



Whistleblower Retaliation: Significant Changes for Employers and Employees

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Know Your Whistleblower

- “Private Attorney General”
 - Seeks to “right the ship,” and protect the company, employees and shareholders
- Opportunistic or disgruntled employee
 - “sees the writing on the wall”
 - seeks leverage
 - seeks recognition or influence



Whistleblower Retaliation Claims On The Rise

- OSHA recently released statistics showing increases in both the number of whistleblower cases filed with OSHA last year and the number of OSHA determinations.
- The number of whistleblower cases submitted to OSHA in FY 2012 was 2,787 – **up 5% from 2011** – and the number of complaint determinations made by OSHA **increased by 42%**.
 - 21% resulted in settlements that DOL approved.
 - 2% resulted in a finding or preliminary order by the Assistant Secretary of Labor.
- The number of SOX whistleblower claims filed with OSHA in 2012 (164) increased by approximately 20% from 2011.
 - OSHA: only 2 were meritorious.

Federal Whistleblower Protection Provisions Enforced By The DOL

- OSHA investigates alleged violations of whistleblower provisions contained in a number of different federal statutory schemes, including:
 - Consumer Product Safety Improvement Act of 2008;
 - Energy Reorganization Act of 1974;
 - Federal Railroad Safety Act of 1970;
 - International Safe Container Act;
 - National Transit System Security Act of 1007;
 - Pipeline Safety Improvement Act of 2002;
 - Surface Transportation Assistance Act of 1982;
 - Asbestos Hazard Emergency Response Act of 1986;
 - Clean Air Act;
 - Comprehensive Environmental Response, Compensation, and Liability Act of 1980;
 - Federal Water Pollution Control Act;
 - Safe Drinking Water Act;
 - Solid Waste Disposal Act;
 - Toxic Substances Control Act;
 - Wendell H. Ford Aviation Investment and Reform Act for the 21st Century;
 - Occupational Safety and Health Act of 1970; and
 - Sarbanes-Oxley Act of 2002



Procedure

- Must file complaint with OSHA within 180 days of adverse action
 - Dodd-Frank doubled the original 90-day statute of limitations
- Employee can pursue claim through DOL's adjudicative regime and then proceed in federal court of appeals: OSHA → OALJ → ARB → Federal Appellate Court
- Employee can “kick out” claim to federal district court (*de novo*) if DOL does not issue a final order within 180 days – even where an ALJ already adjudicated the claim
 - *Stone v. Instrumentation Lab. Co.*, 2009 WL 5173765 (4th Cir. Dec. 31, 2009)



Coverage

- **Applies to publicly traded companies and their subsidiaries**
 - Section 806 of SOX applies to publicly traded companies, defined as all companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934 (the “SEA”) and to all companies that are required to file reports under § 15(d) of the SEA.
 - Dodd-Frank amended Section 806 of SOX by extending its application to subsidiaries and affiliates of publicly traded companies whose financial information is included in the publicly traded company’s financial statements.

Employee's Burden of Proof: *Prima Facie* Case under SOX Whistleblower Provision

- Whistleblowing was a **contributing factor** to the adverse action
- Employee must show:
 - The employee engaged in **protected activity/conduct**;
 - The named person **knew or suspected, actually or constructively** of the employee's protected activity;
 - The employee suffered an **unfavorable personnel action**;
 - There are circumstances sufficient to raise an inference that the protected activity was a **contributing factor** in the unfavorable action.
- If the employee fails to meet this burden, the Secretary must dismiss the complaint and discontinue the investigation.

49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1980.04(b)



Protected Activity

- Employee engages in lawful whistleblowing activities when:
 - S/he provides information or investigative assistance regarding any conduct which the employee “reasonably believes” to be a violation of: §§ 1341, 1343, 1344 or 1348 of the U.S. Code (which address mail fraud; wire, radio and television fraud; bank and securities fraud); the rules or regulations of the SEC; or any federal law provisions relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1).
 - S/he files, cause to be filed, testifies, participates in or otherwise assists in a proceeding filed or about to be filed regarding an alleged violation of §§ 1341, 1343, 1344 or 1348 of the U.S. Code (which address mail fraud; wire, radio and television fraud; bank and securities fraud); the rules or regulations of the SEC; or any federal law provisions relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(2).



