New Developments in Whistleblower Law and Effective Strategies for Prosecuting Whistleblower Retaliation Claims

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Whistleblower Provisions Of The Dodd-Frank Act

Law360, New York (July 20, 2010) -- Recognizing that robust whistleblower protection is critical to preventing another financial crisis, Congress included in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) numerous provisions designed to encourage whistleblowing and to provide robust protection from retaliation.

These provisions create monetary awards for whistleblowers who provide original information to the U.S. Securities and Exchange Commission or Commodity Futures Trading Commission, strengthen the whistleblower protection provisions of the Sarbanes-Oxley Act and the False Claims Act, and create additional whistleblower retaliation causes of action.

Reward for Whistleblowing to the SEC and Prohibition Against Retaliation (Section 922)

Under Section 922, the SEC will be required to pay a reward to individuals who provide original information to the SEC resulting in monetary sanctions exceeding $1 million in civil or criminal proceedings. The purpose of this reward program is to "motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud."

According to Senate Report 111-176, whistleblower tips identified 54.1 percent of uncovered fraud schemes in public companies, while external auditors, including the SEC, detected only 4.1 percent of uncovered fraud schemes.

The award will range from 10 to 30 percent of the amount recouped and the amount of the award shall be at the discretion of the SEC. Penalties, disgorgement and interest paid count toward the $1 million threshold.

Factors to be considered in determining the amount of the reward include the significance of the information provided by the whistleblower, the degree of assistance provided by the whistleblower, the programmatic interest of the SEC in deterring violations of the securities laws by making awards to whistleblowers, and other factors that the SEC may establish by rule or regulation.

If the amount awarded is less than 10 percent or more than 30 percent of the amount recouped, a whistleblower may appeal the SEC's determination by filing an appeal in the appropriate federal court of appeals within 30 days of the determination.

To qualify for a whistleblower reward, Section 922 requires that the individual provide "original information," which means information that "(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information."

In contrast to the qui tam provisions of the FCA, Section 922 does not provide a private right of action to whistleblowers to prosecute securities fraud or other violations of SEC rules.

Section 922 prohibits the SEC from providing an award to a whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information; who gains the information by auditing financial statements as required under the securities laws; who fails to submit information to the SEC as required by an SEC rule; or who is an employee of the U.S. Department of Justice or an appropriate regulatory agency, a self-regulatory

organization, the Public Company Accounting Oversight Board, or a law enforcement organization.

Section 922 also creates a new private right of action for employees who have suffered retaliation "because of any lawful act done by the whistleblower — '(i) in providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act,'" the Securities Exchange Act of 1934, and "'any other law, rule, or regulation subject to the jurisdiction of the [SEC].'"

The action may be brought directly in federal court and remedies include reinstatement, double back pay with interest, as well as litigation costs, expert witness fees, and reasonable attorney's fees. A Section 922 retaliation action can be brought six years after the date on which the retaliation occurred or three years after the date on which the facts material to the right of action are known or reasonably should have been known by the employee. In contrast to the anti-retaliation provision of SOX, a Section 922 plaintiff need not exhaust administrative remedies before bringing a Section 922 retaliation action in federal court.

Reward for Whistleblowing to the Commodity Futures Trading Commission and Protection Against Retaliation (Section 748)

Section 748 amends the Commodity Exchange Act to create a whistleblower incentive program and whistleblower protection provision that are substantially similar to the SEC reward program and anti-retaliation provision contained in section 922.

Under section 748, the amount of a reward is determined by the CFTC and unlike section 922, a whistleblower may appeal any determination regarding an award, not just rewards outside of the 10 to 30 percent range. Protected conduct under Section 748 includes providing information to the CFTC in accordance with the whistleblower incentive provision and "assisting in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information."

New Whistleblower Protection for Financial Services Employees (Section 1057)

Section 1057 creates a robust private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service.

The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect, analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

Section 1057 prohibits retaliation against an employee who has engaged in any of the following protected acts:

- Provided, caused to be provided, or is about to provide or cause to be provided, to an employer, the newly created Bureau of Consumer Financial Protection (Bureau), or any other government authority or law enforcement agency, information that the employee reasonably believes relates to any violation of any provision of Title X of the Dodd-Frank Act, which establishes new consumer financial protections, or any rule, order, standard or prohibition prescribed or enforced by the Bureau;

- Testified or will testify in a proceeding resulting from the administration or enforcement of any provision of Title X;

- Filed, instituted, or caused to be filed or instituted any proceeding under any federal consumer financial law; or

- Objected to, or refused to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of, or enforceable, by the Bureau.

Remedies include reinstatement, backpay, compensatory damages, and attorney's fees and litigation costs, including expert witness fees. Where reinstatement is unavailable or impractical, front pay may be awarded.

Section 1057 employs a burden-shifting framework that is favorable to employees. A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable action. A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.

Once a complainant meets her burden by a preponderance of the evidence, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected conduct.

The procedures governing section 1057 claims are identical to those governing retaliation claims brought under the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087. The statute of limitations is 180 days and the claim must be filed initially with the Occupational Safety and Health Administration, which will investigate the complaint and can order preliminary reinstatement.

Once OSHA issues its findings, either party can request a hearing before a U.S. Department of Labor administrative law judge. If the DOL has not issued a final order within 210 days of the filing of the complaint, the complainant has the option to remove the claim to federal court and either party can request a trial by jury. Section 1057 claims are exempt from predispute arbitration agreements.

