportation Whistleblower Statutes	5
Figure 2: Federal Whistleblower Investigation and Review Process	6
Figure 3: Number of Whistleblower Claims for Transportation-Related Statutes, Fiscal Years 2008-2013	17
Figure 4: Disposition of Transportation-Related Whistleblower Claims That OSHA Closed in Fiscal Year 2013	24
Figure 5: Key Differences in the Whistleblower Protection Process of the Transportation-Related Statutes	28
Figure 6: Disposition of Whistleblower Claims That the Office of Administrative Law Judges Closed in Fiscal Year 2012	35
Figure 7: Disposition of Whistleblower Claims That the Administrative Review Board Closed in Fiscal Year 2012	36

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## Abbreviations

ALJ	Administrative Law Judge
AIR21	Wendell H. Ford Aviation Investment and Reform Act of the 21st Century
ARB	Administrative Review Board
DOT	Department of Transportation
FAA	Federal Aviation Administration
FMCSA	Federal Motor Carrier Safety Administration
FRA	Federal Railroad Administration
FRSA	Federal Railroad Safety Act
FTA	Federal Transit Administration
MAP-21	Moving Ahead for Progress in the 21st Century Act
MOA	memorandums of agreement
NHTSA	National Highway Traffic Safety Administration
NTSSA	National Transit Systems Security Act
PHMSA	Pipeline and Hazardous Materials Safety Administration
PSIA	Pipeline Safety Improvement Act
OALJ	Office of Administrative Law Judges
OSHA	Occupational Safety and Health Administration
STAA	Surface Transportation Assistance Act

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March 19, 2014

The Honorable John D. Rockefeller IV  
Chairman  
The Honorable John Thune  
Ranking Member  
Committee on Commerce, Science, and Transportation  
United States Senate

The Honorable Fred Upton  
Chairman  
The Honorable Henry A. Waxman  
Ranking Member  
Committee on Energy and Commerce  
House of Representatives

Transportation industry employees who “blow the whistle” on prohibited or unlawful practices they discover through their employment can play an important role in ensuring that their employers comply with federal laws. Currently, there are six federal statutes that prohibit employers in various transportation industries from discriminating or retaliating against these employees.<sup>1</sup> If whistleblowers in these transportation industries believe they experienced reprisals (such as being fired) for participating in protected activities, they can file a claim with the Department of Labor’s Occupational Safety and Health Administration (OSHA). Through its Whistleblower Protection Program, OSHA investigates and reviews whistleblower claims.<sup>2</sup> To carry out its responsibilities for investigating whistleblower claims, OSHA coordinates with relevant federal agencies that oversee those industries. For example, in the case of the various transportation-related statutes, OSHA coordinates with the Department of Transportation (DOT). As the federal agency responsible for developing and enforcing regulations to ensure a safe transportation system that employers in the transportation sectors must follow, DOT investigates potential transportation-related safety issues to determine whether any DOT regulations have been violated.

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<sup>1</sup>The transportation industries are automotive, aviation, commercial motor carriers, pipeline, public transit, and rail.

<sup>2</sup>In all, OSHA is responsible for investigating whistleblower claims under 22 statutes.

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The Moving Ahead for Progress in the 21st Century Act (MAP-21), enacted in 2012, mandated protections for individuals employed in the auto industry and expanded OSHA's responsibility to investigate the whistleblower claims from auto industry workers.<sup>3</sup> MAP-21 also directed that we review OSHA's efforts to include auto industry workers in the Whistleblower Protection Program.<sup>4</sup> In this report, we present information on (1) the steps OSHA has taken to include auto industry employees in its whistleblower program and the extent to which OSHA has collaborated with DOT components to address potential safety violations, and (2) the number of transportation-related whistleblower claims in the last 6 years and stakeholder-identified factors that might affect those numbers. We also present information on the differences in the transportation-related whistleblower statutes (see app. I) and the disposition of claims.

To address these issues, we examined the whistleblower provisions of the six statutes covering transportation workers in industries regulated by DOT<sup>5</sup>: (1) MAP-21,<sup>6</sup> (2) the Federal Railroad Safety Act,<sup>7</sup> (3) the National Transit Systems Security Act,<sup>8</sup> (4) the Surface Transportation Assistance Act,<sup>9</sup> (5) the Pipeline Safety Improvement Act,<sup>10</sup> and (6) the Wendell H. Ford Aviation Investment and Reform Act for 21st Century.<sup>11</sup> We reviewed our previous reports on whistleblower protections and pertinent documentation from OSHA and DOT, including memorandums of agreement (MOA), and interviewed key federal agency officials on efforts to coordinate whistleblower protections for employees in the transportation industry. We compared the agencies' MOAs with our key

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<sup>3</sup>Pub. L. No. 112-141, § 31307, 126 Stat. 405, 765 (2012).

<sup>4</sup>Pub. L. No. 112-141, § 31307(b), 126 Stat. 405, 765 (2012).

<sup>5</sup>These statutes cover transportation industry employees, not federal government employees who work for DOT.

<sup>6</sup>49 U.S.C. § 30171.

<sup>7</sup>49 U.S.C. § 20109.

<sup>8</sup>6 U.S.C. § 1142.

<sup>9</sup>49 U.S.C. § 31105.

<sup>10</sup>49 U.S.C. § 60129.

<sup>11</sup>49 U.S.C. § 42121.

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practices for effective collaboration.<sup>12</sup> We also analyzed OSHA data on the number of whistleblower claims for fiscal years 2008 to 2013 and the disposition of claims in fiscal year 2013. To determine the reliability of OSHA's data on whistleblower claims, we reviewed relevant documentation and interviewed cognizant officials about their processes for reviewing the data and ensuring their accuracy. We determined the data used to be sufficiently reliable with attribution to official sources for conveying general information on OSHA's receipt of complaints over the last 6 years and claim dispositions for fiscal year 2013.

To identify factors affecting whistleblower claims, we interviewed a broad array of stakeholders from 44 organizations representing six different transportation industries. The stakeholders include officials from organizations representing employees and employers in the different transportation industries and nonprofit and advocacy groups representing whistleblowers. We selected these stakeholders because among other things, they are significant stakeholders in the transportation industries, and they represented a significant number of members in each of the six transportation industries; they were also referred by other stakeholders, including federal government officials and experts in whistleblower issues. The factors we identified are based on information gathered from the stakeholders and should not be viewed as identifying all factors that could affect the number of whistleblower claims made; however, the factors were consistently raised by the various stakeholders. The factors we report are limited to those identified by the stakeholders noted above and may not include all factors that could be identified. Also, the factors that we have identified should not be viewed as being representative of all transportation sector representatives and stakeholders.

We conducted this performance audit from May 2013 to March 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and

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<sup>12</sup>GAO, *Managing for Results: Key Considerations for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#), (Washington, D.C.: Sept. 27, 2012). In conducting its work, GAO interviewed experts in the field of collaboration, reviewed collaborative mechanisms used by federal agencies, and reviewed and analyzed literature on interagency collaborative mechanisms.



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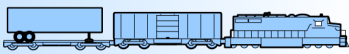
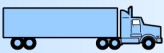

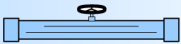


conclusions based on our audit objectives. Further details on our scope and methodology can be found in appendix II.

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## Background

As the primary federal agency responsible for administering the Whistleblower Protection Program, OSHA is responsible for investigating whistleblower claims under 22 statutes, 6 of which contain protections for employees in the transportation industries who are regulated by DOT. The 6 transportation-related statutes also include basic transportation safety provisions, which are administered by different DOT component agencies, as shown in figure 1. While OSHA investigates whistleblower claims, DOT investigates potential safety violations to determine whether any of its regulations have been violated and can refer employees alleging retaliation to OSHA. In fiscal year 2012, OSHA had a budget of approximately \$16 million and 119 full-time employees to administer the whistleblower program.

