

Labor & Employment Update

November 2004

OSHA Adopts Procedures for Whistleblower Complaints

Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") provides that:

- no company required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 shall discriminate against any person who lawfully assists in an investigation or proceeding relating to a violation of the federal securities laws or the rules of the Securities and Exchange Commission; and
- an employee who alleges such discrimination may file a complaint with the Secretary of Labor seeking reinstatement, back pay with interest and compensation for special damages.

About This Update

Notice of a SOX whistleblower complaint demands rapid, effective internal review and response. The time frame for OSHA investigation is extremely short, and the penalties for mistakes have significant short and long term implications for the company.

In the two years since the effective date of SOX, more than 300 whistleblower complaints have been filed with OSHA and more than 100 cases have been appealed to the Department of Labor's administrative law judges for adversarial hearings.

On August 28, 2004, OSHA published a final rule setting forth procedures for the handling of SOX discrimination complaints.

Within 20 calendar days of receiving notice of a SOX complaint, the employer must conduct an investigation of the allegations, submit a statement of position supported by affidavits and other evidence, and meet with OSHA to present its

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position. By the time the complaint is served, OSHA has already preliminarily determined that the employee engaged in protected activity and was subject to retaliation. The employer has an uphill battle to overcome that presumption, and further must prove that it would have taken the same action against the employee in the absence of behavior protected by SOX. If the employer fails to meet this burden, a broader investigation will ensue, during which OSHA will interview witnesses identified by both sides. The employer is not entitled to the identities of the employee's sources.

Within 45 days of the filing of the complaint, OSHA will issue proposed findings and a proposed preliminary order. If OSHA finds reasonable cause to believe the employee's allegations, it will serve a preliminary order on the employer setting forth the evidence supporting the allegations and the proposed relief. The employer must present rebuttal evidence within 10 calendar days of service of the findings and preliminary order, or as soon after as the employer and OSHA can agree. If the employer has evidence that reinstatement of the employee pending further litigation would pose a security risk, it should be presented at this time.

Within 60 days of the filing of the complaint, OSHA generally must issue final written findings as to whether there is reasonable cause to believe that the employer has discriminated against the employee in violation of SOX. These findings are served on all parties by certified mail, return receipt requested. If OSHA fails to meet this deadline, and if more than 180 days elapse from the date the

complaint was filed, the employee may file an action in federal court. Employers have no such rights and are forced to pursue the case in an administrative forum.

If OSHA issues a finding of reasonable cause, and the employer fails to convince OSHA that reinstatement of the employee would pose a security risk, it will be accompanied by another order containing all relief necessary to make the employee whole, including, where appropriate: reinstatement, back pay with interest, and compensation for special damages such as litigations costs, expert witness fees, and reasonable attorneys' fees. If the employer proves the existence of a security risk, the employee will nevertheless be entitled to "economic reinstatement" pending the outcome of any appeals.

Both the employer and the employee have the right to file objections and obtain a hearing, provided they serve notice of appeal within 30 days following service of the final findings. The employer can also seek an award of attorneys' fees from the administrative law judge if the employer alleges that the complaint was frivolous and brought in bad faith. A failure to appeal within 30 days will convert the findings and preliminary order into a final order subject to judicial enforcement.

Risk Control Recommendations

1. Because of the extremely short time frames adopted by OSHA for investigation of SOX complaints, covered employers should establish a SOX response team to receive notice and manage

the company's internal investigation and response. Members of the team should be trained in the procedural and substantive requirements of SOX whistleblower law, the financial management and securities issues which underlie these complaints, and the personnel policies and procedures that govern the complainant's employment.

2. We also recommend that covered employers adopt written policies and procedures defining and prohibiting harassment and discrimination based on protected SOX activity. This policy should also provide a complaint procedure for reporting unlawful discrimination, and promise a prompt

investigation and remediation of any unlawful activity without fear of retaliation. The United States Court of Appeals for the Fifth Circuit recently recognized the existence of an affirmative defense to a claim of hostile environment in an environmental whistleblower case based upon the existence of such a policy. Aside from providing a potential affirmative defense in SOX whistleblower cases, the policy provides a basis for rebutting allegations of unlawful intent, and the complaint process provides an early warning system for potential claims.

ABOUT THE AUTHOR



Mary Pivec is a partner in the Labor and Employment Practice Group in the firm's Washington, D.C. office. Ms. Pivec has extensive experience in representing employers in labor, employment and immigration matters, as well as representing governmental employers in EEO, constitutional law, whistleblower, and collective bargaining matters. Ms. Pivec has lectured and made presentations on a wide range of labor and employment issues, including union avoidance techniques for supervisors and managers, defeating union representation elections, employer sanctions and I-9 compliance, developing effective employee handbooks, investigating and defending sexual harassment claims, and complying with the Family and Medical Leave Act, the Americans with Disabilities Act, the Fair Labor Standards Act. Prior to her legal practice, Ms. Pivec worked as a business agent and handled collective bargaining and grievance and arbitration disputes in the public sector. She has been a commentator on matters of employment and public concern for national news organizations, such as CNN, and has appeared on CNN & Company. Ms. Pivec can be contacted at (202) 772-5310 or mpivec@sheppardmullin.com.

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