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CLIENT ALERT

Final Sarbanes-Oxley Act Whistleblower Retaliation Regulations Issued

March 12, 2015

More than three years after issuing its interim final rule, the U.S. Department of Labor (DOL) has released the final version of its rule implementing the whistleblower protections provided by the Sarbanes-Oxley Act (SOX), as amended by the Dodd-Frank Act reforms of 2010. The final rule closely tracks the key provisions of the interim final rule. In particular, the whistleblower-friendly preliminary reinstatement remedy and the provision allowing oral complaints remain largely untouched. However, there are some changes to DOL's procedures that benefit employers facing a SOX complaint.

With respect to preliminary reinstatement, DOL refused to restore a provision in the prior regulations that denied preliminary reinstatement when the employer established the complainant was a security risk. DOL instead stated in the preamble to the final rule that it will continue to consider whether reinstatement is proper on a case-by-case basis. Despite this statement, the final regulation does not provide for a discretionary determination. Instead, it states that once the Occupational Health and Safety Administration (OSHA) has determined there is reasonable cause to believe retaliation occurred, OSHA's "preliminary order will include all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation…"

Justifying its refusal to reinsert the security risk provision, DOL stated in the preamble to the final rule that a DOL Administrative Law Judge (ALJ) or the Administrative Review Board (ARB) has the power to stay any preliminary reinstatement order. While that statement is accurate, it provides little comfort to employers who have business reasons to avoid bringing a putative whistleblower back to work. The ALJ and ARB are only empowered to stay the reinstatement order after the employer both contests OSHA's initial determination and files a separate motion seeking the stay, and the ALJ or ARB can only then stay the order in "exceptional circumstances."

DOL stated in the preamble to the final rule that it will continue to consider "economic reinstatement," whereby OSHA orders the employer to pay the complainant the same wages and benefits he or she received prior to discharge in lieu of actually reinstating the employee to work. However, DOL noted preliminary reinstatement is the presumptive remedy and economic reinstatement is only appropriate in limited circumstances, such as when: (1) the employee has a medical condition caused by the alleged retaliation, (2) there is "manifest hostility" between the parties, (3) the complainant's position no longer exists, or (4) the employer is out of business. Further, DOL refused again to consider amending the rules to allow employers to recoup any payments made to the complainant as a result of an economic reinstatement order where an ALJ or the ARB later determines the employer did not violate the law. Thus, DOL's refusal to restore the security risk provision combined with its affirmation of the presumption of preliminary reinstatement, increases the chances that employers will be required to bring putative whistleblowers back to work pursuant to a preliminary reinstatement order, even while the employer is awaiting a merits determination by an ALJ and, if necessary, an appeal to the ARB.

While DOL maintained its position set forth in the interim final rule that oral complaints made to OSHA are now sufficient to constitute a filed SOX complaint, DOL made changes in the final rule that should make greater information available to

employers when responding to a SOX complaint. In particular, in response to comments from employer groups, DOL changed the final rule to now state that it will require the parties to exchange any submissions made in support of or in response to a complaint. The prior regulatory regime only required employers to provide copies of their responses to the complainant, with no parallel obligation on complainants. In addition, the final rule states that should the parties fail to exchange submissions, DOL will furnish copies to each party. Further, DOL will now give parties a chance to respond to each and every written submission made by the opposing party. While DOL claimed this is consistent with its current practice, this right of response is now codified in the final rule.

The final version of the regulations took effect on March 5, 2015.

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