

111TH CONGRESS
2D SESSION

H. R. 5749

To provide whistleblower and other protections to certain offshore workers,
and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2010

Mr. GEORGE MILLER of California (for himself and Ms. WOOLSEY) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide whistleblower and other protections to certain
offshore workers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Offshore Worker Whis-
5 tleblower Protection Act”.

6 **SEC. 2. WHISTLEBLOWER PROTECTIONS; EMPLOYEE PRO-**
7 **TECTION FROM OTHER RETALIATION.**

8 (a) PROHIBITION AGAINST RETALIATION.—

1 (1) IN GENERAL.—No employer may discharge
2 or otherwise discriminate against a covered employee
3 because the covered employee, whether at the cov-
4 ered employee’s initiative or in the ordinary course
5 of the covered employee’s duties—

6 (A) provided, caused to be provided, or is
7 about to provide or cause to be provided to the
8 employer, the Federal Government, or the at-
9 torney general of a State information relating
10 to any violation of, or any act or omission the
11 covered employee reasonably believes to be a
12 violation of any provision of the Outer Conti-
13 nental Shelf Lands Act (43 U.S.C. 1301 et
14 seq.), or any order, rule, regulation, standard,
15 or prohibition under that Act;

16 (B) testified or is about to testify in a pro-
17 ceeding concerning such violation;

18 (C) assisted or participated or is about to
19 assist or participate in such a proceeding;

20 (D) testified or is about to testify before
21 Congress on any matter covered by such Act;

22 (E) refused to perform the covered employ-
23 ee’s duties if the covered employee had a good
24 faith belief that performing such duties would

1 result in injury to or impairment of the health
2 of the covered employee or other employees; or
3 (F) objected to, or refused to participate in
4 any activity, policy, practice, or assigned task
5 that the covered employee reasonably believed
6 to be in violation of any provision of such Act,
7 or any order, rule, regulation, standard, or ban
8 under such Act.

9 (2) GOOD FAITH BELIEF.—For purposes of
10 paragraph (1)(E), the circumstances causing the
11 covered employee’s good faith belief that performing
12 such duties would pose a health and safety hazard
13 shall be of such a nature that a reasonable person
14 under circumstances confronting the covered em-
15 ployee would conclude there is such a hazard.

16 (b) PROCESS.—

17 (1) IN GENERAL.—A covered employee who be-
18 lieves that he or she has been discharged or other-
19 wise discriminated against (hereafter referred to as
20 the “complainant”) by any employer in violation of
21 subsection (a)(1) may, not later than 180 days after
22 the date on which such alleged violation occurs or
23 the date on which the covered employee knows or
24 should reasonably have known that such alleged vio-
25 lation occurred, file (or have any person file on his

1 or her behalf) a complaint with the Secretary of
2 Labor (referred to in this section as the “Sec-
3 retary”) alleging such discharge or discrimination
4 and identifying employer or employers responsible
5 for such act. Upon receipt of such a complaint, the
6 Secretary shall notify, in writing, the employer or
7 employers named in the complaint of the filing of
8 the complaint, of the allegations contained in the
9 complaint, of the substance of evidence supporting
10 the complaint, and of the opportunities that will be
11 afforded to such person under paragraph (2).

12 (2) INVESTIGATION.—

13 (A) IN GENERAL.—Not later than 90 days
14 after the date of receipt of a complaint filed
15 under paragraph (1) the Secretary shall initiate
16 an investigation and determine whether there is
17 reasonable cause to believe that the complaint
18 has merit and notify, in writing, the complain-
19 ant and the employer or employers alleged to
20 have committed a violation of subsection (a)(1)
21 of the Secretary’s findings. The Secretary shall,
22 during such investigation afford the complain-
23 ant and the employer or employers named in
24 the complaint an opportunity to submit to the
25 Secretary a written response to the complaint

1 and an opportunity to meet with a representa-
2 tive of the Secretary to present statements from
3 witnesses. The complainant shall be provided
4 with an opportunity to review the information
5 and evidence provided by employer or employers
6 to the Secretary, and to review any response or
7 rebuttal by such the complaint, as part of such
8 investigation.

9 (B) REASONABLE CAUSE FOUND; PRELIMI-
10 NARY ORDER.—If the Secretary concludes that
11 there is reasonable cause to believe that a viola-
12 tion of subsection (a)(1) has occurred, the Sec-
13 retary shall accompany the Secretary’s findings
14 with a preliminary order providing the relief
15 prescribed by paragraph (3)(B). Not later than
16 30 days after the date of notification of find-
17 ings under this paragraph, the employer or em-
18 ployers alleged to have committed the violation
19 or the complainant may file objections to the
20 findings or preliminary order, or both, and re-
21 quest a hearing on the record before an admin-
22 istrative law judge of the Department of Labor.
23 The filing of such objections shall not operate
24 to stay any reinstatement remedy contained in
25 the preliminary order. Any such hearing shall

1 be conducted expeditiously. If a hearing is not
2 requested in such 30-day period, the prelimi-
3 nary order shall be deemed a final order that is
4 not subject to judicial review. The Secretary of
5 Labor is authorized to enforce preliminary rein-
6 statement orders in the United States district
7 court for the district in which the violation was
8 found to occur, or in the United States district
9 court for the District of Columbia.

