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Report to Congressional Requesters

January 2009

WHISTLEBLOWER PROTECTION PROGRAM

Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency

GAO-09-106

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Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency

GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-09-106, a report to congressional requesters

Why GAO Did This Study

Workers who "blow the whistle" on prohibited practices play a role in enforcing federal laws, but these workers risk reprisals from their employers. The Whistleblower Protection Program at the Department of Labor's (Labor) Occupational Safety and Health Administration (OSHA) is responsible for investigating whistleblowers' complaints. OSHA's decisions generally may be appealed to the Office of Administrative Law Judges (OALJ) and, ultimately, the Administrative Review Board (ARB). GAO examined (1) what is known about processing times for complaints and what affects these times, (2) what outcomes resulted, and (3) what challenges OSHA faces in administering the program. To answer these questions, GAO analyzed electronic data files from OSHA, OALJ, and ARB; visited five OSHA regional offices; reviewed case files; conducted a Web-based survey of investigators; and interviewed key officials.

What GAO Recommends

GAO recommends that Labor take a number of steps to improve the accuracy of its data and enhance program oversight. OSHA questioned the need for the recommendation to ensure that audits of the program are completed. GAO clarified the recommendation to focus on developing interim milestones to ensure timely completion. ARB agreed with the need for accurate appeals data, and commented that it appreciates GAO's recommendation for improving the data. However, it did not provide specific information on the steps it would take in response.

To view the full product, including the scope and methodology, click on GAO-09-106. For more information, contact George A. Scott, (202) 512-7215 or scottg@gao.gov.

What GAO Found

Labor lacks reliable information on processing times and, as a result, cannot accurately report how long it takes to investigate and close a case or decide on certain appeals. OSHA does not have an effective mechanism to ensure that the data are accurately recorded in its database, and GAO's file reviews revealed that the key dates are often inaccurately recorded in the database or cannot be verified due to a lack of supporting documentation. For example, in one region visited, none of the case closed dates matched the documentation in case files. At the appeals level, the reliability of information on the processing times is mixed. Timeliness data at the OALJ level are reliable, and the OALJ completed appealed cases in an average of about 9 months in fiscal year 2007. In contrast, ARB data are unreliable, and the agency lacks sufficient oversight of data quality. GAO's file review found that ARB processing times ranged from 30 days to over 5 years. At all levels of the whistleblower program, GAO found that increasing caseloads, case complexity, and accommodating requests from the parties' legal counsel affect case processing times.

Whistleblowers received a favorable outcome in a minority of cases that were closed in fiscal year 2007, both at initial decision and on appeal, but the actual proportion may be somewhat lower than Labor's data show. OSHA's data show that whistleblowers received a favorable outcome in 21 percent of complaints—nearly all settled through a separate agreement involving the whistleblower and the employer, rather than through a decision rendered by OSHA. However, GAO found several problems in the way settlements were being recorded in OSHA's database, and a review of settlement agreements suggests that the proportion of cases found to have merit may actually be about 19 percent. As with investigations, when whistleblower complaints were appealed, decisions favored the whistleblower in a minority of the cases—one-third or less of outcomes favored the whistleblower.

With respect to administering the whistleblower program, OSHA faces two key challenges—it lacks a mechanism to adequately ensure the quality and consistency of investigations, and many investigators said they lack certain resources they need to do their jobs, including equipment, training, and legal assistance. OSHA does not routinely conduct independent audits of the program to ensure consistent application of its policies and procedures. OSHA's new field audit program has begun to address this need but is lacking in several key areas. For example, the current audit processes do not adequately provide for independence, an important aspect of an effective audit program. Moreover, OSHA is challenged to ensure that investigators in all regions have the resources they need to address their large and complex caseloads. OSHA has not established minimum equipment standards for its investigators, and nearly half of the whistleblower investigators reported that the equipment they have does not meet the needs of their jobs. Furthermore, investigators often cite the need for more training and legal assistance on the complex federal statutes that OSHA administers.

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Abbreviations

AHERA	Asbestos Hazard Emergency Response Act
ALJ	Administrative Law Judge
ARB	Administrative Review Board
Aviation Investment and Reform Act	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
CFR	Code of Federal Regulations
CPSIA	Consumer Product Safety Improvement Act of 2008
Environmental protection statutes	Consists of Clean Air Act; Comprehensive Environmental Response, Compensation, and Liability Act; Federal Water Pollution Control Act; Safe Drinking Water Act; Solid Waste Disposal Act; and Toxic Substances Control Act.
FRSA	Federal Railroad Safety Act of 1970
Labor	Department of Labor
NTSSA	National Transit Systems Security Act of 2007
OALJ	Office of Administrative Law Judges
OIS	OSHA Information System
OSH Act	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
Secretary	Secretary of Labor
STAA	Surface Transportation Assistance Act
USC	United States Code

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Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

January 27, 2009

The Honorable Patty Murray
Chairman
Subcommittee on Employment and Workplace Safety
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable George Miller
Chairman
Committee on Education and Labor
House of Representatives

The Honorable Lynn Woolsey
Chairwoman
Subcommittee on Workforce Protections
Committee on Education and Labor
House of Representatives

Workers who "blow the whistle" on prohibited or unlawful practices they discover during their employment can play an important role in enforcing federal laws. However, these whistleblowers also risk reprisals from their employers, sometimes being demoted, reassigned, or fired. Many federal laws and regulations establish a whistleblower protection process, whereby workers who feel they have faced retaliation for blowing the whistle can report their allegations to the appropriate federal agency, which then determines the merit of their claims. The Whistleblower Protection Program at the Department of Labor's Occupational Safety and Health Administration (OSHA) is responsible for receiving and investigating most whistleblower complaints. Since the whistleblower program began in 1970, the number of statutes for which OSHA is responsible for enforcing whistleblower provisions has increased—recent additions in 2008 bring the total to 17 such statutes. With the exception of the Occupational Safety and Health Act, the basic provisions of these statutes are administered by agencies other than the Department of Labor (Labor).[1] All of the whistleblower provisions are intended to protect

[1]Throughout this report, unless specifically stated otherwise, "statute," "whistleblower statute," "OSHA statute," "DOL statute," and similar language refer only to the whistleblower provisions of the referenced law, and not the entire statute or act.

non-federal workers[2] in a range of industries, including nuclear power, transportation, pipeline infrastructure, consumer product safety, and securities industries, as well as in several environmental areas. The Whistleblower Protection Program does not have its own budget, but shares resources with OSHA's other enforcement programs–the exact distribution of resources for investigations is decided by each of the 10 regional administrators. Since 2003, the number of investigators has remained relatively steady; currently, OSHA has 69 investigators, 8 supervisory investigators, and 1 program manager assigned to the whistleblower program. During fiscal year 2007, OSHA investigated and closed over 1,800 whistleblower complaints covering 13 statutes.[3]

To receive protection under the program, a whistleblower must file a complaint with OSHA. Under the whistleblower provisions, OSHA has between 30 and 90 days, depending on the statute, to complete its investigation and make its initial findings. After OSHA completes its investigation and issues its decision, the whistleblower and his or her employer generally have the right to appeal the decision within Labor—for many of the statutes, to the Office of Administrative Law Judges (OALJ) and, ultimately, the Administrative Review Board (ARB). After this administrative appeals process, either party may, in certain circumstances, bring a legal action in a U.S. District Court or a U.S. Court of Appeals.

When we last reviewed the whistleblower program in 1988, we found that OSHA had not focused sufficient management attention on the program, and that criteria and standards for handling complaints were not consistently followed. In addition, we found that many investigations under the statute we reviewed were not completed within statutory time frames.[4] In 2001, Labor's Inspector General similarly found that OSHA was not completing its whistleblower investigations under two other statutes

[2]Federal workers who become whistleblowers are protected through the Whistleblower Protection Act. Generally, claims for whistleblower protections for federal employees may be raised before the Merit Systems Protection Board or the Office of Special Counsel.

[3]OSHA did not complete any cases in fiscal year 2007 under the Federal Railroad Safety Act of 1970, the National Transit Systems Security Act of 2007, or the Consumer Product Safety Improvement Act of 2008 because these whistleblower provisions were recently enacted. It also did not receive any complaints under the International Safe Container Act.

[4]This report focused solely on protections for whistleblowers under the Surface Transportation Assistance Act of 1982. See GAO, *Whistleblowers: Management of the Program to Protect Trucking Company Employees Against Reprisal*, GAO/GGD-88-123 (Washington, D.C.: Sept. 22, 1988).

within statutory time frames.[5] Moreover, with the addition of new statutes to the program, caseloads are increasing at all levels. Within this context, we addressed the following objectives: (1) What is known about the processing times for claims under the whistleblower statutes that OSHA administers and what factors affect processing times? (2) What are the outcomes from complaints filed with the Whistleblower Protection Program? (3) What are the key challenges OSHA faces in administering the whistleblower program?

To answer these questions, we obtained and tested the reliability of databases on key information about whistleblowers' cases from OSHA, OALJ, and ARB. We found that the OSHA and ARB data on processing times were not reliable, so we conducted case file reviews in 5 of the 10 OSHA regions to provide examples of processing times for investigating these cases. We selected these regions to give us a mix of case volumes (high and low) and to provide geographic dispersion.[6] In addition, we requested case file documents on all cases the ARB closed in fiscal year 2007 and were able to obtain and analyze 109 of the 120 cases that were closed. With regard to outcomes, we found that elements in OSHA's database related to cases dismissed and withdrawn were sufficiently reliable for our purposes, but the data related to settlements were not; therefore, we reviewed and analyzed all available settlement documents completed in fiscal year 2007. The OALJ and the ARB databases did not contain outcome information. Because we had to rely largely on reviewing whistleblower case decisions to gather these data, we focused our efforts on cases closed in fiscal year 2007. We also reviewed pertinent documents and interviewed agency officials from OSHA, OALJ, and ARB. In addition, we surveyed all OSHA investigators to gather information about their views of the whistleblower program, and we received an 86 percent response rate. During our site visits to the five OSHA regional offices, we interviewed key officials and, to supplement these site visits, we interviewed officials in the other five regions by phone to obtain their views of the whistleblower program[7]. In our work, we did not review the adequacy of Labor's human capital strategies for meeting its current and future investigation workload. In addition, we did not assess the quality of the investigations or the appropriateness of whistleblower outcomes because these aspects were

[5]Department of Labor, Office of Inspector General, *Evaluation of OSHA's ERA and EPA Whistleblower Investigations*, Report No. 2E-10-105-001 (Washington, D.C.: Mar. 16, 2001).

[6]The regional offices we visited were Atlanta, Denver, New York, Philadelphia, and Seattle.

[7]In this document, the term "whistleblower program" refers to OSHA's Whistleblower Protection Program.

beyond the scope of the engagement. Appendix I contains a detailed discussion of our objectives, scope, and methodology. We conducted this performance audit from October 2007 to January 2009, 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.

Results in Brief

Labor lacks reliable information on processing times and, as a result, cannot accurately report how long it takes to investigate and close a case or decide on certain appeals. OSHA does not have an effective mechanism to ensure that the data are accurately recorded in its database, and our file reviews revealed that the key dates are often inaccurately recorded in the database or cannot be verified due to a lack of supporting documentation. For example, in one region we visited, none of the case closed dates matched the documentation in case files. Furthermore, we found that completion of any one phase of an investigation—opening, information gathering, or closing—sometimes took longer than the overall statutory or regulatory time frame for the entire investigation. At the appeals level, the reliability of information on the processing times is mixed. We determined that the timeliness of data at the OALJ level are reliable, with the data showing that the OALJ completed cases in fiscal year 2007 in an average of about 9 months. However, these times varied widely, ranging from 10 days to about 3 years. In contrast, we found that ARB data are unreliable and that the agency lacks sufficient oversight of data quality. Although we cannot report overall processing times for ARB, in our file review of cases closed in fiscal year 2007, we found that processing times ranged from 30 days to over 5 years. At all levels of the whistleblower program, we found that increasing caseloads, case complexity, and involvement of the parties' legal counsel affect case processing times.

Whistleblowers received a favorable outcome in a relatively small proportion of the 1,800 complaints that were closed in fiscal year 2007, both in terms of initial decisions and on appeal, but the actual proportion may be somewhat lower than Labor's data indicate because some decisions were inaccurately recorded in OSHA's database. OSHA's data show investigations resulted in a favorable outcome for whistleblowers in about 21 percent of complaints; nearly all of these were settled through a separate agreement involving the whistleblower and the employer. However, we found several problems in the way settlements were being recorded in OSHA's database, and our review of settlement documents

suggests that the proportion of complaints found in favor of the whistleblower may actually be somewhat lower than OSHA's data indicate. For example, several complaints recorded as settled were actually dismissed by OSHA or withdrawn by the whistleblower, while other complaints reported as settled lacked sufficient documentation to be able to determine the actual outcome of the complaint. When complaints were settled, most often whistleblowers received a monetary payment. Moreover, many complaints filed by whistleblowers were not investigated or recorded in OSHA's database. For certain statutes—including the one with the most complaints, the Occupational Safety and Health Act—OSHA permits investigators to screen out complaints without recording them in its database if they are not filed on a timely basis or if they do not meet the criteria to open an investigation. Because these complaints are never recorded in its database, OSHA does not have a complete picture of its overall investigator workload or of the outcomes of all complaints received. Overall, based on information from the five regions we visited, investigators screened out a large portion of complaints they received, but the proportion varied widely across the regions. Two of the five regions screened out very few complaints; two others screened out more than they investigated. When whistleblower complaints were appealed, whistleblowers similarly received a favorable decision in a minority of cases. Depending on the statute, whistleblowers may appeal to OSHA's Appeals Committee, or whistleblowers or their employers may appeal to OALJ and, ultimately, ARB. While there were some differences in outcomes from the two different appeals processes, most appeals were dismissed or denied in fiscal year 2007, most often due to insufficient evidence. Regardless of the appeals process, about one-third or fewer of outcomes favored the whistleblower.

With respect to administering the whistleblower program, OSHA faces two key challenges—it lacks a mechanism to adequately ensure the quality and consistency of investigations, and many investigators have said they lack some of the resources they need to do their jobs, including equipment, training, and legal assistance. OSHA does not routinely conduct independent audits of the program to ensure consistent application of its policies and procedures. OSHA's new field audit program has begun to address this need but is lacking in several key areas. For example, due to a lack of clarity in the current audit guidance, officials cannot ensure that every region's whistleblower program is audited using the same criteria. In addition, the current audit processes do not adequately provide for independence, an important aspect of an effective audit program, and the regions are not held accountable for audit findings. All phases of OSHA's current audit process are controlled by the regional administrator whose programs are being audited.

Moreover, OSHA also faces the challenge of ensuring that investigators in all ten regions have the resources they need to address their large and complex caseloads. Nearly half of the whistleblower investigators reported on our survey that the equipment they have does not meet the needs of their jobs, and some report lacking at least some essential equipment, such as a portable printer or a laptop computer. OSHA has not established minimum equipment standards for its investigators, and regional administrators must make key management decisions for the whistleblower program in their region, including how to allocate resources among many different OSHA priorities. Furthermore, the majority of investigators told us that they need more training to effectively address cases from some of the complex federal statutes that OSHA administers. For example, between one-third and one-half of investigators responding to our survey reported that they have not received any specific training on two of the statutes that OSHA considers most complex—Sarbanes-Oxley and the Aviation Investment and Reform Act . OSHA officials have developed and begun to implement a national mandatory training program that would address these needs but does not centrally control the training budget for investigators. Regional budget constraints may, therefore, make it difficult for all investigators to receive this training. Additionally, while investigators in some OSHA regions are able to draw on the legal expertise of their region's Solicitor's Office over the course of an investigation, neither the regional Solicitors' Offices nor the national whistleblower program office have specialized legal experts available to assist investigators with cases involving complex legal matters, such as those that are frequently encountered when investigating Sarbanes-Oxley cases.

We are making several recommendations to improve Labor's management and oversight of the program. We are recommending that the Secretary of Labor direct OSHA to establish a mechanism to ensure the accuracy of the data in its management information system and to ensure that the planned new system includes information on screened out cases. We are also recommending that the Secretary direct OSHA to revise its audit directive to ensure independence and accountability, and to take steps to ensure that regions conduct these audits within specified time frames. Furthermore, we are recommending that the Secretary direct OSHA to establish minimum standards for equipment and materials needed by whistleblower investigators. Finally, we are recommending that the Secretary direct ARB to improve the database it uses to track appeals. In its comments, OSHA generally agreed with our findings, but expressed concerns that we did not take into account the program's resource constraints when developing our findings and recommendations. In our report, we note that, due to the addition of several new statutes, investigators are carrying larger, more complex caseloads. However, given

that the program has no budget of its own, decisions on how to allocate staffing or other resources among the various OSHA programs are within the agency's control and discretion. Evaluating these resource allocation issues was beyond the scope of this engagement. OSHA disagreed with the need for our draft recommendation to ensure that audits are completed, citing its expectation that all 10 regional offices will have completed on-site audits during fiscal year 2009. Because we found that audits of the whistleblower program have not been routinely conducted, we are retaining the recommendation while clarifying that the agency should focus its efforts on developing interim milestones to ensure that audits of the program are completed within time frames. ARB agreed that the data in its tracking system should be accurate and acknowledged that there is always room for improvement; however, officials contend that the existing internal controls are appropriate for managing the board's docket. We disagree and continue to stress the need for ARB to take action to ensure the data it uses to track cases are accurate. ARB also commented that it appreciates our recommendations for continued improvements to the tracking system, but did not provide information on the specific steps it would take in response. The OALJ provided only technical comments which we incorporated where appropriate.

