

111<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 5851

To provide whistleblower protections to certain workers in the offshore oil and gas industry.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 26, 2010

Mr. GEORGE MILLER of California (for himself and Mr. MARKEY of Massachusetts) introduced the following bill; which was referred to the Committee on Education and Labor

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## A BILL

To provide whistleblower protections to certain workers in the offshore oil and gas industry.

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 Oil and Gas  
5 Worker Whistleblower Protection Act of 2010”.

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

8 (a) PROHIBITION AGAINST RETALIATION.—

9 (1) IN GENERAL.—No employer may discharge  
10 or otherwise discriminate against a covered employee

1 because the covered employee, whether at the cov-  
2 ered employee's initiative or in the ordinary course  
3 of the covered employee's duties—

4 (A) provided, caused to be provided, or is  
5 about to provide or cause to be provided to the  
6 employer or to a Federal or State Government  
7 official, information relating to any violation of,  
8 or any act or omission the covered employee  
9 reasonably believes to be a violation of any pro-  
10 vision of the Outer Continental Shelf Lands Act  
11 (43 U.S.C. 1301 et seq.), or any order, rule,  
12 regulation, standard, or prohibition under that  
13 Act, or exercised any rights provided to employ-  
14 ees under that Act;

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

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

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

21 (E) reported an illness, injury, or unsafe  
22 condition related to the employer's activities to  
23 the employer or a State or Federal Government  
24 official;

1 (F) refused to perform the covered employ-  
2 ee's duties, or exercised stop work authority, re-  
3 lated to the employer's activities described in  
4 section 3(1) if the covered employee had a good  
5 faith belief that performing such duties could  
6 result in injury to or impairment of the health  
7 of the covered employee or other employees, or  
8 cause an oil spill to the environment; or

9 (H) objected to, or refused to participate  
10 in any activity, policy, practice, or assigned task  
11 that the covered employee reasonably believed  
12 to be in violation of any provision of such Act,  
13 or any order, rule, regulation, standard, or ban  
14 under such Act.

15 (2) GOOD FAITH BELIEF.—For purposes of  
16 paragraph (1)(E), the circumstances causing the  
17 covered employee's good faith belief that performing  
18 such duties would pose a health and safety hazard  
19 shall be of such a nature that a reasonable person  
20 under circumstances confronting the covered em-  
21 ployee would conclude there is such a hazard.

22 (b) PROCESS.—

23 (1) IN GENERAL.—A covered employee who be-  
24 lieves that he or she has been discharged or other-  
25 wise discriminated against (hereafter referred to as

1 the “complainant”) by any employer in violation of  
2 subsection (a)(1) may, not later than 180 days after  
3 the date on which such alleged violation occurs or  
4 the date on which the covered employee knows or  
5 should reasonably have known that such alleged vio-  
6 lation occurred, file (or have any person file on his  
7 or her behalf) a complaint with the Secretary of  
8 Labor (referred to in this section as the “Sec-  
9 retary”) alleging such discharge or discrimination  
10 and identifying employer or employers responsible  
11 for such act. Upon receipt of such a complaint, the  
12 Secretary shall notify, in writing, the employer or  
13 employers named in the complaint of the filing of  
14 the complaint, of the allegations contained in the  
15 complaint, of the substance of evidence supporting  
16 the complaint, and of the opportunities that will be  
17 afforded to such person under paragraph (2).

18 (2) INVESTIGATION.—

19 (A) IN GENERAL.—Not later than 90 days  
20 after the date of receipt of a complaint filed  
21 under paragraph (1) the Secretary shall initiate  
22 an investigation and determine whether there is  
23 reasonable cause to believe that the complaint  
24 has merit and notify, in writing, the complain-  
25 ant and the employer or employers alleged to

1 have committed a violation of subsection (a)(1)  
2 of the Secretary's findings. The Secretary shall,  
3 during such investigation afford the complain-  
4 ant and the employer or employers named in  
5 the complaint an opportunity to submit to the  
6 Secretary a written response to the complaint  
7 and an opportunity to meet with a representa-  
8 tive of the Secretary to present statements from  
9 witnesses. The complainant shall be provided  
10 with an opportunity to review the information  
11 and evidence provided by employer or employers  
12 to the Secretary, and to review any response or  
13 rebuttal by such the complaint, as part of such  
14 investigation.

15 (B) REASONABLE CAUSE FOUND; PRELIMI-  
16 NARY ORDER.—If the Secretary concludes that  
17 there is reasonable cause to believe that a viola-  
18 tion of subsection (a)(1) has occurred, the Sec-  
19 retary shall accompany the Secretary's findings  
20 with a preliminary order providing the relief  
21 prescribed by paragraph (3)(B). Not later than  
22 30 days after the date of notification of find-  
23 ings under this paragraph, the employer or em-  
24 ployers alleged to have committed the violation  
25 or the complainant may file objections to the

1 findings or preliminary order, or both, and re-  
2 quest a hearing on the record before an admin-  
3 istrative law judge of the Department of Labor.  
4 The filing of such objections shall not operate  
5 to stay any reinstatement remedy contained in  
6 the preliminary order. Any such hearing shall  
7 be conducted expeditiously. If a hearing is not  
8 requested in such 30-day period, the prelimi-  
9 nary order shall be deemed a final order that is  
10 not subject to judicial review. The Secretary of  
11 Labor is authorized to enforce preliminary rein-  
12 statement orders in the United States district  
13 court for the district in which the violation was  
14 found to occur, or in the United States district  
15 court for the District of Columbia.