Strengthening SOX's Whistleblower Protection Provision (Sections 922 and 929A)

Sections 922 and 929A contain important amendments to Section 806 of SOX that broaden the scope of coverage, increase the statute of limitations, exempt SOX whistleblower claims from mandatory arbitration, and clarify that SOX claims can be tried before a jury.

Section 929A clarifies that the whistleblower protection provision of SOX applies to employees of subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of [a publicly] traded company."

This amendment eliminates a significant loophole that some courts have read into SOX that has substantially narrowed the scope of SOX coverage. Elevating form over substance, some judges have permitted publicly traded companies to avoid liability under SOX merely because the parent company that files reports with the SEC has few, if any, direct employees, and instead employs most of its workforce through non-publicly traded subsidiaries.

As Judge Levin pointed out in Morefield v. Exelon Servs. Inc., ALJ No. 2004-SOX-002 (ALJ Jan. 28, 2004), this loophole is contrary to the purpose of SOX in that "[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries ... [Congress] imposed reforms upon the publicly traded company, and through it, to its entire corporate organization."

Eliminating this loophole will remove a popular defense that has enabled employers to delay litigating SOX claims on the merits.

Section 922(b) further expands SOX coverage to employees of nationally recognized statistical ratings organizations (NRSROs). Covered organizations include Moody's Investors Service Inc., A.M. Best Company Inc., and Standard & Poor's Ratings Service.

According to Sen. Benjamin Cardin, D-Md., a co-sponsor of an amendment expanding SOX coverage, "NRSROs played a large role — by overestimating the safety of residential mortgage-backed securities and collateralized debt obligations — in creating the housing bubble and making it bigger. Then by marking tardy but massive simultaneous downgrades of these securities, they contributed to the collapse of the subprime secondary market and the 'fire sale' of assets, exacerbating the financial crisis."

In a May 7, 2010 press release, Sen. Cardin's office noted that "91 percent of the AAA-rated securities backed by subprime mortgages issued in 2007 have been downgraded to junk status, along with 93 percent of those issued in 2006. Someone at these agencies had to be aware of the problems with these ratings early enough to have made a difference in the severity."

Section 922(c) doubles the statute of limitations for SOX whistleblower claims from 90 to 180 days and clarifies that the statute of limitations begins to toll when an employee becomes aware of a SOX violation, not the date on which the violation occurs. In addition, Section 922(c) clarifies that SOX whistleblowers can elect to try their claims before a jury.

While Congress intended for SOX whistleblowers to have the option to try their claims before a jury, some courts held that the relief provided in SOX is solely equitable in nature and therefore SOX plaintiffs do not have the right to a jury trial. Section 922(c) also declares void any "agreement, policy form, or condition of employment, including a predispute arbitration agreement" which waives the rights and remedies afforded to SOX whistleblowers.

These significant changes to SOX will likely result in more SOX plaintiffs removing their claims from the Department of Labor Office of Administrative Law Judges to federal court, and a significant increase in compensatory damages.

Amendments to the Anti-Retaliation Provision of the False Claims Act (Section 1079B)

Section 1079B amends the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h), by expanding the definition of protected conduct to include "lawful acts done by the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of [the False Claims Act]," thereby protecting against associational discrimination and covering a broad range of activities that could further a potential qui tam action, such as investigating potential contractor fraud.

Section 1079B also clarifies that the statute of limitations for FCA retaliation actions is three years, which brings much-needed clarity in the wake of the Supreme Court's decision in Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409 (2005) holding that the most closely analogous state statute of limitations applies to FCA retaliation claims.

Approximately one year ago, Congress strengthened the FCA's anti-retaliation provision by providing for individual liability and broadening the scope of coverage to include contractors and agents. See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-625.

The FERA amendments to § 3730(h), combined with the Dodd-Frank Act amendments, substantially broaden the scope of covered employees and the scope of protected conduct. Employees who suffer retaliation for blowing the whistle on fraud related to economic stimulus funds, however, have a stronger cause of action under the Section 1553 of the American Recovery and Reinvestment Act of 2009.

Impact of Whistleblower Provisions in Dodd-Frank Act

The whistleblower provisions in the Dodd-Frank Act will likely have several significant effects on the financial services industry and on publicly traded companies.

First, the whistleblower reward provisions will increase disclosures to the SEC and CFTC, thereby strengthening the ability of regulators to uncover and prosecute fraudulent schemes. It remains to be seen, however, whether the culture at the SEC has changed such that the SEC will investigate whistleblower disclosures. The SEC's repeated failure to act on detailed tips about Bernard Madoff's ponzi scheme is just one example of the consequences of the SEC's failure to investigate whistleblower tips.

Second, whistleblowers now have a broad range of options to pursue retaliation claims, and many of the loopholes that courts and administrative agencies carved into SOX's anti-retaliation provisions have been eliminated, including loopholes that substantially narrowed the scope of covered employees.

Third, the option to try whistleblower retaliation claims before juries will likely increase damages awards. General antagonism

about the role of financial services firms in precipitating the financial crisis might spur large jury verdicts.

Fourth, exempting whistleblower retaliation claims from predispute arbitration agreements will enable whistleblowers to obtain broader discovery and will increase public exposure of fraudulent schemes.

Fifth, the option to bring certain whistleblower retaliation claims directly in federal court and to try SOX claims before a jury will put pressure on DOL to promptly adjudicate SOX claims and to demonstrate that it will conduct effective investigations rather than rubber-stamping pretextual employer justifications for retaliatory adverse actions.