Background

OSHA was established after the passage of the Occupational Safety and Health Act in 1970. In the broadest sense, OSHA was mandated to ensure safe and healthy working conditions for working men and women. Section 11(c) of that act prohibits anyone from discharging or discriminating against any private sector employee because that employee filed a complaint related to the act. Section 11(c) also allows these employees to file a complaint with the Secretary of Labor alleging such discrimination. OSHA was initially responsible for investigating whistleblower allegations under only the Occupational Safety and Health Act. In 1983, OSHA began investigating whistleblower complaints from trucking employees and, since that time, OSHA has been assigned whistleblower provisions under 15 other statutes related to airline, nuclear power, pipeline, environmental, rail, consumer product safety, and securities industries. Currently, under OSHA's whistleblower program, the agency is responsible for investigating discrimination complaints under 17 statutes, the basic provisions of which are administered by a number of different federal agencies (see table 1). Other Labor agencies, such as the Mine Safety and Health Administration and the Employment Standards Administration, are responsible for enforcing anti-retaliation provisions for several other statutes for which Labor is substantively responsible. (App. II provides details on the whistleblower provisions OSHA enforces, including statutory and

regulatory time frames. App. III provides information on the anti-retaliation provisions that other Labor agencies administer.)

Table 1: Statutes Included in OSHA's Whistleblower Protection Program

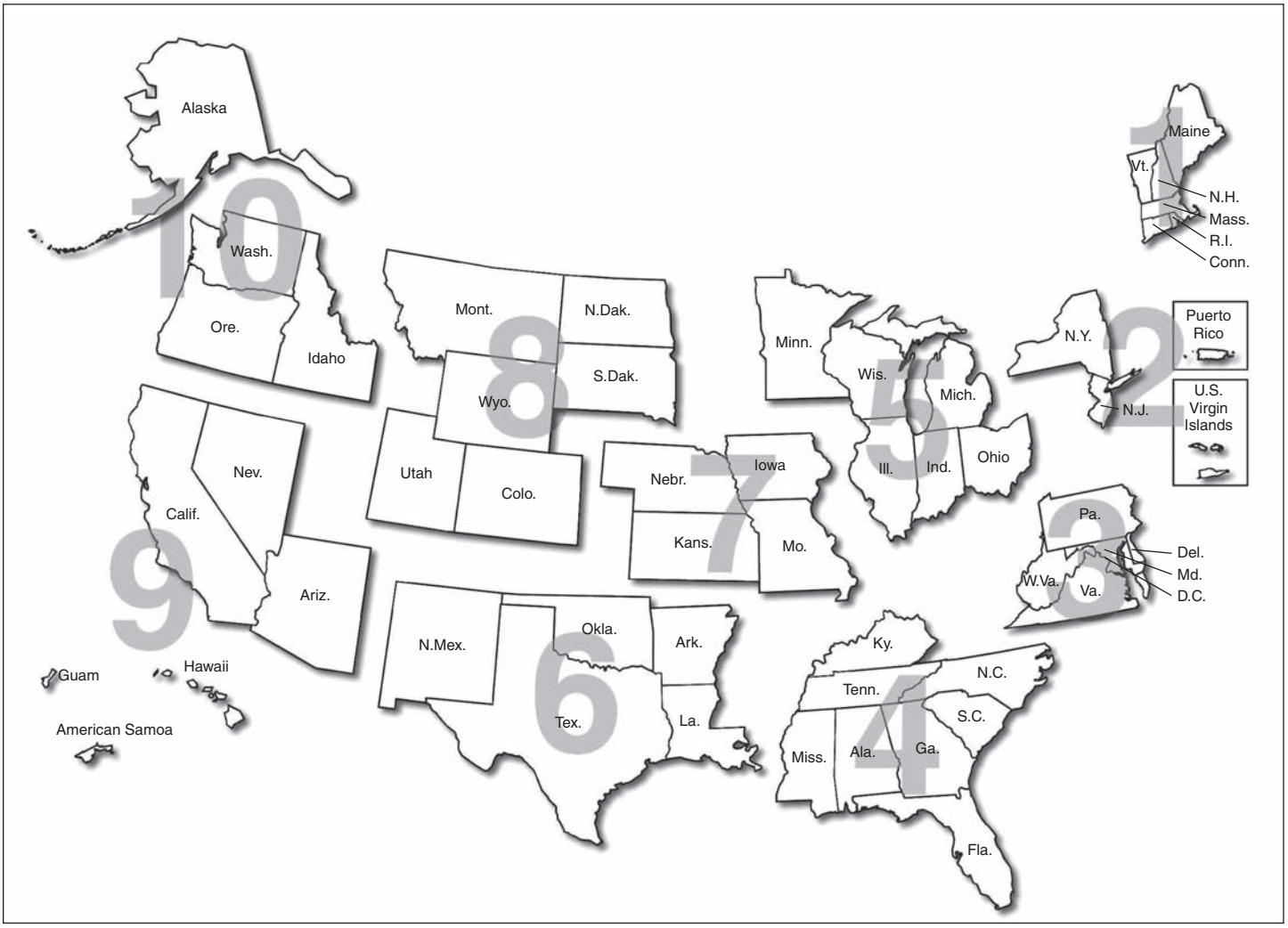
Cognizant agency and statute	Year of enactment of whistleblower provision
Department of Energy	
Energy Reorganization Act	1978
Department of Transportation	
Federal Railroad Safety Act	1980
International Safe Container Act	1977
National Transit Systems Security Act	2007
Pipeline Safety Improvement Act	2002
Surface Transportation Assistance Act	1983
Environmental Protection Agency	
Asbestos Hazard Emergency Response Act	1986
Clean Air Act	1977
Comprehensive Environmental Response, Compensation, and Liability Act	1980
Federal Water Pollution Control Act	1972
Safe Drinking Water Act	1974
Solid Waste Disposal Act	1976
Toxic Substances Control Act	1976
Federal Aviation Administration	
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	2000
Department of Labor	
Occupational Safety and Health Act	1970
Securities and Exchange Commission	
Sarbanes-Oxley Act	2002
Consumer Product Safety Commission	
Consumer Product Safety Improvement Act	2008

Source: GAO analysis of relevant statutes

Note: These years represent the date that the whistleblower provisions were added to the relevant statutes, and not necessarily the date of the original enactment of the statutes themselves, or the date that OSHA was given responsibility for enforcement for such provisions. For example, the Energy Reorganization Act was enacted in 1974, but the whistleblower provisions were not added until 1978. The program was originally assigned to the Wage and Hour Division of the Employment Standards Administration, but was reassigned to OSHA in 1997.

As with OSHA's enforcement programs, the whistleblower program operates within the decentralized structure of the agency's regional and area offices, and the 10 regional administrators are responsible for administering the program in their regions (see fig. 1). Each region generally employs a supervisory investigator or program manager and a number of investigators to review claims filed under the whistleblower program. The program's national director, located in Washington, D.C., is responsible for developing policy and procedures, providing training, and offering technical assistance and guidance.

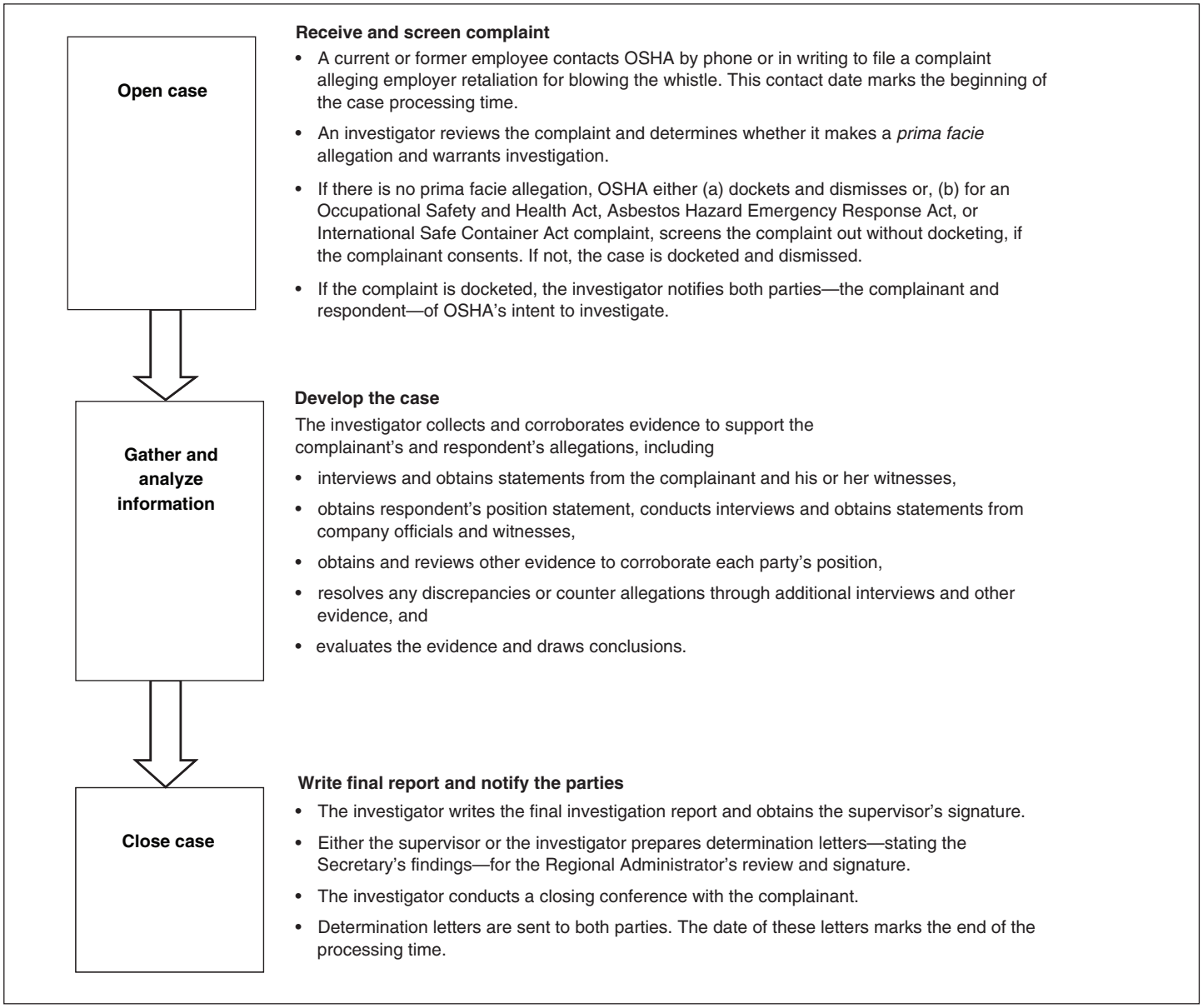
Figure 1: OSHA's 10 Regions



Source: OSHA.

A whistleblower's claim begins when he or she contacts OSHA with an allegation of discrimination for engaging in a protected activity, such as reporting a workplace health violation to OSHA or a Clean Air Act violation to the Environmental Protection Agency. According to Labor, the whistleblower—or complainant—should address the *prima facie* elements of a violation: the employer knew about the protected activity, that the employer—or respondent—subjected the whistleblower to an adverse action (such as being fired), and the protected activity contributed to the adverse action. Investigators screen complaints for these *prima facie* elements and, if warranted, conduct an investigation (see fig. 2).

Figure 2: OSHA's Whistleblower Investigation Process



Source: GAO analysis of whistleblower investigation process.

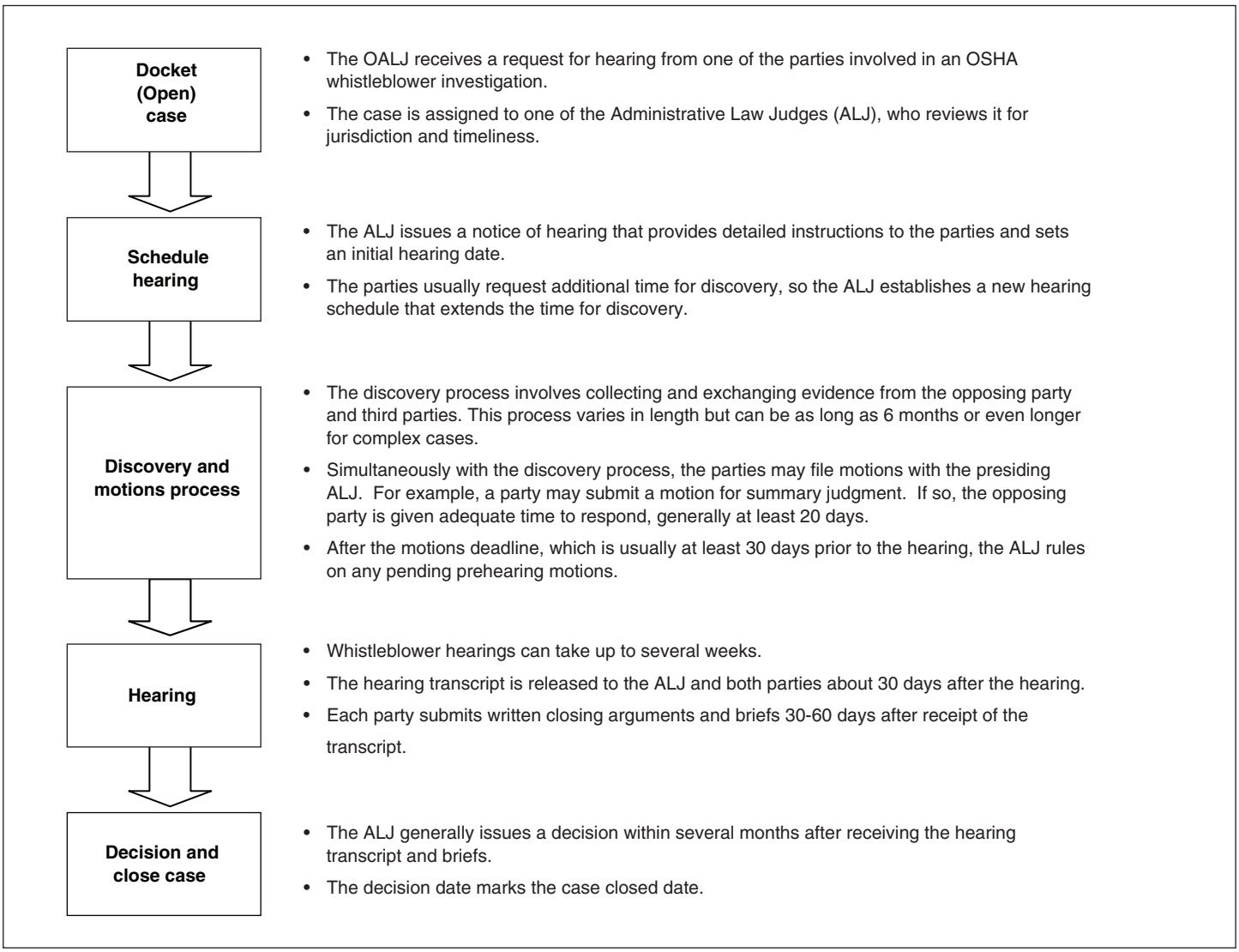
If the investigation results in a finding of nonmerit, the case is dismissed. If the investigation leads to a Secretary's finding of merit, OSHA generally issues a preliminary order, which may include reinstatement to the employee's previous position and back pay. If neither party files an

objection within the required time frames, the preliminary order becomes final. (See app. II for information on each statute's time frames.) If either party objects to the Secretary's findings or preliminary order, the objecting party may generally request a review of the case.

For complaints under the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and International Safe Container Act, the whistleblower may request that the Appeals Committee review OSHA's decision. This committee will review the file and any other documentation supplied by the complainant or the regional administrator, and may (1) return the case for additional investigation, or (2) deny the appeal.

Under the other 14 statutes, either party may generally file an objection to the Secretary's findings or preliminary order by requesting a hearing with Labor's Office of Administrative Law Judges (see fig. 3). This review is *de novo*—it does not take into account the Secretary's findings from the OSHA investigation.

