A Refresher On Minimizing Employers' Whistleblower Risks

By **David Dubberly and Brittany Clark** (October 24, 2022)

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On Sept. 1, the U.S. Department of Labor's Occupational Safety and Health Administration issued a news release claiming that a financial services employer "violated the whistleblower protection provisions of the Sarbanes-Oxley Act," or SOX, by terminating the employment of a manager who alleged financial misconduct.[1]

According to OSHA, it ordered the employer to pay the employee more than $22 million as a result of the violation.

However, the news release is misleading because OSHA does not have the authority to order payment of such a proposed award in a whistleblower case.

OSHA's Investigative Role in Whistleblower Cases

OSHA administers more than 20 whistleblower protection laws and has the authority to investigate whistleblower claims, including those under the Occupational Safety and Health Act and SOX. The majority of the 20 whistleblower protection laws involve environmental laws and laws regulating the aviation, railroad, health care and nuclear power industries.

But OSHA's findings are not necessarily final, as they can be reviewed de novo by an administrative law judge, and the administrative law judge's subsequent decision can then also be appealed to the DOL's Administrative Review Board for another review. Even then, the ARB's decision can be further reviewed in federal court.

This procedural backdrop also illustrates that whistleblower cases against employers, even those that are without merit, can go on for an extended period of time and be costly to defend.

In short, despite its public Sept. 1 news release, OSHA's proposal that the employer in that matter should pay its former executive more than $22 million in damages is not a final judgment, and there are many subsequent forums that will review the complaint.

Elements of a Whistleblower Claim

Whistleblower provisions prohibit employers from taking adverse action against employees because they engaged in protected activity.

OSH Act

The OSH Act prohibits retaliation against employees who engage in protected activity, which includes:

- Making a good faith complaint about safety to OSHA, another agency or management;
- Participating in an investigation of a safety complaint; and
- Refusing to perform a dangerous assigned task under certain circumstances.

To set out a prima facie case in a workplace safety whistleblower case under the OSH Act, an employee must show that:

- He or she engaged in protected activity;
- The employer took adverse action against the employee; and
- But for the protected activity, the employer would not have taken the adverse action.

The "but for" causation standard used in OSH Act workplace safety actions means that the employee must demonstrate that he or she would not have been subject to the adverse action, such as termination, but for or without the employee's blowing the whistle on the employer.

SOX

SOX is aimed at protecting employees who disclose information that they believe is unlawful, such as fraud. SOX includes administrative, civil and criminal provisions.

Under SOX, protected activity mainly includes disclosing or reporting conduct that the whistleblowing employee reasonably believes violates:

- Federal criminal prohibitions against securities or bank fraud;
- Any rule or regulation of the U.S. Securities and Exchange Commission; or
- Any provision of federal law relating to fraud against shareholders.

The standard under SOX is a subjective one — the conduct that is disclosed does not need to, in fact, violate the law — the employee only needs to reasonably believe that it did. To set out a prima facie case in a SOX whistleblower case, an employee must show that:

- He or she engaged in protected conduct;

- The employer took adverse action against the employee; and

- The protected activity was a contributing factor in the employer's decision to take adverse action.

The "contributing factor" causation test used in SOX cases is easier for employees to meet than the but-for test used for alleged violations of the OSH Act.

Under the contributing factor standard, the employee must only show that the protected whistleblowing contributed to the employer's decision to take the adverse employment action, likely in addition to other reasons.

Employer Defenses and Potential Remedies

As to the merits of these claims, employers often defend whistleblower cases by challenging the causation element of the claim. An employer may argue that it took adverse action due to legitimate, nonretaliatory reasons that are unrelated to the employee's alleged protected activity.

For example, even if an employee engaged in protected activity under the OSH Act, if the employee was terminated for an entirely legitimate and unrelated reason, such as for poor performance or other misconduct, then the protected activity was not the but-for cause.

