



Electronic Dispatch

Labor and Employment Law Information Memo

November 2004

[Go to BS&K Labor and Employment Law Home Page](#)

OSHA ISSUES FINAL REGULATIONS FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER THE SARBANES-OXLEY ACT

Section 806 of the Sarbanes-Oxley Act (the "Act") protects employees of publicly traded companies who report or testify about conduct that they reasonably believe constitutes a violation of the securities laws, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. That section shields an employee who has engaged in protected whistleblowing from discharge, demotion, suspension, threats, harassment, or other discrimination in the terms or conditions of employment because of that protected activity.

On August 23, 2004, the Occupational Safety and Health Administration ("OSHA") issued its final regulations for the handling of whistleblower discrimination complaints under Section 806 of the Act. This information memo details the procedures and time frames set forth in those final regulations, and contains some practical advice to ensure compliance with the Act.

The Regulations

An employee alleging discrimination based on protected whistleblower activity may file a complaint in writing with the United States Department of Labor within 90 days of the alleged discriminatory act. After a complaint is filed, the Assistant Secretary of Labor for Occupational Safety and Health ("Assistant Secretary") will inform the employer of the details of the allegations in the complaint, the substance of the supporting evidence, and the employer's rights with respect to the investigation. After receipt of this notice, the employer has 20 days to submit a written statement of its position with respect to the complaint, as well as any affidavits or documents that support the employer's defenses. Within this 20-day period, the employer may also request a meeting with the Assistant Secretary to present its position.

If an employee does not allege facts in the complaint sufficient to state a *prima facie* case of discrimination based on protected whistleblower activity, the complaint may be dismissed without an investigation. An employee states a *prima facie* case by showing that: (1) he or she engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employee suffered an adverse personnel action; and (4) there were circumstances giving rise to an inference that the employee's protected activity was a contributing factor to the adverse employment action. An inference of discrimination may be created by the proximity in time between the protected activity and the adverse action.

Even if the employee is able to establish a *prima facie* case, OSHA will not conduct further investigation beyond review of the employer's position statement and supporting documents if they contain "clear and convincing" evidence that the employer would have taken the same action even in the absence of the employee's protected conduct. If the employer's position statement and supporting documents do not contain such "clear and convincing" evidence, OSHA will conduct further investigation.

If, after investigation, the Assistant Secretary finds that there is reasonable cause to believe that the employer violated Section 806 of the Act, the Assistant Secretary will give the employer notice of the substance of the evidence which supports that finding. The employer will have ten business days to respond, meet with the OSHA investigators, and present its position as to why a preliminary order of reinstatement is not appropriate.

After considering the relevant information collected during the investigation, the Assistant Secretary will issue written findings within 60 days of the filing of the complaint as to whether there is reasonable cause to believe that the employer has discriminated against the employee. A reasonable cause finding will be accompanied by a preliminary order granting all relief necessary to make the employee whole, including reinstatement, back pay with interest, and compensation for any special damages resulting from the discrimination. If the employer can show that the employee presents a "security risk," a reinstatement order will not be issued. Although the phrase "security risk" is not defined in the regulations, OSHA commentary specifies that an employee is a security risk if reinstatement might result in harm to another employee or to the public, or destruction of property. If the Assistant Secretary determines that there is no reasonable cause to believe that unlawful discrimination occurred, the Assistant Secretary will notify the parties of that determination.

Bond, Schoeneck & King, PLLC • New York • Albany Buffalo Garden City Ithaca New York Oswego Syracuse Utica • Kansas • Overland Park
Bond, Schoeneck & King, P.A. • Florida • Bonita Springs Naples



A party who wishes to challenge the Assistant Secretary's determination may do so by filing objections and requesting a hearing before an Administrative Law Judge ("ALJ"). Objections and a request for a hearing must be filed within 30 days of the party's receipt of the determination. A timely request for a hearing will result in a stay of all remedial aspects of the preliminary order except any provision requiring reinstatement. The employer may make a motion to stay a reinstatement order pending the administrative hearing, but such a motion will generally be granted only if the employer proves a likelihood of success at the hearing and that irreparable injury will result if the employee is reinstated. If no stay of a reinstatement order is granted, and the employer can show that reinstating the employee would be inadvisable, the employer may make a request to provide only "economic reinstatement" – in other words, to provide compensation and benefits as if the employee has been reinstated, but without actual reinstatement. However, the regulations do not permit an employer to recover any of those economic costs, even if it ultimately prevails at the administrative hearing or in a subsequent appeal.

After the administrative hearing, the ALJ will issue his or her decision. The decision of the ALJ will be final unless it is appealed within ten business days by filing a petition to review with the Administrative Review Board ("ARB"). Again, if a timely petition to review is filed, the ALJ's preliminary order of relief will be stayed pending the outcome of the appeal, except for a preliminary order of reinstatement. The ARB will decide within 30 days whether to accept the appeal, and will issue a final decision on the appeal within 120 days of the conclusion of the hearing before the ALJ. If either the ALJ or the ARB determines that a complaint was frivolous or was brought in bad faith, the employer may be entitled to an award of attorneys' fees up to a maximum of \$1,000.00.

Within 60 days of the ARB's final order, any party aggrieved by the ARB's decision may file a petition for review in the Federal Court of Appeals for the Circuit in which the violation allegedly occurred, or the Circuit in which the employee resided on the date of the alleged violation.

Ensuring Compliance With The Act

Because the regulations do not permit an employer to recover the economic costs of complying with a preliminary order of reinstatement even if the employer ultimately prevails before the ALJ, ARB, or a Federal Appeals Court, it is critical to obtain a favorable initial determination from the Assistant Secretary when faced with a complaint. There are a variety of measures an employer can take to increase the likelihood of a favorable initial determination. All publicly-traded companies should revise their anti-discrimination policies to include provisions for the protection of whistleblowers under Section 806 of the Act. In addition, any periodic anti-harassment and anti-discrimination training that publicly-traded companies provide for their employees should include a discussion of the protections provided to whistleblowers under Section 806 of the Act. Employers should also maintain accurate and sufficient documentation of all employee performance and conduct problems if those problems could form a basis for discharging or otherwise disciplining an employee. In addition, when faced with a whistleblower complaint, a publicly-traded company should cooperate fully and provide to the Assistant Secretary during the initial investigation all relevant documentation and information that supports the company's legitimate, non-discriminatory reasons for taking an adverse employment action against the employee.

If you have any questions regarding your obligations under the Sarbanes-Oxley Act, please contact:

In the Capital District, call 518-533-3000 or e-mail:

John M. Bagyi	jbagyi@bsk.com	Nicholas J. D'Ambrosio	ndambrosio@bsk.com
---------------	--	------------------------	--

In Central New York, call 315-218-8000 or e-mail:

R. Daniel Bordoni	dbordoni@bsk.com	Robert A. LaBerge	rlaberge@bsk.com
-------------------	--	-------------------	--

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	toneil@bsk.com
--------------	--

In New York City, call 646-253-2300 or e-mail:

Michael I. Bernstein	mbernstein@bsk.com	Louis P. DiLorenzo	ldilorenzo@bsk.com
Stanley Schair	sschair@bsk.com		

In Western New York, call 716-566-2800 or e-mail:

Robert A. Doren	rdoren@bsk.com	Daniel P. Forsyth	dforsyth@bsk.com
Richard C. Heffern	rheffern@bsk.com		