16 (C) DISMISSAL OF COMPLAINT.—

17 (i) STANDARD FOR COMPLAINANT.—

18 The Secretary shall dismiss a complaint  
19 filed under this subsection and shall not  
20 conduct an investigation otherwise required  
21 under subparagraph (A) unless the com-  
22 plainant makes a prima facie showing that  
23 any behavior described in subparagraphs  
24 (A) through (F) of subsection (a)(1) was a

1 contributing factor in the adverse action  
2 alleged in the complaint.

3 (ii) STANDARD FOR EMPLOYER.—Not-  
4 withstanding a finding by the Secretary  
5 that the complainant has made the show-  
6 ing required under clause (i), no investiga-  
7 tion otherwise required under subpara-  
8 graph (A) shall be conducted if the em-  
9 ployer demonstrates, by clear and con-  
10 vincing evidence, that the employer would  
11 have taken the same adverse action in the  
12 absence of that behavior.

13 (iii) VIOLATION STANDARD.—The  
14 Secretary may determine that a violation  
15 of subsection (a)(1) has occurred only if  
16 the complainant demonstrates that any be-  
17 havior described in subparagraphs (A)  
18 through (F) of such subsection was a con-  
19 tributing factor in the adverse action al-  
20 leged in the complaint.

21 (iv) RELIEF STANDARD.—Relief may  
22 not be ordered under subparagraph (A) if  
23 the employer demonstrates by clear and  
24 convincing evidence that the employer

1           would have taken the same adverse action  
2           in the absence of that behavior.

3           (3) ORDERS.—

4           (A) IN GENERAL.—Not later than 90 days  
5           after the receipt of a request for a hearing  
6           under subsection (b)(2)(B), the administrative  
7           law judge shall issue findings of fact and order  
8           the relief provided under this paragraph or  
9           deny the complaint. At any time before issuance  
10          of an order, a proceeding under this subsection  
11          may be terminated on the basis of a settlement  
12          agreement entered into by the Secretary, the  
13          complainant, and the person alleged to have  
14          committed the violation. Such a settlement may  
15          not be agreed by such parties if it contains con-  
16          ditions which conflict with rights protected  
17          under this Act, are contrary to public policy, or  
18          include a restriction on a complainant's right to  
19          future employment with employers other than  
20          the specific employers named in the complaint.

21          (B) CONTENT OF ORDER.—If, in response  
22          to a complaint filed under paragraph (1), the  
23          administrative law judge determines that a vio-  
24          lation of subsection (a)(1) has occurred, the ad-



1           ministrative law judge shall order the employer  
2           or employers who committed such violation—

3                   (i) to take affirmative action to abate  
4                   the violation;

5                   (ii) to reinstate the complainant to his  
6                   or her former position together with com-  
7                   pensation (including back pay and prejudg-  
8                   ment interest) and restore the terms, con-  
9                   ditions, and privileges associated with his  
10                  or her employment; and

11                  (iii) to provide compensatory and con-  
12                  sequential damages, and, as appropriate,  
13                  exemplary damages to the complainant.

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

24           (D) BAD FAITH CLAIM.—If the Secretary  
25           finds that a complaint under paragraph (1) is

1 frivolous or has been brought in bad faith, the  
2 Secretary may award to the prevailing employer  
3 reasonable attorneys' fees, not exceeding  
4 \$1,000, to be paid by the complainant.

5 (E) ADMINISTRATIVE APPEAL.—Not later  
6 than 30 days after the receipt of findings of  
7 fact or an order under subparagraph (B), the  
8 employer or employers alleged to have com-  
9 mitted the violation or the complainant may  
10 file, with objections, an administrative appeal  
11 with the Secretary, who may designate such ap-  
12 peal to a review board. In reviewing a decision  
13 and order of the administrative law judge, the  
14 Secretary shall affirm the decision and order if  
15 it is determined that the factual findings set  
16 forth therein are supported by substantial evi-  
17 dence and the decision and order are made in  
18 accordance with applicable law. The Secretary  
19 shall issue a final decision and order affirming,  
20 or reversing, in whole or in part, the decision  
21 under review within 90 days after receipt of the  
22 administrative appeal under this subparagraph.  
23 If it is determined that a violation of subsection  
24 (a)(1) has occurred, the Secretary shall order  
25 relief provided under subparagraphs (B) and

1 (C). Such decision shall constitute a final agen-  
2 cy action with respect to the matter appealed.