10 (C) DISMISSAL OF COMPLAINT.—

11 (i) STANDARD FOR COMPLAINANT.—

12 The Secretary shall dismiss a complaint
13 filed under this subsection and shall not
14 conduct an investigation otherwise required
15 under subparagraph (A) unless the com-
16 plainant makes a prima facie showing that
17 any behavior described in subparagraphs
18 (A) through (F) of subsection (a)(1) was a
19 contributing factor in the adverse action
20 alleged in the complaint.

21 (ii) STANDARD FOR EMPLOYER.—Not-

22 withstanding a finding by the Secretary
23 that the complainant has made the show-
24 ing required under clause (i), no investiga-
25 tion otherwise required under subpara-

graph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same adverse action in the absence of that behavior.

(iii) VIOLATION STANDARD.—The Secretary may determine that a violation of subsection (a)(1) has occurred only if the complainant demonstrates that any behavior described in subparagraphs (A) through (F) of such subsection was a contributing factor in the adverse action alleged in the complaint.

(iv) RELIEF STANDARD.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same adverse action in the absence of that behavior.

(3) ORDERS.—

(A) IN GENERAL.—Not later than 90 days after the receipt of a request for a hearing under subsection (b)(2)(B), the administrative law judge shall issue findings of fact and order the relief provided under this paragraph or

1 deny the complaint. At any time before issuance
2 of an order, a proceeding under this subsection
3 may be terminated on the basis of a settlement
4 agreement entered into by the Secretary, the
5 complainant, and the person alleged to have
6 committed the violation. Such a settlement may
7 not be agreed by such parties if it contains con-
8 ditions which conflict with rights protected
9 under this Act, are contrary to public policy, or
10 include a restriction on a complainant's right to
11 future employment with employers other than
12 the specific employers named in the complaint.

13 (B) CONTENT OF ORDER.—If, in response
14 to a complaint filed under paragraph (1), the
15 administrative law judge determines that a vio-
16 lation of subsection (a)(1) has occurred, the ad-
17 ministrative law judge shall order the employer
18 or employers who committed such violation—

19 (i) to take affirmative action to abate
20 the violation;

21 (ii) to reinstate the complainant to his
22 or her former position together with com-
23 pensation (including back pay and prejudg-
24 ment interest) and restore the terms, con-

1 ditions, and privileges associated with his
2 or her employment; and

3 (iii) to provide compensatory and con-
4 sequential damages, and, as appropriate,
5 exemplary damages to the complainant.

6 (C) ATTORNEY FEES.—If such an order is
7 issued under this paragraph, the Secretary, at
8 the request of the complainant, shall assess
9 against the employer or employers a sum equal
10 to the aggregate amount of all costs and ex-
11 penses (including attorneys' and expert witness
12 fees) reasonably incurred by the complainant
13 for, or in connection with, the bringing of the
14 complaint upon which the order was issued at
15 the conclusion of any stage of the proceeding.

16 (D) BAD FAITH CLAIM.—If the Secretary
17 finds that a complaint under paragraph (1) is
18 frivolous or has been brought in bad faith, the
19 Secretary may award to the prevailing employer
20 a reasonable attorneys' fees, not exceeding
21 \$1,000, to be paid by the complainant.

22 (E) ADMINISTRATIVE APPEAL.—Not later
23 than 30 days after the receipt of findings of
24 fact or an order under subparagraph (B), the
25 employer or employers alleged to have com-

mitted the violation or the complainant may file, with objections, an administrative appeal with the Secretary, who may designate such appeal to a review board. In reviewing a decision and order of the administrative law judge, the Secretary shall affirm the decision and order if it is determined that the factual findings set forth therein are supported by substantial evidence and the decision and order are made in accordance with applicable law. The Secretary shall issue a final decision and order affirming, or reversing, in whole or in part, the decision under review within 90 days after receipt of the administrative appeal under this subparagraph. If it is determined that a violation of subsection (a)(1) has occurred, the Secretary shall order relief provided under subparagraphs (B) and (C). Such decision shall constitute a final agency action with respect to the matter appealed.

