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Department of Labor Finalizes Rule for Handling SOX Retaliation Claims

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On March 4, 2015, the Occupational Health and Safety Administration ("OSHA") issued final regulations governing workplace retaliation claims brought by purported whistleblowers under Title VIII of the Sarbanes-Oxley Act of 2002 (as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010). These final regulations come more than three years after OSHA issued the interim final rule in November 2011, which since then has governed the agency's approach to retaliation claims.

The Final Rule: Noteworthy Issues

The final rule does not materially alter OSHA's approach to investigating, evaluating or adjudicating Sarbanes-Oxley retaliation claims. In addressing comments submitted in response to the interim final rule, however, the agency clearly reinforced its pro-employee interpretation of the statute and highlighted challenges that employers may face in responding to retaliation claims at the agency.

- *The status of verbal complaints*. As was the case under the interim final rule, Sarbanes-Oxley retaliation complaints filed with OSHA under the final rule are not required to be in any particular form. When a complaint is made orally, OSHA will "reduce the complaint to writing"; complaints (oral or written) may be filed in any language, and may be filed by any person on an employee's behalf. OSHA acknowledged receiving several comments critical of this approach, including arguments that permitting oral complaints encouraged frivolous complaints and required investigators to advocate for complainants. The agency declined to make any changes in response to those comments, however, explaining that this approach was consistent with Sarbanes-Oxley and other anti-retaliation statutes.

- *Providing employer with information regarding a complaint*. In response to comments regarding ambiguities in the interim final rule, OSHA revised the regulations to clarify that, after a complaint is filed, it will notify the employer of the filing of the complaint, the allegations contained in the complaint, and the substance of the evidence supporting the complaint. Under the final rule, OSHA will also ensure that each party is provided with copies of the other party's submissions regarding the complaint, and be given opportunities to respond. The final rule also explains that OSHA "generally" provides a copy of its memorandum summarizing the complaint to the employer and that the employer has the opportunity to request clarification of allegations, "if necessary."

- *Preliminary order of reinstatement*. At the conclusion of the investigation, if the agency determines there is reasonable cause to believe the statute has been violated, it issues a preliminary order for relief. OSHA responded to several comments about the reinstatement remedy. Many commenters argued for the return to language contained in

the preliminary rule (and removed in the interim final rule), which indicated that reinstatement would not be appropriate in circumstances where a discharged employee was a security risk. As the only relief not automatically stayed pending a de novo hearing by an administrative law judge ("ALJ"), these commenters argued, reinstatement should be subject to such an exception, and the rule should create appropriate standards for when that exception should apply. OSHA, however, rejected that suggestion, pointing out that reinstatement as a remedy can be evaluated on a "case-by-case basis," and employers still retained the ability to seek discretionary stays. The agency also rejected suggestions that it provide further guidance on the "exceptional circumstances" standard that governs an employer's request to an ALJ for a stay of the preliminary order of reinstatement. Instead, the final rule articulates the agency's view that a stay would be appropriate only when the employer can establish the criteria for equitable injunctive relief—e.g. irreparable harm, likelihood of success on the merits, etc.

- *Economic reinstatement*. OSHA also disagreed with commenters regarding the practice of ordering preliminary "economic reinstatement"—that is, reinstatement of pay to employees who are not actually reinstated to work—without a mechanism in place for the employer to recoup such payments if it ultimately prevails. Employer groups had argued that, in the absence of such a mechanism, the employer's due process rights would be violated. OSHA concluded that there was no due process right to reimbursement when actual preliminary reinstatement was later found to be unwarranted.

- *Judicial enforcement of preliminary orders of reinstatement*. Unsurprisingly, OSHA continues to assert that preliminary orders of reinstatements are enforceable in federal district court—a position that has been met with mixed success in practice. Although Sarbanes-Oxley is relatively clear that *final* orders of reinstatement are enforceable in district court, whether federal courts have jurisdiction over actions to enforce preliminary orders is debatable. Despite the ambiguity in the law, the final rule indicates that the agency will continue to pursue enforcement of preliminary orders in federal court where appropriate.

Practical Takeaways

Given the agency's views on the issues identified above, employers responding to Sarbanes-Oxley retaliation claims should do the following:

- Press the agency for all relevant details concerning the complaint, particularly in the case of verbal complaints, and specifically request the agency's memorandum summarizing the complaint; this will best position the employer to defend against the claim and respond to a preliminary order for relief.

- Keep in mind that complainants must only meet the lesser "contributing factor" causation standard for proving their retaliation claims. Therefore, it is important to carefully build a record for demonstrating that the employer would have taken the same action in the absence of the protected activity; the employer must prove this affirmative defense by the higher "clear and convincing evidence" standard.

- Consider early and carefully how best to make a factual record against reinstatement of the complainant; a preliminary order of reinstatement can give the complainant tremendous leverage in any settlement negotiations.

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