

FINAL WHISTLEBLOWER RULE UNDER SARBANES-OXLEY

November 2004

By Daniel O. Carroll, Esq.

The Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act, was enacted on July 30, 2002. The new law included a provision to protect employees in publicly traded companies and their contractors, subcontractors, or agents from retaliatory action for providing information that an employee believes is a violation of a Securities and Exchange Commission rule or other federal law relating to corporate fraud. Labor Secretary Elaine Chao touted that the whistleblower protection afforded by Sarbanes-Oxley “will protect courageous workers who speak out against corporate abuse and fraud.” See OSHA press release available at www.dol.gov/opa/media/press/osha/OSHA20041664.

Although unrelated to occupational safety or health, the Sarbanes-Oxley Act is one of 14 laws with whistleblower protections administered by the Occupational Safety and Health Administration (OSHA). According to OSHA, a total of 307 employee complaints had been filed under Sarbanes-Oxley as of August 24, 2004.

On August 24, 2004, OSHA promulgated a final rule establishing the procedures for the expeditious handling of complaints from employees who believe that they have been the subject of illegal retaliation.¹ See Procedures for Handling Discrimination Complaints Under Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,103 (2004)(codified at 29 C.F.R. 1980 et seq.) The final rule includes procedures for submitting complaints, investigations and issuing findings and preliminary orders. The rule also sets forth administrative and litigation procedures, including how to object to the findings and request a hearing. The final section of the rule discusses miscellaneous provisions including withdrawals of complaints and settlements and judicial review and judicial enforcement.

OSHA's Ability to Enforce

Public comment on the final rule offered by the Society for Human Resource Management and the U.S. Chamber of Commerce expressed concern that OSHA may lack the expertise to undertake Sarbanes-Oxley investigations due to the complex issues prevalent in corporate securities laws and other financial laws and practices. These groups attempted to differentiate Sarbanes-Oxley from other whistleblower laws administered by OSHA.

The agency countered that the whistleblower provisions of Sarbanes-Oxley are similar to the 13 other whistleblower statutes OSHA administers, as they all involve protecting employees from retaliatory actions taken by employers against workers who have engaged in protected activity. Thus, OSHA believes it is prepared to handle and investigate employment disputes arising under Sarbanes-Oxley. See Procedures for

¹ The final rule left the interim final rule issued on May 28, 2003 largely unchanged.

Handling Discrimination Complaints Under Sarbanes-Oxley, 69 Fed. Reg. 52,104-52,105.

Time Frames For a Complaint

Under Sarbanes-Oxley, an employee of a publicly traded company may file a complaint with OSHA within 90 days of the alleged discrimination.² The 90 limitation period on filing complaints commences once an employee is aware or reasonably should be aware of the employer's adverse decision. See 69 Fed. Reg. 52,106 (citing Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001)).

After the filing of the complaint, the agency has 60 days to conduct an investigation into the complaint. Importantly, the named party to the complaint has an opportunity during the investigation to respond to the complaint allegations.

Within 60 days of the filing of the complaint, the Assistant Secretary for OSHA must issue written findings and, if appropriate, a preliminary order making the employee whole. The preliminary order may include reinstatement, back pay with interest and compensation for any special damages. Upon timely filing of an objection (*i.e.* within 30 days of the findings and preliminary order), all aspects of the preliminary order will be automatically stayed except that portion requiring reinstatement. However, as explained by OSHA when it issued the final rule, preliminary orders of reinstatement may be stayed in exceptional cases. It would be an "exceptional case" where the named party can establish the criteria for equitable injunctive relief. See Procedures for Handling Discrimination Complaints Under Sarbanes-Oxley, 69 Fed. Reg. 52,109.

If no objection to the initial findings and preliminary order is filed within 30 days of receiving the same, then the Assistant Secretary's findings and preliminary order will be the final decision of the Secretary of Labor. However, if a timely objection and request for hearing are filed with the Chief Administrative Law Judge, the case will be assigned to an Administrative Law Judge ("ALJ") who will set the time and place of the hearing. The hearing will be conducted *de novo* on the record. The decision of the ALJ, containing findings and conclusions of law, will become effective 10 business days after the date of the decision, except any decision made with respect to reinstatement of an employee will become effective immediately.

Any party seeking review of the ALJ's decision must file a written petition for review by the Administrative Review Board ("Board") within 10 business days of the ALJ's decision. The petition must specify the portions of the ALJ's decision that are being appealed. Unless the parties are notified within 30 days of the filing of the petition that the petition has been accepted for review, the decision of the ALJ will become the final order of the Secretary of Labor. If a case is accepted for review, the Board must issue its

² The Secretary of Labor has delegated the responsibility for receiving and investigating these complaints to the Assistant Secretary for OSHA.

decision within 120 days of the conclusion of all proceedings before the ALJ (i.e. 10 business days after the date of the ALJ's decision).