**Figure 1: Information on Department of Transportation Whistleblower Statutes**

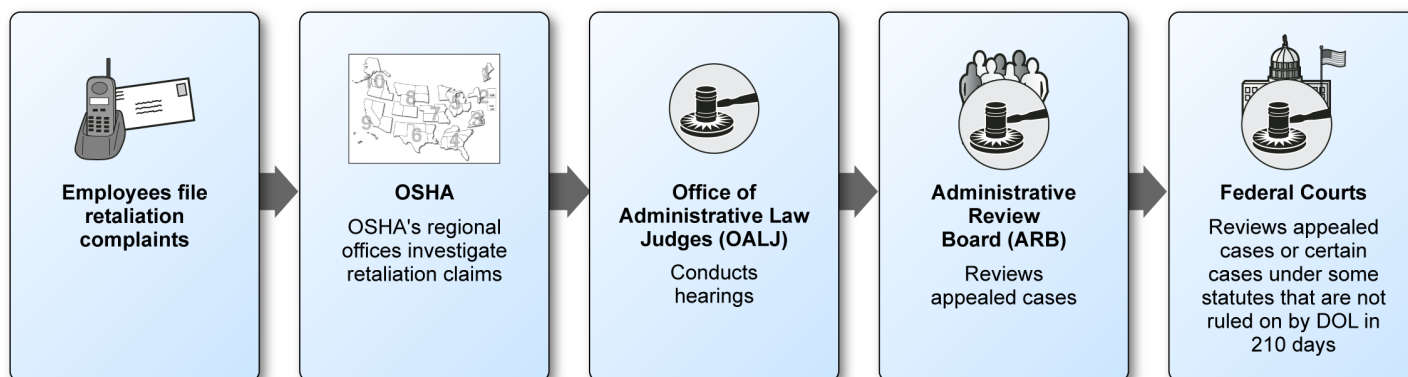
Transportation-related statutes	Year of enactment of whistleblower provision	Employees covered	DOT component administering transportation safety provision	Approximate number of employees in industry in 2012 (in thousands)
 Federal Railroad Safety Act (FRSA)	1980 <sup>a</sup>	Employees of railroad carriers, or contractors or subcontractors	Federal Railroad Administration (FRA) and Federal Transit Administration (FTA)	287
 Surface Transportation Assistance Act (STAA)	1983	Private sector drivers, including independent contractors while personally operating a commercial motor vehicle and other employees of commercial motor carriers	Federal Motor Carrier Safety Administration (FMCSA)	2,263
 Wendell H. Ford Aviation Investment and Reform Act (AIR21)	2000	Employees of air carriers or their contractors or subcontractors. Contractors are defined as companies that perform safety sensitive functions by contract for air carriers	Federal Aviation Administration (FAA)	1,117
 Pipeline Safety Improvement Act (PSIA)	2002	Employees of pipeline facilities, contractors or subcontractors	Pipeline and Hazardous Materials Safety Administration (PHMSA)	172
 National Transit Systems Security Act (NTSSA)	2007	Employees of public transportation agencies or their contractors or subcontractors, if the public transportation agencies provide regular and continuing general or special transportation to the public (e.g., subway, commuter rail, bus system)	Federal Transit Administration (FTA)	373
 Moving Ahead for Progress in the 21st Century Act (MAP-21)	2012	Employees of motor vehicle manufacturers, part suppliers, and dealerships	National Highway Traffic Safety Administration (NHTSA)	3,709

Source: GAO analysis of transportation-related statutes, OSHA data, and Bureau of Labor Statistics Current Employment Survey.

<sup>a</sup>FRSA was amended in 2007 to assign responsibility for the whistleblower protections to the Department of Labor.

As shown in figure 2, there are several steps in the OSHA whistleblower claims process that employees in transportation-related industries follow.

**Figure 2: Federal Whistleblower Investigation and Review Process**



Sources: GAO and OSHA.

- First, transportation industry employees file retaliation complaints with OSHA. A complaint should address the *prima facie* elements of a violation—that is, the complainant should state that the employee engaged in protected activity, the employer knew about the protected activity, the employer subjected the employee to an adverse action (such as being fired or demoted), and the protected activity contributed to the adverse action. OSHA investigators will screen a whistleblower claim for these *prima facie* elements and, if not met, dismiss the claim.
- Second, for claims meeting the *prima facie* standard, OSHA’s regional offices conduct an investigation. OSHA’s whistleblower investigation process involves the following key steps: receive and screen complaint, investigate the claim, and write final report and notify the parties. If OSHA’s investigation shows the complaint does not have merit (no reasonable cause to believe there was retaliation), the claim is dismissed. If the investigation leads to the Secretary of Labor’s finding of merit (reasonable cause to believe there was retaliation), OSHA issues its finding and a preliminary order, which generally includes reinstatement to the employee’s previous position and back pay and may order other monetary relief. If neither party files an objection within the required time frames, the findings and the preliminary order become final. (See app. I for information on each statute’s time frames.)
- Third, if either party objects to the Secretary’s findings or preliminary order, under the DOT transportation-related statutes, either party may

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request a hearing before one of the Department of Labor's Administrative Law Judges (ALJ). This review is *de novo*—it does not take into account the Secretary's findings from the OSHA investigation. The ALJ then makes a ruling that either upholds or overturns the Secretary's finding.

- Fourth, if either party objects to the ALJ's decision, either party may petition for review of the ALJ's decision to the Administrative Review Board (ARB) which generally issues the Secretary of Labor's final decision.
- Fifth, ARB's final decision may be appealed to the appropriate federal court of appeal. Also, under some of the DOT transportation-related statutes, whistleblowers may file their complaint in federal district court if the Secretary of Labor does not issue a final decision within 210 days. See our prior work for detailed information on OSHA's whistleblower investigation process.<sup>13</sup>

The whistleblower protection process is generally prescribed in the six DOT transportation-related whistleblower statutes, which are supplemented by regulations that clarify and set forth specific requirements for the whistleblower protection process.<sup>14</sup> The statutes also provide some time-frames for filing whistleblower complaints, investigating whistleblower claims, and issuing a final decision. For instance, a whistleblower in the covered transportation industries generally has 180 days from when the retaliatory action took place to file a claim (except under AIR21, which requires claims to be made in 90 days). Once a claim has been filed, OSHA has 60 days to issue findings and in cases where there is reasonable cause to believe there was retaliation, a preliminary order. However, the process could take longer than the 60 days. (See app. I for more information on the differences in the statutory provisions.) Given these timeframes, in some cases, whistleblower claims can take years to move through the process, from initially filing the claim to completion of the appeals process.

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<sup>13</sup>GAO, *Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency*, [GAO-09-106](#), (Washington, D.C.: Jan. 27, 2009).

<sup>14</sup>29 C.F.R. §§ 1978, 1979, 1981, 1982, and 1983.

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OSHA has been challenged in its ability to conduct investigations in a timely manner. In 2009, we examined the processing times for whistleblower claims and challenges OSHA faced in administering the program.<sup>15</sup> At that time, OSHA faced two key challenges—it lacked a mechanism to adequately ensure the quality and consistency of investigations and many investigators reported they lacked resources, such as training, to do their jobs. We made recommendations intended to improve the Whistleblower Protection Program and enhance oversight; the Department of Labor took actions to address most of our recommendations, including revising its information database and providing training.<sup>16</sup>

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<sup>15</sup>[GAO-09-106](#).

<sup>16</sup>Additional information about the status of these recommendations is available at <http://www.gao.gov/products/GAO-09-106>.

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## OSHA Has Initiated Efforts to Include Auto Employees in Its Whistleblower Program, but Has Opportunities to Enhance Collaborative Mechanisms with DOT

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### OSHA Has Taken Preliminary Steps to Establish Whistleblower Protections for Auto Employees

OSHA is establishing whistleblower protections for auto industry employees as required under MAP-21. Specifically, OSHA has started to develop an interim final rule, investigative policies and procedures, and a fact sheet as follows:<sup>17</sup>

- **Interim final rule.** According to OSHA officials, the agency is in the early stages of developing an “interim final rule”<sup>18</sup> that will cover whistleblower claims filed under MAP-21. MAP-21’s whistleblower provisions protect auto industry employees from retaliation by motor vehicle manufacturers, parts suppliers, and dealerships, for engaging in protected activity related to motor vehicle defects. The rule would, among other things, summarize the statutory whistleblower provisions

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<sup>17</sup>During our review, OSHA initially planned to develop a memorandum of agreement (MOA) with the National Highway Traffic Safety Administration (NHTSA) for auto employees covered under MAP-21. In their technical comments on a draft of this report, the agencies said OSHA and NHTSA agreed that due to the low complaint volume under MAP-21, an MOA was not needed at this time.

<sup>18</sup>When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an “interim final rule,” or “interim rule.” This type of rule typically becomes effective immediately upon publication. In most cases, the agency stipulates that it will alter the interim rule if warranted by public comments. If the agency decides not to make changes to the interim rule, it generally will publish a brief final rule in the *Federal Register* confirming that decision. We did not review the interim final rule because it was being developed during our review.

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and the available remedies, explain how to file a claim, and describe OSHA's investigative process. The rule was placed on the Department of Labor's fall 2013 regulatory agenda;<sup>19</sup> according to OSHA, the interim final rule is scheduled for publication in October 2014. At the time of our review, additional steps that OSHA planned to take in developing the rule included researching key issues, drafting the rule in consultation with the Solicitor of Labor, sharing the draft with the National Highway Traffic Safety Administration (NHTSA), obtaining agency and departmental clearance, and submitting the rule to Office of Management and Budget for review. OSHA officials told us they did not have a project plan or timeline for completing these tasks related to development of the rule, but OSHA did have a due date for the overall development of the interim final rule. The interim final rule will be effective once it is published (currently scheduled for October 2014) and there will be a 60-day public comment period. After the comment period, OSHA plans to review the public's comments and begin drafting a final rule, whereby the drafting and clearance steps described above are to be repeated. OSHA then plans to issue the final rule, which may incorporate changes based on comments the agency received.