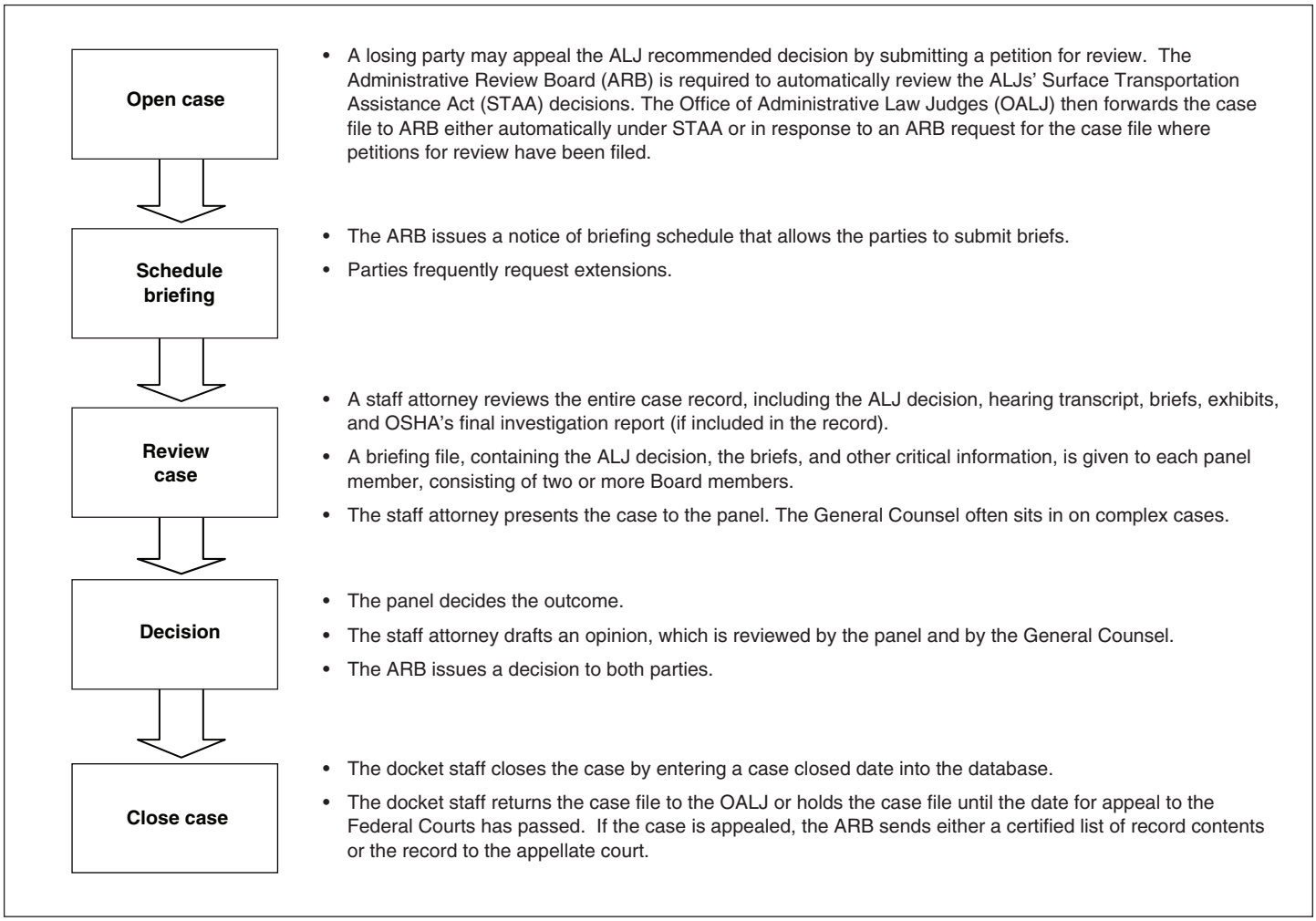
Figure 3: Hearing Process at OALJ



Source: GAO analysis of OALJ appeals process.

Either party may generally appeal the ALJ's decision to the Administrative Review Board (ARB). In 1996, the Secretary of Labor delegated authority to ARB to issue final decisions on whistleblower and other types of cases. The Secretary's final decision may, in specific circumstances, be appealed to the federal courts (see fig. 4).

Figure 4: Review Process at ARB



Source: GAO analysis of ARB appeals/review process.

A whistleblower may potentially obtain relief in many forms. One possible remedy is an order for reinstatement of the whistleblower to his or her former position, or an equivalent position. The whistleblower may also be awarded back pay to make up for the money he or she would have earned in the absence of retaliation. Additionally, at any time in the whistleblower complaint process, the whistleblower and his or her employer may enter into a settlement agreement which ends the process.

Labor Lacks Reliable Data on Processing Times for the Whistleblower Program

Labor lacks reliable information on processing times and, as a result, cannot accurately report how long it takes to investigate and close a case or decide on certain appeals. Processing times reflected in both the OSHA and the ARB databases differ from actual processing times, and neither office has systematically verified the accuracy of its data. Moreover, case files we reviewed showed that some cases exceeded their statutory or regulatory time frames. Only the OALJ data were reliable, enabling us to report that the average processing time at the OALJ for cases closed in fiscal year 2007 was about 9 months. At all three agencies, certain factors, such as heavy caseloads, case complexity, and accommodating requests from the parties' legal counsel, negatively affect case processing times.

OSHA Lacks Reliable Data on Timeliness

OSHA is unable to accurately track and report information on complaint processing times because the data it collects are unreliable. Specifically, the dates used to measure processing times are often inaccurately recorded in OSHA's database or cannot be verified due to a lack of supporting documentation in the case files.[8] We found a large number of errors in four of the five regions where we reviewed randomly selected case files. For example, in at least one-sixth of the cases we reviewed in three regions, documentation for the dates the cases were opened did not match information in the database or was missing from files. In one region, none of the documentation for the dates that the cases were closed matched the information in the database because this region does not follow agency policy for determining when the case is closed. In this region, the case closed date reflects an interim step—the date the supervisor signed the investigator's report. However, according to OSHA's guidance, the case closed date should match the date OSHA sends a letter describing the outcome of the investigation to the whistleblower and the employer.

Moreover, the processing times that some regions reported were appreciably different than the actual processing times for several of the cases we reviewed—in some cases, actual processing times were longer and in others, shorter than they appeared in the database. Cases that had actual processing times that were longer than they appeared in the database had case open dates that were as much as 50 days later than the actual date they were opened or case closed dates as much as 27 days

[8]Throughout this report, when we refer to OSHA's database we mean the Integrated Management Information System.

earlier than the actual dates the cases were closed. Conversely, cases for which the actual processing times were shorter than they appeared had case closed dates in the database that were as much as 121 days later than the actual dates the cases were closed.

These unreliable data undermine OSHA's efforts to manage the whistleblower program and ensure the completion of cases within statutory and regulatory time frames. The Office of Management and Budget requires that federal agencies establish and maintain internal controls, in part, to ensure the agency's compliance with laws and regulations.[9] As part of this process, agencies are required to ensure that transactions are processed accurately in their information systems and that the data are valid and complete. Furthermore, according to the *Government Auditing Standards*, managers are responsible for providing reliable, useful, and timely information for accountability of government programs and their operations.[10] OSHA does not have an effective mechanism to ensure that the data are accurately recorded in the system. There is no requirement that data entered in OSHA's database be validated—the decision to do so is left to the regions. And, although OSHA has an internal audit program[11] that could help focus efforts on the data quality, some regions have not conducted audits of their whistleblower program in recent years. Even when they have, we found their timeliness data to be unreliable.

Although we cannot report overall processing times for OSHA's investigations, in our review of case files we found cases that exceeded their statutory or regulatory time frames.[12] Furthermore, cases under each statute revealed a wide range of processing times, regardless of their statutory or regulatory requirements. Table 2 presents illustrative case

[9]Office of Management and Budget *OMB Circular A-123, Management's Responsibility for Internal Control* (Washington, D.C.: Dec. 21, 2004.)

[10]GAO, *Government Auditing Standards, January 2007 Revision*, GAO-07-162G, Section 1.02 (Washington, D.C.: Jan. 31, 2007).

[11]This audit program requires regions to evaluate some aspect of operations every year and conduct comprehensive audits every 4 years.

[12]OSHA officials report that the agency evaluates performance based on a 90-day overall average processing time for all investigations, regardless of the statutory or regulatory time frame. OSHA considers 90 days to be the most reasonable of the various statutory and regulatory time frames, for how long investigations should take, given the exigencies of the investigative process as well as the need to provide employers with reasonable time frames for responding. Moreover, two-thirds of OSHA's cases fall under a 90-day deadline.

processing times for the files we reviewed under statutes that had 30-, 60-, or 90-day time frames.

Table 2: Processing Times for 20 Selected Cases We Reviewed

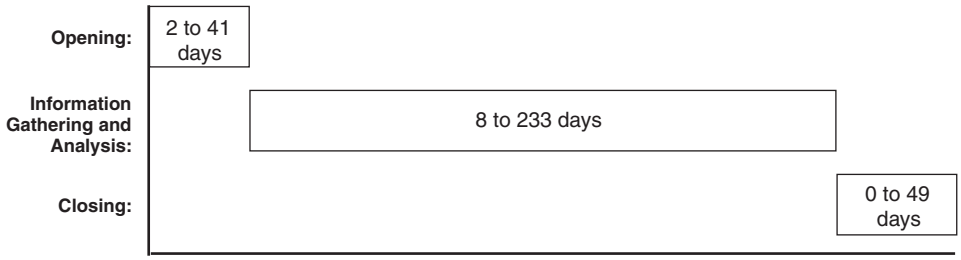
Statute	Time frame allowed for investigation	Shortest processing time	Longest processing time
Occupational Safety and Health Act	90 days	41 days	182 days
Sarbanes-Oxley Act	60 days	89 days	320 days
Environmental protection statutes	30 days	40 days	323 days

Source: GAO analysis of case files in three regions.

Note: The 20 cases included in this analysis were investigated under the Occupational Safety and Health Act, six environmental protection statutes (Clean Air Act; Comprehensive Environmental Response, Compensation, and Liability Act; Federal Water Pollution Control Act; Safe Drinking Water Act; Solid Waste Disposal Act; and Toxic Substances Control Act), and the Sarbanes-Oxley Act. We selected these statutes because they represent a range of required time frames (30, 60, or 90 days). During site visits to three of OSHA's 10 regions, we randomly selected for review at least three cases under each statute or type of statute (i.e., environmental protection) that were closed in fiscal year 2007 and represented short, medium, and long processing times, as reported in OSHA's database. In total, we reviewed 30 cases: 9 Occupational Safety and Health cases, 12 environmental protection cases, and 9 Sarbanes-Oxley cases. However, we could not determine processing times for some of these cases due to incomplete case file documentation, so table 2 reflects data from 20 cases: 6 Occupational Safety and Health cases, 7 environmental protection cases, and 7 Sarbanes-Oxley cases.

Completion of any one of the three phases of an investigation—opening, information gathering, or closing—sometimes took longer than the overall statutory or regulatory time frame for the entire investigation. Figure 5 illustrates the range of days each phase took among the randomly selected cases we reviewed. In general, investigators who responded to our survey believe that 30 or 60 days are not sufficient to conduct an investigation. For example, for cases under the environmental protection statutes and the Energy Reorganization Act of 1974, the employer is permitted 20 days after receiving notice of the complaint to submit a written statement. At this point, the case has nearly reached the 30-day time frame, but the information gathering and analysis phase has just begun.

Figure 5: Range of Days for Each Phase of Nine Selected Case Studies



Source: GAO review of selected case files.

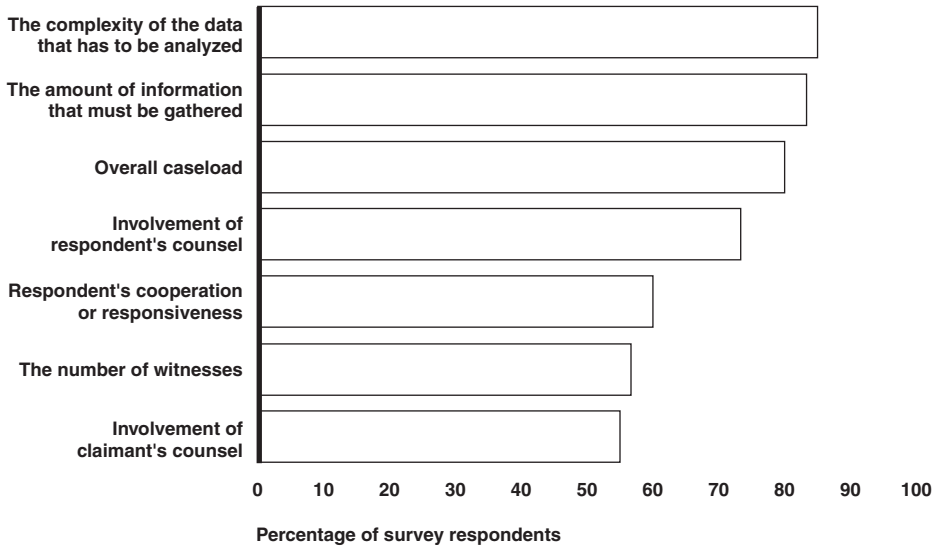
Note: The 9 cases included in this analysis are a subset of the 20 cases used in the analysis for table 2. To report the range of phase lengths, we reviewed the short and long cases from each of three statutes in each region—18 cases in total—but we could not determine the lengths of all phases for 9 of these cases. Consequently, figure 5 reflects data from 2 short and 1 long Occupational Safety and Health cases, 2 short Sarbanes-Oxley cases, and 3 short and 1 long environmental protection cases.

OSHA officials also commented that the differences in allowable processing times between the statutes can undermine efficiency because investigators are often forced to place a higher priority on completing the 30-day cases, instead of treating each case in the order it is received.

Caseload Size, Case Complexity, and Involvement of the Parties' Legal Counsels Hinder Investigators' Ability to Complete Cases within Required Time Frames

Overall caseload, the amount and complexity of information to gather and analyze, and involvement of the parties' counsel affect investigators' ability to complete whistleblower investigations within statutory or regulatory time frames, according to survey respondents. Four-fifths of investigators who completed our survey reported that the size of their caseloads at least moderately hindered their ability to complete investigations within these time frames (see fig 6). In addition, many regional officials we interviewed confirmed that the caseload affects the timeliness of investigations, citing the increased number and complexity of statutes and associated training needs as contributing factors. In general, they reported that investigators can reasonably manage between 5 and 12 open investigations concurrently, depending on the types of cases. However, the national average was 16 open cases per investigator, as of October 2008, with individual regions ranging from 6 to 35 cases per investigator.

Figure 6: Certain Factors Hinder Investigators' Ability to Complete Investigations within Required Time Frames



Source: GAO survey of OSHA whistleblower investigators.

Note: Percentages in figure reflect responses by investigators who reported that these factors either hindered their ability to complete investigations within time frames to a moderate extent or to a great extent.

About three-fourths or more of investigators also reported that the amount and complexity of information that must be collected and the involvement of the employer's counsel at least moderately hindered their ability to complete investigations within statutory or regulatory time frames. In particular, cases filed under the Sarbanes-Oxley Act, Energy Reorganization Act, the environmental protection statutes,[13] and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (Aviation Investment and Reform Act)—all of which have 30-or 60-day statutory time frames—tend to involve especially complex data and require interviewing numerous witnesses. In our interviews, officials and investigators cited Sarbanes-Oxley cases as particularly complex and time-consuming, with different officials equating the work required for one Sarbanes-Oxley case to the work required for two to six cases under the Occupational Safety and Health Act. One official explained that Sarbanes-Oxley cases take the longest to investigate for several reasons: investigators must learn financial

[13]The environmental statutes we refer to do not include the Asbestos Hazard Emergency Response Act, which has a 90-day time frame.

terminology; the cases tend to require more detailed, often legal, research with little case precedent; and the employers are often large corporations that engage a larger contingent of attorneys than do employers in other types of whistleblower cases. Attorney involvement and settlement negotiations—which are especially common with Sarbanes-Oxley cases—involve substantial paperwork and processing at various points, such as for requests for extensions to allow attorneys to conduct their own investigations. While nearly three-quarters of survey respondents said that the involvement of the employers' legal counsel is a factor that hinders processing times, over half also identified the employee's counsel as a factor.

Reliability of Timeliness Data for Appeals Is Mixed

Depending on the particular appeals process, the available data may not be reliable enough to allow an assessment of how long the appeals process takes. Whistleblower appeals may follow two different paths. For three statutes—the Occupational Safety and Health Act, the Asbestos Hazard Emergency Response Act of 1986, and the International Safe Container Act—the whistleblower may request that the OSHA Appeals Committee review the case. For the other statutes, the whistleblower or the employer may generally appeal to the OALJ and, ultimately, to ARB.

Appeals to the OSHA Appeals Committee. In contrast to the investigations processing times data maintained in OSHA's database, OSHA's information about appeals filed with the Appeals Committee is reliable. Processing times for the 69 appeals completed in fiscal year 2007—all of which were Occupational Safety and Health cases—ranged from about 2 to 9 months, with an average of 4 months.

Appeals to the OALJ. Data on the timeliness of OALJ decisions, which were reliable, showed that OALJ completed 207 cases in fiscal year 2007 with an average of about 9 months per case.[14] Processing times varied widely across statutes, ranging from as little as 10 days to about 3 years (see table 3).[15]

[14]Cases under statutes other than the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and the International Safe Container Act generally may be heard at the Office of Administrative Law Judges.

[15]Only cases under one statute—the Surface Transportation Assistance Act—have a time frame for the OALJ hearing process. The OALJ completed only 4 of the 55 trucking cases closed in fiscal year 2007 within this 60-day time frame.

Table 3: Processing Times of OALJ Cases Closed in Fiscal Year 2007 by Statute

Statute	Total cases closed in FY 07	Length of OALJ hearing process (days)		
		Shortest	Average	Longest
Aviation Investment and Reform Act	18	49	279	553
Environmental protection statutes	15	45	363	945
Energy Reorganization Act	18	79	247	518
Pipeline Safety Improvement Act	2	172	311	450
Sarbanes-Oxley Act	99	25	243	1,106
Surface Transportation Assistance Act	55	10	284	812
All cases	**207**	**10**	**267**	**1,106**

Source: GAO analysis of Labor data.

Note: The OALJ database contains 220 records of cases closed in fiscal year 2007. Thirteen of these 220 cases are considered "companion" cases because one of the parties included more than one person or entity. Consequently, the Administrative Law Judge issued one decision letter, addressed to all participants in the case. We have combined these companion cases in reporting processing times because using all 220 case records would skew the average processing time for one statute's cases.