3 (4) ACTION IN COURT.—

4 (A) IN GENERAL.—If the Secretary has  
5 not issued a final decision within 300 days after  
6 the filing of the complaint, the complainant  
7 may bring an action at law or equity for de  
8 novo review in the appropriate district court of  
9 the United States with jurisdiction, which shall  
10 have jurisdiction over such an action without  
11 regard to the amount in controversy, and which  
12 action shall, at the request of either party to  
13 such action, be tried by the court with a jury.  
14 The proceedings shall be governed by the same  
15 legal burdens of proof specified in paragraph  
16 (2)(C).

17 (B) RELIEF.—The court shall have juris-  
18 diction to grant all appropriate relief including  
19 injunctive relief, compensatory and consequen-  
20 tial damages, including—

21 (i) reinstatement with the same se-  
22 niority status that the covered employee  
23 would have had, but for the discharge or  
24 discrimination;

1 (ii) the amount of back pay sufficient  
2 to make the covered employee whole, with  
3 prejudgment interest;

4 (iii) exemplary damages, as appro-  
5 priate; and

6 (iv) reasonable attorney fees, includ-  
7 ing litigation costs, and expert witness  
8 fees.

9 (5) REVIEW.—

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

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

6           (6) FAILURE TO COMPLY WITH ORDER.—When-  
7           ever any employer has failed to comply with an order  
8           issued under paragraph (3), the Secretary may file  
9           a civil action in the United States district court for  
10          the district in which the violation was found to  
11          occur, or in the United States district court for the  
12          District of Columbia, to enforce such order. In ac-  
13          tions brought under this paragraph, the district  
14          courts shall have jurisdiction to grant all appropriate  
15          relief including, but not limited to, injunctive relief  
16          and compensatory damages.

17          (7) CIVIL ACTION TO REQUIRE COMPLIANCE.—

18                (A) IN GENERAL.—A person on whose be-  
19                half an order was issued under paragraph (3)  
20                may commence a civil action against the em-  
21                ployer to whom such order was issued to re-  
22                quire compliance with such order. The appro-  
23                priate United States district court shall have  
24                jurisdiction, without regard to the amount in  
25                controversy or the citizenship of the parties, to

1 enforce such order. In cases where the Sec-  
2 retary and the complainant file civil action to  
3 require compliance, the action of the Secretary  
4 shall take precedence.

5 (B) AWARD.—The court, in issuing any  
6 final order under this paragraph, may award  
7 costs of litigation (including reasonable attor-  
8 neys' and expert witness fees) to any party  
9 whenever the court determines such award is  
10 appropriate.

11 (c) CONSTRUCTION.—

12 (1) EFFECT ON OTHER LAWS.—Nothing in this  
13 section preempts or diminishes any other safeguards  
14 against discrimination, demotion, discharge, suspen-  
15 sion, threats, harassment, reprimand, retaliation, or  
16 any other manner of discrimination provided by Fed-  
17 eral or State law.

18 (2) RIGHTS OF EMPLOYEES.—Nothing in this  
19 section shall be construed to diminish the rights,  
20 privileges, or remedies of any employee under any  
21 Federal or State law or under any collective bar-  
22 gaining agreement. The rights and remedies in this  
23 section may not be waived by any agreement, policy,  
24 form, or condition of employment.

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

5 (e) POSTING OF NOTICE AND TRAINING.—All em-  
6 ployers shall post a notice which has been approved as to  
7 form and content by the Secretary of Labor in a con-  
8 spicuous location in the place of employment where cov-  
9 ered employees frequent which explains employee rights  
10 and remedies under this section. Each employer shall pro-  
11 vide training to covered employees of their rights under  
12 this section within 30 days of employment, and at not less  
13 than once every 12 months thereafter, and provide covered  
14 employees with a card which contains a toll free telephone  
15 number at the Department of Labor which covered em-  
16 ployees can call to get information or file a complaint  
17 under this section.

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

23 **SEC. 3. DEFINITIONS.**

24 As used in this Act the following definitions apply:

25 (1) The term “covered employee”—

1 (A) means an individual performing serv-  
2 ices on behalf of an employer that is engaged  
3 in activities on or in waters above the Outer  
4 Continental Shelf related to—

5 (i) supporting, or carrying out explo-  
6 ration, development, production, proc-  
7 essing, or transportation of oil or gas; or

8 (ii) oil spill cleanup, emergency re-  
9 sponse, environmental surveillance, protec-  
10 tion, or restoration, or other oil spill activi-  
11 ties related to occupational safety and  
12 health; and

13 (B) includes an applicant for such employ-  
14 ment.

15 (2) The term “employer” means one or more  
16 individuals, partnerships, associations, corporations,  
17 trusts, unincorporated organizations, nongovern-  
18 mental organizations, or trustees, and includes any  
19 agent, contractor, subcontractor, grantee or consult-  
20 ant of such employer.

21 (3) The term “Outer Continental Shelf” has  
22 the meaning that the term “outer Continental Shelf”  
23 has in the Outer Continental Shelf Lands Act (43  
24 U.S.C. 1331 et seq.).

○