- **Investigative policies and procedures.** OSHA is developing the policies and procedures for its investigators to use when reviewing claims filed by auto industry employees. According to OSHA, these policies and procedures will outline the procedures for handling retaliation complaints under the auto whistleblower statute and will be included in OSHA's Whistleblower Investigations Manual.<sup>20</sup> Until these procedures are finalized in fiscal year 2014, OSHA has instructed its investigators to follow procedures under the Consumer Product Safety Improvement Act of 2008, because the procedures under this statute are similar to the MAP-21 whistleblower statute for auto industry employees.<sup>21</sup>
- **Fact sheet.** OSHA is developing a whistleblower fact sheet that describes employees' protected activities under MAP-21 and how to

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<sup>19</sup>The regulatory agenda is how agencies announce future rulemaking activities and update the public on pending and completed regulatory activities.

<sup>20</sup>OSHA's Whistleblower Investigations Manual provides guidance for investigating complaints of retaliation under all the whistleblower statutes administered by OSHA.

<sup>21</sup>Pub. L. No. 110-314, § 219, 122 Stat. 3016, 3062 (2008).

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report a claim of retaliation to OSHA. OSHA plans to publish the fact sheet for auto industry employees in 2014 and post it on its Whistleblower Protection Program webpage.<sup>22</sup>

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## OSHA and DOT Could Strengthen Their Collaborative Mechanisms

According to OSHA and DOT officials, memorandums of agreement (MOA) are key documents through which the agencies document their collaboration. Although MOAs are not required by law, officials at both agencies said that the MOAs provide benefits, such as establishing a process between the agencies to communicate, exchange information, and work on common issues involving transportation safety violations that may arise from whistleblower complaints. In addition, agency officials said the MOAs provide continuity between the agencies as agency staff change and help to ensure that current staff understand what information should be shared. The MOAs include, among other things, background information on the agencies' responsibilities and areas of cooperation.

OSHA has established MOAs or has plans under way to do so with several DOT components. For example, OSHA has established an MOA with the Federal Aviation Administration (FAA) covering aviation employees, and with the Federal Railroad Administration (FRA) covering rail employees in 2002 and 2012, respectively.<sup>23</sup> These MOAs are available on OSHA's website and transportation industry employees and the public can access the documents. Although OSHA had not yet established MOAs with DOT components covering the remaining transportation industries, OSHA officials told us they were in the process of developing an MOA with the Federal Motor Carrier Safety Administration (FMCSA) to cover commercial drivers and other motor carrier employees and the Pipeline and Hazardous Materials Safety Administration (PHMSA) to cover pipeline employees. OSHA officials said

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<sup>22</sup>OSHA has developed and posted fact sheets for other transportation industry employees in aviation, commercial motor carriers, pipeline, public transportation agencies, and railroad workers.

<sup>23</sup>Since 1993, DOT's component agencies have been authorized to enter into MOAs with OSHA in regard to setting and enforcing occupational safety or health standards and whistleblower protections for employees in DOT-regulated industries. 49 C.F.R. § 1.81(a)(23).



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they plan to finalize the MOAs with FMCSA and PHMSA in 2014.<sup>24</sup> OSHA requested an introductory meeting with the Federal Transit Administration (FTA) to discuss whether an MOA is needed to cover public transit employees.<sup>25</sup> OSHA and NHTSA agreed that due to the low complaint volume under MAP-21 for auto employees, an MOA is not needed at this time. According to OSHA, the agencies will maintain established points of contact, keep lines of communication open, and continue to share information. Furthermore, OSHA officials said regardless of whether MOAs are developed with all DOT component agencies, OSHA has established points of contact at each component agency and will continue to share information with these agencies.

In our past work, we concluded that collaboration is critical when meaningful results that the federal government seeks to achieve require the coordinated efforts of more than one federal agency.<sup>26</sup> Following key practices for effective collaboration can help agencies address a range of challenges, including policy development, program implementation, oversight and monitoring, information sharing and communication, and organizational capacity for training.<sup>27</sup> For this review, we determined that two of the key practices are directly relevant to OSHA's efforts to collaborate with DOT: (1) defining roles, responsibilities, and authorities; and (2) defining outcomes and monitoring progress toward outcomes. OSHA and DOT officials agree that these key practices are beneficial for effective collaboration and believe the key practices we identified have been incorporated in the existing MOAs. However, based on our review of the existing MOAs, we found that the practices were not fully incorporated as discussed below.

## Roles and Responsibilities

As our prior work has shown, when agencies work together to define and agree on their respective roles and responsibilities, as well as steps for

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<sup>24</sup>In OSHA's technical comments, OSHA said the agency is considering whether certain MOAs are necessary, specifically those involving transportation statutes with low complaint volume.

<sup>25</sup>We were unable to review any draft of MOAs because they were in the beginning stages of development during our review.

<sup>26</sup>[GAO-12-1022](#).

<sup>27</sup>[GAO-12-1022](#). The key practices for collaboration include outcomes and accountability, bridging organizational cultures, leadership, clarity of roles and responsibilities, participants, resources, and written guidance and agreements.

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decision making, clear purposes and goals can be achieved. For example, as part of this effort, agencies can begin to clarify who will do what, identify how to organize their joint and individual efforts, and articulate steps for decision making.<sup>28</sup> Our review of the MOAs between OSHA and DOT components found the agreements document some roles and responsibilities across broad areas of collaboration and provide the framework for working together and defining collaboration, for example:

- Officials from both OSHA and DOT have said that it is in their interests to share information—that is, to identify or refer potential claims of retaliation and safety violations to the other agency. Specifically, if an employee reports a potential safety violation directly to OSHA, it is beneficial for OSHA to refer the employee to DOT since DOT components investigate the allegations of potentially unsafe conditions. To facilitate referrals between the agencies, OSHA’s MOAs with FAA<sup>29</sup> and FRA state that when an individual notifies FAA or FRA of alleged discrimination that involves air-carrier or rail-carrier safety, the DOT agencies will inform the individual that a personal remedy is available only through OSHA and that the individual should personally contact OSHA.<sup>30</sup> Additionally, according to OSHA’s Whistleblower Investigation Manual, OSHA should provide all incoming retaliation complaints, findings, and orders to the relevant DOT agency.
- OSHA’s MOAs with FAA and FRA require OSHA to provide FAA and FRA copies of all complaints and any findings filed under the relevant statute. FAA recently established a secure electronic mailbox designed to receive such complaints and findings from OSHA. Additionally, FAA is using that e-mail mailbox to securely communicate with OSHA to confirm receipt of a complaint or finding, refer a new complaint, and notify staff of safety enforcement actions and outcomes FAA initiated based on OSHA-referred complaints or findings. FRA officials said that all OSHA complaints relevant to FRA

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<sup>28</sup>[GAO-12-1022](#).

<sup>29</sup>Although FAA refers to its agreement as a memorandum of understanding, in this report we use MOAs to refer to agreements between OSHA and DOT components.

<sup>30</sup>There is no direct referral from DOT to OSHA. It is left to the individual employee whether he or she wants to file a claim with OSHA.

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are sent to FRA headquarters where they are scanned into a database and reviewed for any potential violations of FRA safety regulations. FRA staff summarizes how FRA handles the complaint and this information is added to FRA's file.

OSHA's current MOAs include general descriptions of the agencies' respective authorities and responsibilities and, according to agency officials, are intended to be broad, flexible agreements to facilitate cooperation. However, the existing MOAs do not clearly define roles with respect to training and regional coordination between the agencies. For example, although the FRA MOA includes information on developing training, the MOA with FAA does not because in general, OSHA officials said a more specific MOA may quickly become outdated or inoperable. Nevertheless, it is unclear which agency—FAA or OSHA—would develop or provide any training to assist FAA enforcement staff in recognizing alleged discrimination complaints that must be referred to OSHA and to assist OSHA staff in recognizing potential violations of federal air safety regulations that should be reported to DOT. OSHA officials said their investigative staff would benefit from additional training because a key challenge the staff face is to fully understand the differences in the transportation industries and statutes. Having roles and responsibilities with respect to training clearly articulated in the FAA MOA (and other MOAs as they are developed) could help ensure such training takes place.

Regarding regional coordination, neither of the existing MOAs specifically defined roles with respect to regional coordination, and as a result, it is not clear or transparent how referrals are coordinated between OSHA and DOT's regional offices. For example, in the case of FRA, before April 2011, each regional office had its own practices for responding to OSHA investigators' requests for whistleblower-related information, which resulted in FRA investigators being unaware of their roles and responsibilities regarding the type of information they could share with OSHA. In April 2011, FRA issued detailed guidance about responding to OSHA's requests for information. FRA developed a centralized approach to respond to OSHA's requests. However, FRA's guidance was issued to FRA's regional offices, and not to OSHA's regional offices and it was unclear whether OSHA's regional investigators were aware of FRA's policies. By more clearly defining agency roles and responsibilities regarding how regional coordination will occur, the agencies may be better able to avoid miscommunication and address inconsistent

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Outcomes and Monitoring  
Progress

whistleblower processes involving referrals between the agencies' regional offices.