--By R. Scott Oswald (pictured) and Jason M. Zuckerman, The Employment Law Group PC

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Congress Enacts Robust Whistleblower Protections To Prevent Fraud In Stimulus Spending

R. Scott Oswald & Jason Mark Zuckerman

Introduction

The economic stimulus bill passed by Congress on February 12, 2009 includes robust whistleblower protections to ensure that employees of private contractors and state and local governments can disclose waste, fraud, gross mismanagement, or a violation of law related to stimulus funds. This article summarizes the key provisions of Senator McCaskill's (D–MO) whistleblower protection amendment to the stimulus bill ("McCaskill Amendment").

Covered Employers

The McCaskill Amendment applies to private contractors, state and local governments, and other non–Federal employers that receive a contract, grant, or other payment appropriated or made available by the stimulus bill.

Broad Scope Of Protected Conduct

Protected conduct includes a disclosure to a person with supervisory authority over the employee, a State or Federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a Federal agency, or an inspector general information that the employee reasonably believes evidences:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or xsafety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or
- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Significantly, internal disclosures are protected, which is a substantial expansion of two current analogous whistleblower protection laws protecting contractors, both of which do not expressly cover internal disclosures. See 10 U.S.C. §2409; 41 U.S.C. §265. The McCaskill Amendment specifically protects so–called "duty speech" whistleblowing, i.e., disclosures made by employees in the ordinary course of performing their job duties. Courts will likely apply a standard of objective reasonableness from analogous whistleblower protection laws, such as Section 806 of the Sarbanes–Oxley Act, 18 U.S.C. §1514A, which evaluates the reasonableness of a belief based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

Prohibited Acts Of Retaliation

The McCaskill Amendment prohibits a broad range of retaliatory employment actions, including termination, demotion, or any other discriminatory act, which includes any act that would dissuade a reasonable person from engaging in protected conduct. See *Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53 (2006).

Employee-Favorable Burden Of Proof

To prevail in a whistleblower action under the McCaskill Amendment, an employee need not show that the protected conduct was a significant or motivating factor in the reprisal, but instead must merely prove that the protected conduct was a "contributing factor" to the reprisal. The Amendment specifically clarifies that an employee can meet the "contributing factor" standard through temporal proximity or by demonstrating that the decision maker knew of the protected disclosure. An employer can avoid liability by demonstrating by "clear and convincing evidence," a high evidentiary burden, that it would have taken the same action in the absence of the employee engaging in protected conduct.

Remedies

A prevailing employee is entitled to "make whole" relief, which includes: (1) reinstatement; (2) back pay; (3) compensatory damages; and (4) attorneys' fees and litigation costs. Where an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may also award exemplary damages.

Administrative Exhaustion Requirement And Right To A Jury Trial

Actions brought under the whistleblower provisions of the McCaskill Amendment must be filed with the appropriate inspector general. Unless the inspector general determines that the action is frivolous, does not relate to covered funds, or has been resolved in another Federal or State administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint. Within 30 days of receiving an inspector general's investigative findings, the head of the agency shall determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, compensatory damages, and attorney fees. If an agency head has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a complaint, the complainant

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can bring a *de novo* action in federal court, which shall be tried by a jury at the request of either party. The McCaskill Amendment expressly clarifies that pre–dispute arbitration agreements do not apply to claims brought under the Amendment.

Alternative Remedies

In addition to the relief available under the McCaskill Amendment, employees of government contractors have other options to remedy whistleblower retaliation. The retaliation provision of the False Claims Act (FCA), 31 U.S.C. §3730 (h), prohibits retaliation against an employee who has taken actions "in furtherance of" an FCA enforcement action, including initiating an FCA action, investigating a potential FCA action, and testifying in an FCA action. At least twenty–four states have adopted laws similar to the FCA, nearly all of which include an analogous retaliation provision. Unlike the McCaskill Amendment, the retaliation provision of the FCA does not require administrative exhaustion. Employees of contractors and of state governments may also have claims under state whistleblower protection statutes, but some of those statutes do not protect internal whistleblowing. In addition, employees of private contractors may have a claim of common law wrongful discharge in violation of public policy, a *tort* remedy that provides access to a jury trial and punitive damages. When evaluating a whistleblower retaliation claim arising from an employee's disclosure about fraud on the government, it is critical to consider whether the employee also has a *qui tam* action and to preserve the employee's ability to pursue a *qui tam*, which may entail avoiding public disclosure of the fraud. In sum, the McCaskill Amendment provides a critical safeguard against fraudulent spending of stimulus funds.

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Whistleblower Protections Under Health Care Bill

Law360, New York (April 08, 2010) -- To further the goal of rooting out fraud, waste and abuse in health care, The Patient Protection and Affordable Care Act of 2009[1] ("Act") that President Barack Obama signed into law on March 23, 2010, includes several whistleblower provisions, including a new private right of action for retaliation (Section 1558), reporting requirements designed to prevent abuse of patients in elder care facilities (Section 6703(b)(3)), mandatory implementation of a complaint resolution process for residents and persons acting on behalf of residents at skilled nursing facilities (Section 6105), and a new definition of an "original source" under the False Claims Act that is favorable to qui tam relators (Section 10104(j)(2)).

Prohibition Against Whistleblower Retaliation (Section 1558)[2]

Section 1558 prohibits retaliation against an employee who provides or is about to provide to an employer, the Federal Government, or a state Attorney General, information that the employee reasonably believes to be a violation of Title I of the Act.

This provision also protects individuals who participate in investigations or object to or refuse to participate in any activity that the employee reasonably believes to be a violation of Title I.