The factors that affect the timeliness of OSHA investigations also affect the length of the OALJ appeals process: the amount and complexity of evidence, involvement of the parties' legal counsel, and the judge's overall caseload. According to the judges we interviewed, in complex cases, such as those under Sarbanes-Oxley, Energy Reorganization, and Aviation Investment and Reform, the discovery and motions phase can last 6 months or more due to the complexity and volume of documents involved. During the discovery process, at least one party typically requests extensions, usually to review and respond to the other party's submitted documents and to take depositions of witnesses—requiring more time when lawyers are involved. This phase also involves disputes over evidence to be entered, and sometimes the judges will have to write lengthy discovery orders or motions to require opposing parties or outside parties to cooperate. According to one judge, such disputes occur more often in whistleblower cases than other types of cases that they hear. Usually toward the end of the discovery process, parties sometimes submit a motion for summary judgment—typically requiring a complex and lengthy motion decision by the judge. If the case is not resolved through the motions process, the resulting hearing may last a few days or a few weeks, depending on the number of witnesses and the complexity of evidence. For example, Sarbanes-Oxley cases typically require expert witnesses to explain evidence. Judges report that their overall caseload

may increase processing times, especially during the decision phase of the process. While writing the decision for a complex case may require 1 month of work, it spans several months because of other, ongoing cases. The judges we interviewed each had from 61 to 115 open cases at the time of the interview and, although whistleblower cases represent a minority of the OALJ's overall caseload, judges report that they take longer to adjudicate than cases under other statutes.

Appeals to the ARB. In contrast to the OALJ, ARB does not maintain reliable timeliness data and thus is unable to accurately track and report information on its processing times. For example, according to ARB officials, the case closed date in the case tracking database should match the date of the letter ARB sends to the parties, describing the outcome of its review. However, for 84 percent of the cases closed in fiscal year 2007, database information for the case closed date did not match the date of the letter. Moreover, the case open date is also unreliable because documentation was either missing or inaccurately recorded in at least 13 percent of the cases. Agency officials noted that the agency lacks written guidance on recording processing time data and also lacks a database manager in charge of data integrity. Although ARB tracks processing times and, according to officials, is working toward shortening them, the agency cannot accurately report progress on this goal.

Although we cannot report overall processing times for ARB, our case file review showed that processing times for 109 of the 120 cases closed in fiscal year 2007 ranged from 1 month to over 5 years (see table 4).[16] While at least 84 percent of these 109 cases exceeded the statutory or regulatory time frames,[17] officials explained that a more realistic processing time would be 6 to 8 months, citing the same factors that affect processing times at OSHA and the OALJ: caseload, case complexity, and involvement of the parties' legal counsel.

[16]The remaining 11 case files lacked documentation about when the case was opened.

[17]We were unable to determine if four cases met the statutory time frames because we lacked information about the date of the OALJ hearing. These four cases all fell under the Sarbanes-Oxley Act.

Table 4: Processing Times for 109 of 120 Cases the ARB Closed in Fiscal Year 2007

	Total cases closed in FY 07	Number of cases with known processing times	Shortest case (in days)	Longest case (in days)
Aviation Investment and Reform Act	12	10	469 (15 mos.)	2,015 (5 yrs., 6 mos.)
Environmental protection statutes	12	9	406 (13 mos.)	1,071 (2 yrs., 11 mos.)
Energy Reorganization Act	7	4	674 (22 mos.)	1,001 (2 yrs., 9 mos.)
Sarbanes-Oxley Act	18	15	50	945 (2 yrs., 7 mos.)
Surface Transportation Assistance Act	71	71	32	1,917 (5 yrs., 3 mos.)
Total	**120**	**109**		

Source: GAO analysis of case files.

Whistleblowers Received a Favorable Outcome in a Minority of Cases, but OSHA's Data Somewhat Overstate the Outcomes

Whistleblowers received a favorable outcome in a small proportion of the complaints that were closed in fiscal year 2007, both in terms of initial decisions and on appeal, but the actual proportion may be slightly lower than Labor's data show. Investigations resulted in a favorable outcome for whistleblowers in about 21 percent of complaints, according to OSHA's data; nearly all of these were settled through a separate settlement agreement involving the whistleblower and the employer.[18] However, we found several problems in the way settlements were being recorded in OSHA's database—several cases recorded as settled were actually dismissed by OSHA or withdrawn by the whistleblower and, therefore, should not have been classified as favoring the whistleblower. When cases were settled, most often the whistleblower received a monetary payment. Moreover, many complaints filed by whistleblowers were not investigated, but were screened out because they were not filed within time frames or they did not meet the criteria for opening a case. Because these complaints were never recorded in OSHA's database, OSHA does not have a complete picture of its overall investigator workload or the outcomes of all complaints received. At the appeals level, whistleblowers similarly won a minority of the cases closed in fiscal year 2007—not more than one-third of outcomes favored the whistleblower.

[18]In this report, we counted settlements that provided a remedy for the whistleblower as a favorable decision or outcome.

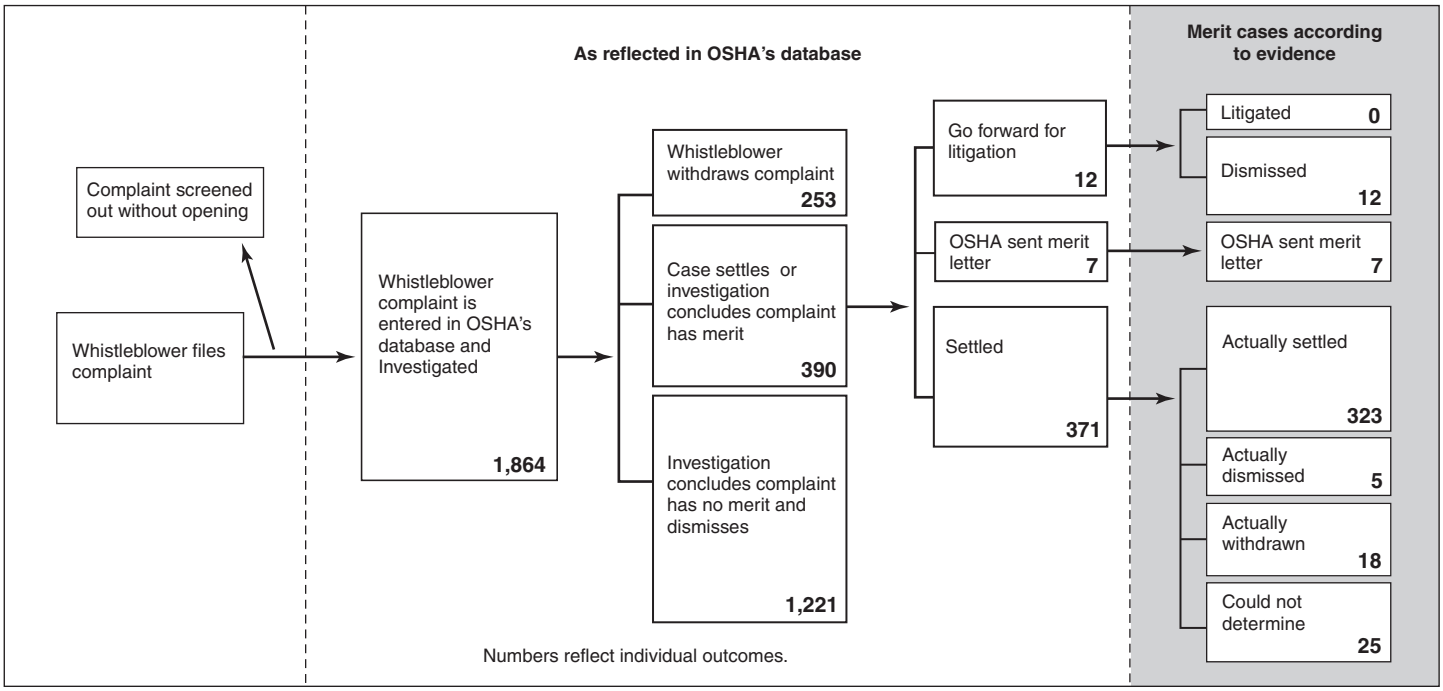
OSHA's Data Show That the Whistleblower Received a Favorable Outcome in About One-in-Five Complaints, but the Actual Proportion May Be Slightly Lower

Whistleblowers received a favorable outcome in about 21 percent of complaints closed in fiscal year 2007, according to OSHA's data. Out of more than 1,800 complaints that were closed, most were dismissed by OSHA or withdrawn by the whistleblower. About two-thirds of all complaints closed in 2007 were dismissed, and another 14 percent were withdrawn by whistleblowers. When OSHA dismissed complaints, information from five regions suggests that it was often because the available evidence did not show that the employer had violated the whistleblower provisions. OSHA's data show that about 21 percent of the complaints resulted in dispositions favorable to the whistleblower—OSHA refers to the case as "having merit"— and nearly all of them were settled through a separate agreement involving the whistleblower and the employer.[19] OSHA's policy is to seek settlement of all complaints determined to have merit prior to referring them for litigation, and about 95 percent of the complaints with merit were settled. Of the remaining 5 percent, or 19 complaints, 12 were sent to Labor's Solicitor's Office for litigation. According to an OSHA official, none of these complaints were actually litigated, all were dismissed. In the remaining 7 complaints, OSHA sent Secretary's findings and orders to the whistleblower and the employer describing the corrective action that the employer needed to take.

While OSHA's data show that 371 complaints were settled in fiscal year 2007, the actual number of complaints settled may be 323. We found several problems in the way complaints were being recorded in OSHA's database. According to OSHA's procedures, all complaints recorded as settled should have a written settlement agreement on file signed by the whistleblower and the employer. However, in 58 of the complaints, OSHA was unable to provide a signed agreement and, instead, provided the final OSHA summary report, memoranda to the file, or final decision letters sent to the whistleblower. In our review of these documents, we found that several of the complaints that were recorded as settled should have been recorded as dismissed by OSHA or withdrawn by the whistleblower. In addition, we were unable to determine the actual outcome of another 25 complaints from the documentation OSHA provided. While these errors occurred in four different regions, the vast majority came from one region. (See fig. 7 for a summary of actual outcomes.)

[19]According to agency officials, about seven of every 10 of these settlements were settled with the direct involvement of OSHA. The remainder were settled by the parties alone, without OSHA involvement.

Figure 7: Outcomes for OSHA's Whistleblower Investigations Closed in Fiscal Year 2007



Source: GAO analysis of OSHA database and file documentation.

When we adjusted the overall totals from OSHA's database to account for these errors, we found that the percentage of cases in which the whistleblower received a favorable outcome declined slightly, from 21 percent to 19 percent (see table 5). Most of this decline occurred in the Occupational Safety and Health Act cases.

Table 5: Adjusted Outcomes of Investigations by Statute, Fiscal Year 2007

	Dismissed		Withdrawn		Merit		Total	
Statute	**Number**	**Percentage**	**Number**	**Percentage**	**Number**	**Percentage**	**Number**	**Percentage**
Asbestos Hazard Emergency Response Act	1	100%	0	0%	0	0%	1	100%
Aviation Investment and Reform Act	31	65	8	17	9	19	48	100
Environmental protection statutes	44	69	7	11	13	20	64	100
Energy Reorganization Act	20	77	3	12	3	12	26	100
Occupational Safety and Health Act	786	65	190	16	229	19	1,205	100
Pipeline Safety Improvement Act	2	100	0	0	0	0	2	100
Sarbanes-Oxley Act	171	70	31	13	42	17	244	100
Surface Transportation Assistance Act	183	67	32	12	59	22	274	100
Total	**1,238**	**66%**	**271**	**15%**	**355**	**19%**	**1,864**	**100%**

Source: GAO analysis of OSHA's Integrated Management Information System and document review.

Note: Percentages may not total 100 due to rounding. Numbers listed have been adjusted to exclude cases litigated that were dismissed and cases for which errors were found during our review of settlement agreements.

Most Settlement Agreements Contained Monetary Payments

Most of the signed settlement agreements we reviewed contained provisions requiring the employer to provide a payment to the whistleblower. About 90 percent of the 288 settlement agreements we reviewed contained some type of payment, including back pay, front pay (often given in lieu of reinstatement), or other type of payment, such as compensatory damages or accrued leave. These payments ranged from an average of $5,288 for Occupational Safety and Health Act complaints to $133,575 for Sarbanes-Oxley complaints (see table 6).

Table 6: Number of Settlement Agreement Payments and Selected Amounts by Statute, Complaints Settled in Fiscal Year 2007

Statute	Number of agreements with monetary payments	Average amount	Minimum amount	Maximum amount
Aviation Investment and Reform Act	6	$10,083	$1,000	$22,500
Environmental protection statutes	5	41,821	2,000	99,920
Energy Reorganization Act	2	70,176	8,000	132,352
Occupational Safety and Health Act	172	5,288	65	94,500
Sarbanes-Oxley Act	35	133,575	5,000	775,000
Surface Transportation Assistance Act	38	6,617	176	81,500
Overall	**258**	**$23,604**	**$65**	**$ 775,000**

Source: GAO analysis of settlement agreements, 2007.

Many Whistleblower Complaints Were Not Investigated or Centrally Recorded

While OSHA investigated and closed over 1,800 complaints in fiscal year 2007, many other complaints were dismissed—or "screened out"—without conducting a full investigation. OSHA procedures provide that complaints filed under three statutes—the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and International Safe Container Act—will be screened out without being docketed for investigation if they do not meet certain criteria and if the whistleblower agrees.[20] These criteria are: (1) the complaint was not filed within statutory time limits; (2) the case was not within OSHA's jurisdiction,[21] or

[20]OSHA procedures provide that complaints filed under the other statutes it administers may not be closed administratively. Rather, complaints that are untimely or do not present a *prima facie* case will be docketed and a written determination issued (unless the complainant withdraws the complaint).

[21]A review of jurisdictional issues might include determining that wages not paid is under the purview of Labor's Wage and Hour Division, rather than OSHA's whistleblower provisions.

(3) the complaint does not allege a *prima facie* case.[22] When this occurs, investigators do not record the complaint in OSHA's central database because they are not required to and, according to OSHA officials, the system's design does not allow them to record complaints that are never opened or investigated. While the individual regional offices have begun tracking their own screen-outs, OSHA currently has no central mechanism to assess the overall investigators' workload during the year, or the outcomes of all complaints received. OSHA officials tell us they are in the process of designing a new Web-based data system—called the OSHA Information System, or OIS—that would capture information on screened out complaints, including the reasons for the screen-out. OSHA expects to implement the new system in late 2010.

The number of complaints that were screened out in fiscal year 2007 varied widely from region to region, and sometimes exceeded the number of complaints that the region investigated and closed based on data we reviewed from the five regions we visited. We found that, for two of the regions, the number of complaints screened out was higher than the number investigated and closed during the year and, in two other regions, the number was much lower (see table 7). In explaining these differences, officials told us that regions are using different standards to make screen-out decisions--existing criteria on when to screen out cases are not consistently applied and the current process lacks accountability.

The vast majority of cases that the five regions screened out, where we could identify the applicable statute, were received under the Occupational Safety and Health Act—also the statute with the largest overall number of complaints. According to the regions' documentation, the most frequently cited reason for screening out cases was that the complainant's allegation did not meet the elements of a *prima facie* case. Also, frequently cited reasons included that the complaint was not within OSHA's jurisdiction or was not filed within required time frames. Other reasons included lack of cooperation from the whistleblower and the whistleblower declined to pursue the complaint. Overall, the five regions we visited reported that they screened out about 590 cases during fiscal year 2007, compared with 861 cases that they investigated and closed.

[22]In this context, the *prima facie* elements of a violation are: 1) the complainant engaged in an activity protected by the specific statute; 2) the respondent was aware of or suspected that the complainant engaged in a protected activity; 3) the complainant suffered some form of adverse action such as discharge, demotion, or harassment; and 4) a causal link (nexus) between the protected activity and the adverse action.

Table 7: Fiscal Year 2007 Investigated and Closed Cases and Screen-Outs for Five Regional Offices

OSHA region	Number of investigated and closed cases	Number of screened out complaints
Region A	163	222
Region B	190	11
Region C	364	281
Region D	71	74
Region E	73	2
Total	**861**	**590**

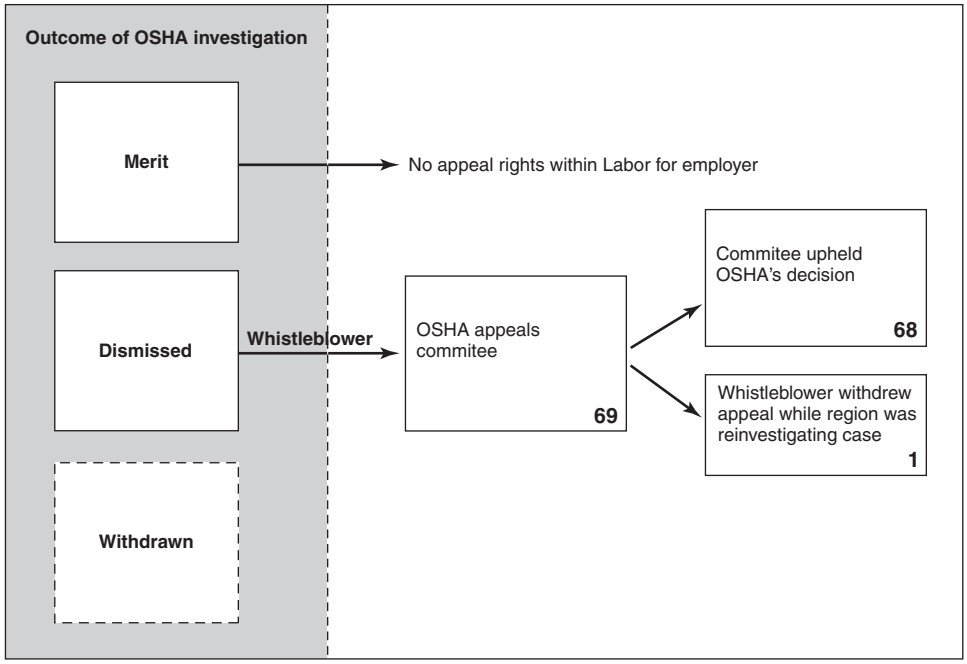
Source: GAO analysis of OSHA regional data.