In September 2012, we concluded that federal agencies engaged in collaborative efforts need to create the means to monitor and evaluate their efforts.<sup>31</sup> Reporting on these activities can help key decision makers within the agencies, as well as clients and stakeholders, to obtain feedback for improving both policy and operational effectiveness. With respect to whistleblower complaints, it would be beneficial for OSHA and DOT to track, monitor, and document the outcomes of the referral processes they have established—that is, the referrals from DOT to OSHA of potential claims of retaliation and the referrals from OSHA to DOT of potential safety violations.<sup>32</sup> Although OSHA's MOAs with FAA and FRA establish these referral processes, the agencies did not develop or document an approach for tracking, monitoring, and overseeing the referral processes. Without such data or developing and documenting an approach, neither OSHA nor DOT can assess whether the referral process is working as intended. OSHA officials said FAA and OSHA are developing a new MOA to streamline the agencies' whistleblower processes for referrals to make them more efficient and consistent. However, since some referrals could involve serious safety concerns from other transportation industries that do not yet have established MOAs with OSHA, it is important that all transportation-related referrals be tracked, monitored, and evaluated. According to OSHA officials, OSHA identifies its intended outcomes for the whistleblower program overall within its operating plan, and specific information on monitoring outcomes of OSHA's collaboration with DOT regarding whistleblower referrals is not included in the plan. We believe by establishing a means to monitor and evaluate the referral processes in the MOAs, OSHA and the DOT component agencies would be able to identify areas for improvement and better ensure that appropriate steps are taken with respect to referrals that include safety violations.

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<sup>31</sup>[GAO-12-1022](#).

<sup>32</sup>When employees contact DOT about a potential claim of retaliation, DOT informs the employees that they should contact OSHA directly to file a claim.

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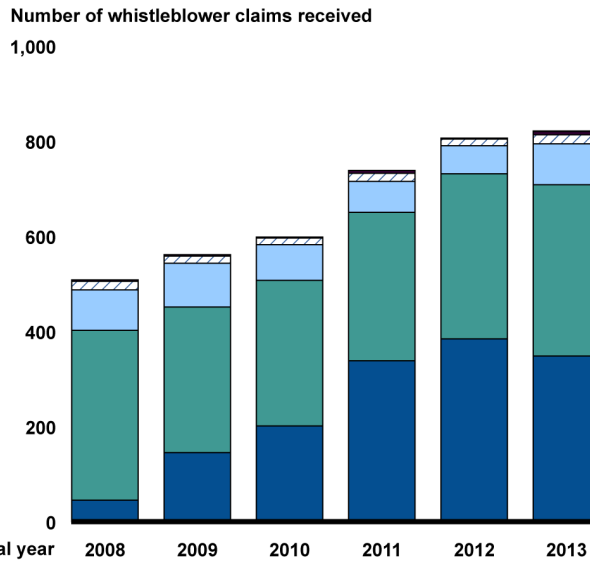
Transportation-  
Related  
Whistleblower Claims  
Have Increased, and  
Stakeholders  
Identified Various  
Factors Potentially  
Affecting the Number  
of Claims

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Whistleblower Claims  
Have Increased in the Last  
6 Fiscal Years

Overall, the number of transportation-related whistleblower claims increased during the last 6 fiscal years—from 508 in fiscal year 2008 to 821 in fiscal year 2013 (see fig. 3). A sharp rise in claims filed by rail employees, discussed later in this report, accounted for most of the increase in the number of claims. Claims from other transportation industry employees fluctuated during that time. In fiscal year 2013, one whistleblower claim was filed in the auto industry (under the new provisions in MAP-21).

**Figure 3: Number of Whistleblower Claims for Transportation-Related Statutes, Fiscal Years 2008-2013**



	Fiscal year	2008	2009	2010	2011	2012	2013
Moving Ahead for Progress in the 21st Century Act (MAP-21)		N/A	N/A	N/A	N/A	N/A	1
Pipeline Safety Improvement Act (PSIA)		3	3	2	6	2	7
National Transit Systems Security Act (NTSSA)		18	15	14	17	14	19
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)		85	92	75	65	59	86
Surface Transportation Assistance Act (STAA)		357	306	306	312	347	360
Federal Railroad Safety Act (FRSA)		45	145	201	338	384	348
<b>Total</b>		<b>508</b>	<b>561</b>	<b>598</b>	<b>738</b>	<b>806</b>	<b>821</b>

Source: OSHA's Whistleblower Protection Program statistics.

Auto industry stakeholders we contacted, including employers and employee representatives, expect the number of whistleblower claims from auto employees to be low because they believe the industry has multiple reporting mechanisms in place, which enables employees to raise safety concerns through those avenues. For example, representatives from the five major auto makers we spoke with noted that a safety-reporting system exists internally within each company, and the companies expect and encourage their employees to report any safety concerns without retaliation. All of the auto makers we contacted said they have a reporting program, such as a hotline, to allow employees to raise safety issues anonymously via the phone or by e-mail, and a process for evaluating and addressing, as appropriate, the reported

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safety issues. One auto maker we contacted said it has an employee award program, which honors its employees for identifying and reporting any safety concerns on its automobiles, rather than retaliating against employees for raising safety issues. Union officials we contacted also mentioned that grievance procedures and a neutral arbitration process exist internally within one auto company and, as a result, they expect very few whistleblower claims from auto employees at that company. On the other hand, union officials also told us that many auto employees may not be aware of their whistleblower protections under MAP-21, which could also lead to fewer claims with OSHA.

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**Stakeholders Cited  
Various Factors That Might  
Affect the Number of  
Whistleblower Claims**

Stakeholders we contacted consistently identified multiple factors that need to be considered when looking at the number of whistleblower claims filed.<sup>33</sup> These factors are not mutually exclusive and could either increase or decrease the number of whistleblower claims filed with OSHA. The factors include (1) industry-specific characteristics, (2) multiple avenues to address safety issues or a strong safety culture, (3) awareness of whistleblower protection rights, (4) fear of retaliation, (5) statutory whistleblower provisions, and (6) a high number of dismissed claims.

**Industry-Specific  
Characteristics**

Stakeholders we contacted consistently cited unique characteristics and cultural differences in each transportation industry as a factor in the number of whistleblower claims. For example, they noted that the number of workers in an industry could play a role. Specifically, a commercial motor vehicle industry official noted that the large number of active truck drivers, compared to the number of employees in other transportation industries contributes to the number of whistleblower claims made by truck drivers. In other words, since there are so many truck drivers, the number of workers who may file a claim might be statistically larger than in other transportation industries. The Bureau of Labor Statistics reported more than 2.2 million employees in the commercial motor vehicle industry, compared to about 1.1 million and 287,000 in the aviation and rail industries, respectively, in 2012.

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<sup>33</sup>The factors were commonly identified by stakeholders; however, not all stakeholders identified each factor.

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Multiple Avenues to Address Safety Issues or a Strong Safety Culture

The presence of labor unions may also contribute to the number of whistleblower claims, according to rail and aviation industry stakeholders we contacted. In a 2011 study of employees and whistleblowers in the work place, the Ethics Resources Center found that union employees, who are often provided certain contractual protections, had much higher rates of reporting specific misconduct than nonunion employees.<sup>34</sup> Officials from OSHA and rail employee groups we contacted also noted that the relationship between employees and management in the rail industry and the working conditions for rail employees has been challenging, such as working up to 16 hours a day and suffering from chronic injuries on the job, which has likely contributed to employees filing more whistleblower claims.

The extent to which employees are able to successfully report safety violations also affects the number of potential claims, according to officials from the aviation, pipeline, and public transit industries and unions we interviewed. The availability of multiple safety-reporting mechanisms, such as safety hotlines provided by companies and the industry, can affect whether employees file whistleblower claims. Officials told us that when employees can report safety issues anonymously, they are less fearful of retaliation. Federal safety programs are also available to serve as an avenue for reporting safety issues. For instance, FAA established various voluntary disclosure reporting and partnership programs, which allow aviation employees to report safety concerns and events with protection from legal or disciplinary action by FAA or others, even if the reporting employee caused the safety violation.<sup>35</sup> According to aviation union officials we contacted, this type of collaborative program with labor, management, and FAA may have contributed to the

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<sup>34</sup>Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey*, Arlington, VA (2012).

<sup>35</sup>The goal of FAA's Aviation Safety Action Program is to enhance aviation safety through the prevention of accidents and incidents. Its focus is to encourage voluntary reporting of safety issues and events that come to the attention of employees of certain aircraft certificate holders (i.e., aircraft carriers). The program is based on a safety partnership that includes the FAA and air carriers as well as any third party entities, such as the employee's labor organization. Other self-reported safety programs include the Voluntary Disclosure Reporting Program. For more information on these safety programs, see GAO, *Aviation Safety: Enhanced Oversight and Improved Availability of Risk-Based Data Control Could Further Improve Safety*, [GAO-12-24](#) (Washington, DC: Oct. 5, 2011) and GAO, *Aviation Safety: Improved Data Quality and Analysis Capabilities Are Needed as FAA Plans a Risk-Based Approach to Safety Oversight*, [GAO-10-414](#) (Washington, DC: May 6, 2012).