Protected Activity (cont'd)

- Reasonable belief standard
- Definitively & specifically standard hangs in the balance - circuit split:
 - Some courts have emphasized that only complaints that “definitively and specifically” relate to the statutes enumerated in SOX or the reporting of material shareholder fraud is protected under SOX.
 - *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Allen v. ARB*, 514 F.3d 468, 476-77 (5th Cir. 2008); *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009); *Riddle v. First Tenn. Bank, N.A.*, No. 11-cv-6277, 2012 U.S. App. LEXIS 18684 (6th Cir. Aug. 31, 2012) (unpublished))
 - Others repudiate this standard:
 - *Weist v. Lynch*, No. 11-cv-4257, 2013 U.S. App. LEXIS 5345 (3d Cir. March 19, 2013); *Sylvester v. Parexel Int’l LLC*, ARB Case No. 07-123, slip op. (ARB May 25, 2011)



Adverse Employment Action

- No Tangible Harm Required For An Adverse Action
 - *Menendez v. Halliburton, Inc.*, No. 09-002, 2011 DOL Ad. Rev. Bd. LEXIS 83 (ARB Sept. 13, 2011): must maintain anonymity of whistleblower; no tangible consequence necessary for an adverse action
 - ARB granted \$30K award for “outing” on March 15, 2013



Employer's Burden Of Proof

- Clear and convincing evidence employer would have acted the same absent the whistleblowing
 - If the employee meets his/her burden, the employer can still avoid liability if it demonstrates by “**clear and convincing**” evidence that it “**would have taken the same unfavorable personnel action in the absence of that behavior.**”
49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1980.104(c).



Remedies

- In both the administrative hearing and court action, a prevailing employee is entitled to “**all relief necessary to make the employee whole.**” This includes reinstatement, back pay with interest, and compensation for “special damages” incurred, such as litigation costs, reasonable attorneys’ fees, and expert witness fees. 18 U.S.C. § 1514A(c).
- **Objections Will Not Stay Preliminary Order:** Although an employer can file objections to the preliminary order and has the right to a hearing before an ALJ on claims of retaliation, the filing of objections will not stay a reinstatement remedy in the preliminary order.
- **No punitive Damages**
- **Criminal Penalties:** SOX provides that any person who knowingly and intentionally retaliates against an individual for providing law enforcement with truthful information relating to the commission or possible commission of a federal offense is subject to fines up to \$250,000, up to 10 years of imprisonment or both. 18 U.S.C. § 1513(e).



Hot issues

- Claims By Compliance Officers And Attorneys
- Misappropriation Of Confidential Information In The Name Of Protected Activity
 - *Vannoy v. Celanese Corp.*, No. 09-1118, 2011 DOLSOX LEXIS 68 (ARB Sept. 28, 2011)
- Attorneys' obligations?
- Coupling With State Law Retaliatory Discharge Claims To Seek Punitive Damages



Solutions

- **Conduct focus groups & surveys**
 - Learn attitudes, perceptions and concerns of your employee population
- **Create and widely disseminate whistleblower protection policies with multiple avenues for reporting**
- **Conduct whistleblower-specific training for managers**
- **Break down corporate silos so that HR, legal (employment counsel in particular) and compliance work together**
 - Understand why each function is an important piece of the puzzle and develop synergies
- **Promptly appoint a liaison to the whistleblower**
 - HR often fits the bill
- **Oversee the evaluations of whistleblowers who remain employed, with an emphasis on objective metrics**
 - Ensure whistleblower does not receive less favorable treatment than similarly situated employees
- **Reward good-faith whistleblowers**



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