Whistleblowers Received a Favorable Decision in No More than One-Third of Cases Appealed in Fiscal Year 2007

Across all statutes, whistleblowers received a favorable decision in no more than about one-third of the cases appealed in fiscal year 2007. As we reported earlier, the appeals process differs depending on statute. In fiscal year 2007, the Appeals Committee reviewed 69 appeals under the three statutes for which it hears appeals and eventually denied 68 of those cases.[23] In 2007, three of those cases were sent back to the appropriate regions for reinvestigation and, upon further review by the Appeals Committee, two of those cases were denied. The remaining case was also sent back to the region for reinvestigation, but the whistleblower withdrew his complaint while the case was being reinvestigated (see fig. 8).

[23]According to OSHA officials, the Appeals Committee cannot overturn a case; it can only agree with OSHA's decision that a case does not have merit or, if there are potential grounds to change the original no-merit finding, it can refer the case back to the originating OSHA office for reinvestigation.

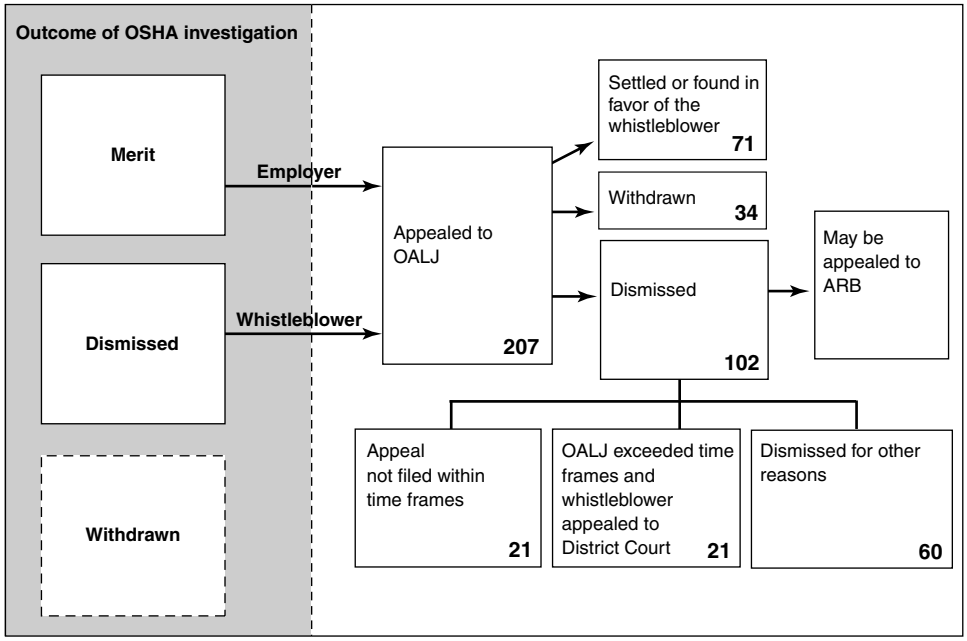
Figure 8: Outcomes for Cases Appealed to the OSHA Appeals Committee and Closed in Fiscal Year 2007



Source: GAO analysis of OSHA appeals documents.

For all other statutes, cases may generally be appealed to OALJ and, ultimately, to ARB. Of the 207 appeals that OALJ reviewed in fiscal year 2007, almost two-thirds were either dismissed by OALJ, or withdrawn by the whistleblower. About one-third of the cases were settled between the two parties or found in favor of the whistleblower. In a small portion of appeals, OALJ did not make a decision within the required time frames, and the whistleblowers took their case to U.S. District Court. Most of the cases appealed to the courts were related to the Sarbanes-Oxley Act, which permits an action to be brought in U.S. District Court if the Secretary has not issued a decision within 180 days of the filing of the complaint. If either party disagrees with OALJ's decision, it can file an appeal with ARB (see fig. 9).

Figure 9: Outcomes for Cases Appealed to OALJ and Closed in Fiscal Year 2007

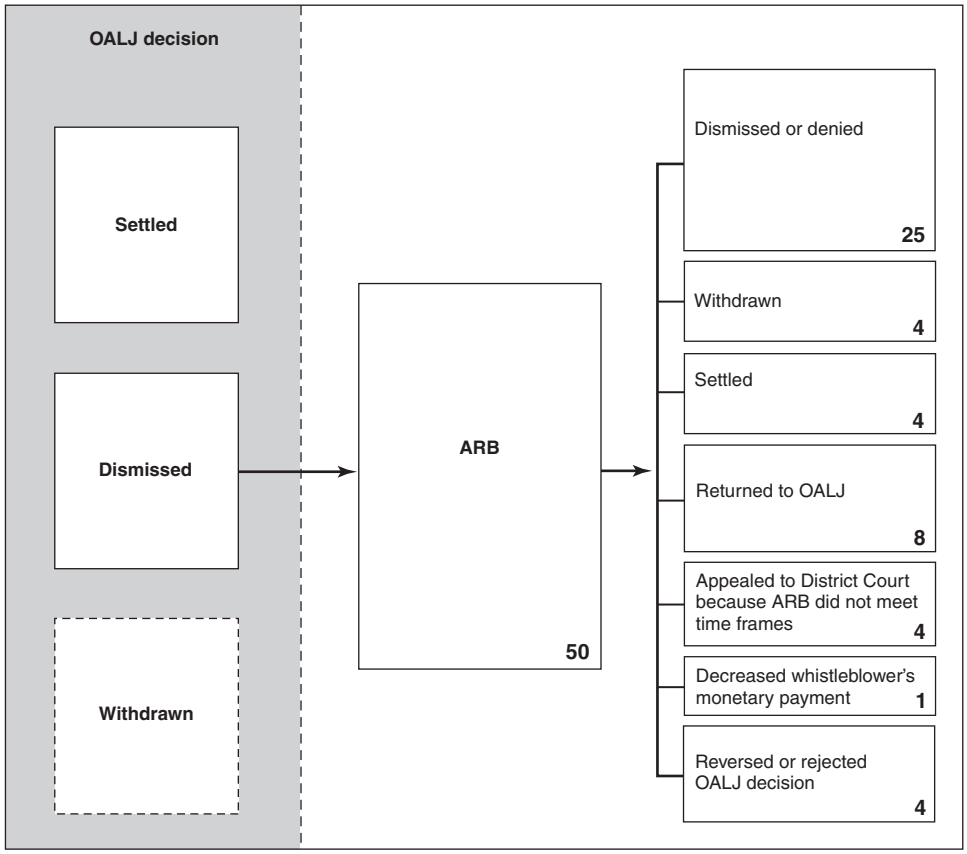


Source: GAO analysis of OALJ decisions.

When cases were further appealed to the ARB, a small portion was resolved in favor of the whistleblower, most often through a settlement agreement. ARB decided 50 appealed cases in fiscal year 2007 and dismissed or denied about 50 percent of the cases it decided.[24] In four cases, ARB reversed OALJ's decision that originally favored the whistleblower, often citing insufficient evidence showing that the whistleblower was protected by the act or the employer had taken an adverse action. ARB decided in favor of the whistleblower in 8 percent of the complaints, and those resulted in a settlement agreement. (See fig. 10.)

[24]ARB is required to automatically review any OALJ decision under the Surface Transportation Assistance Act, so these cases are not actually appealed to ARB. Of the 36 settlement cases reviewed by the ARB in 2007, 32 were settlement agreements that were completed while the appeals were being adjudicated by OALJ. Four of the settlement agreements were signed during the ARB adjudication process and were included in our merit calculations. We excluded all but one of the Surface Transportation Assistance Act decisions in our calculations so the total number of cases will differ from the number used in our processing time analysis.

Figure 10: Outcomes for Cases Appealed to the ARB and Closed in Fiscal Year 2007



Source: GAO analysis of ARB decisions.

OSHA Faces Challenges in Ensuring the Quality and Consistency of the Program

OSHA faces two key challenges in administering the whistleblower program—it lacks a mechanism to adequately ensure the quality and consistency of investigations, and many investigators report they lack certain resources they need to do their jobs—including equipment, training, and legal assistance. OSHA does not routinely conduct independent audits of the whistleblower program to ensure consistent application of policies and procedures. OSHA's new field audit program has begun to address this need but is lacking in several key areas; in particular, it does not adequately provide for audit independence or for accountability in resolving audit findings. With respect to resources, nearly half of the investigators overall reported that the equipment they have does not meet the needs of the job, but these equipment needs vary from region to region. OSHA has not established minimum standards for

investigator equipment, and we found that the equipment investigators lack varies from region to region. Furthermore, the majority of investigators told us that they need more training to effectively address cases from some of the complex federal statutes that OSHA administers. For example, between one-third and one-half of investigators responding to our survey reported that they have not received any specific training on two of the statutes that OSHA considers most complex—Sarbanes-Oxley and Aviation Investment and Reform. Moreover, investigators' lack an adequate resource of specialized legal expertise on their more complex statutes.

OSHA Has Revised Its Audit Program but Is Not Yet Routinely Conducting Audits of the Whistleblower Program to Ensure Consistent Application of Policies and Procedures

Since 2005, OSHA has taken steps to strengthen its audit program, but does not routinely conduct audits of the whistleblower program. In 2004, we recommended that OSHA develop a system to ensure that the regions complete audits of their programs as required and that OSHA establish a system for using the audit results to improve the consistency of their programs and processes.[25] In response, OSHA revised its audit directive, and an office within OSHA is responsible for overseeing regional audit activities. The revised audit directive requires regions to perform comprehensive audits of all programs, including the whistleblower program, at least once every 4 years, but also requires that they audit some aspect of their own regional operations each year. Such annual audits may, for example, focus on a single aspect of a program—possibly the whistleblower program—or may examine only one of several office locations in a region. Despite these efforts, we found several areas in which audit efforts fell short.

Audits of the whistleblower program have not been routinely conducted. OSHA has not been systematically conducting audits of the whistleblower program to ensure all regions consistently apply the same policies and procedures. Since this new directive became effective in 2005, only 6 out of the 10 regions have completed a limited-focus audit of their whistleblower program, and none of OSHA's regions has conducted a comprehensive audit of the entire program. Officials told us regional audit teams will begin conducting these audits for all programs in fiscal year

[25]See GAO, *OSHA'S Complaint Response Policies: OSHA Credits Its Complaint System with Conserving Agency Resources, but the System Still Warrants Improvement*, GAO-04-658 (Washington, D.C.: June 18, 2004) and *Workplace Safety and Health: OSHA's Oversight of Its Civil Penalty Determination and Violation Abatement Processes Has Limitations*, GAO-04-920 (Washington, D.C.: Aug. 13, 2004).

2009. All regions should complete a comprehensive audit by the end of fiscal year 2009.

Audit guidance is unclear. The current audit directive is unclear and agency officials expressed conflicting views about the criteria regions must meet in order to comply with the audit directive. For example, the directive does not provide specific guidance about what aspects of the whistleblower program all regions must examine in a comprehensive audit. The guidance is limited to a sample list of questions auditors may use—but are not required to use—for either a limited focus or a comprehensive audit. It does not specify which questions must be answered and does not always provide clear criteria against which to evaluate performance. For example, one question asks whether complaints are forwarded to the investigator in a timely manner, without defining what is meant by timely. Given this lack of clarity, officials cannot ensure that every region's whistleblower program is audited using the same standards and criteria.

Audits lack independence. OSHA's audit processes do not adequately provide for independence, an important aspect of an effective audit program and a key aspect of generally accepted government auditing standards. *Government Auditing Standards* describes the criteria for independence.

> "The audit organization and the individual auditor, whether government or public, must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments to independence. Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information…. audit organizations must not audit their own work..."[26]

All phases of the audit process are controlled by the regional administrator whose programs are being audited. Each OSHA regional administrator appoints regional staff to plan and conduct audits, receives the audit findings, and takes corrective action. Audit team leaders and members usually serve on the audit team in addition to their regular duties within the region; for the purposes of the audits, they report directly to the regional administrator. Although an official with the audit program told us that the audit team leader and members should not audit a program on

[26]GAO, *Government Auditing Standards, January 2007 Revision*, GAO-07-162G, Sections 3.02, 3.03, and 3.22 (Washington, D.C.: Jan. 31, 2007).

which they work, the current audit directive does not specifically discuss the independence of the audit coordinator or team members. An official acknowledged that regions sometimes appoint staff from within a program to participate in audits of that program. Regional administrators are also responsible for deciding how their region will comply with the annual audit requirement—regions determine the program(s) and/or office locations to be audited and the scope of those audits. Lacking specific national guidance regarding comprehensive audits, regions decide the scope of these as well. This current audit structure raises serious concerns about OSHA's ability to ensure the independence and quality of its audits.

Audit process lacks an accountability mechanism for addressing problems found in audits. Even when audits are performed, there is no process to ensure full audit findings are shared outside the region, and there is no mechanism to hold the regions accountable for taking corrective action in response to audit findings. Audit reports are kept within the region—only a summary report is shared with the national office of the audit program. Starting in fiscal year 2008, regions are directed to submit, along with the audit summary report, a checklist that indicates whether there were findings and recommendations for the topics that were audited. The national office may contact regional audit staff to verbally verify that the information on this checklist is correct. However, neither OSHA's national office of the audit program nor the national office of the whistleblower program has the opportunity to review or follow up on the full findings of audits, or to systematically monitor whether the region has addressed the problems identified. The current audit directive directs national office staff to participate in selected comprehensive audits at least once per quarter, but this has occurred only three times since 2005.

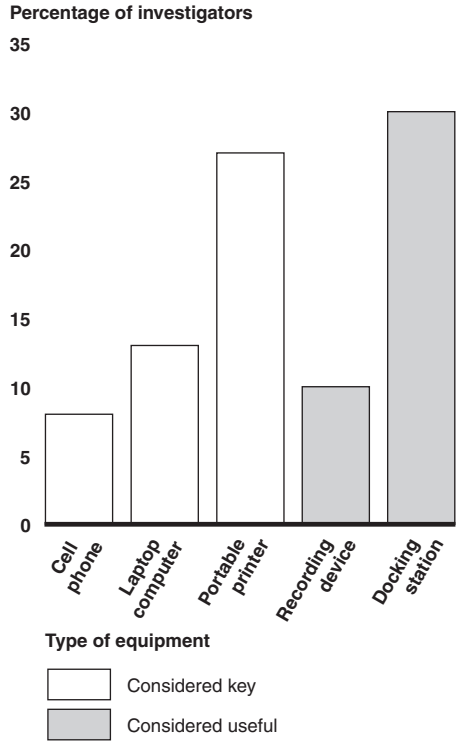
Many Whistleblower Investigators Report They Lack the Resources They Need to Do Their Jobs

Another key challenge facing OSHA's whistleblower program is that many investigators report they lack essential resources, including basic equipment, training, and the legal assistance needed to adequately address their large and complex caseloads.

Basic equipment. Forty-five percent of the investigators reported that the equipment they have does not meet the needs of the job, but these equipment needs vary from region to region. According to OSHA officials, regional administrators must make key management decisions for the whistleblower program in their region, including how to allocate resources among the whistleblower program and the many other OSHA priorities. This need to balance competing needs against limited resources has led to a situation in which investigators in some regions lack essential tools.

According to headquarters officials, the program has not established minimum equipment standards, but all of the program's investigators should have laptop computers, portable printers, and cell phones. In addition to these items, investigators and supervisors told us that docking stations and digital voice recorders are also useful tools. Since much of the work investigators do takes place in the field, the availability of high-quality equipment is critical. Many investigators reported in our survey that Labor has provided some key equipment. For example, about 70 percent of investigators reported that Labor has provided them with laptop computers, and about the same percentage say they have been given digital recorders. However, about 26 percent of investigators reported needing a portable printer, and about 13 percent reported needing a laptop computer (see fig. 11). Moreover, specific equipment needs vary greatly from region to region. For example, in two regions one-half or more of investigators reported needing portable printers, but in three other regions, none of the investigators reported this need. Additionally, in four regions, one-half or more of investigators reported needing docking stations, in four other regions, none reported needing them.

Figure 11: Key and Useful Equipment Investigators Report They Do Not Have, but Need



Source: GAO survey of Whistleblower investigators.

Lacking essential, up-to-date equipment limits investigators' ability to conduct timely investigations. Nearly one-third of all investigators reported that their equipment or computer software hinders their ability to complete investigations within statutory or regulatory time frames. However, this figure varies from region to region—while this was not a major problem in four regions, for six regions, it ranged from around 30 to 80 percent. Lacking essential equipment can negatively affect investigators' work. For example, not having a laptop computer and portable printer while in the field can cause significant delays in an investigation. According to investigators, having this equipment is often key to quickly getting witness statements. It is not uncommon for a witness to be willing and available to sign a sworn statement directly following an in-person interview in the field, but to be slow to respond—or not willing to respond at all—if he or she receives the statement in the mail. Table 8 provides illustrative examples of how investigators would use certain essential tools to do their jobs.