Title I covers a broad range of topics and therefore the scope of protected conduct will be broad, including disclosures related to the denial of coverage based upon a preexisting condition, disclosures concerning discrimination based upon an individual's receipt of health insurance subsidies, or disclosures about the failure of an insurer to rebate portions of excess premiums.

Section 1558 incorporates the procedures, burden-shifting framework, remedies and statute of limitations set forth in the whistleblower protection provision of the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. 2087(b), including the following:

Broad Scope of Prohibited Retaliation

An employer is prohibited from discharging or "in any manner discriminate[ing] against any employee with respect to his or her compensation, terms, conditions, or other privileges of

employment."[3]

The U.S. Department of Labor's Administrative Review Board (ARB) applies the Burlington Northern[4] standard to analogous whistleblower protection statutes,[5] and therefore Section 1558 will prohibit not only tangible adverse actions, but also any action that may dissuade a reasonable employee from engaging in further protected activity.

Prohibited acts of retaliation will likely include termination, suspension, demotion, reduction in pay, demotion, failure to promote, failure to hire, diminution in job duties and blacklisting.

Employee-Favorable Causation Standard and Burden-Shifting Framework

A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable action.[6] A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[7]

Once a complainant meets her burden by a preponderance of the evidence, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected conduct.[8] Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."[9]

A Reasonable but Mistaken Belief is Protected

A Section 1558 complainant need not demonstrate that she disclosed an actual violation of Title I. Instead, Section 1558 employs a "reasonable belief" standard that the DOL and federal courts have construed as protecting a reasonable but mistaken belief that an employer may have violated a particular law.[10]

The reasonable belief standard consists of both a subjective and objective component, and objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[11]

Administrative Exhaustion Requirement

The complaint must be filed with the Occupational Safety and Health Administration within 180 days of the employee becoming aware of the retaliatory adverse action. OSHA will investigate the claim and can order preliminary relief, including reinstatement.

Either party can appeal OSHA's determination by requesting a de novo hearing before a DOL ALJ, but objecting to an order of preliminary relief will not stay the order of reinstatement. Discovery

before an ALJ typically proceeds at a faster pace than discovery in state or federal court, and the hearings are less formal than federal court trials.

For example, ALJs are not required to apply the Federal Rules of Evidence. Either party can appeal an ALJ's decision to the ARB and can appeal an ARB decision to the circuit court of appeals in which the adverse action took place.

Option to Remove Claim to Federal Court and Right to a Jury Trial

If the Secretary of Labor fails to issue a final decision within 210 days of the filing of a complaint, or within 90 days after receiving a written determination from OSHA, the complainant can remove her claim to federal court for de novo review and either party may request a trial by jury.[12]

Remedies

Remedies include reinstatement, back pay with interest, "special damages," attorney's fees, litigation costs, and expert witness fees.[13] Where reinstatement is unavailable or impractical, front pay may be awarded. "Special damages" has been construed under similar whistleblower protection statutes to include damages for pain, suffering, mental anguish and career damage.[14]

A complainant may also be entitled to damages for loss to their reputation as part of the "make whole" remedy provided by the statute.[15]

Mandatory Arbitration Agreements Inapplicable

Section 1558 claims are exempted from mandatory arbitration: "The rights and remedies in this section may not be waived by any agreement, policy, form or condition of employment."[16]

Broadened Definition of the Original Source Exception to the False Claims Act's Public Disclosure Bar (Section 10104(j)(2))

Section 10104(j)(2) amends the False Claims Act (FCA) by broadening the original source exception to the public disclosure bar.

Effective March 23, 2010, an "original source" is an "individual who either (1) prior to a public disclosure ... has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section."

Significantly, the public disclosure bar is no longer jurisdictional in that the Government can pursue an FCA action where the relator does not qualify as an original source.[17]

Until recently, it was unsettled whether the public disclosure bar contained in 31 U.S.C. § 3730(e)(4)(A) applies to disclosures at all levels of government or only to disclosures in federal hearings or in which the Government is a party.[18]

Just last week, the Supreme Court held in Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,[19] that a relator could not maintain her qui tam action where the suit was based in part on information contained in county and state administrative reports.

While not retroactive, the amended definition of an "original source" ensures that the court's expansive construction of the public disclosure bar does not impact future qui tam actions.

The basic purpose of the public disclosure bar, i.e., preventing parasitic qui tam actions based on public disclosures, is not altered, but it will be easier to meet the original source exception to the public disclosure bar.

Combined with recent amendments to the FCA in the Fraud Enforcement and Recovery Act of 2009, signed into law on May 20, 2009, and increased resources for the U.S. Department of Justice to prosecute health care fraud, the qui tam provision of the FCA will continue to be a potent tool to combat contractor fraud.

Indeed, according to Taxpayers Against Fraud, 80 percent of the FCA cases that are now pursued by the U.S. Department of Justice are initiated by whistleblowers and since 1986, FCA judgments and settlements against fraud feasors have totaled over $20 billion.[20]

Reporting Requirements for Employees of Federally Funded Long-Term Care Facilities (Section 6703(b)(3))

The Elder Justice Act of 2009[21] requires long-term care facilities that receive more than $10,000 in federal funding in the preceding year to notify all officers, employees, managers and contractors that they are required by law to report any reasonable suspicion of a crime committed "against any individual who is a resident of, or is receiving care from the facility" to the Secretary of the U.S. Department of Health and Human Services and one or more local law enforcement agency.