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## Awareness of Whistleblower Protection Rights

decreasing volume of whistleblower claims since fiscal year 2009, although the numbers have increased in fiscal year 2013. Aviation union officials also noted how such programs have changed the aviation industry culture and allowed employees to report their mistakes and work on resolving safety issues, rather than fearing disciplinary actions or retaliation. Similar to the aviation industry, pipeline union officials we contacted told us that pipeline companies are encouraged to establish an environment where employees can report safety concerns without retaliation. A 2011 survey of employees in the workplace found that employees are more likely to report unlawful or prohibited practices if employees feel confident about their job security and are not worried about retaliation.<sup>36</sup>

Rail-industry and commercial motor-vehicle industry officials we contacted consistently noted employees' awareness of whistleblower protection rights as another factor that may increase or decrease the number of claims. Union officials noted that educating rail employees on whistleblower protection rights may contribute to the higher number of whistleblower claims from rail workers because employees are more aware of their rights. According to rail union officials, they made a concerted effort to educate their members on whistleblower protection rights soon after the Federal Rail Safety Act was amended in 2007.<sup>37</sup> FRA officials also noted that more rail workers are learning from various sources about OSHA's enforcement of whistleblower protections for rail employees, which might have led to the increase in whistleblower claims.<sup>38</sup> In contrast, pipeline union officials noted that the lower number of whistleblower claims in the pipeline industry may also be attributed to pipeline workers' lack of awareness of OSHA's whistleblower protection program. A union official representing one segment of truck drivers and a whistleblower attorney representing truck drivers cited lack of education on whistleblower protection rights by both employers and employees as a contributing factor to the number of whistleblower claims. On the other

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<sup>36</sup>Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey*, Arlington, VA (2012).

<sup>37</sup>The Federal Rail Safety Act was amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub.L.No. 110-53, 121 Stat. 444.

<sup>38</sup>FRA officials also told us that FRA's witness statement form, which is used for enforcement activities, includes information about whistleblower protections and where to file a claim with OSHA.

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hand, this official also noted that long-haul truck drivers and independent owner-operators of trucks may be more aware of whistleblower protection rights than truck drivers in other industries, an awareness that could help explain the high number of whistleblower claims in the commercial motor-vehicle industry.

## Fear of Retaliation

Officials representing rail and truck drivers and a whistleblower attorney we contacted said that fear of retaliation is a factor that could cause employees to underreport safety violations and also file fewer whistleblower complaints. For example, officials representing truck drivers noted that truck drivers may break federal safety regulations, such as driving beyond the maximum number of service hours, to avoid getting fired or facing other retaliation from their employers.<sup>39</sup> Independent truck drivers are paid by the mile and are under pressure by employers to extend driving beyond the regulated service hours each day, which may compromise the ability of the drivers to drive trucks safely. Officials representing truck drivers told us that if truck drivers do not want to drive beyond the required service hours and compromise safety, then employers may retaliate in many different ways, including providing no loads (i.e., goods or products) to be delivered. Those representatives and two whistleblower attorneys we contacted said employers can also retaliate by filing fictitious reports on truck drivers, such as reporting that a truck driver abandoned a load, in their employment history, so no one else would hire them.<sup>40</sup> Since truck drivers are afraid of getting “black-listed” if they make any safety complaints, they may be less likely to report any safety violations. Officials representing independent truck drivers also noted that whistleblower claims may be from new drivers because more experienced drivers are too fearful to file claims. New drivers may also be more aware of whistleblower protections since the Federal Motor Carrier Safety Administration began requiring

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<sup>39</sup>Most drivers are subject to the Hours of Service regulations, if they drive commercial motor vehicles. The Hours of Service regulations differs for property-carrying drivers and passenger-carrying drivers (e.g., Greyhound bus drivers). Passenger-carrying drivers may not drive after having been on duty for 15 hours, following 8 consecutive hours off duty, while property-carrying drivers may not drive beyond the 14<sup>th</sup> consecutive hour after coming on duty, following 10 consecutive hours off duty. (49 C.F.R. Part 395).

<sup>40</sup>As part of a pre-hiring procedure, nearly all large trucking companies will look at a trucker’s employment and driving record to see if there is any history of accidents, traffic violations, or other issues that might disqualify the driver from the job. HireRight collects all this information into its database and sells the information on individual drivers as a Drive-a-Check report.

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whistleblower training as part of the entry-level requirements for commercial drivers in July 2004.<sup>41</sup>

## Statutory Whistleblower Provisions

### Example of a Whistleblower Claim

A truck driver filed a whistleblower claim alleging that his employer violated his rights under the Surface Transportation Assistance Act when the employer blacklisted him and placed an unfavorable notation on his employment report. This retaliation stemmed from the truck driver's refusal to drive an unsafe truck and filing a complaint about violations of commercial vehicle safety regulations related to the unsafe truck. In December 2008, the employee filed a complaint with OSHA. After OSHA investigated the claim, it was appealed through ALJ's and ARB's *de novo* review process. The ARB affirmed ALJ's decision and issued a decision in favor of the employee in June 2012.

Source: GAO analysis of Administrative Review Board data.

Differences in the statutory provisions related to the number of protected activities and availability of punitive damages may also contribute to variations in the number of filed whistleblower claims, according to rail and public transit officials we contacted. In particular, rail industry officials told us that the larger number of protected activities for rail employees compared with other transportation-related whistleblower statutes has enabled more rail employees to file claims. Rail union officials told us that, on the other hand, the additional protected activities have had a positive effect on rail employees as rail carriers are less likely to retaliate against employees for reporting injuries. The Federal Rail Safety Act provides 12 categories of protected activities for rail employees, including prohibiting employers from retaliating against employees for notifying rail carriers or DOT of a work-related injury or illness and medical and first-aid treatment.<sup>42</sup> Other transportation-related statutes have no such protection for covered employees. According to OSHA officials, about 60 percent of whistleblower claims filed by rail workers involved injury reporting over the years. OSHA recently began meeting with representatives from air, rail, and trucking industries to discuss the effectiveness of existing legislation in addressing practices that threaten employees' ability to raise safety concerns, among other things.<sup>43</sup> Additionally, rail industry officials told us that the availability of punitive damages in some statutes may be another contributing factor to the number of whistleblower claims. Rail, trucking,

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<sup>41</sup>All entry-level drivers who drive in interstate commerce and are subject to the commercial drivers license requirements of 49 C.F.R. Part 383 must comply with the rules of Entry-Level Driver Training Requirements of 49 C.F.R. Part 380, Subpart E. Drivers who are subject to the jurisdiction of the Federal Transit Administration or who are otherwise exempt under 49 C.F.R. § 390.3(f) are exempt. Information on whistleblower protections is included as part of the Entry-Level Driver Training Requirements. See 69 Fed. Reg. 29384 (May 21, 2004).

<sup>42</sup>49 U.S.C. § 20109.

<sup>43</sup>The meeting with representatives from air, rail, and trucking industries is part of the Whistleblower Protection Advisory Committee's Transportation Sector Working Group that was charged to consider the effects and successes of the existing laws, gaps in both legislation and employer practices, employer practices that raise particular concerns, and the effectiveness of current legislation and enforcement in addressing these gaps. According to OSHA officials, the purpose of the working group is to obtain advice on where and how to most effectively and productively focus OSHA's enforcement and outreach to the industries to achieve the greatest impact, given its current resources.

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High Number of Dismissed Claims

and pipeline employees are eligible to receive punitive damages if OSHA determines their whistleblower claims to be of merit. Rail industry officials noted that after the Federal Rail Safety Act was amended in 2007, increasing the amount of punitive damages that could be collected, the number of claims from rail workers began increasing.<sup>44</sup>


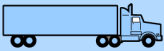

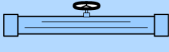
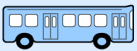
Officials representing rail, aviation, and public transit employees and truck drivers, and a whistleblower attorney told us that the high number of dismissed claims may discourage other employees, who may believe they have been retaliated against, from filing a claim. As shown in figure 4, some 49 percent of transportation-related claims OSHA closed in fiscal year 2013 were dismissed, while 3 percent of the claims were found to have merit. According to OSHA officials, whistleblower claims were dismissed for various reasons, including that the claims were filed past the deadline or had insufficient evidence to demonstrate the employer had violated the whistleblower provisions. Additionally, about 52 percent (64) of the 123 claims that were closed by the OALJ and about 66 percent (19) of 29 claims that were closed by ARB in fiscal year 2012 were also dismissed. More information on the disposition of transportation-related whistleblower claims that were closed in fiscal year 2012 by OALJ and ARB can be found in appendix III.<sup>45</sup>

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<sup>44</sup>The Federal Rail Safety Act was amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub.L.No. 110-53, 121 Stat 444.