Table 8: Key and Useful Equipment for Investigators and Examples of Their Functions for Investigating Whistleblower Claims

Equipment	Examples of functions in day-to-day activities
Cell phone	• Allows investigators to coordinate with their supervisors, witnesses, and others during investigators' frequent travel.
Laptop computer	• Enables investigators to have critical documents, such as sworn statements for witnesses to sign, on hand at all times, even while they are traveling. • Allows investigators to compose important case file documentation, such as records of interviews, while in the field. • Along with an Internet connection, permits investigators to access OSHA's database to enter key processing data real-time, regardless of the investigator's location. Also allows investigators to conduct research (e.g., case law or corporate filings) while in the field.
Docking station	• Allows investigators to use a laptop computer for long periods of time and to quickly access additional peripheral equipment, such as CD-ROMs, larger monitors, and standard keyboards.
Recording device	• A recording device allows investigators to record their numerous interviews, rather than having to rely on their own notes and written statements taken while conducting the interview. Interviews may be burned onto a CD-ROM and included with the case file. Some recordings may be manually transcribed, depending on the circumstances. • A digital recording device allows investigators to save interviews electronically and use voice recognition software to automatically transcribe them.
Portable printer	• Enables investigators to print critical documents, such as sworn statements for witnesses to sign, while they are in the field.

Source: GAO analysis of testimonial information provided by investigators and supervisors.

Over one-half of investigators reported spending some out-of-pocket funds on work-related equipment, supplies, or transportation in calendar year 2007, according to our survey. In some cases, this was as little as $75, but, in two regions, investigators spent as much as $2,000 of their own money. Some investigators said they purchased basic equipment, such as a laptop computer or a printer, with their own money, either because they have not been supplied such equipment by the agency, or because the equipment the agency provided is of insufficient quality. In one instance, an investigator who was preparing to attend the mandatory 2-week investigator training course learned that the course required participants to bring laptops with operating systems that were compatible with the software being used for the course. Lacking this, the investigator used his or her own money to buy a laptop with a compatible operating system. In three regions, nearly all investigators reported that they had been issued a

government-funded cell phone but, in four other regions, all of the investigators reported they have not. Most investigators in these four regions reported using personal cell phones to conduct official business. Some investigators report that they are not reimbursed for the cost of using personal cell phones.

Training and legal resources for complex cases. Whistleblower investigators reported that they need more training to address their complex cases. For example, between one-third and one-half of investigators responding to our survey reported that they have not received any specific training on two of the statutes that OSHA considers most complex—Sarbanes-Oxley and the Aviation Investment and Reform Act. Overall, 40 percent of investigators reported in our survey that a lack of training hinders their ability to complete investigations within required time frames; in five regions, it was one-half or more of investigators. Furthermore, OSHA officials and several supervisors told us that budgetary constraints have prevented most investigators from receiving training. All investigators are required to complete a 2-week basic whistleblower investigations training course that focuses on complaints filed under the Occupational Safety and Health Act; but, investigators and supervisors told us, and OSHA officials have acknowledged, that investigators need additional training that goes beyond the topics covered in the 2-week course. For example, nearly three-quarters of investigators ranked the Sarbanes-Oxley Act as the statute on which they most need additional training in order to improve their ability to effectively do their jobs. In particular, supervisors and investigators stressed the need for training on the scope of protected activities covered by the Act. The national office, together with a curriculum development team, has recently redesigned the mandatory basic training course to include, among other changes, training on all of the federal statutes OSHA administers, but the national office does not control the training budget for regional investigators. Twenty-four whistleblower investigators and supervisors were able to take the course in June 2008; while another session has been scheduled, it is unclear whether all investigators will be able to receive this training. OSHA officials recognize the need for more investigators to receive training, but regional budgetary constraints may limit participation.

Additionally, investigators do not consistently receive the legal assistance they need to conduct high-quality investigations. Investigators in many OSHA regions are able to draw on the legal expertise of their region's Solicitor's Office. In addition, officials and supervisors report that OSHA's national Whistleblower Protection Program office frequently offers

technical assistance on complex cases. However, the specialized knowledge required for some of the statutes does not readily exist within Labor, in part, because the agency does not administer the substantive provisions of most of the statutes. Moreover, some of the newer, more complex statutes have limited case law to guide decision making. As a result, investigators sometimes have difficulty getting the legal advice they need to help them with the complex issues they frequently encounter over the course of investigating cases. Officials and supervisors told us that the Sarbanes-Oxley Act is the statute on which specialized legal assistance is most often needed, although other statutes also involve complex legal matters, for example, the Aviation Investment and Reform Act. Sarbanes-Oxley cases in particular often require investigators to analyze evidence that is difficult and highly technical—for example, investigators must analyze laws and regulations pertaining to securities transactions. Several supervisors report that the national office and their region's solicitor's office are sometimes good sources of assistance on such matters, but that neither is consistently able to quickly answer important questions about specific, complex legal issues. Supervisory investigators in several regions expressed concern that the lack of such legal assistance may be adversely affecting the quality and timeliness of the decisions investigators make.

Conclusion

The whistleblower program is intended to provide non-federal workers with protection from retaliatory actions when they identify prohibited practices at their employers' businesses. Twenty years ago, we found that OSHA lacked adequate internal controls to ensure that criteria and standards for investigating whistleblower complaints were consistently followed. Since then, little has been done to ensure that OSHA—and ARB—have the accurate and complete data they need to manage and oversee the program. No effort has been made to validate the accuracy or the timeliness of the data. Having such data is a necessary first step in determining whether the program is meeting required statutory and regulatory time frames for responding to whistleblowers' complaints, and, if it is not, in assessing the reasonableness of those time frames. Furthermore, because many complaints are screened out and never recorded in OSHA's database, it has an incomplete picture of how many complaints it receives and of their ultimate outcomes, and it cannot ensure that screen-out decisions are made using consistent criteria.

As in the past, OSHA is focusing too little attention on developing the accountability framework it needs to ensure that criteria and standards for investigating complaints are consistently followed. Audits are central to

any internal control and accountability process and, while some progress has been made to enhance its audit program, more needs to be done to bring it in line with government auditing standards. Current guidance for conducting audits lacks the detail and clarity needed to ensure that the audits achieve the intended results on a consistent basis across regions. Even with clearer guidance, OSHA's audit program lacks the independence necessary for an objective review of the regions' activities and provides too little opportunity for accountability when follow-up is needed. Without sufficient internal controls and an appropriate accountability mechanism, the whistleblower program lacks key components of good program management and does not have the oversight tools it needs to ensure it is meeting its mission. Moreover, lacking this oversight and accountability, OSHA will be hampered in its ability to ensure the quality and consistency of investigations, as well as the validity of the outcomes.

Whistleblower investigators continue to be challenged in their efforts to meet statutory and regulatory time frames. In the years since our last review, they have been entrusted with the responsibility of protecting from retaliation many more employees who blow the whistle—employees from industries as diverse as trucking, energy, aviation, and securities. With these new responsibilities have come increased job complexity, but OSHA has struggled to provide investigators with the skills and resources they need to effectively do their jobs. Fully implementing the new standardized training on the complex issues that investigators confront and establishing minimum standards for the equipment they need are important first steps in helping ensure the program meets its goals. We recognize that OSHA faces significant resource constraints, and the decision to provide this additional support will be challenging. But, resources such as these can facilitate investigators' ability to address the many new complaints filed by whistleblowers and to meet the required time frames for processing them.

Recommendations for Executive Action

We recommend that the Secretary of Labor take the following eight actions:

- In order to ensure the quality and consistency of the whistleblower program and to ensure that OSHA has reliable information to use to monitor the program, we recommend that the Secretary of Labor direct the Assistant Secretary of OSHA to take the following actions:
  - Ensure that its new information system for tracking whistleblower complaints includes information on cases that are screened-out before they are investigated and the reasons for being screened-out.

- Establish a mechanism to ensure the data on whistleblower complaints are accurate and require that the National Office of the Whistleblower Protection Program holds regions accountable for the accuracy of the data.
- Revise its field audit directive to:
  - clarify the criteria that regions must use in conducting focused and comprehensive audits.
  - require that the audit be conducted by an entity outside the control of the regional administrator whose programs are being audited to ensure independence, and
  - require that regions submit complete reports of the audit findings and recommendations to OSHA's national office upon completion of an audit, along with periodic updates on corrective actions taken.
- Develop interim audit milestones that regions must meet in order to ensure that audits are completed within specified time frames.

- In order to ensure that all investigators have the necessary equipment and computer software resources, we also recommend the Secretary of Labor direct the Assistant Secretary of OSHA to establish minimum standards for equipment and computer software that investigators need to do their jobs, and develop a mechanism to ensure these needs are met .
- We further recommend that the Secretary of Labor direct the ARB to conduct routine, systematic, independent reviews of its case tracking system in order to ensure that it has accurate and reliable information to use to monitor the program.

Agency Comments and Our Evaluation

We provided a draft of this report to Labor for review and comment. OSHA, OALJ, and ARB commented separately. In its comments, OSHA generally agreed with our findings, but disagreed with one of our recommendations. The agency acknowledged that there is room for improvement in OSHA's processing of whistleblower complaints, but it expressed concerns that we did not take into account the program's resource constraints when developing our findings and recommendations. In our report, we have noted that, due to the addition of several new statutes, investigators are carrying larger, more complex caseloads. However, given that the program has no budget of its own, decisions on how to allocate staffing or other resources among the various OSHA programs are within the agency's control and discretion. Evaluating these resource allocation issues was beyond the scope of this engagement. As already reflected in our report, OSHA noted the steps it has taken to improve its training curriculum for investigators, citing January 2009 as the date for the next training session. However, in its comments, officials did not discuss plans for ensuring that all investigators are able to attend

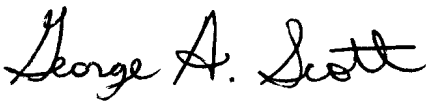
this training. In addition, officials commented that we failed to take into account the impact on overall efficiency of having statutory processing time frames that vary from 30 to 90 days. We have modified our report to reflect that point. Finally, OSHA disagreed with the need for our draft recommendation to ensure that audits of the program are completed, citing its expectation that all 10 regional offices will have completed on-site audits during fiscal year 2009. Because audits of the whistleblower program have not been routinely conducted, we revised the recommendation, clarifying that the agency should focus its efforts on developing interim milestones to ensure that audits of the program are completed within time frames. In so doing, we reiterate the importance of timely, independent audits in ensuring that policies and procedures for conducting investigations are consistently applied.

In its comments, ARB agreed that the data in its tracking system should be accurate and acknowledged that there is always room for improvement; however, officials contend that existing internal controls are appropriate for managing the board's docket. ARB commented that it has taken steps to improve the system, but did not provide specific information on what steps those were. In defending its position, ARB listed additional reports that it uses in conjunction with the case tracking system to monitor performance. In our view, even if the case tracking system is but one component of its efforts to manage the docket, it must be accurate. Given the magnitude of the errors we found in ARB's case tracking system, we disagree that existing internal controls are sufficient and continue to stress the need for improvement. ARB also commented that it appreciates our recommendations for continued improvements to the tracking system, but did not provide information on the specific steps it would take in response.

OSHA and OALJ provided technical comments which we incorporated where appropriate. Labor's entire comments are reproduced in appendix IV.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Secretary of Labor, relevant congressional committees, and other interested parties. The report will also be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or at scottg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Other contacts and staff acknowldgments are listed in appendix V. A list of related GAO products is included at the end of this report.



George A. Scott, Director
Education, Workforce, and
Income Security Issues

Appendix I: Objectives, Scope, and Methodology

The objectives for this engagement were to determine (1) what is known about the processing times for claims under the whistleblower statutes that the Department of Labor (Labor) administers and the factors that affect processing times, (2) what the outcomes were of those complaints, and (3) what key challenges Labor's Occupational Safety and Health Administration (OSHA) faces in administering the program.

Objective 1: Processing Times

To determine what is known about processing times, we obtained and tested the reliability of databases on key information about whistleblowers' cases from OSHA, the Office of Administrative Law Judges (OALJ) and the Administrative Review Board (ARB). To assess the reliability of OSHA's database—the Integrated Management Information System (IMIS), we conducted file reviews at two regional offices and found the data to be unreliable for reporting processing times agencywide. We then adopted a case study approach and conducted case file reviews in three more regions to provide additional evidence about data reliability and examples of actual case processing times. In all, we visited 5 of OSHA's 10 regions: Region 2 in New York City, Region 3 in Philadelphia, Region 4 in Atlanta, Region 8 in Denver, and Region 10 in Seattle. We selected these locations to give us a mix of case volumes (high and low), regions with and without state-based occupational safety and health programs, and to provide geographic dispersion. To select cases for our case studies, we created lists of cases closed in fiscal year 2007 and identified the 10 shortest, 10 longest, and 10 median-length cases within each region and type of case.[1] We then randomized the cases within each subgroup and reviewed the first case on each list. Because we selected nonprobability samples of regions to visit and cases to review, the information we obtained at these locations may not be generalized across all OSHA regions. However, because we selected these regions based on geographic location and volume of cases investigated in each region, and because we selected a stratified random sample of cases, the information we gathered at these locations provided us with an understanding of OSHA's whistleblower program operations. We limited our analysis to cases closed in fiscal year 2007 because OSHA had archived off-site the files for many of the cases closed in earlier years.

[1]We grouped six environmental statutes under one case type, called environmental protection statutes, which mirrors OSHA's approach. These statutes are Clean Air Act; Comprehensive Environmental Response, Compensation, and Liability Act; Federal Water Pollution Control Act; Safe Drinking Water Act; Solid Waste Disposal Act; and Toxic Substances Control Act.

To provide examples of processing times, we analyzed the short and long environmental protection, Sarbanes-Oxley, and Occupational Safety and Health cases we reviewed in three regions. We chose these case types because, with regard to the Secretary's deadline for making initial findings, environmental protection cases have the shortest time frame of 30 days, Sarbanes-Oxley cases have a 60-day time frame, and Occupational Safety and Health cases have the longest time frame of 90 days. We also identified three phases of an investigation: opening, information gathering and analysis, and closing. The opening stage of a case refers to the time from which OSHA receives a case to the investigator's first contact with the complainant or respondent. The information gathering and analysis phase begins the following day and ends when the investigator completes an internal report, called the Final Investigative Report. The closing phase begins the following day and ends when OSHA mails determination letters to the parties.

To describe factors that affect processing times at OSHA, we interviewed OSHA officials and supervisory investigators in all 10 regions, and we interviewed investigators in the five regions we visited. To gather information about investigators' jobs, we designed and implemented a Web-based survey. (See below for more information about the survey.)

To assess the reliability of processing times data for the 207 cases OALJ closed in fiscal year 2007, we obtained a copy of the database and reviewed case files of 10 cases completed in six district offices, 8 cases in one district office, and reviewed 20 cases in the national office. We determined that the data were reliable for reporting processing times across the agency. To describe factors that affect processing times at OALJ, we interviewed eight Administrative Law Judges.

To assess the reliability of the processing times data for ARB, we obtained a copy of the database and reviewed the case files of cases closed in fiscal year 2007. We determined that the data were unreliable and consequently conducted a comprehensive case file review of all 120 cases ARB closed in fiscal year 2007. For 11 of the 120 cases, documentation in the files was insufficient to determine processing times. To describe factors that affect processing times at ARB, we interviewed board members and staff attorneys. We also reviewed pertinent documents and interviewed agency officials from the OSHA, OALJ, and ARB.

Objective 2: Outcomes

To determine the whistleblower decisions made by OSHA, we analyzed outcomes reported in OSHA's Integrated Management Information System and found that the outcome variables were reliable for selected data elements–cases

dismissed and withdrawn. To test the reliability of these data, we reviewed a sample of case files for the five OSHA regional offices visited and obtained documents from randomly selected cases from the other five OSHA regional offices. Our testing determined that decisions related to complaints dismissed and withdrawn were accurately recorded in the database. For OSHA cases that were settled, we requested documentation for all settlements that occurred in fiscal year 2007 and manually reviewed and analyzed this documentation. We found several errors in the database related to recorded settlement information. When we adjusted settlement outcomes based on the documentation we obtained, we confirmed our decision with OSHA officials. Despite the database errors in recording settlements, we concluded that our testing had accurately assessed that information on cases dismissed and withdrawn was correct. To arrive at this conclusion, we took into account (1) the higher likelihood that we would have detected errors in cases dismissed and withdrawn due to its higher occurrence in the population and (2) the contents of settlement documents tended to be more nuanced than the documentation related to cases dismissed or withdrawn and, therefore, more likely to have errors. For the cases screened out by OSHA, we obtained documentation for cases screened out in fiscal year 2007 from the five OSHA regional offices we visited. Because this information is not maintained in a centralized database, we had to manually collect and analyze this information. For the OALJ and ARB, their databases did not contain information on outcomes, so we manually reviewed all of the cases decided in fiscal year 2007. Due to the time required to manually review whistleblower case decisions, we focused our efforts on cases decided during the most recently completed year, fiscal year 2007.