In SOX whistleblower cases, the contributing factor causation standard is more favorable to the reporting employee than the but-for test. However, in a SOX action, if the employer can show by clear and convincing evidence that the employee was terminated or faced the adverse action for reasons other than the alleged protected activity, the complaint should be dismissed.

Employers can support their position on lack of causation with documents and information, such as performance reviews, written warnings or disciplinary actions, witness statements, training records, and company policies. The ability to establish the facts and the timeline of events may also help an employer prove a causation-based defense.

Companies have received favorable rulings in federal court and before administrative law judges where they established that well-documented performance problems preceded the employee's alleged protected activity.[2]

A properly managed employee termination and disciplinary process with documentation is key to the success of this type of defense.

Additional potential defenses available to employers to defend against whistleblower claims include, among others:

- Lack of jurisdiction;

- That the employee did not engage in protected conduct within the meaning of the whistleblower law;

- That the employee failed to establish that he actually believed that the conduct complained of violated the fraud laws; and

- That the employee failed to show that she reasonably believed that she engaged in protected activity.

Under SOX, challenging the employee's subjective belief that the conduct complained of actually violated the law and/or the employee's reasonable belief about engaging in protected activity can be particularly effective when there is a sophisticated or educated

whistleblower, and when the offense complained of is not one covered by the whistleblower law.

In the matter OSHA addressed in its Sept. 1 news release, the employer defended the former employee's whistleblower retaliation claim at the agency level by arguing that the employee was terminated because his job position was eliminated in a restructuring — not because the employee engaged in any protected conduct under the SOX.

While OSHA was not persuaded by the employer's position, the employer has since stated publicly that it disagrees with OSHA's findings and plans to appeal to an administrative law judge.

OSHA Does Not Have the Final Authority to "Order" an Award or Judgment

If OSHA believes a whistleblower complaint has merit, it generally has the authority to propose that the employer pay an award to the employee, which can include back wages, interest, lost bonuses and benefits, front pay or reinstating the employee, compensatory damages and attorney fees.

But again, OSHA's findings and proposed award or penalty are simply allegations based on the agency's own investigation — they do not constitute an order of judgment or final determination.

As noted, after OSHA makes its proposal, the employer has several avenues of appeal and further review to obtain relief from that proposal.

The employer can also request a hearing and can present its defenses and evidence showing, for example, that the adverse action was taken for legitimate, nonretaliatory reasons — and OSHA's proposal could be reversed.

Best Practices to Minimize the Risk of Whistleblower Claims

OSHA's Sept. 1 news release serves as a reminder that employers should be proactive in taking steps to try to minimize the risk of whistleblower claims. Best practices for employers include:

- Adopting safety and corporate ethics policies that require employees to report alleged financial misconduct;

- Stating that employees who report violations will be protected from retaliation;

- Ensuring that responsible personnel is knowledgeable on all aspects of how to comply with applicable whistleblower laws, including, for example, confidentiality of a reporting employee under SOX;

- Clearly identifying those individuals to whom employees can make internal complaints, and including more than one individual or department for such reporting;

- Training personnel to investigate reports of violations;

- Documenting all communications with the complaining employee about his or her allegations and the investigation;

- Documenting the valid, nonretaliatory reasons for any disciplinary action or employment decision; and

- Giving employees written performance feedback on a regular basis so that appropriate disciplinary action can be taken promptly if and when necessary, even in cases where an employee complains of a policy violation.

Taking steps like these may not prevent whistleblower claims, but they should substantially reduce the risk of litigation and liability for employers.

Even companies with high ethical standards and robust internal reporting systems may still get hit with a whistleblower complaint, which will also bring the potential for substantial monetary and reputational costs.

To minimize these risks and losses, employers should incorporate the above best practices, understand the whistleblower protection laws, and establish and regularly audit thorough and well-managed internal reporting processes.

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[1] https://www.osha.gov/news/newsreleases/national/09012022.

[2] See Robinson v. U.S. Dep't of Labor, 406 F. App'x 69, 72–73 (7th Cir. 2010) (reviewing and analyzing SOX whistleblower complaint).