If the events that raise suspicion result in serious bodily injury, the suspected crime must be reported immediately and not more than "2 hours after forming the suspicion." All other suspected crimes must be reported within 24 hours.

Failure to report a suspected crime can expose an employee, manager, or contractor to civil fines of up to $300,000. In addition, the Elder Justice Act prohibits retaliation against an employee "because of lawful acts done by the employee."

Prohibited retaliation includes filing a complaint or report against an individual with a state professional disciplinary agency. Facilities violating the anti-retaliation provision may be subject to a fine of up to $200,000 and exclusion from federal programs for a period up to two years.

Mandatory Complaint Resolution Process for Skilled Nursing Facilities (Section 6105)

Effective March 23, 2011, Section 6105 requires states to make available federally prescribed standardized complaint forms for residents and persons acting on the behalf of residents of skilled nursing facilities.

In addition, states must establish a complaint resolution process to track and investigate complaints at skilled nursing facilities and to ensure that complainants are not subjected to retaliation.

--By Jason M. Zuckerman (pictured) and R. Scott Oswald, The Employment Law Group

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The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] Patient Protection and Affordable Care Act § 1558 (to be codified in a newly created subsection of the Fair Labor Standards Act).

[3] Id. § 1558

[4] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[5] Melton v. Yellow Transp. Inc., ARB No. 06-052, ALJ No. 2005-STA-02 (ARB Sept. 30, 2008).

[6] 15 U.S.C. §§ 2087(b)(2)(B)(i)-(iii).

[7] Klopfenstein v. PPC Flow Technologies Holdings Inc., ARB No. 04-149 at 18, ALJ No. 2004-SOX-11 (ARB May 31, 2006).

[8] 15 U.S.C. § 2087(b)(2)(B)(iv)

[9] Peck v. Safe Air Int'l Inc., ARB No. 02-028 at 9, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

[10] See Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009) ("to encourage disclosure, Congress chose statutory language which ensures that an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected."); Allen v. Admin. Review Bd., 514 F. 3d 468, 477 (5th Cir. 2008) (applying "reasonable belief" standard in a Sarbanes-Oxley whistleblower retaliation action); Kalkunte v. DVI Fin. Svcs., Inc., ARB Nos. 05-139 & 05-140, 2004-SOX-056 (ARB Feb. 27, 2009) (clarifying that a reasonable but mistaken belief is protected under SOX).

[11] Allen, 514 F.3d at 477.

[12] 15 U.S.C. § 2087(b)(4).

[13] Id.

[14] Kalkunte, ARB Nos. 05-139 & 05-140 at 15 (Sarbanes-Oxley case in which complainant obtained emotional distress damages); Hannah v. WCI Communities, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) ("a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity").

[15] Hannah, 348 F. Supp. 2d at 1334.

[16] Patient Protection and Affordable Care Act § 1558.

[17] Patient Protection and Affordable Care Act § 10104(j)(2).

[18] 31 U.S.C. § 3730(e)(4)(A) deprived any federal court of jurisdiction to hear a qui tam action based on information publicly disclosed "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation ..." Circuits were split as to whether this applied only to federal proceedings or at the state and local level as well. Compare U.S. ex rel. Dunleavy v. County of Del., 123 F.3d 734 (3d Cir. 1997) (county reports did not violate the public disclosure bar.) and U.S. ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006) (public disclosure bar precluded FCA claim based upon information contained in a state report).

[19] Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, __ S. Ct. __, 2010 WL 1189557 (Mar. 30, 2010)

[20] See Taxpayers Against Fraud website, www.taf.org.

[21] The Elder Justice Act is subtitle H of the Patient Protection and Affordable Care Act of 2009.

