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OSHA's Revision of Sarbanes-Oxley Whistleblower Regulations

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The Occupational Safety and Health Administration recently published an interim final rule amending its whistleblower regulations under the Sarbanes-Oxley Act of 2002. Comments on the interim final rule are due by January 3, 2012.

On November 3, 2011, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published in the *Federal Register* an interim final rule amending its whistleblower regulations under the Sarbanes-Oxley Act of 2002, as amended (Sarbanes-Oxley). 76 Fed Reg. 68084. The interim final rule was effective upon publication.

OSHA is responsible for receiving and investigating whistleblower complaints under Sarbanes-Oxley and 20 other whistleblower protection statutes. OSHA has amended the Sarbanes-Oxley whistleblower regulations to address amendments to Sarbanes-Oxley's statutory whistleblower provisions made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted in July 2010. The interim final rule implements the Dodd-Frank amendments, clarifies and improves OSHA's procedures for handling Sarbanes-Oxley whistleblower complaints and makes the procedures for handling Sarbanes-Oxley whistleblower complaints more consistent with the procedures for handling complaints under other whistleblower protection statutes administered by OSHA.

As amended, employees are protected from retaliation by covered persons because the employee, or a person acting on behalf of the employee, has engaged in protected activity. "Covered person" includes: any company that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or is required to file reports under Section 15(d) of the Securities Act, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company; any nationally recognized statistical rating organization; or any officer, employee, contractor, subcontractor or agent of such company or nationally recognized statistical rating organization.

Protected activity occurs when an employee lawfully provides information or causes information to be provided, or otherwise assists in an investigation regarding any conduct the employee reasonably believes constitutes a violation of certain laws or regulation: a fraud or swindle; wire, radio or television fraud; bank fraud; securities and commodities fraud; a violation of a rule or regulation promulgated by the U.S. Securities and Exchange Commission (SEC); or a violation of a federal law proscribing fraud against shareholders, when such information is provided to, or the investigation is conducted by, a federal

regulatory or law enforcement agency, a member or committee of Congress, or a person with supervisory authority over the employee or other person working for the employer who has authority to investigate, discover or stop misconduct. Protected activity also occurs when an employee files, causes to be filed, testifies, participates in or otherwise assists in a filed or about to be filed proceeding relating to such misconduct. Employees' whistleblower rights may not be waived by agreement, policy form or condition of employment, including an arbitration agreement.

Whistleblower complaints are filed with OSHA, which will notify and provide copies of the complaint to respondents, and provide an opportunity for respondents to submit to OSHA information responding to the complaint. Information submitted by respondents will be shared with complainants. Complaints will be dismissed by OSHA unless the complainant establishes a *prima facie* showing that protected activity was a contributing factor in the alleged adverse action. Even if a complainant makes a *prima facie* showing, an investigation will not proceed if the respondent demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the complainant's protected activity. If OSHA determines that a respondent has violated Sarbanes-Oxley and that preliminary reinstatement is warranted, OSHA will notify respondent and provide supporting evidence to which respondents can further respond. Within 60 days of the filing of a complaint, OSHA will issue findings as to whether there is reasonable cause to believe that complainant has been retaliated against in violation of the statute. If reasonable cause is found, OSHA will issue a preliminary order providing all relief necessary to make complainant whole.

OSHA's findings and preliminary order will be effective 30 days after respondent receives them, or on the compliance date stated in the order, unless objections to OSHA's findings or preliminary order and a request for a hearing before an administrative law judge (ALJ) are filed. The filing of objections or request for hearing do not, however, stay any reinstatement remedy provided in a preliminary order. Also, OSHA states in the interim final rule that in certain circumstances it may order an employer to provide a complainant with "economic reinstatement," in which the employee does not return to work but still earns full pay and benefits from the employer during adjudication of the complaint. OSHA will decide whether economic reinstatement is appropriate – employers may not themselves just choose to provide an employee with economic reinstatement instead of permitting the employee to return to work. Employers are not entitled by law to recover the costs of economically reinstating an employee, even if they ultimately prevail on the retaliation complaint. ALJ decisions may be appealed to the U.S. Department of Labor's Administrative Review Board, and from there may be appealed to a United States Court of Appeals.

Other changes implemented in OSHA's interim final rule include: The period for filing complaints is extended from 90 to 180 days. Complainants now have the right to a jury trial in a federal district court if the U.S. Secretary of Labor does not issue a final decision within 180 days of the filing of a complaint and complaints may be oral or in writing, may be in any language, and may be filed by anyone on behalf of the employee, and not just by the employee.

Comments on the interim final rule are due on January 3, 2012.