Within 60 days after the issuance of a final order by the Board, any person adversely affected may appeal to the appropriate federal Circuit Court of Appeals.

Importantly, the case may be settled at any time after the filing of a complaint and before the findings and/or order are objected to (referred to as "Investigative Settlements") or at any time after the findings and/or order are objected to, but before the findings and/or order become final (referred to as "Adjudicatory Settlements").

Significantly, if a final decision is not issued by the department within 180 days of receiving the complaint, the complainant may bring suit in federal district court for de novo judicial review. Critics commented that these regulatory time frames are unrealistic. OSHA countered by noting that the time frames are either statutorily mandated or designed to effectuate the legislative desire for an expedited administrative complaint process. See Procedures for Handling Discrimination Complaints Under Sarbanes-Oxley, 69 Fed. Reg. 52,105.

Form of Complaint

Although it must be in writing, there is no required form of complaint. See Procedures for Handling Discrimination Complaints Under Sarbanes-Oxley, 69 Fed. Reg. 52,106. OSHA "will not investigate where a complainant has failed to make a prima facie showing that the protected behavior was a contributing factor in the unfavorable personnel action alleged." See id. Significantly, OSHA recognizes that follow-up supplemental interviews may become part of a complaint. Therefore, a facially inadequate complaint may withstand dismissal upon further investigation. See id.

Administrative Hearings

The named party and the complainant are parties in every proceeding. OSHA may participate either as a party or as amicus curiae. The Securities Exchange Commission ("SEC") may participate as amicus curiae. See 29 C.F.R. 1980.108. An initial decision issued by an administrative law judge, may be reviewed by the Administrative Review Board (the "Board") upon written petition. See 29 C.F.R. 1980.110. Within 60 days of the issuance of any final order of the Board, an aggrieved party may appeal the same in the United States Circuit Court of Appeal for the appropriate jurisdiction.

Protected Activities

Two categories of employee conduct are protected under Sarbanes-Oxley. Employees are protected when providing information or otherwise assisting in an investigation concerning conduct which the employee reasonably believes to constitute a violation of "(a) any rule or regulation of the SEC; (b) any provision of federal law relating to fraud against shareholders; or (c) federal criminal law provision prohibiting mail fraud, bank

fraud, or fraud by wire, radio or television.” 18 U.S.C. 1514A(a)(1). Employees are also protected when filing, testifying, participating in or otherwise assisting in proceeding file or about to be filed relating to an alleged violation of the aforementioned laws and regulations. See 18 U.S.C. 1514A(a)(2).

Enforcement

- Administrative decisions have consistently held that the protection afforded by Sarbanes-Oxley will not be applied to adverse employment actions taken prior to the date of the law’s enactment (i.e. July 30, 2002). See Gilmore v. Parametic Tech., 2003-SOX-1 (ALJ Feb. 6, 2003); Kunkler v. Global Futures & Fortex, Ltd., 2003-SOX-6 (ALJ Apr. 24, 2003).
- After becoming aware of the adverse employment action by the employer, complaints should be brought promptly by an employee. The 90 day period for bringing a complaint has been strictly enforced. See Flood v. Cendant Corp. 2004-SOX-16 (ALJ Feb. 23, 2004)(holding that the complaint was untimely since it was filed 95 days after the employee was notified of the termination decision notwithstanding a later effective date for termination); accord, Lawrence v. AT&T Labs and AT&T Corp., 2004-SOX-65 (ALJ Sept. 9, 2004).
- Despite the procedures established for enforcing the whistleblower protection of Sarbanes-Oxley, arbitration clauses in employment agreements may be enforced. The federal court in Boss v. Solomon Smith Barney, Inc., 263 F.Supp.2d 684 (S.D.N.Y. 2003), noted that nothing in Sarbanes-Oxley indicates that it should be exempt from the presumption in favor of arbitration.

Useful Links

- OSHA Whistleblower Program - <http://www.osha.gov/dep/oia/whistleblower/>.
- OSHA Fact Sheet Concerning Corporate Fraud - http://www.osha.gov/OshDoc/data_WhistleblowerFacts/whistleblowers_corporatefraud-factsheet.pdf.
- OSHA Complaint Procedure and Complaint Form - <http://www.osha.gov/as/opa/worker/complain.html>.