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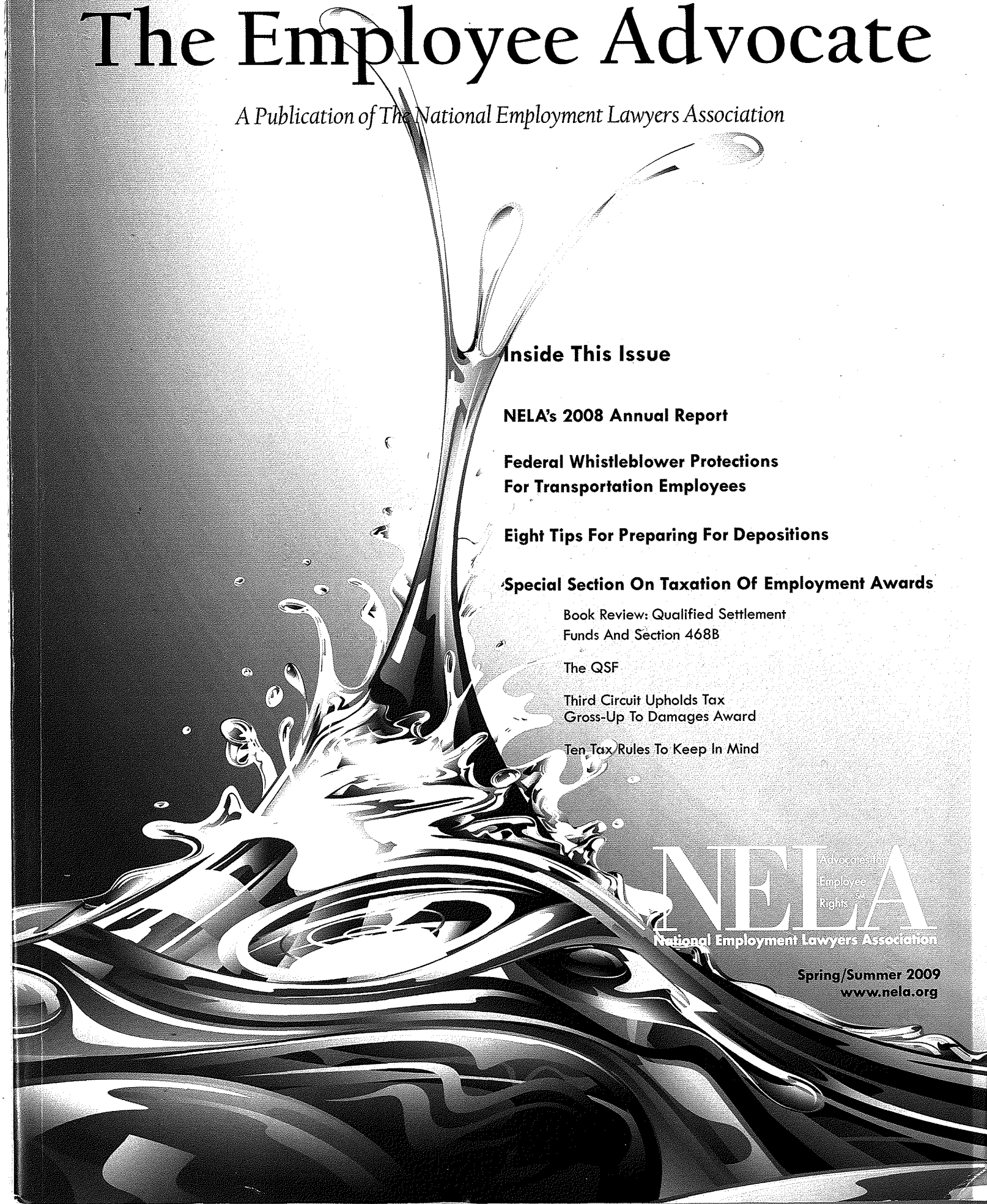

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Federal Whistleblower Protections For Transportation Employees

R. Scott Oswald & Jason Mark Zuckerman

In response to the catastrophic events of September 11, 2001, Congress enacted The Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"). To ensure that employees can blow the whistle on transportation safety issues, the Act provides robust whistleblower protection to employees in the railroad, commercial motor carrier, and public transportation industries.[1] In particular, the following three provisions of the 9/11 Act protect whistleblowers:

- Section 20109 of the Federal Rail Safety Act ("FRSA");[2]
- Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended by section 1536 of 9/11 Act;[3] and
- Section 1413 of the National Transit Systems Security Act of 2007 ("NTSSA").[4]

Elements Of A Whistleblower Retaliation Claim

Similar to the retaliation provision of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. 1514A, transportation whistleblowers must prove by a preponderance of evidence that (1) they engaged in protected conduct; (2) the employer knew that they engaged in protected conduct; (3) the employer took an adverse action; and (4) the protected conduct was a contributing factor in the employer's decision to take an adverse action against the employee.[5]

Protected Conduct Under The Federal Rail Safety Act

The FRSA prohibits an employer from retaliating against a railroad employee who provides information to a regulatory or law enforcement agency, a member of Congress, or any person with supervisory authority over the employee about a reasonably perceived violation of federal law relating to railroad safety or security.[6] In addition, the FRSA protects an employee who:

- refuses to violate a federal law, rule or regulation related to railroad safety or security;[7]
- files a complaint under FRSA;[8]
- notifies or attempts to notify the railroad carrier or Department of Transportation ("DOT") of a work related personal injury or illness of an employee;[9]
- cooperates with safety or security investigations conducted by the DOT, Department of Homeland Security ("DHS"), or National Transportation Safety Board ("NTSB");[10]
- furnishes information to the DOT, DHS, NTSB, or any federal, state or local law enforcement agency regarding an accident resulting in death or injury to a person in connection with railroad transportation;[11] or
- accurately reports hours on duty.[12]

Protected Conduct Under The Surface Transportation Assistance Act (STAA)

The STAA protects drivers of commercial motor vehicles, mechanics, freight handlers, or any other person employed by a commercial motor vehicle carrier who affects safety and security during their employment.[13] An employee engages in protected activity by filing a complaint or initiating a proceeding related to a violation of a regulation affecting highway safety.[14] In addition, the STAA protects employees who accurately report hours on duty; cooperate with a safety or security investigation conducted by the DOT, DHS, or NTSB; furnish information to the DOT, DHS, NTSB or any federal, state, or local law enforcement agency regarding an

accident resulting in death or injury to a person in connection with commercial motor vehicle transportation; or refuse to operate a vehicle because operation of the vehicle would violate a STAA regulation.[15]

Protected Conduct Under The National Transit Systems Security Act (NTSSA)

The NTSSA prohibits public transportation agencies, including contractors and subcontractors, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because the employee:

- reports a hazardous safety or security condition;[16]
- refuses to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties;[17]
- refuses to authorize the use of any safety or security related equipment, track, or structures under certain hazardous conditions;[18]
- provides information or assists in an investigation regarding conduct which the employee reasonably believes constitutes a violation of federal law relating to public transportation safety or security;[19]
- is perceived by the employer to have engaged in the protected activity;
- refuses to violate or assist in the violation of a federal law;[20]
- files an employee protection complaint under NTSSA;[21]
- cooperates with a safety or security investigation conducted by the DOT, DHS, or NTSB;[22] or
- furnishes information to the DOT, DHS, NTSB or any federal, state, or local law enforcement agency regarding an accident resulting in death or injury to a person in connection with public transportation.[23]

"Reasonable Belief" Standard

A complainant need not prove that her disclosure is correct. Instead, the transportation whistleblower protection statutes apply a "reasonable belief" standard. Under that standard, a reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of the enumerated transportation safety laws is protected. See *Allen v. Administrative Review Bd.*, 514 F. 3d 468, 477 (5th Cir. 2008) (applying "reasonable belief" standard in a Sarbanes-Oxley whistleblower retaliation action). To determine whether the complainant's disclosure is objectively reasonable, the fact finder considers whether a reasonable person with the employee's training and experience would reasonably believe that the employer was violating the relevant law or regulation.