<sup>45</sup> We used data from fiscal year 2012 from these two agencies because it was the most recent data available to us during the time of our review.

**Figure 4: Disposition of Transportation-Related Whistleblower Claims That OSHA Closed in Fiscal Year 2013**

Transportation-related statutes	Merit	Settled <sup>a</sup>	Kicked out <sup>b</sup>	Dismissed	Withdrawn	Total number of closed cases
 Federal Railroad Safety Act (FRSA)	17 (4%)	110 (28%)	34 (9%)	173 (43%)	65 (16%)	399
 Surface Transportation Assistance Act (STAA)	11 (3%)	83 (22%)	5 (1%)	191 (51%)	85 (23%)	375
 Wendell H. Ford Aviation Investment and Reform Act (AIR21)	2 (2%)	18 (20%)	N/A	53 (60%)	15 (17%)	88
 Pipeline Safety Improvement Act (PSIA)	0	0	N/A	5 (83%)	1 (17%)	6
 National Transit Systems Security Act (NTSSA)	0	1 (9%)	0	5 (45%)	5 (45%)	11
<b>Total</b>	<b>30 (3%)</b>	<b>212 (24%)</b>	<b>39 (4%)</b>	<b>427 (49%)</b>	<b>171 (19%)</b>	<b>879</b>

Source: OSHA's Whistleblower Protection Program statistics.

Note: Percentages may not sum to 100 because of rounding.

<sup>a</sup>The number of settled claims includes both settlements where OSHA investigators actively assisted both parties (complainant and respondent) in reaching an agreement, where possible, and those where OSHA did not participate in the settlement negotiations. Settled claims may also have merit, but they were categorized as "settled" if both parties reached an agreement.

<sup>b</sup>Kicked out claims are those filed under FRSA, STAA, and NTSSA, where the complainants decided to file civil actions in federal district courts for *de novo* review, where there had been no final decision of the Secretary of Labor within 210 days of filing the claim, and there had been no delay due to the complainant's bad faith.

Officials representing rail, aviation, and public transit employees and truck drivers we contacted attributed the high number of dismissed claims to inconsistent investigation and significant differences in the investigation of whistleblower claims among OSHA's regional offices; the officials told us that while the investigative process is fair and reasonable in some regional offices, other regional offices are not. Another official representing transportation employees told us that there could be a different investigation process and decision for the same type of whistleblower claim depending on which OSHA regional office was handling the claim. In September 2010, the Department of Labor's Office of Inspector General reported that OSHA did not always ensure that whistleblower claims were appropriately investigated and could not provide assurance that complainants were protected as intended under

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the various whistleblower protection statutes.<sup>46</sup> The DOL-OIG recommended, among other things, that OSHA oversee and monitor investigations, and OSHA agreed. OSHA officials told us that steps have been taken to improve the investigative process, such as further training of investigators and increased staffing. In December 2013, OSHA completed its first regional audit. OSHA is also planning to establish a work group to look at developing a consistent process for OSHA's regions to use when they conduct case file audits of the whistleblower program. OSHA plans to establish the work group in March 2014 and plans to develop a process by September 2014. OSHA plans to incorporate this process into OSHA's overall audit process.

Although the number of transportation-related whistleblower claims has increased in the last 6 years, the reported number of claims can be interpreted various ways, yielding little meaningful information. For example, a low number of whistleblower claims could mean that employees are not retaliated against for reporting safety violations. But a low number of claims could also mean that employees are so fearful of retaliation that they choose not to report safety violations in the first place, or even that employees who have been retaliated against for reporting a safety violation are so discouraged by the high number of dismissed claims that they choose not to file a claim. Our interviews with key stakeholders revealed numerous factors that could affect the number of claims made. Because of the factors identified by stakeholders, it is difficult to use the number of claims as an indication of whether employees are taking appropriate advantage of their protections under whistleblower laws.

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## Conclusions

The ability of transportation workers to report safety violations or other unsafe conditions without fear of reprisal is protected by law. While OSHA has primary responsibility for administering the Whistleblower Protection Program for these workers, collaboration with DOT is critical because of DOT's role to enforce the underlying safety provisions of the transportation-related whistleblower statutes. Consistent with key practices for effective collaboration, OSHA and DOT document their agreements through MOAs that are publicly available, and at the time of

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<sup>46</sup>Department of Labor Office of Inspector General, *Complainant Did Not Always Receive Appropriate Investigation Under the Whistleblower Protection Program*, Report Number 02-10-202-10-105 (Washington, D.C.: Sept. 30, 2010).

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our review, the agencies had two existing MOAs and were in the process of developing MOAs for almost all of the other transportation industries. There are opportunities to strengthen these MOAs by following key practices for effective collaboration, especially related to (1) clearly delineating roles and responsibilities for training and regional coordination and (2) monitoring program outcomes. It is unclear which agencies will develop training and how they will coordinate their regional offices' activities and how the referral processes will be monitored to ensure that goals and desired outcomes are achieved. Clearly delineating roles and responsibilities for conducting training and for coordinating regional offices' activities could help ensure that training occurs and that the agencies avoid miscommunication and inconsistent processes involving referrals between their regional offices. Additionally, lacking clarity on how the agencies will evaluate and report on the results of the referral processes, the agencies are unable to identify areas for improvement and ensure that appropriate steps are taken on safety violations. Finally, if OSHA and DOT do not build these practices into their ongoing efforts to develop their MOAs, they may miss an opportunity to enhance and sustain interagency collaboration through these MOAs.

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## Recommendation for Executive Action

We recommend that the Secretaries of Labor and Transportation evaluate their current and in-process MOAs to ensure that the MOAs incorporate key practices for collaboration, such as those practices highlighted in this report.

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## Agency Comments and Our Evaluation

We provided a draft of this report to the Departments of Labor and Transportation for their review and comment. The Department of Labor provided written comments (reprinted in app. IV), as well as technical comments. The Department of Transportation provided technical comments only. We incorporated the technical comments from both agencies as appropriate.

Neither agency stated whether they agreed or disagreed with the recommendation that the agencies assess their current and in-process MOAs and incorporate key practices for collaboration. While DOT did not address the recommendation, OSHA said that it believed its current and pending MOAs do incorporate the key collaboration practices that we identified in this report but agreed that there was room for improvement in the implementation of these key practices when collaborating with DOT's agencies. We did not assess the extent to which the key practices were actually being implemented. However, as discussed in this report, the

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existing MOAs do not clearly define roles and responsibilities with respect to training and regional coordination between the agencies, and the agencies did not develop or document an approach for tracking, monitoring, and overseeing the referral process. Thus, we continue to believe that there are opportunities to strengthen the existing MOAs by better delineating roles and responsibilities and monitoring program outcomes that may help inform the implementation of such practices. Moreover, because the pending MOAs were not made available for our review, we were not able to determine whether they contained the key practices.

In technical comments, both agencies also noted that for certain industries with low complaint volume such as auto employees, they are assessing whether MOAs were needed at this time. We believe this approach is contradictory to the agencies' position that MOAs are a key way they document their collaboration. Additionally, as we found in this report, it is difficult to use the number of claims as an indication of whether employees are taking appropriate advantage of their protections under whistleblower laws, and so it is not clear why the agencies would use this as a determinant in their decision. Finally, for auto employees, considering that this law recently passed and OSHA is still establishing procedures for how it will address such claims, it is not surprising that the number of claims filed to date is low. As a result, we encourage OSHA and DOT to consider these factors as they assess the need for MOAs.

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We are sending copies of this report to the Secretaries of Labor and Transportation and the appropriate congressional committees. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at 202-512-2834 or [rectanusl@gao.gov](mailto:rectanusl@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found at the last page of this report. Contact information and major contributors to this report are listed in appendix V.



Lori Rectanus  
Acting Director, Physical Infrastructure Issues



# Appendix I: Differences in the Transportation-Related Whistleblower Statutes

OSHA is responsible for administering the whistleblower protection provisions of six transportation-related federal statutes. These statutes are supplemented by regulations that set forth specific requirements for the whistleblower protection process. Such a process often includes an investigation, an administrative review (which can include the Office of Administrative Law Judges (OALJ) and the Administrative Review Board (ARB), and potential legal action in a U.S. court. Many provisions of the statutes are similar, including a 60-day deadline for determining the initial findings of an OSHA investigation, a *de novo* review of appealed whistleblower claims, and some remedies, such as back pay. There are key differences in the whistleblower protection process, as shown in figure 5.