Objective 3: Challenges

To identify the key challenges facing OSHA, we designed and implemented a Web-based survey to gather information on various aspects of the investigators' jobs, and we interviewed key officials. Our survey population consisted of all OSHA whistleblower investigators across all 10 OSHA regions. The response rate for this survey was 86 percent, with 60 out of a possible 70 respondents completing the survey. The survey asked a combination of questions that allowed for open-ended and close-ended responses. Because of potential variation in the investigators' backgrounds and years with the program, the instrument was designed so that investigators were asked to comment only on those questions which were directly applicable to them. Therefore, the number of survey respondents for some questions varied, depending on the relevance of the question to each investigator. We pretested the content and format of the questionnaire with two investigators. In addition, we asked a program official to review it for clarity of language and question flow. During the pretests, we asked questions to determine whether (1) the survey

questions were clear, (2) the terms we used were precise, (3) the questionnaire did not place an undue burden on the respondents, and (4) the questions were unbiased. We also assessed the usability of the Web-based format. We received input on the survey and made changes to the content and format of the final questionnaire based on our pretest results.

The survey was conducted using self-administered electronic questionnaires posted on the Web. We sent e-mail notifications to investigators beginning on February 26, 2008. We then sent each potential respondent a unique password and user name by e-mail to ensure that only members of the target population could participate in the appropriate survey, and we activated the survey on February 27, 2008. To encourage respondents to complete the questionnaire, we sent e-mail messages to prompt each nonrespondent approximately 2 weeks and 3 weeks after the initial e-mail message. We also made follow-up phone calls to potential respondents from March 20, 2008 to March 26, 2008. We closed the survey on March 27, 2008, obtaining an 86 percent response rate. Because we attempted to collect data from every investigator in the population, there was no sampling error. However, the practical difficulties of conducting any survey may introduce errors, commonly referred to as nonsampling errors. For example, differences in how a particular question is interpreted, the sources of information available to respondents, how the responses were processed and analyzed, or the types of people who do not respond can influence the accuracy of the survey results. We took steps in the development of the survey, the data collection, and the data analysis to minimize these nonsampling errors and help ensure the accuracy of the answers that were obtained. For example, a social science survey specialist designed the questionnaire, in collaboration with GAO staff with subject matter expertise. Then, as noted earlier, the draft questionnaire was pretested to ensure that questions were relevant, clearly stated, and easy to comprehend. The questionnaire was also reviewed by an additional GAO survey specialist. Data analysis was conducted by a GAO data analyst working directly with GAO staff with subject matter expertise. A second, independent analyst checked all of the computer programs for accuracy. Since this was a Web-based survey, respondents entered their answers directly into electronic questionnaires. This eliminated the need to have data keyed into databases, thus removing an additional source of error. To obtain additional perspectives on the challenges OSHA faces in administering the whistleblower program, we interviewed key OSHA officials in headquarters and in all 10 regional offices.

In our work, we did not assess the adequacy of investigator staffing levels for meeting current workloads, nor did we assess the quality of the investigations

or the appropriateness of whistleblower outcomes at either the investigation or the appeals levels because these aspects were beyond the scope of the current engagement. We conducted this performance audit between October 2007 and January 2009, 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 II: OSHA's 17 Statutes and Their Provisions

The Department of Labor (Labor) is responsible for administering the whistleblower protection provisions of many different federal statutes. For 17 of these whistleblower provisions, Labor's Occupational Safety and Health Administration (OSHA) initially investigates any alleged violations. The majority of the statutory whistleblower protections are supplemented by regulations that further clarify and set forth specific requirements for the whistleblower protection process in the private sector. Such processes often include 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. The following tables are based on both the statutes and the regulations and describe the major steps in this process, as well as the potential remedies. Tables 9 and 10 describe Labor's investigative and findings process; tables 11 and 12 describe the appeal process for whistleblowers' complaints; tables 13 and 14 describe the litigation process that may take place in U.S. courts; and table 15 describes the whistleblowers' potential remedies from adverse personnel actions. It should also be noted that at any time, the whistleblower can enter into a settlement agreement which would end the process.

Labor's Investigation and Findings Process

When a whistleblower believes he or she has been retaliated against in some manner and desires relief, the first step he or she must take is filing a complaint with Labor. The complainant initiates a process whereby the Secretary of Labor, through various OSHA investigators, conducts an investigation of the alleged retaliation. After the investigation is complete, the Secretary makes initial findings. The initial findings may be accompanied by a preliminary order, in which the Secretary orders the parties to comply with various remedial requirements. As shown below, and in tables 9-15, with one exception, the 17 statutes—other than the whistleblower provisions—are primarily administered by other federal agencies such as the Department of Transportation and the Environmental Protection Agency. The highlighted federal agencies shown in the tables are the program agencies primarily responsible for administering the non-whistleblower provisions of the 17 statutes.

Table 9: Initial Filing of the Complaint

	Deadline to file complaint from date of alleged violation				Form of complaint	
	30 days	60 days	90 days	180 days	No form specified/ required[a]	Complaint must be written
Consumer Product Safety Commission						
Consumer Product Safety Improvement Act of 2008				X	X	
Department of Energy						
Energy Reorganization Act of 1974				X[b]		X
Department of Transportation						
Federal Railroad Safety Act of 1970				X	X	
International Safe Container Act		X			X	
National Transit Systems Security Act of 2007				X	X	
Pipeline Safety Improvement Act of 2002				X[b]		X
Surface Transportation Assistance Act of 1982				X	X	
Environmental Protection Agency						
Asbestos Hazard Emergency Response Act of 1986			X		X	
Clean Air Act	X[b]					X
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	X[b]					X
Federal Water Pollution Control Act	X[b]					X
Safe Drinking Water Act	X[b]					X
Solid Waste Disposal Act	X[b]					X
Toxic Substances Control Act	X[b]					X
Federal Aviation Administration						
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century			X[b]			X
Department of Labor						
Occupational Safety and Health Act of 1970	X				X	
Securities and Exchange Commission						
Sarbanes-Oxley Act of 2002			X[b]			X

Source: GAO analysis of relevant statutes and regulations.

[a]Although no form is specified or required, whistleblower complaints may be provided either orally or in writing. For example, for the Occupational Safety and Health Act, the whistleblower may provide his or her complaint by telephone to a responsible OSHA official.

[b]The date of violation occurs when the retaliatory decision has been both made and communicated to the complainant.

Table 10: Secretary's Actions After the Complaint is Made

	Notification of program agency		Deadline for secretary's initial findings			Initial findings include a preliminary order	
	Program agency is notified of the complaint	No process specified	30 days	60 days	90 days	Yes, if a violation (or reasonable cause) is found[a]	No process specified
Consumer Product Safety Commission							
Consumer Product Safety Improvement Act of 2008		X		X		X	
Department of Energy							
Energy Reorganization Act of 1974	X		X			X	
Department of Transportation							
Federal Railroad Safety Act of 1970		X		X		X	
International Safe Container Act		X	X				X[b]
National Transit Systems Security Act of 2007		X		X		X	
Pipeline Safety Improvement Act of 2002	X			X		X	
Surface Transportation Assistance Act of 1982		X		X		X	
Environmental Protection Agency							
Asbestos Hazard Emergency Response Act of 1986		X			X		X[b]
Clean Air Act	X		X			X	
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	X		X			X	
Federal Water Pollution Control Act	X		X			X	
Safe Drinking Water Act	X		X			X	
Solid Waste Disposal Act	X		X			X	
Toxic Substances Control Act	X		X			X	
Federal Aviation Administration							
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	X			X		X	
Department of Labor							
Occupational Safety and Health Act of 1970		X[c]			X		X[b]
Securities and Exchange Commission							
Sarbanes-Oxley Act of 2002	X			X		X	

Source: GAO analysis of relevant statutes and regulations.

Note: None of the whistleblower provisions of these statutes and regulations address subpoena powers directly. Outside of its whistleblower provisions, the Occupational Safety and Health Act (OSH Act) gives the Secretary of Labor subpoena power for making investigations. Asbestos Hazard Emergency Response Act (AHERA), in turn, states that reviews under its whistleblower provisions shall be conducted in accordance with OSHA. As a result, the Secretary has subpoena power under both OSH Act and AHERA.

[a]Preliminary orders of reinstatement may also be issued.

[b]Although no specific mention of preliminary orders is made, the Secretary can bring an action in U.S. District Court after finding that a violation occurred.

[c]Because OSHA is the program agency for this Act, it effectively receives notice via the filing of the complaint itself.

Administrative Appeals Process for Whistleblower Complaints

If a party is not satisfied with the Secretary's initial findings or preliminary order, in most instances the party may seek an appeal through Labor's administrative appeals process. An adversely affected party may generally file an appeal with Labor's OALJ. Once this appeal is filed, an ALJ generally holds a hearing and, after reviewing the evidence, issues a decision. A party adversely affected by the ALJ's decision may appeal the matter to the final level in the administrative appeals process: the ARB. The ARB reviews the ALJ's decision, and the decision made by the ARB serves as the final decision of the Secretary of Labor. After that point, there are no further administrative appeals within Labor.

However, the International Safe Container Act, the Asbestos Hazard Emergency Response Act, and the Occupational Safety and Health Act do not provide an administrative appeals process through OALJ and ARB. For cases that are found to have merit, the Secretary of Labor can bring an action for judicial relief in U.S. District Court.

Table 11: Administrative Law Judge Appeals Process

	Deadline for appealing to the ALJ			ALJ standard of review		Deadline for the ALJ to issue a decision		
	30 days	60 days	No ALJ process specified	De Novo[a]	No ALJ process specified	60 days	No deadline specified	No ALJ process specified
Consumer Product Safety Commission								
Consumer Product Safety Improvement Act of 2008 (CPSIA)			X[b]		X[b]			X[b]
Department of Energy								
Energy Reorganization Act of 1974	X			X			X	
Department of Transportation								
Federal Railroad Safety Act of 1970 (FRSA)			X[b]		X[b]			X[b]
International Safe Container Act			X		X			X
National Transit Systems Security Act of 2007 (NTSSA)			X[b]		X[b]			X[b]
Pipeline Safety Improvement Act of 2002		X		X			X	

	Deadline for appealing to the ALJ			ALJ standard of review		Deadline for the ALJ to issue a decision		
	30 days	60 days	No ALJ process specified	De Novo[a]	No ALJ process specified	60 days	No deadline specified	No ALJ process specified
Surface Transportation Assistance Act of 1982	X			X		X		
Environmental Protection Agency								
Asbestos Hazard Emergency Response Act of 1986			X		X			X
Clean Air Act	X			X			X	
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	X			X			X	
Federal Water Pollution Control Act	X			X			X	
Safe Drinking Water Act	X			X			X	
Solid Waste Disposal Act	X			X			X	
Toxic Substances Control Act	X			X			X	
Federal Aviation Administration								
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	X			X			X	
Department of Labor								
Occupational Safety and Health Act of 1970			X		X			X
Securities and Exchange Commission								
Sarbanes-Oxley Act of 2002	X			X			X	

Source: GAO analysis of relevant statutes and regulations.

Note: None of the whistleblower provisions of these statutes or regulations explicitly address the solicitor's role in the process.

[a]A "de novo" standard of review is a nondeferential review conducted as if the original proceeding had not taken place.

[b]Since CPSIA, FRSA, and NTSSA are relatively new statutes, none have accompanying regulations yet. As a result, there is no specific mention of ALJs or ARB. Therefore, for the purposes of these tables, these statutes are placed in the relevant columns, indicating that no process has been specified. The statutes do, however, permit the parties to request a hearing on the record. Because of this language, and pursuant to the Administrative Procedure Act, Labor is currently docketing such cases at the ALJ level.

Table 12: Administrative Review Board Appeals Process

	Deadline for Appealing from the ALJ to the ARB			ARB Standard of Review		Deadline for the ARB's Final Decision			
	10 business days	ARB Automatic Review	No ARB process specified	Substantial evidence standard[a]	No ARB process specified	90 days after complaint is filed	90 days after the hearing concludes	120 days after the hearing concludes	No ARB process specified
Consumer Product Safety Commission									
Consumer Product Safety Improvement Act of 2008 (CPSIA)			X[b]		X[b]				X[b]
Department of Energy									
Energy Reorganization Act of 1974	X			X		X			
Department of Transportation									
Federal Railroad Safety Act of 1970 (FRSA)			X[b]		X[b]				X[b]
International Safe Container Act			X		X				X
National Transit Systems Security Act of 2007 (NTSSA)			X[b]		X[b]				X[b]
Pipeline Safety Improvement Act of 2002	X			X			X		
Surface Transportation Assistance Act of 1982		X		X				X	
Environmental Protection Agency									
Asbestos Hazard Emergency Response Act of 1986			X		X				X
Clean Air Act	X			X		X			
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	X			X		X			

	Deadline for Appealing from the ALJ to the ARB			ARB Standard of Review		Deadline for the ARB's Final Decision			
	10 business days	ARB Automatic Review	No ARB process specified	Substantial evidence standard[a]	No ARB process specified	90 days after complaint is filed	90 days after the hearing concludes	120 days after the hearing concludes	No ARB process specified
Federal Water Pollution Control Act	X			X		X			
Safe Drinking Water Act	X			X		X			
Solid Waste Disposal Act	X			X		X			
Toxic Substances Control Act	X			X		X			
Federal Aviation Administration									
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	X			X				X	
Department of Labor									
Occupational Safety and Health Act of 1970			X		X				X
Securities and Exchange Commission									
Sarbanes-Oxley Act of 2002	X			X				X	

Source: GAO analysis of relevant statutes and regulations.

[a]A "substantial evidence" standard of review is deferential to the factual findings of the body below as long as those findings are supported by substantial evidence.

[b]Since CPSIA, FRSA, and NTSSA are relatively new statutes, none have accompanying regulations yet. As a result, there is no specific mention of ALJs or ARB. Therefore, for the purposes of these tables, these statutes are placed in the relevant columns, indicating that no process has been specified. The statutes do, however, permit the parties to request a hearing on the record. Because of this language, and pursuant to the Administrative Procedure Act, Labor is currently docketing such cases at the ALJ level.

Litigation Process through the U.S. Courts

In certain situations, a case may go beyond the Labor's administrative appeals process, with legal action being brought in U.S. District Court or a U.S. Court of Appeals. The Secretary of Labor may have the authority to bring a legal action in U.S. District Court in two types of situations. First, for two of the whistleblower provisions, the Secretary is required to bring legal action once he or she determines that a violation of whistleblower provisions has occurred and, for one provision, the Secretary has the option of deciding whether to bring an action. Second, the Secretary may

have the authority to bring such a legal action in U.S. District Court if a party fails to comply with the Secretary's preliminary order. In these cases, the Secretary shall (as required by law), or may (at the Secretary's discretion), depending on the provision, bring an action to force compliance with the order.

In some situations, a party may have a right to bring an action in U.S. District Court or a U.S. Court of Appeals. Under many whistleblower provisions, a party may bring an action to enforce the Secretary of Labor's order against another party who is not in compliance with that order. Some provisions allow an action to be brought if there has been no final decision via the administrative appeals process within a certain amount of time. One provision permits the parties to bring an action in order to review the final order of ARB. Finally, for certain whistleblower provisions, a party may take an action directly to a U.S. Court of Appeals to review the final decision of ARB.

Table 13: Parties Bringing an Action in U.S. District Court

	Parties' rights to bring legal action in U.S. District Court						
	In order to get compliance with an order	If the Secretary has not issued a final decision within 180 days of the complaint	If the Secretary has not issued a final decision within 210 days of the complaint	If the Secretary has not issued a final decision within 1 year of the complaint	Within 90 days after receiving a written determination	In order to review the final ARB order	No process for legal action specified
Consumer Product Safety Commission							
Consumer Product Safety Improvement Act of 2008 (CPSIA)	X		X[a]		X[a]		
Department of Energy							
Energy Reorganization Act of 1974	X			X			
Department of Transportation							
Federal Railroad Safety Act of 1970 (FRSA)	X		X[a]				
International Safe Container Act							X
National Transit Systems Security Act of 2007 (NTSSA)	X		X[a]				
Pipeline Safety Improvement Act of 2002	X						
Surface Transportation Assistance Act of 1982			X[a]				
Environmental Protection Agency							
Asbestos Hazard Emergency Response Act of 1986							X
Clean Air Act	X						
Comprehensive Environmental Response, Compensation, and Liability Act of 1980						X	

	Parties' rights to bring legal action in U.S. District Court						
	In order to get compliance with an order	If the Secretary has not issued a final decision within 180 days of the complaint	If the Secretary has not issued a final decision within 210 days of the complaint	If the Secretary has not issued a final decision within 1 year of the complaint	Within 90 days after receiving a written determination	In order to review the final ARB order	No process for legal action specified
Federal Water Pollution Control Act							X
Safe Drinking Water Act							X
Solid Waste Disposal Act							X
Toxic Substances Control Act							X
Federal Aviation Administration							
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	X						
Department of Labor							
Occupational Safety and Health Act of 1970							X
Securities and Exchange Commission							
Sarbanes-Oxley Act of 2002	X	X					

Source: GAO analysis of relevant statutes and regulations.

[a]Jury trials are specifically permitted.

