ALSTON&BIRD

WWW.ALSTON.COM

Labor & Employment ADVISORY ■

**MARCH 10, 2015**

# OSHA Issues Final Rule Implementing SOX Whistleblower Complaint Procedures

On March 5, 2015, the Department of Labor's Occupational Safety and Health Administration (OSHA) published a Final Rule, more than three years in the making, on procedures for handling whistleblower complaints under the Sarbanes-Oxley Act (SOX).

## Background

SOX, enacted in 2002, contains whistleblower protections for employees who report fraudulent activity and violations of certain Securities and Exchange Commission (SEC) rules and regulations. In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) amended SOX to clarify that public companies, their subsidiaries and national credit rating agencies are covered employers under the law's whistleblower provision and to extend the statute of limitations for filing a whistleblower complaint from 90 to 180 days.

OSHA enforces the whistleblower provisions of SOX. In November 2011, OSHA issued an Interim Rule to implement Dodd-Frank's amendments and to set forth OSHA's interpretations of SOX as amended. Last week, three years after the close of the notice and comment period, the Final Rule was published. The Final Rule is substantially similar to the Interim Rule, despite commenters' concerns related to several key provisions.

## Procedures Under the Final Rule

**Statute of limitations.** A covered employee who believes her employer took adverse action against her because she reported what she "reasonably believed" to be mail fraud, bank fraud, wire fraud or securities fraud has 180 days from the date of the alleged retaliation to file a complaint with OSHA.

**Form of complaint.** A covered employee's complaint may be either oral or written, and the employee must show only that her protected activity was a contributing factor to the adverse action in order to trigger an OSHA investigation. When a complaint is made orally, an agency investigator will "reduce the complaint to writing." Notably, the Final Rule, like the Interim Rule, lacks standards to ensure that the investigator acts in an entirely neutral capacity. During the notice and comment period, commenters expressed concern that without such standards, investigators will inevitably ask leading questions and expand the scope of the complaint to fill in gaps with the goal of avoiding dismissal based on the pleadings, shifting the role of the investigator from objective fact-finder to legal advocate.

In the Final Rule, OSHA rejected these concerns by stating that SOX does not require written complaints and that allowing oral complaints is consistent with whistleblower protection laws in other contexts.

**Burden-shifting framework.** If the complaint (as supplemented by interviews of the complainant) establishes a prima facie case that the protected activity was a contributing factor in the adverse action, the burden will shift to the employer to show, by clear and convincing evidence, that it would have taken the adverse action regardless of the protected activity. If the employer cannot make this showing, then OSHA's investigation will continue. In this instance, too, the Final Rule reflects OSHA's rejection of criticisms expressed during the notice and comment period to the effect that these standards set a low bar for complaining employees and a high bar for defending employers, increasing the likelihood of an investigation.

**Preliminary order and reinstatement.** After investigating a complaint, OSHA will issue written findings. If OSHA finds there is reasonable cause to believe that retaliation occurred, then the agency will issue a preliminary order, effective immediately, awarding all relief necessary to make the employee whole, including actual or economic reinstatement with the same seniority status that the employee would have had but for the retaliation, 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 attorneys' fees. The preliminary order will take effect immediately, regardless of whether the employer files an objection and requests a hearing. Employers will not be able to avoid preliminary reinstatement by establishing that the complainant is a security risk. During the notice and comment period, commenters criticized this rule as a violation of employers' due process rights in that it does not provide circumstances under which preliminary reinstatement would be inappropriate. Additionally, in cases where the employer ultimately prevails, the employer cannot recover wages paid to the complainant during the reinstatement period, even if the reinstatement was purely economic. OSHA disagreed with these criticisms, stating that Congress intended to provide for preliminary reinstatement, including economic reinstatement in situations when OSHA deems physical reinstatement inadvisable because of a complainant's medical condition or manifest hostility between the parties, or when the complainant's position no longer exists.

**Review.** Following the issuance of a preliminary order, the complainant and respondent have 30 days to file objections and request a hearing before an administrative law judge. The filing of objections will stay any remedy in the preliminary order *except for preliminary reinstatement*. Following a hearing, OSHA has 120 days to issue a final order. The final order may be appealed within 60 days to the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

## Takeaways and Best Practices

Although OSHA's Final Rule seeks to clarify and improve the procedures for handling SOX whistleblower complaints, many of its provisions will effectively make it easier for employees to file and prosecute whistleblower complaints and more difficult and expensive for employers to defend. Employers accused of whistleblower violations can expect increased defense costs due to the reinstatement requirement, the practical effect being that employers will have to pay to economically reinstate the complainant while at the same time paying another worker to fill the position left vacant by the complainant.

In light of this Final Rule and recent whistleblower-friendly Arbitration Review Board (ARB) decisions, including *Sylvester v. Parexel International LLC* and *Menendez v. Halliburton, Inc.*, employers can expect an increased willingness on the part of plaintiffs' attorneys and their clients to invest in whistleblower complaints. Some best practices to help avoid whistleblower liability include:

- Ensure policies are adhered to uniformly before a complaint of illegal behavior occurs. This gives the employer some recourse to legitimately discipline a complaining party when appropriate.
- Keep all complaints and claims by employees and resulting investigations as confidential as possible. Share information about the claim only on a need-to-know basis. If a decision maker can truthfully testify that she never knew about the protected activity, it is more difficult for the complainant to prove a causal connection.
- Be vigilant. To the extent managers and supervisors are aware of an employee's protected actions, they should be reminded of the company's policy prohibiting retaliation or reprisal against whistleblowers.
- Take prompt investigatory action. If the employer believes that any adverse treatment may be motivated in any way by an employee's protected activity, the employer should investigate promptly and take remedial action if necessary.
- Consult with counsel prior to taking actions that may involve liability exposure under SOX.

A copy of the Final Rule (80 Fed. Reg. 11865) can be found here.

If you would like to receive future ***Labor & Employment Advisories*** electronically, please forward your contact information to **labor.advisory@alston.com**. Be sure to put "**subscribe**" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:


**ATLANTA**

Alexandra Garrison Barnett
404.881.7190
alex.barnett@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Kristen Fox
404.881.4284
kristen.fox@alston.com

Kandis Wood Jackson
404.881.7969
kandis.jackson@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Katherine H. Smith
404.881.4575
katherine.smith@alston.com

Brooks Suttle
404.881.7551
brooks.suttle@alston.com

**CHARLOTTE**

Susan B. Molony
704.444.1121
susan.molony@alston.com

**DALLAS**

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

**LOS ANGELES**

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

James R. Evans, Jr.
213.576.1146
james.evans@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Ryan T. McCoy
213.576.1062
ryan.mccoy@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

**WASHINGTON, D.C.**

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com


ALSTON&BIRD

WWW.ALSTON.COM



ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333