**Figure 5: Key Differences in the Whistleblower Protection Process of the Transportation-Related Statutes**

Transportation-related statutes	Deadline to file complaint		Deadline for appealing to the ALJ		Deadline for the ARB's final decision		If the Secretary has not issued a final decision within 210 days of the complaint, the complainant can bring an action in U.S. District Court	Punitive damages  Ordered by the Secretary and enforceable by the Court	Fines for frivolous complaints <sup>a</sup>
	90 days	180 days	30 days	60 days	90 days after the hearing concludes	120 days after the hearing concludes			
Moving Ahead for Progress in the 21st Century Act (MAP-21) 		✓	✓			✓	✓		✓
Federal Railroad Safety Act (FRSA) 		✓	✓			✓	✓	✓	
Surface Transportation Assistance Act (STAA) 		✓	✓			✓	✓	✓	
Wendell H. Ford Aviation Investment and Reform Act (AIR21) 	✓		✓			✓			✓
Pipeline Safety Improvement Act (PSIA) 		✓		✓	✓				✓
National Transit Systems Security Act (NTSSA) 		✓	✓			✓	✓	✓	✓

**Acronyms:**  
Office of Administrative Law Judges (ALJ)  
Administrative Review Board (ARB)

Source: GAO analysis of relevant statutes and regulations.

Note: Secretary determines that a complaint is frivolous or brought in bad faith, the Secretary may award the employer a reasonable attorney's fee not exceeding \$1,000.

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# Appendix II: Objectives, Scope, and Methodology

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The Moving Ahead for Progress in the 21st Century (MAP-21) mandated that we review efforts to include auto industry employees in the Occupational Safety and Health Administration's (OSHA) Whistleblower Protection Program and provide information on the differences in the statutory provisions and the disposition of transportation-related whistleblower claims. This report presents information on (1) the steps OSHA has taken to include auto industry employees in its whistleblower program and the extent to which OSHA has collaborated with DOT components to address potential safety violations, and (2) the number of transportation-related whistleblower claims in the last 6 years and stakeholder-identified factors that might affect those numbers.

To address these issues, we examined the whistleblower provisions of the six relevant transportation-related statutes: (1) MAP-21, (2) the Federal Railroad Safety Act, (3) the National Transit Systems Security Act, (4) the Surface Transportation Assistance Act, (5) the Pipeline Safety Improvement Act, and (6) the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. These statutes cover transportation industry employees and do not cover federal employees who work in DOT. We also reviewed our previous reports on whistleblower protection. To examine OSHA's efforts to include auto industry employees in whistleblower protection, we reviewed pertinent documentation from OSHA and DOT on whistleblower protection and interviewed key agency officials from OSHA's Whistleblower Protection Program and DOT components on coordinating efforts to administer whistleblower protection for transportation industry employees. To determine the extent to which OSHA and DOT incorporated key practices for effective collaboration, we reviewed regulations authorizing DOT to enter into MOAs with OSHA in regard to setting and enforcing occupational safety or health standards and whistleblower protections,<sup>1</sup> and identified key practices to apply to interagency collaborative efforts based on our past work on leading collaboration practices.<sup>2</sup> We reviewed the key practices<sup>3</sup> and selected two key practices for interagency collaborative efforts—defining roles and

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<sup>1</sup>49 C.F.R. § 1.81 (a)(23).

<sup>2</sup>GAO, *Managing for Results: Key Considerations for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#), (Washington, D.C.: Sept. 27, 2012).

<sup>3</sup>[GAO-12-1022](#). The key practices for collaboration include outcomes and accountability, bridging organizational cultures, leadership, clarity of roles and responsibilities, participants, resources, and written guidance and agreements.

responsibilities and outcomes and monitoring progress—because they were the most relevant to our review of OSHA’s and DOT’s collaborative efforts. We analyzed and compared memorandums of agreements that were available between OSHA and DOT component agencies to determine the extent to which the agencies were following key practices for implementing interagency collaborative mechanisms. In completing our work, we did not assess the effectiveness of OSHA’s Whistleblower Protection Program because GAO had recently reviewed the effectiveness of the program.<sup>4</sup>

To assess the number of transportation-related whistleblower claims, we analyzed OSHA data on the number of whistleblower claims received from fiscal years 2008 to 2013 and the disposition of claims that were closed in fiscal year 2013. We selected data starting from fiscal year 2008 to include the number of claims from rail and public transit employees that filed with OSHA in the first year after the enactment of the National Transit Systems Security Act and amendment of the Federal Rail Safety Act in 2007. To determine the reliability of OSHA’s data on whistleblower claims, we reviewed our previous reports recommending improvements on OSHA’s data on whistleblower complaints and assessed the status of OSHA’s implementing our recommendations, including reviewing relevant documentation, and interviewing cognizant officials about their processes for reviewing the data and ensuring their accuracy. In general, based on the corrective actions that were taken, we consider the data used to be sufficiently reliable with attribution to official sources for the purposes of providing information on the number of transportation-related whistleblower complaints received in fiscal years 2008 to 2013 and information on the disposition of transportation-related whistleblower claims that OSHA closed in fiscal year 2013. We focused on the disposition of claims in fiscal year 2013 since the corrective actions were taken over time and earlier disposition data are likely to be less reliable. We also analyzed data on the disposition of transportation-related whistleblower claims that the Office of Administrative Law Judges and Administrative Review Board closed to examine other possible disposition of claims in the whistleblower review process. We used data from fiscal year 2012 from these two agencies because it was the most recent data available to us during the time of our review. We used the Bureau of Labor Statistics Current Employment Survey to obtain data on the 2012

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<sup>4</sup>[GAO-09-106](#).

average annual number of employees in the different transportation sectors.

To identify factors affecting the number of whistleblower claims, we reviewed literature on whistleblower protection and interviewed stakeholders in the different transportation industries, including officials from 44 organizations representing employees and employers and nonprofit and advocacy groups representing whistleblowers to obtain their perspective on factors that impact the filing of whistleblower claims. Table 1 below provides a list of all the stakeholders we interviewed, including government officials and industry representatives in the different transportation industries. We selected these stakeholders because among other things, we had previously identified them as significant stakeholders in the transportation industries, and they represented a significant number of members in each of the six transportation industries; they were also referred by other stakeholders, including federal government officials and experts in whistleblower issues.

**Table 1: Government Officials and Industry Representatives We Interviewed**

Stakeholder groups	Stakeholder
Federal government agency officials	Department of Labor: <ul style="list-style-type: none"> <li>• Occupational Safety and Health Administration</li> <li>• Office of Administrative Law Judges</li> <li>• Administrative Review Board</li> <li>• Office of Inspector General</li> </ul> Department of Transportation: <ul style="list-style-type: none"> <li>• Federal Aviation Administration</li> <li>• Federal Motor Carrier Safety Administration</li> <li>• Federal Railroad Administration</li> <li>• Federal Transit Administration</li> <li>• National Highway Traffic Safety Administration</li> <li>• Pipeline and Hazardous Materials Safety Administration</li> <li>• Office of Inspector General</li> </ul>

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**Appendix II: Objectives, Scope, and Methodology**

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<b>Stakeholder groups</b>	<b>Stakeholder</b>
Organizations Representing Employees	<ul style="list-style-type: none"><li>• Government Accountability Project</li><li>• National Whistleblower Center</li><li>• AFL-CIO, Transportation Trade Department</li><li>• Commercial Vehicle Safety Alliance</li><li>• Truckers Justice Center</li></ul> <p>Automobiles:</p> <ul style="list-style-type: none"><li>• International Association of Machinist, Auto Mechanics Local 701</li><li>• United Auto Workers</li></ul> <p>Aviation:</p> <ul style="list-style-type: none"><li>• Airline Pilots Association</li><li>• American Federation of Flight Attendants</li><li>• International Brotherhood of Teamsters, Airline Division</li></ul> <p>Motor Carriers:</p> <ul style="list-style-type: none"><li>• International Brotherhood of Teamsters</li><li>• Owner-Operator Independent Driver Association</li></ul> <p>Pipeline:</p> <ul style="list-style-type: none"><li>• International Brotherhood of Electrical Workers</li><li>• International Brotherhood of Teamsters, Pipeline Division</li><li>• International Union of Operating Engineers</li><li>• United Association, Pipeliners Local 798</li></ul> <p>Public Transit:</p> <ul style="list-style-type: none"><li>• American Federation of State, County and Municipal Employees</li><li>• Transport Workers Union</li><li>• Union Transportation Union</li></ul> <p>Rail:</p> <ul style="list-style-type: none"><li>• American Train Dispatchers Association</li><li>• Brotherhood of Locomotive Engineers and Trainmen</li><li>• Brotherhood of Maintenance of Ways Employees Division</li><li>• Transportation Communications International Union</li></ul>

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**Appendix II: Objectives, Scope, and Methodology**

Stakeholder groups	Stakeholder
Organizations Representing Industry Employers	Automobile: <ul style="list-style-type: none"> <li>• Ford</li> <li>• General Motors</li> <li>• Honda</li> <li>• National Automobile Dealers Association</li> <li>• Nissan</li> <li>• Toyota</li> </ul> Aviation: <ul style="list-style-type: none"> <li>• Airlines for America</li> <li>• National Air Transportation Association</li> <li>• Regional Airline Association</li> </ul> Motor Carriers: <ul style="list-style-type: none"> <li>• American Bus Association</li> <li>• American Trucking Association</li> </ul> Pipeline: <ul style="list-style-type: none"> <li>• American Gas Association</li> <li>• American Petroleum Institute</li> <li>• American Pipeline Contractors Association</li> <li>• Association of Oil Pipe Lines</li> <li>• Common Ground Alliance</li> </ul> Public Transit: <ul style="list-style-type: none"> <li>• American Public Transportation Association</li> <li>• Community Transportation Association</li> </ul> Rail: <ul style="list-style-type: none"> <li>• American Short Line and Regional Railroad Association</li> <li>• Association of American Railroads</li> <li>• National Railroad Construction and Maintenance Association</li> </ul>

Source: GAO.