Specificity Of Disclosure

Both the DOL's Administrative Review Board and federal appellate courts construing analogous whistleblower protection laws are requiring complainants to demonstrate that their disclosures relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded. See, e.g., *Platone v. Dep't. of Labor*, No. 07-1635 (4th Cir. Dec. 3, 2008). Accordingly, it is important to plead the complainant's protected activities in detail and to describe in the complaint how the complainant's disclosures implicate a violation of the relevant transportation safety law.

Employer Knowledge Of Protected Conduct

Demonstrating knowledge of protected conduct is generally not difficult because the Department of Labor ("DOL") recognizes the doctrine of constructive knowledge, i.e., knowledge of protected conduct will be imputed to a decision-maker where a supervisor with knowledge of the protected conduct influenced the decision to take an adverse action.[24]

Prohibited Acts Of Retaliation

The transportation whistleblower provisions prohibit a broad range of adverse actions, including discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment.[25] This includes blacklisting,

Federal Whistleblower...continued from page 19

termination, suspension, demotion, reduction in salary, failure to hire, or any act that would dissuade a reasonable person from engaging in protected activity.[26]

Causation

The causation standard under the whistleblower protection laws is very favorable to employees. The complainant must only demonstrate that the protected activity was a "contributing factor" in the adverse action.[27] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[28] Once a complainant meets her burden by a preponderance of the evidence, the employer must demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the employee engaging in protected conduct.[29]

Remedies For Prevailing Employees

A prevailing employee is entitled to "make whole" relief, including: (1) reinstatement, (2) back pay, (3) compensatory damages, and (4) attorney fees and litigation costs.[30] In addition, a prevailing employee can recover exemplary or punitive damages up to $250,000.[31] The availability of punitive damages is significant because most whistleblower protection statutes administered by the DOL, including SOX, do not authorize punitive damages.

Procedures Governing Transportation Whistleblower Actions

Actions brought under the three transportation whistleblower provisions must be filed initially with the Occupational Safety and Health Administration ("OSHA") within 180 days of the employee becoming aware of the retaliatory adverse action.[32] OSHA investigates the claim and can order preliminary relief, including reinstatement.[33] Either party can appeal OSHA's determination by requesting a *de novo* hearing before a DOL Administrative Law Judge ("ALJ"). Objecting to an OSHA order of relief will stay the order, except for an order of reinstatement.[34] If neither party objects to OSHA's findings, the findings and any accompanying order of relief become final. Hearings before DOL ALJs are less formal than federal court proceedings. For example, ALJs are not required to apply the Federal Rules of Evidence.

The ALJ issues a recommended order and decision, which either party can appeal by requesting review by the DOL Administrative Review Board ("ARB"), and can appeal an ARB decision to the Circuit Court of Appeals in which the adverse action took place.[35] If DOL does not issue a final decision within 210 days of the employee filing the complaint, the employee can remove the claim to federal court and is entitled to a trial by jury.[36]

Summary

The whistleblower provisions of the 9/11 Act provide robust protection to employees in the transportation industry and will go a long way in enhancing transportation safety. ■

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[1] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (2007).

[2] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (codified as amended at 49 U.S.C. § 20109 (2007)).

[3] See *Id.* § 1536, 121 Stat. at 464 (codified as amended at 49 U.S.C. § 31105 (2007)).

[4] See *Id.* § 1413, 121 Stat. at 414 (codified at 6 U.S.C. § 1142 (2007)).

[5] See *Allen v. Administrative Review Board, United States DOL*, 514 F.3d 468, 475-76 (5th Cir. 2008).

[6] 49 U.S.C. § 20109(a)(1)(A)-(C).

[7] See *Id.* § 20109(a)(2).

[8] See *Id.* § 20109(a)(3).

[9] See *Id.* § 20109(a)(4).

[10] See *Id.* § 20109(a)(5).

[11] See *Id.* § 20109(a)(6).

[12] See *Id.* § 20109(a)(7).

[13] 49 U.S.C. § 31105(b)(3)(j).

[14] See *Id.* § 31105(a)(1)(A)(i).

[15] See *Id.* § 31105(a)(1)(B)-(E).

[16] 6 U.S.C. § 1142 (b)(1)(A).

[17] See *Id.* § 1142 (b)(1)(B).

[18] See *Id.* § 1142 (b)(1)(C).

[19] See *Id.* § 1142 (a)(1).

[20] See *Id.* § 1142 (a).

[21] See *Id.*§ 1142 (a)(3)

[22] See *Id.* § 1142 (a)(4).

[23] See *Id.* § 1142 (a)(5).

[24] See, e.g., *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2 (ALJ June 29, 2007).

[25] 49 U.S.C. § 31105.