(4) ACTION IN COURT.—

(A) IN GENERAL.—If the Secretary has not issued a final decision within 300 days after the filing of the complaint, the complainant may bring an action at law or equity for de novo review in the appropriate district court of

1 the United States with jurisdiction, which shall
2 have jurisdiction over such an action without
3 regard to the amount in controversy, and which
4 action shall, at the request of either party to
5 such action, be tried by the court with a jury.
6 The proceedings shall be governed by the same
7 legal burdens of proof specified in paragraph
8 (2)(C).

9 (B) RELIEF.—The court shall have juris-
10 diction to grant all appropriate relief including
11 injunctive relief, compensatory and consequen-
12 tial damages, including—

13 (i) reinstatement with the same se-
14 niority status that the covered employee
15 would have had, but for the discharge or
16 discrimination;

17 (ii) the amount of back pay sufficient
18 to make the covered employee whole, with
19 prejudgment interest;

20 (iii) exemplary damages, as appro-
21 priate; and

22 (iv) reasonable attorney fees, includ-
23 ing litigation costs, and expert witness
24 fees.

25 (5) REVIEW.—

1 (A) IN GENERAL.—Any person adversely
2 affected or aggrieved by a final order issued
3 under paragraph (3) or a judgment or order
4 under paragraph (4) may obtain review of the
5 order in the United States Court of Appeals for
6 the circuit in which the violation, with respect
7 to which the order was issued, allegedly oc-
8 curred or the circuit in which the complainant
9 resided on the date of such violation. The peti-
10 tion for review must be filed not later than 60
11 days after the date of the issuance of the final
12 order of the Secretary. Review shall conform to
13 chapter 7 of title 5, United States Code. The
14 commencement of proceedings under this sub-
15 paragraph shall not, unless ordered by the
16 court, operate as a stay of the order.

17 (B) NO OTHER JUDICIAL REVIEW.—An
18 order of the Secretary with respect to which re-
19 view could have been obtained under subpara-
20 graph (A) shall not be subject to judicial review
21 in any criminal or other civil proceeding.

22 (6) FAILURE TO COMPLY WITH ORDER.—When-
23 ever any employer has failed to comply with an order
24 issued under paragraph (3), the Secretary may file
25 a civil action in the United States district court for

1 the district in which the violation was found to
2 occur, or in the United States district court for the
3 District of Columbia, to enforce such order. In ac-
4 tions brought under this paragraph, the district
5 courts shall have jurisdiction to grant all appropriate
6 relief including, but not limited to, injunctive relief
7 and compensatory damages.

8 (7) CIVIL ACTION TO REQUIRE COMPLIANCE.—

9 (A) IN GENERAL.—A person on whose be-
10 half an order was issued under paragraph (3)
11 may commence a civil action against the em-
12 ployer to whom such order was issued to re-
13 quire compliance with such order. The appro-
14 priate United States district court shall have
15 jurisdiction, without regard to the amount in
16 controversy or the citizenship of the parties, to
17 enforce such order. In cases where the Sec-
18 retary and the complainant file civil action to
19 require compliance, the action of the Secretary
20 shall take precedence.

21 (B) AWARD.—The court, in issuing any
22 final order under this paragraph, may award
23 costs of litigation (including reasonable attor-
24 neys' and expert witness fees) to any party

1 whenever the court determines such award is
2 appropriate.

3 (c) CONSTRUCTION.—

4 (1) EFFECT ON OTHER LAWS.—Nothing in this
5 section preempts or diminishes any other safeguards
6 against discrimination, demotion, discharge, suspen-
7 sion, threats, harassment, reprimand, retaliation, or
8 any other manner of discrimination provided by Fed-
9 eral or State law.

10 (2) RIGHTS OF EMPLOYEES.—Nothing in this
11 section shall be construed to diminish the rights,
12 privileges, or remedies of any employee under any
13 Federal or State law or under any collective bar-
14 gaining agreement. The rights and remedies in this
15 section may not be waived by any agreement, policy,
16 form, or condition of employment.

17 (d) ENFORCEMENT OF NONDISCRETIONARY DU-
18 TIES.—Any nondiscretionary duty imposed by this section
19 shall be enforceable in a mandamus proceeding brought
20 under section 1361 of title 28, United States Code.

21 (e) POSTING OF NOTICE AND TRAINING.—All em-
22 ployers shall post a notice which has been approved as to
23 form and content by the Secretary of Labor in a con-
24 spicuous location in the place of employment where cov-
25 ered employees frequent which explains employee rights

1 and remedies under this section. Each employer shall pro-
2 vide training to covered employees of their rights under
3 this section within 30 days of employment, and at not less
4 than once every 12 months thereafter, and provide covered
5 employees with a card which contains a toll free telephone
6 number at the Department of Labor which covered em-
7 ployees can call to get information or file a complaint
8 under this section.

9 (f) DESIGNATION BY THE SECRETARY.—The Sec-
10 retary of Labor shall, within 30 days of the date of enact-
11 ment of this Act, designate by order the appropriate agen-
12 cy officials to receive, investigate, and adjudicate com-
13 plaints of violations of subsection (a)(1).