Based on our interviews with stakeholders, we identified and synthesized the factors under major themes. One aspect of the analysis was to discern the extent to which a factor was common to all transportation sectors or associated with a few or just one sector. The factors we report are limited to those identified by the stakeholders noted above and may not include all factors that could be identified. Also, the factors that we have identified should not be viewed as being representative of all transportation sector representatives and stakeholders. However, the factors identified are illustrative of key issues affecting the number of whistleblower claims that were consistently raised by the various stakeholders.

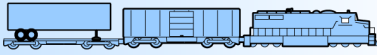


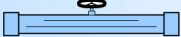
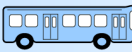
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We conducted this performance audit from May 2013 to March 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

# Appendix III: Disposition of Whistleblower Claims from the Office of Administrative Law Judges and Administrative Review Board

After OSHA investigates a whistleblower claim and makes a finding, either party to the claim may appeal OSHA's finding to the Office of Administrative Law Judges. After the Office of Administrative Law Judges reviews and issues a decision, the finding can further be appealed to the Administrative Review Board. Most of the claims that the Office of Administrative Law Judges and Administrative Review Board decided in fiscal year 2012 have been dismissed or withdrawn.<sup>1</sup> Some reasons for dismissal included: employee failure to meet one or more elements of a claim, lack of timeliness of complaint, or employee abandonment of the claim. Figures 6 and 7 illustrate the disposition of whistleblower claims that were closed in fiscal year 2012 from the Office of Administrative Law Judges and the Administrative Review Board, respectively.

**Figure 6: Disposition of Whistleblower Claims That the Office of Administrative Law Judges Closed in Fiscal Year 2012**

Transportation-related statutes	Favorable to complainant	Settled	Dismissed	Withdrawn	Total
Federal Railroad Safety Act (FRSA) 	3 (7%)	13 (30%)	22 (51%)	5 (12%)	43
Surface Transportation Assistance Act (STAA) 	4 (7%)	18 (32%)	28 (49%)	7 (12%)	57
Wendell H. Ford Aviation Investment and Reform Act (AIR21) 	2 (12%)	3 (18%)	10 (59%)	2 (12%)	17
Pipeline Safety Improvement Act (PSIA) 	0	0	1 (100%)	0	1
National Transit Systems Security Act (NTSSA) 	2 (40%)	0	3 (60%)	0	5
<b>Total</b>	<b>11 (9%)</b>	<b>34 (28%)</b>	<b>64 (52%)</b>	<b>14 (11%)</b>	<b>123</b>

Source: GAO analysis of the Office of Administrative Law Judges data.

Note: Percentages may not sum to 100 because of rounding.

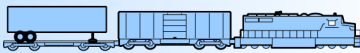
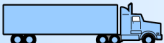



<sup>a</sup>Settled claims may also have merit but they were categorized as "settled" if both parties reached an agreement.

<sup>1</sup>We used fiscal year 2012 data from the two agencies because it was the most recent data available during the time of our review.



**Appendix III: Disposition of Whistleblower  
Claims from the Office of Administrative Law  
Judges and Administrative Review Board**

**Figure 7: Disposition of Whistleblower Claims That the Administrative Review Board Closed in Fiscal Year 2012**

Transportation-related statutes	Favorable to complainant <sup>a</sup>		Dismissed <sup>b</sup>		Settled <sup>c</sup>	Withdrawn by either party	Denied review
	Merit	Procedural	Merit	Procedural			
Federal Railroad Safety Act (FRSA) 	0	0	1	2	0	0	0
Surface Transportation Assistance Act (STAA) 	1	3	5	4	0	1	2
Wendell H. Ford Aviation Investment and Reform Act (AIR21) 	1	0	4	2	0	0	0
Pipeline Safety Improvement Act (PSIA) 	0	0	0	0	0	0	0
National Transit Systems Security Act (NTSSA) 	0	1	0	1	1	0	0
<b>Total</b>	<b>2</b>	<b>4</b>	<b>10</b>	<b>9</b>	<b>1</b>	<b>1</b>	<b>2</b>

Source: GAO analysis of the Administrative Review Board data.

Note: Whistleblower claims that reversed the Office of Administrative Law Judges' (OALJ) decisions and/or remanded it back to OALJ were not included in this analysis. Claims that did not fall under the categories above were also excluded.

<sup>a</sup>Of the 29 whistleblower claims that the Administrative Review Board closed in fiscal year 2012, 6 (or about 21 percent) were found favorable to complainants based on merit or procedural grounds.

<sup>b</sup>Of the 29 whistleblower claims that the Administrative Review Board closed in fiscal year 2012, 19 (or about 66 percent) were dismissed based on merit or procedural grounds.

<sup>c</sup>Settled claims may also have merit, but they were categorized as "settled" if both parties reached an agreement.

# Appendix IV: Comments from the U.S. Department of Labor

U.S. Department of Labor

Assistant Secretary for  
Occupational Safety and Health  
Washington, D.C. 20210



FEB 26 2014

Lori Rectanus  
Acting Director, Physical Infrastructure Issues  
Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Rectanus:

Thank you for the opportunity to comment on GAO's proposed report, *Whistleblower Protection Program: Opportunities Exist for OSHA and DOT to Strengthen Collaborative Mechanisms*. The following comments are submitted on behalf of the Department of Labor's Occupational Safety and Health Administration (OSHA).

OSHA appreciates the time and effort that GAO placed in its evaluation. OSHA believes the report accurately describes the statutory and regulatory procedures for handling whistleblower complaints filed with OSHA under the Department of Transportation (DOT) whistleblower statutes, and the steps OSHA has taken to include auto employees in the Whistleblower Protection Program. The report also acknowledges the measures OSHA has taken to improve efficiency and transparency within the Whistleblower Protection Program.

As noted in your report, OSHA agrees that clearly defining agency roles and responsibilities and monitoring outcomes are key practices that are beneficial to effective collaboration between OSHA and its DOT agency partners. OSHA believes that our current and pending memoranda of understanding (MOAs) with DOT agencies do incorporate these practices by providing flexible frameworks under which the agencies may establish more specific processes, and may change these processes as needed over time. However, OSHA agrees that there is room for improvement in the implementation of these key practices when collaborating with DOT agencies, whether included in an MOA or developed through other interagency communications.

Additionally, OSHA would like to clarify that the outcomes included within its operating plan, referred to on page 12 of the draft report, are OSHA's outcome goals for the program overall, rather than outcome goals for a specific MOA or collaboration effort. Collaboration with federal agency partners, including DOT agencies, is one method OSHA utilizes to reach its program goal of conducting effective and efficient whistleblower investigations.

With respect to specific outcome measures for a given MOA, OSHA recognizes the value in tracking and monitoring the referral process between OSHA and DOT agencies. For example, the MOA with the Federal Railroad Administration includes a reporting provision, under which the agencies will submit annual reports to each other summarizing actions taken throughout the

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year under the MOA. While the Federal Aviation Administration (FAA) MOA does not include a reporting provision, FAA and OSHA regularly compare data to track the referral process under the MOA and, as noted in the draft report, have improved the process by which the agencies submit these referrals.

OSHA appreciates that opportunity to review and respond to GAO's draft report.

Sincerely,

A handwritten signature in black ink, appearing to read 'DM Michaels', with a stylized flourish at the end.

David M. Michaels, PhD, MPH

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# Appendix V: GAO Contact and Staff Acknowledgments

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## GAO Contact

Lori Rectanus, 202-512-2834, or [rectanusl@gao.gov](mailto:rectanusl@gao.gov).

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## Staff acknowledgments

In addition to the contact mentioned above, Sally Moino, Assistant Director; Thomas Beall; Colin Fallon; David Hooper; Jennifer Kim; Joshua Ormond, and Lisa Shibata made key contributions to this report.

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# Related GAO Products

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*Whistleblower Protection: Actions Needed to Improve DOD's Military Whistleblower Reprisal Program.* [GAO-12-362](#). Washington, D.C.: February 22, 2012.

*Whistleblower Protection: Sustained Management Attention Needed to Address Long-Standing Program Weaknesses.* [GAO-10-722](#). Washington, D.C.: August 17, 2010.

*Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency.* [GAO-09-106](#). Washington, D.C.: January 27, 2009.

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