Table 14: Actions Brought by the Secretary in U.S. District Court and by the Parties to Review the ARB Decision

	The Secretary's authority to bring legal action in U.S. District Court[a]				Deadline to bring action in U.S. Court of Appeals to review ARB decision			
	Secretary "shall" bring an action for a violation	Secretary "may" bring an action for a violation	Secretary "shall" bring action for failure to comply	Secretary "may" bring action for failure to comply	60 days	90 days	120 days	No right of action specified
Consumer Product Safety Commission								
Consumer Product Safety Improvement Act of 2008 (CPSIA)				X				X[b]
Department of Energy								
Energy Reorganization Act of 1974				X	X			
Department of Transportation								
Federal Railroad Safety Act of 1970 (FRSA)				X				X[b]
International Safe Container Act		X						X
National Transit Systems Security Act of 2007 (NTSSA)				X				X[b]
Pipeline Safety Improvement Act of 2002				X	X			
Surface Transportation Assistance Act of 1982			X		X			
Environmental Protection Agency								
Asbestos Hazard Emergency Response Act of 1986	X							X
Clean Air Act				X	X			
Comprehensive Environmental Response, Compensation, and Liability Act of 1980				X				X
Federal Water Pollution Control Act				X			X	
Safe Drinking Water Act			X		X			
Solid Waste Disposal Act				X		X		
Toxic Substances Control Act			X		X			
Federal Aviation Administration								
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century				X	X			
Department of Labor								
Occupational Safety and Health Act of 1970	X							X
Securities and Exchange Commission								
Sarbanes-Oxley Act of 2002				X	X			

Source: GAO analysis of relevant statutes and regulations.

[a]An action "for a violation" is brought against the violator as a direct result of a finding that a violation occurred. In such actions, the court determines the remedy. An action for "failure to comply" is brought only if a violator fails to comply with an order of the Secretary, with the purpose of enforcing that order.

[b]Since CPSIA, FRSA, and NTSSA are relatively new statutes, none have accompanying regulations yet. As a result, there is no specific mention of ARB.

Whistleblowers' Available Remedies

Throughout the process, a whistleblower can obtain relief in many forms. The most basic remedy is an order for the employer to abate, or cease, the violation. For example, if a whistleblower is receiving a lesser amount of compensation as a result of an inappropriate retaliation, an order of abatement would ensure that the whistleblower begins receiving his or her pre-retaliation amount of compensation. These statutes also allow the possibility of reinstatement of the whistleblower, either at his or her former position, or an equivalent position. The whistleblower may also be awarded back pay to make up for the money he or she would have earned in the absence of retaliation. In many cases, the whistleblower may receive the reasonable costs and expenses of bringing and pursuing the complaint. In addition, a prevailing whistleblower may get compensatory damages, which are intended to compensate for damages suffered. Some of the statutes include provisions whereby the whistleblower may be awarded monetary punitive damages on top of the other remedies provided.

Table 15: Whistleblowers' Available Remedies

	Potential types of remedies permitted						
	Abatement (cessation) of the violation	Reinstatement	Back pay	Costs/ expense of bringing the complaint	Compensatory damages	Punitive damages (ordered by the Secretary)	Punitive damages (ordered/enforced by the Court)
Consumer Product Safety Commission							
Consumer Product Safety Improvement Act of 2008	X	X	X	X[a]	X		
Department of Energy							
Energy Reorganization Act of 1974	X	X	X	X[a]	X		
Department of Transportation							
Federal Railroad Safety Act of 1970	X	X	X	X[a]	X	X[b]	X[b]

	Potential types of remedies permitted						
	Abatement (cessation) of the violation	Reinstatement	Back pay	Costs/ expense of bringing the complaint	Compensatory damages	Punitive damages (ordered by the Secretary)	Punitive damages (ordered/enforced by the Court)
International Safe Container Act	X	X	X		X		X
National Transit Systems Security Act of 2007	X	X	X	X[a]	X	X[b]	X[b]
Pipeline Safety Improvement Act of 2002	X	X	X	X[a]	X		
Surface Transportation Assistance Act of 1982	X	X	X	X[a]	X	X[b]	X[b]
Environmental Protection Agency							
Asbestos Hazard Emergency Response Act of 1986	X	X	X		X		X
Clean Air Act	X	X	X	X[a]	X		X
Comprehensive Environmental Response, Compensation, and Liability Act of 1980	X	X	X	X[a]	X		
Federal Water Pollution Control Act	X	X	X	X[a]	X		
Safe Drinking Water Act	X	X	X	X[a]	X	X	X
Solid Waste Disposal Act	X	X	X	X[a]	X		
Toxic Substances Control Act	X	X	X	X[a]	X	X	X
Federal Aviation Administration							
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century	X	X	X	X[a]	X		
Department of Labor							
Occupational Safety and Health Act of 1970	X	X	X		X		X
Securities and Exchange Commission							
Sarbanes-Oxley Act of 2002	X	X	X	X[c]	X		

Source: GAO analysis of relevant statutes and regulations.

[a]Attorney fees may be included in the complainant's remedy. Costs and expenses are limited to those "reasonably incurred."

[b]Punitive damages are limited to $250,000.

[c]Attorney fees may be included in the complainant's remedy.

Appendix III: Anti-Retaliation Provisions Enforced by Labor Agencies Other Than OSHA

In addition to the 17 statutes administered by OSHA, Labor has other statutes with anti-retaliation provisions administered by other Labor agencies. Agencies such as the Mine Safety and Health Administration and Veterans' Employment and Training Services are responsible for investigating anti-retaliation allegations that are protected by these statutes. Table 16 shows the non-OSHA agencies, the relevant statutes and regulations, and some of the protected activities under these statutes and regulations.

Table 16: Labor Agencies With Anti-Retaliation Provisions

	Statutes and regulations	Protected activities
Mine Safety and Health Administration		
Federal Mine Safety and Health Act of 1977	30 U.S.C. §815(c); 29 C.F.R. Part 2700 Subpart E	Filing a complaint, being the subject of medical evaluations and potential transfer, instituting a proceeding related to this act, testifying in such a proceeding, exercising a statutory right.
Veterans' Employment and Training Services		
Uniformed Services Employment and Reemployment Rights Act of 1994	38 U.S.C. §§4311(b), 4323, and 4324; 5 C.F.R. Part 353; 20 C.F.R. Part 1002	Taking an action to enforce a protection afforded, testifying in a proceeding, assisting/participating in an investigation, exercising a right.
Employee Benefits Security Administration		
Employee Retirement Income Security Act of 1974	29 U.S.C. §1140	Exercising any right to which he or she is entitled, attaining any such right, giving information/testifying in a proceeding.
Employment and Training Administration		
National Apprenticeship Act	29 U.S.C. §50; 29 C.F.R. §§30.16 and 30.17	Making a complaint, testifying/assisting/participating in an investigation/proceeding.
Workforce Investment Act of 1998	29 U.S.C. §2934(f)	Filing a complaint, instituting a proceeding related to this title, testifying in such a proceeding.
Employment Standards Administration		
Wage and Hour Division		
Fair Labor Standards Act of 1938	29 U.S.C. §215(a)(3)	Filing any complaint, instituting any proceeding related to this act, testifying in any such proceeding, serving on an industry committee.
Family and Medical Leave Act of 1993	29 U.S.C. §2615; 29 C.F.R. Part 825.220	Filing any charge or instituting any proceeding related to this title, giving information in connection with an inquiry or proceeding, testifying in any inquiry or proceeding.

	Statutes and regulations	Protected activities
Migrant and Seasonal Agricultural Worker Protection Act	29 U.S.C. §1855; 29 C.F.R. §500.9	Filing a complaint, instituting a proceeding related to this act, testifying in such proceedings, exercising any right/protection afforded by this act.
Employee Polygraph Protection Act of 1988	29 U.S.C. §2002(4); 29 C.F.R. §§801.4 and 801.7	Filing a complaint or instituting a proceeding related to this act, testifying in any such proceeding, exercising a right afforded by this Act.
Immigration and Nationality Act	8 U.S.C. § 1182(n)(2)(C)(iv) and (v); 20 C.F.R. §655.801; 29 C.F.R. §501.3	Disclosing information that evidences a violation, cooperating in an investigation or other proceeding, filing a complaint, instituting proceedings, testifying in a proceeding, exercising a right afforded, consulting with an attorney.
Office of Federal Contract Compliance Programs		
Executive Order 11246	Executive Order 11246; 41 C.F.R. §60-1.32; 41 C.F.R. Part 60-30	Filing a complaint, assisting/participating in an investigation/hearing, opposing an unlawful act/practice, exercising a right protected by the order.
Vietnam Era Veterans' Readjustment Assistance Act of 1972	38 U.S.C. §4212; 41 C.F.R. §§60-250.65 and 60-250.69	Filing a complaint, assisting/participating in an investigation/hearing, opposing an unlawful act/practice, exercising a right protected by the act.
§ 503 of the Rehabilitation Act of 1973	29 U.S.C. §793; 41 C.F.R. §§60-741.65 and 60-741.69	Filing a complaint, assisting/participating in an investigation/hearing, opposing an unlawful act/practice, exercising a right protected by the act.
Office of Workers' Compensation Programs		
Longshore and Harbor Workers' Compensation Act	33 U.S.C. §948a; 20 C.F.R. Part 802; 29 C.F.R. Part 18	Claiming compensation, testifying in a proceeding.
Office of the Assistant Secretary for Administration and Management		
§ 504 of the Rehabilitation Act of 1973	29 U.S.C. §794; 29 C.F.R. §§32.45(g), 32.47, and 31.9 – 31.11	Filing a complaint, furnishing information, assisting/participating in an investigation/hearing or other activities related to the administration of the act.
Title VI of the Civil Rights Act of 1964	42 U.S.C. §2000(d); 29 C.F.R. §§31.7(e) and 31.9 – 31.11	Making a complaint, testifying/ assisting/participating in an investigation/proceeding.
§ 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (amending Rehabilitation Act §504)	29 U.S.C. §794; 29 C.F.R. §§33.12 and 33.13	Filing a complaint, furnishing information, assisting/participating in an investigation/hearing or other activities related to the administration of §504 and the regulations in this part.
Age Discrimination Act of 1975	42 U.S.C. §6101; 29 C.F.R. §§35.35, 35.37, and 31.9 – 31.11	Asserting a right protected by the act or this part, cooperating in an investigation/hearing.

	Statutes and regulations	Protected activities
Title IX of the Education Amendments of 1972	20 U.S.C. §1681; 29 C.F.R. §§31.7, 36.605, and 31.9 – 31.11	Making a complaint, testifying/assisting/participating in an investigation/proceeding.
Workforce Investment Act of 1998	29 U.S.C. §2801; 29 C.F.R. §§37.11, 37.111, and 37.60 et seq. Subpart D.	Filing a complaint, opposing a prohibited practice, assisting in an investigation/hearing.

Source: GAO analysis of relevant statues and regulations.

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

U.S. Department of Labor

DEC 12 2008

George A. Scott, Director
Education, Workforce, and
Income Security Issues
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Scott:

Thank you for the opportunity to comment on GAO's proposed report, *Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency.* As you know, the Occupational Safety and Health Administration (OSHA) plays a unique role in enforcing the important whistleblower protection laws under our authority. OSHA investigators act as neutral fact-finders, testing both the complainant's allegations of retaliation and the respondent's defense that any adverse action taken was for a non-retaliatory reason.

We have been implementing a number of improvements to the management and oversight of the program during this Administration, and we agree with GAO that there is room for improvement in OSHA's processing of whistleblower complaints. Nevertheless, we believe that the report understates the efficiency and quality of OSHA's investigations, as well as the agency's commitment to providing meaningful whistleblower protection to key sectors of the American workforce, and provide the below comments in response.

Resources
GAO's report appropriately acknowledges "significant resource constraints," on OSHA's program but fails to take that issue into account in developing its findings or recommendations as to resource concerns. In 1981, there was only one whistleblower statute enforced by OSHA under section 11(c) of the Occupational Safety and Health Act. Because of the expertise of OSHA investigators, whistleblower investigative and administrative responsibilities under 16 statutes have been added since then - many with different procedural and more complex legal issues than the original OSH Act. These include corporate fraud under the Sarbanes-Oxley Act and air carrier safety under AIR21. Moreover, in most cases, Congress did not appropriate additional funds to meet the concomitant

implementation and enforcement responsibilities that came with the new whistleblower statutes. With that said, OSHA has endeavored to provide investigators with the necessary resources to conduct thorough investigations.

Training
The draft report also does not adequately acknowledge the significant steps the agency has made to address investigator training needs. For example, OSHA has completely redesigned its mandatory training curriculum for investigators. Nearly one-third of investigative staff has already completed the new two-week training course, which supplements the introductory course and covers all federal whistleblower protection statutes administered by OSHA. The next session of the federal statutes course will be conducted in January 2009.

Challenges Arising from Disparities in the Whistleblower Statutes
GAO appropriately noted that there is much greater complexity for investigations conducted under statutes like Sarbanes-Oxley, but failed to take that fact or other variations among the 17 statutes into account in noting inconsistencies in processing. Leaving aside the added complexity of recent statutes, the marked differences in statutory timeframes for investigations can often undermine efficiency in processing. For example, OSHA is often forced to prioritize the 30-day cases instead of relying on a consistent principle that cases should ordinarily be investigated in the order that they are received. Nevertheless, in investigating complaints under all these statutes, OSHA applies its expertise in resolving retaliation issues.

Recommendation that Regions Perform and Complete Audits within Specified Timeframes
OSHA appreciates GAO's finding that OSHA has "taken steps to strengthen its audit program" and strongly supports the completion of program audits within set timeframes. GAO's report, however, erroneously concludes that audits are not being completed timely. As discussed with GAO, all scheduled audits have been completed in a timely manner since OSHA's Management Accountability Program (MAP) was implemented in FY 2006, according to MAP and the regional audit work plans. OSHA also has every expectation that comprehensive, on-site audits will be completed for all remaining covered field locations by the end of the four-year audit cycle. Therefore, OSHA believes that GAO's sixth recommendation is based on incorrect assumptions. In addition, GAO fails to note in its findings and recommendations that, like the whistleblower program, OSHA's audit program faces resource challenges in implementing significant changes to its program. With that said, OSHA had been completing and expects to continue to complete its audits in a timely manner, and will carefully consider the other recommendations to improve its audit program.

OSHA remains committed to fulfilling its important responsibilities under the whistleblower programs it enforces and is always seeking to improve its programs. Please do not hesitate to contact us if you have questions concerning this response or if we can be of further assistance.

Sincerely,

Thomas M. Stohler

Thomas M. Stohler
Acting Assistant Secretary

U.S. Department of Labor

DEC 12 2008

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

George A. Scott, Director
Education, Workforce and Income Security Issues
Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Scott:

Thank you for the opportunity to comment on the Government Accountability Office's (GAO) proposed report, "*Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency.*" The following comments are submitted on behalf of the Department of Labor's Administrative Review Board's (ARB) appellate program.

ARB has implemented a number of improvements to the management and oversight of its appellate programs throughout this Administration, including as to whistleblower appeals. While we agree with GAO that there is always room for improvement, the ARB believes that its internal controls are appropriate for managing the Board's appellate docket.

GAO's report omits the fact that the ARB's case tracking system database is not the only tool we use to track our performance. We have separate monthly and annual reports showing among other things the case issue date, the assigned personnel, and the number of cases closed. Using our case tracking system database in conjunction with the monthly and annual report, the ARB is able to track the average age of a case and other necessary data. For example, reliable and accurate data collected by ARB reflects the following performance:

1. In February 2002, the ARB had 29 cases pending that were over two years old. Today, there are only nine cases over two years old.[1] The average age of a pending case has been reduced from 13.3 months in 2002 to 11.5 months at the end of FY 2008.

2. ARB staff productivity has more than doubled in the last seven years, and the cases closed per year has increased by 50% from an average of 100 cases per year in the three years preceding 2002 to 150 cases per year in the six years following 2002.

3. Also, the ARB's decisions are being affirmed when reviewed by the U.S. Courts of Appeals. From FY 2002 through FY 2008, the U.S. Courts of Appeals affirmed ARB decisions over 95% of the time.

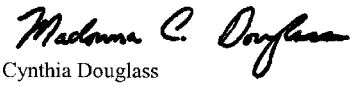
The ARB, however, also agrees with the report's suggestion that the data entered into ARB's tracking system should be accurate, reliable and useful. The ARB has taken, and will continue to

[1] Among reasons for old cases are those cases stayed due to bankruptcy or parties requests in cases awaiting outcome of litigation in other federal courts that could affect the ARB disposition. Also, the parties may request extensions of time for various reasons.

take, steps to improve the system and appreciates the recommendations from GAO for continued improvements.

In conclusion, we believe the appellate whistleblower program is being responsibly administered. We appreciate GAO's recommendations for continued improvement and the opportunity to comment on the report. Please do not hesitate to contact us if you have questions concerning this response or if we can be of further assistance.

Sincerely,



M. Cynthia Douglass
Chair, Administrative Review Board
U.S. Department of Labor

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

George Scott, Director (202) 512-7215 or scottg@gao.gov

Acknowledgments

Dianne Blank, Assistant Director
Richard Harada, Analyst-in-Charge

Jennifer Cook, Rebecca Yurman, and Lerone Reid made significant contributions to all aspects of this report. Alex Galuten provided legal support; and Jay Smale, Stuart Kaufman, and Jerry Sandau assisted with design, methodology, and data analysis. In addition, Jessica Orr and Rachel Valliere provided writing assistance, and Lise Levie, Brittni Milam, Charlie Willson, and Rebecca Woiwode verified our findings.

Related GAO Products

Government Auditing Standards, January 2007 Revision. GAO-07-162G. Washington, D.C.: January 31, 2007.

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