

OSHA Proposes Revised Regulations of Whistleblower and Retaliation Claims under SOX

November 11, 2011

On November 3, 2011, the Labor Department's Occupational Safety and Health Administration (OSHA) published an interim final rule (Interim Rule) revising its regulations regarding retaliation and whistleblower claims under the Sarbanes Oxley Act of 2002 (SOX).

The Interim Rule's stated purpose is to reflect the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) amendments to SOX's whistleblower provisions and to change the procedure for handling SOX whistleblower claims to make them more consistent with procedures under other OSHA-administered whistleblower statutes.

The revised regulations would account for the substantive changes made to SOX's whistleblower provisions by Dodd-Frank. These substantive changes include:

- a new claim of retaliation by employees of "nationally recognized statistical agencies" (i.e. credit rating agencies);
- an extended statutory period for filing retaliation claims under SOX from 90 days to 180 days;
- new right to a jury trial if the Secretary of Labor does not act on a complaint within 180 days of filing and complainant brings the action in U.S. district court;
- a statement that employees cannot waive SOX whistleblower rights, including through a pre-dispute arbitration agreement; and
- coverage of SOX whistleblower provisions to, not only employees of a publicly-traded company, but also to employees of any privately-held subsidiary or affiliates whose financial information is included in the consolidated financial statements of a publicly-traded company.

Additional proposed revisions include miscellaneous changes in terminology that have no substantive effect:

- whistleblower complaints made orally to OSHA and then reduced to writing meet the requirement that complaints must be "in writing"
- determining interest on back pay damages would be computed by using daily compounded interest instead of quarterly compounded interest
- parties must send all relevant documents to each other as well as the Assistant Secretary

OSHA is soliciting public comments on the Interim Rule. Comments must be submitted by January 3, 2012, and can be submitted electronically at <http://www.regulations.gov>, or by mail or fax. A final rule will be published after OSHA receives and reviews the public comments.

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