14 **SEC. 3. EMPLOYMENT STANDARD FOR OUTER CONTI-**
15 **NENTAL SHELF EMPLOYEES.**

16 (a) IN GENERAL.—An employer engaged in activities
17 under a lease or permit issued under the Outer Conti-
18 nental Shelf Lands Act (43 U.S.C. 1301 et seq.) may not
19 discharge or constructively discharge an employee per-
20 forming functions on or in waters above the Outer Conti-
21 nental Shelf without reasonable job-related grounds based
22 on a failure to satisfactorily perform job duties, including
23 compliance with the Outer Continental Shelf Lands Act
24 (43 U.S.C. 1301 et seq.) and with applicable mandatory
25 health and safety standards or other regulations, or other

1 legitimate business reason, where the employee has com-
2 pleted a probationary period of employment, not to exceed
3 6 months.

4 (b) CAUSE OF ACTION.—An employee aggrieved by
5 a violation of subsection (a) may, within 1 year of such
6 alleged violation, file a complaint in a Federal district
7 court of appropriate jurisdiction.

8 (c) REMEDIES.—In an action under subsection (b),
9 for any prevailing employee, the court shall take affirma-
10 tive action to further the purposes of this section, which
11 may include reinstatement with backpay and compen-
12 satory damages. Reasonable attorneys’ fees and costs shall
13 be awarded to any prevailing employee under this section.

14 (d) PRE-DISPUTE WAIVER PROHIBITED.—An em-
15 ployee’s right to a cause of action under this section may
16 not be waived with respect to disputes that have not arisen
17 as of the time of the waiver.

18 (e) CONSTRUCTION.—Nothing in this section shall be
19 construed to limit the availability of rights and remedies
20 of employees under any other State or Federal law or a
21 collective bargaining agreement.

22 **SEC. 4. DEFINITIONS.**

23 As used in this Act the following definitions apply:

24 (1) The term “alternative energy” means elec-
25 tricity generated by a renewable energy resource.

1 (2) The term “covered employee”—

2 (A) means an individual performing serv-
3 ices on behalf of an employer and who is en-
4 gaged in activities on or in waters above the
5 Outer Continental Shelf related to—

6 (i) supporting, or carrying out explo-
7 ration, development, production, proc-
8 essing, or transportation of oil, gas, or sul-
9 fur, or the extraction of other minerals (as
10 such term is defined in section 2 of the
11 Outer Continental Shelf Lands Act (43
12 U.S.C. 1331));

13 (ii) alternative energy; or

14 (iii) oil spill or hazardous substances
15 cleanup, emergency response, environ-
16 mental surveillance, protection, or restora-
17 tion, or activities related to occupational
18 safety and health; and

19 (B) includes an applicant for such employ-
20 ment.

21 (3) The term “employer” means one or more
22 individuals, partnerships, associations, corporations,
23 trusts, unincorporated organizations, nongovern-
24 mental organizations, or trustees that is engaged in
25 profit or nonprofit business or industry and whose

1 activities are conducted on Outer Continental Shelf,
2 and includes any agent, contractor, subcontractor,
3 grantee or consultant of such employer.

4 (4) The term “Outer Continental Shelf” has
5 the meaning that the term “outer Continental Shelf”
6 has in the Outer Continental Shelf Lands Act (43
7 U.S.C. 1331 et seq.).

8 **SEC. 5. COOPERATIVE AGREEMENTS AND CONSULTATION**
9 **BETWEEN DEPARTMENTS OF LABOR AND**
10 **THE INTERIOR.**

11 (a) COOPERATIVE AGREEMENT RELATED TO EDU-
12 CATION AND TRAINING.—The Secretary of Labor and the
13 Secretary of the Interior shall enter into a cooperative
14 educational and training agreement for the purpose of
15 jointly training Department of Labor and Department of
16 the Interior inspectors of onshore and offshore oil and gas
17 drilling or production platforms or rigs, other related De-
18 partment of Labor and Department of the Interior per-
19 sonnel, and individuals who work on such platforms or
20 rigs.

21 (b) CONSULTATION RELATING TO WORKER SAFETY
22 AND HEALTH.—The Secretary of Labor, the Secretary of
23 the Interior (including any office or bureau of the Depart-
24 ment of the Interior) and the Secretary of the department
25 in which the Coast Guard is operating shall enter into a

1 memorandum of understanding to provide for consultation
2 with and written comment of the Secretary of Labor on
3 any regulations or guidelines or proposals therefor related
4 to worker safety and health or the enforcement thereof
5 under the Outer Continental Shelf Lands Act (43 U.S.C.
6 1301 et seq.) when conducting a review or promulgation
7 of such regulations, guidelines, or proposals.

