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OSHA's Interim Final Regulations Clarify the Whistleblower Complaint Investigation Process and Define Available Remedies

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The Occupational Safety and Health Administration (OSHA) has issued interim final regulations governing its procedures for receiving and investigating complaints under the Sarbanes-Oxley Act of 2002 (SOX), as amended by sections 922 and 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[1] As noted in a recent Littler blog post, the revisions are intended to clarify and improve OSHA's procedures for handling SOX whistleblower complaints and create uniformity with other whistleblower claims that are administered by OSHA. While the regulations are not radically different from those issued after SOX, they are clearly focused on defining and reinforcing three critical aspects of OSHA's handling of whistleblower complaints: (1) filing a retaliation claim; (2) the investigation process, including the burden of proof; and (3) remedies.

Filing a Complaint

Among other amendments Dodd-Frank made to SOX, the law extended the statutory filing period for retaliation complaints to 180 days, doubling the 90-day filing period during which potential whistleblowers previously could seek relief. OSHA's interim final regulations have been updated to reflect this change in the statute of limitations, giving potential complainants 180 days after the alleged violation occurs (or the date on which the employee became aware of the violation) to file a complaint with OSHA. To further encourage individuals to report retaliatory actions, the new regulations also provide that a complaint may be made orally or in writing. Under the prior regulations, complaints had to be submitted in writing.

The Investigation Process

Once a complaint is filed, OSHA has a duty to investigate according to the procedures outlined in the new regulations. Many of the revisions to the investigative procedures are simply changes in terminology and organization intended to create consistency with OSHA's investigation procedures under other whistleblower statutes. However, the new regulations also include updated investigative procedures that add predictability and provide certain rights and protections for both complainants and respondents.

OSHA's investigation begins promptly upon receipt of the oral or written complaint. If the complaint is submitted orally, OSHA will "reduce the complaint to writing" – a change that has

received some criticism because it appears to call for OSHA to act as a complainant, rather than as a neutral agency. Regardless of how the complaint is filed, the Assistant Secretary for OSHA will notify the respondent-employer and the Securities and Exchange Commission (SEC) by providing each with a copy of the complaint. The respondent's copy will be redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act"), and other applicable confidentiality laws. The respondent then has 20 days to respond by written statement.

Throughout the investigation, OSHA will provide the complainant a copy of the respondent's submissions, and the complainant will have an opportunity to respond. OSHA will likewise redact, as necessary, any materials sent to the complainant in accordance with the Privacy Act and other applicable confidentiality laws. This sharing of information is expected to enhance OSHA's ability to conduct full and fair investigations and permit the Assistant Secretary to more thoroughly assess defenses raised by respondents.

During the investigation, the initial burden of proof lies with the complainant: he or she must demonstrate that the protected activity (whistleblowing) was a contributing factor in the adverse action alleged in the complaint. To meet this burden, the complaint, supplemented by interviews of the complainant, must allege the existence of facts that demonstrate: (1) the complainant engaged in protected activity; (2) the respondent knew or suspected that the complainant engaged in protected activity; (3) the complainant suffered an adverse action; and (4) the circumstances sufficiently raise the inference that the protected activity was a contributing factor in the adverse action. If the complainant fails to make this showing, the new regulations demand that the investigation be discontinued and the complaint dismissed.

If the complainant can demonstrate the required elements, the burden of proof shifts to the respondent-employer. To avoid liability, the employer must prove by "clear and convincing evidence" that it would have taken the same adverse action absent the protected activity. OSHA must dismiss a retaliation claim under SOX if either: (1) the complainant fails to demonstrate that the protected activity was a contributing factor in the adverse action; or (2) the employer rebuts the complainant's showing by providing clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

While SOX is silent as to the degree of proof needed for a complainant to support his or her claim, OSHA has taken the position that a complainant must prove by a "preponderance of the evidence" that the protected activity contributed to the adverse action. If the complainant cannot make this showing, the burden never shifts to the employer to establish its defense by "clear and convincing evidence." Thus, the complainant bears the initial burden, but a heavier "clear and convincing evidence" burden lies with the employer.

Remedies

"Make-Whole" Relief

Within 60 days after the filing of the complaint, OSHA will issue written findings. If there is reasonable cause to believe that the complaint has merit, OSHA will order "all relief necessary to make the plaintiff whole" – meaning remedies that restore the complainant to the same position he or she would have had but for the retaliatory action. Such remedies include preliminary reinstatement, back pay with interest, and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees and reasonable attorney's fees. The respondent may file objections to the findings of the Assistant Secretary and request a hearing, but doing so will not suspend an order of preliminary reinstatement, which is effective upon the employer's receipt of findings and the preliminary order.

Economic Reinstatement as an Alternative to Preliminary Reinstatement

The former SOX regulations provided that reinstatement would not be ordered where the respondent establishes that the complainant is a security risk. The new regulations removed that statement based on OSHA's belief that the determination of whether reinstatement is appropriate should be made upon review of the circumstances of each case. Where appropriate, however, OSHA may order that the complainant receive the same pay and benefits as before termination, without actually returning to work. This "economic reinstatement" is akin to an order of front pay and may be ordered in lieu of preliminary reinstatement.

According to OSHA, "economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA's satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the employee." OSHA clarifies, however, that the norm is for OSHA to order immediate preliminary reinstatement when a violation is found. An employer does not have a statutory right to choose economic reinstatement.

Implications for Employers

Although these interim final regulations are not significantly different from the regulations issued after SOX, the streamlined process and revised terminology will provide some predictability and consistency for employers in defending against SOX, Dodd-Frank, and other whistleblower claims. The new regulations are also significant for what they represent: OSHA's renewed focus on enforcement of whistleblower protections and efficient investigation and adjudication of retaliation claims.

To help prevent claims of retaliation, employers should continue to create an environment where fraudulent activity is not tolerated and internal reporting of such activity is required. Employee and manager "speak up" and anti-retaliation trainings, notices posted in the workplace, and clear anti-fraud and updated anti-retaliation policies in the employee handbook help accomplish these tasks. It is also critical for employers to re-examine and update their incident management system and investigation process in order to keep up with the new legislation and establish state of the art practices in these areas.

If you have any questions as to how you can further prevent retaliatory activity in the workplace, please contact experienced employment counsel.

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[1] The Securities and Exchange Commission (SEC) previously issued its final rule implementing the securities whistleblower incentives and protection program contained in Dodd-Frank. For a summary of those regulations, click here.