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DOL Issues its Final Rule for SOX Whistleblower Complaints

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On March 5, 2015, the U.S. Department of Labor issued a Final Rule implementing protections for employees of securities companies and their subsidiaries, as well as employees of national credit-rating agencies. The Final Rule protects employees of public companies, their subsidiaries, contractors and subcontractors from retaliation for reporting actions they believe to be violations of securities laws. The Final Rule replaces the Interim Final Rule the DOL implemented on November 3, 2011, at the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which amended the Sarbanes-Oxley Act of 2002 (SOX). The Final Rule is effective immediately.

Does the Final Rule Differ From the Interim Final Rule?

SOX contained the original whistleblower provisions protecting employees who report fraudulent activity and violations of securities laws. Dodd-Frank amended and clarified several SOX whistleblower provisions. The law expanded the SOX statute of limitations for filing a complaint from 90 days to 180 days. It also expanded the definition of covered employers to include not just securities companies, but their subsidiaries and affiliates, as well as national credit-rating agencies. The November 3, 2011 Interim Final Rule implemented these modifications on a temporary basis and solicited comments from stakeholders. After receiving and considering the five comments that were submitted, the DOL issued Thursday's Final Rule.

The Final Rule does not deviate in any appreciable way from the Interim Final Rule, despite the fact that commenters expressed opinions on several important issues raised by the Interim Final Rule. For example, comments were submitted expressing, among other reservations, concern with the allowance of oral complaints; with confidentiality of submissions and information sharing between the parties; with the lack of standards regarding the issuance of preliminary reinstatement orders; and with the absence of a mechanism for employers to recover wages paid pursuant to a preliminary reinstatement order, if the employer were later found to have not violated SOX. However, the Final Rule reflected only a handful of commenters' suggestions. Primary among the substantive comments that were incorporated was the addition of a procedure whereby each party's filings will be shared with the other, which the Interim Final Rule lacked.

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What Employers Should Know About the Final Rule

Under the Final Rule, the complaint process is as follows: if a covered employee believes his or her employer took adverse action against him or her because he or she engaged in a protected activity (such as reporting what he or she "reasonably believed" to be mail fraud, bank fraud, wire fraud or securities fraud), he or she has 180 days from the date of the alleged retaliation to file a complaint with the Occupational Safety and Health Administration (OSHA). The complaint may be either oral or written, and the employee must show only that his or her protected activity was a contributing factor to the adverse action. Although commenters expressed concerns about the filing of oral complaints—particularly that oral complaints recorded by OSHA investigators could transform the investigators into advocates for the complainant—the agency dismissed these concerns. In OSHA's view, a complaint of any type simply initiates the investigation, at which point the employer is given an opportunity to respond.

If the employer is then unable to show by clear and convincing evidence that it would have taken the adverse action regardless of the protected activity, then OSHA's investigation will continue. These standards set a low bar for complaining employees and a high bar for employers, increasing the likelihood of an investigation.

If at the end of its investigation OSHA concludes there is reasonable cause to believe a violation of the SOX whistleblower provisions occurred, it will issue a preliminary order that includes the relief it deems necessary to make the employee whole, up to and including reinstatement. Although the employer may file an objection within 30 days and request a hearing with an Administrative Law Judge (ALJ), any preliminary reinstatement the agency orders must take effect immediately. Put another way, if OSHA's preliminary order requires reinstatement of the complaining employee, the employer must immediately reinstate the employee even if it files an objection and requests a hearing with an ALJ. Employers will not be able to avoid preliminary reinstatement by establishing that the complaining employee is a security risk. This provision was removed from the Interim Final Rule and is likewise absent from the Final Rule. Despite comments requesting that OSHA include standards in the rule regarding the circumstances under which preliminary reinstatement would be inappropriate, the agency refused. It declared that Congress intended for preliminary reinstatement to be the presumptive remedy in the event OSHA found reasonable cause to believe an employee was discharged in violation of SOX.

Notably, where the employer is eventually found to have not engaged in prohibited retaliation, the Final Rule does not permit the employer to recover wages paid during the reinstatement period, even if the reinstatement was economic rather than actual. Although commenters pointed out that employers' due process rights might be violated in the event that they are unable to even argue for recovery of wages paid for wrongful reinstatements, OSHA disagreed. The Final Rule contains no mechanism by which employers can recover in such situations.

Recommendations for Employers

In the event an employer knows, or suspects, that an employee has engaged in an activity protected by SOX, the employer must take great care to ensure that the employee does not suffer adverse action that he or she would not have otherwise suffered. Such adverse actions can include obvious actions such as termination, suspension, and demotion, but can also include any type of discipline or change in the terms of employment. When in doubt, proceed cautiously, and consult with an attorney.

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