

Labor & Employment Newsletter

MARCH 2003 • STRASBURGER & PRICE, LLP

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In addition to imposing corporate accountability measures on publicly traded companies, Sarbanes-Oxley also provides protections to employees who blow the whistle on corporate fraud.

DO NOT ASK FOR WHOM THE WHISTLE BLOWS: SARBANES-OXLEY AND OTHER TEXAS WHISTLEBLOWER PROTECTIONS

In the aftermath of the accounting scandals that traumatized Wall Street, Congress enacted the Sarbanes-Oxley Act with an effective date of July 30, 2002. Sarbanes-Oxley imposes a myriad of corporate accountability checks and balances upon publicly traded companies. To add teeth to these accountability measures, Section 806 of the Act protects employees of publicly-traded companies who in good faith provide information of violations of:

- federal securities laws; or
- the rules of the Securities and Exchange Commission; or
- any provision of federal law relating to fraud against shareholders.

Styled “Whistleblower Protection of Employees of Publicly Traded Companies,” Section 806 is breathtaking in its scope. It appears to create a remedy not only against the publicly traded employer, but also against the employer’s officers, employees, contractors, subcontractors, and agents. Sarbanes-Oxley, Section 806, 18 U.S.C. §1514A(a). Language within Section 806 is susceptible to the interpretation that the whistle-blowing employee also has remedies against entities that do business with publicly traded companies.

To assert a claim, an aggrieved employee must file a complaint with the Department of Labor (“DOL”) within 90 days of an alleged violation. A complaint triggers an obligation by the DOL to investigate and make a “reasonable cause” determination regarding the complaint’s merit. After concluding its investigation, the DOL must notify the parties of its findings. 49 U.S.C. §42121(b)(2)(A). Remedies include:

- reinstatement of the employee to the former position with full seniority, back pay and benefits. 49 U.S.C. §42121(b)(2)(B)(i);
- an award of “special damages,” a term left undefined by the statute. 18 U.S.C. §1514A(c)(2);
- payment of the prevailing employee’s attorneys’ fees and costs (including expert witness fees). 49 U.S.C. §42121(b)(3)(B).

The DOL’s final order may be appealed to the applicable United States Circuit Court of Appeals. 49 U.S.C. §42121(b)(4)(A). In those cases in which the DOL fails to issue a final decision within 180 days from the filing of the



Under Sarbanes-Oxley, whistleblowing employees may also have remedies against entities that do business with publicly traded companies.

Many other federal and Texas statutes provide some form of anti-retaliation protection to whistleblowing employees.

FOR ADDITIONAL INFORMATION REGARDING ACTIONS TO MINIMIZE WHISTLEBLOWER CLAIMS, CONTACT:

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complaint, the aggrieved employee may bypass the administrative process and file suit directly in federal district court.

Sarbanes-Oxley does not stand alone in establishing protections for whistleblowing employees. Many other federal and Texas Statutes provide some form of anti-retaliation protection. Some of the more commonly utilized Texas statutes include:

Tex. Labor. Code §21.055: an employer may not retaliate against an employee who files a claim of discrimination, or who opposes a discriminatory practice, or who participates in an investigation or proceeding.

Tex. Agr. Code §125.001: an employer may not discharge an employee for exercising rights under the Agricultural Hazards Communication Act.

Tex. Health & Safety Code §161.134: a hospital, mental health facility or treatment facility may not terminate, discriminate or retaliate against an employee for reporting abuse, neglect or unprofessional conduct.

Tex. Health & Safety Code §242.133: a nursing home employer cannot terminate employee for reporting abuse or neglect of a resident at the institution.

Tex. Labor Code §451.001: prohibits an employer from discharging or discriminating against an employee who has in good faith provided information regarding a Worker's Compensation Claim.

Whistleblower claims create their greatest danger when an adverse employment decision is proximate in time to the employee's protected activity. Common-sense preventative measures can reduce both the number and financial risks of whistleblower claims. These "risk minimizers" include a well-drafted and consistently applied policy against retaliation; awareness that an employee has engaged in protected activity; and timely documentation of employee performance concerns and misconduct. Timely legal input regarding disciplinary and/or termination issues can also pay dividends. ■

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