[26] The Department of Labor's Administrative Review Board has applied the *Burlington Northern* standard to the STAA and other whistleblower protection statutes administered by DOL. See *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008).

[27] See *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006).

[28] *Id.*

[29] See *Platone v. FLYi, Inc.*, ARB No. 04-154, Case No. 2003-SOX-27(ARB Sept. 29, 2006).

[30] 6 U.S.C. § 1142 (d)(2)(A)-(C). The NTSSA, STAA, and FRSA provide substantially similar remedies.

[31] See *Id.*§ 1142(d)(3).

[32] 6 U.S.C. § 1142(c)(1); 49 U.S.C. § 20109(c)(2)(A)(ii); and 49 U.S.C. § 31105 (b)(1).

[33] 6 U.S.C. § 1142(c)(2)(A) and 49 U.S.C. § 31105 (b)(2)(A).

[34] 6 U.S.C. § 1142(c)(4)(A); 49 U.S.C. § 20109(c)(4); and 49 U.S.C. § 31105 (b)(2)(B).

[35] *Id.*

[36] *Id.*

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SOX: A Robust Remedy For Whistleblowers

Law360, New York (August 25, 2009) -- The Ninth Circuit recently issued a seminal decision construing the whistleblower provision of the Sarbanes Oxley Act[1] ("SOX" or "Section 806"), clarifying that an employee can engage in protected conduct merely by suggesting the need for an employer to investigate potential fraud.

Reversing the district court's entry of summary judgment, the Ninth Circuit held in Van Asdale v. Int'l Game Tech.[2] that the success or failure of a SOX retaliation action does not depend on the plaintiff's "ability to show any actual fraud, only that they reasonably believed that fraud had occurred."[3]

The plaintiffs in Van Asdale are two former in-house attorneys who were initially hired by International Game Technology ("IGT"), a Nevada-based gaming machine company, for the positions of associate general counsel.

During the Van Asdales' employment, IGT merged with Anchor Gaming, a gaming machine manufacturer that held a valuable "wheel" patent.

After the merger and in preparation for litigation against Anchor's former competitor, Bally Technologies, Shawn Van Asdale determined that the benefits of the merger may have been overvalued because Anchor's "wheel" patent was invalidated by prior art, i.e., a machine manufactured by Bally that predated Anchor's "wheel" patent.

Suspecting that IGT shareholders had been misled about the value of IGT's acquisition of Anchor's "wheel" patent, Shawn raised concerns to his supervisors, including IGT's general counsel. Shortly thereafter, IGT terminated Shawn and his wife Lena.

The Van Asdales brought a SOX retaliation claim against IGT, alleging that the company terminated them in retaliation for reporting possible shareholder fraud.[4]

The district court granted IGT's motion for summary judgment, concluding that the attorneys did not engage in protected conduct because they "hadn't reached a conclusion" that IGT engaged in actual shareholder fraud.[5]

The Ninth Circuit rejected the district court's narrow interpretation of SOX, holding that "[r]equiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure."[6]

Noting that the legislative history of Section 806 of SOX makes clear that it protects "all good faith and reasonable reporting of fraud," the Ninth Circuit concluded that the appropriate standard for determining whether an employee engaged in protected conduct is not whether an employee can prove that her employer actually engaged in actual fraud but rather whether the employee "reasonably believed that there might have been fraud."[7]

In particular, the Van Asdales' request for IGT to conduct an investigation and their "subjective belief that the conduct that they were reporting violated a listed law" was sufficient evidence of protected conduct to avoid summary judgment.[8]

In addition to rejecting the district court's narrow construction of the scope of protected conduct under SOX, the Ninth Circuit rejected IGT's position that the Van Asdales could not proceed with their SOX claims because proving their alleged protected conduct would require the disclosure of attorney-client privileged information.[9]

Relying on SOX's express authorization for any "person" to file a whistleblower complaint and the purpose of Section 806, the court found that "Congress plainly considered the role [in-house] attorneys might play in reporting possible securities fraud," and thus, to the extent that a suit may implicate confidentiality-related concerns, a court must use "equitable measures at its disposal to minimize the possibility of harmful disclosures, not dismiss the suit altogether."[10]

The Scope of SOX Whistleblower Protection Seven Years After Congress Enacted SOX

This month marks the seventh year anniversary of the enactment of SOX.

While decisions construing the scope of SOX's whistleblower provision were all over the map for several years, Federal Circuit Court opinions and U.S. Department of Labor Administrative Review Board ("ARB"') decisions have now clarified the scope of SOX whistleblower protection and have rejected most of the efforts of employers to narrow SOX.

1) Protected Conduct is Not Limited to Disclosures About Shareholder Fraud

Employers have tried to limit the scope of protected conduct to disclosures about shareholder fraud.[11]

Applying the plain meaning of section 806, the ARB has held that protected conduct is not limited to providing information to management about "just fraud, but also [the] 'violation of ... any rule or regulation of the Securities and Exchange Commission."[12]

The First, Fourth, Fifth, Seventh and Ninth Circuits have also held that SOX protects disclosures about a reasonably perceived violation of any SEC rule,[13] any provision of Federal law related to shareholder fraud against shareholders, bank fraud, mail fraud and wire fraud.

Indeed, as the SEC noted in an amicus brief it filed in the leading Fourth Circuit decision on the scope of protected conduct under SOX, [14] raising a concern about noncompliance with generally accepted accounting principles, including a misclassification of items in a financial statement that do not affect the bottom line, may constitute protected conduct.

In sum, SOX protects not only concerns about shareholder fraud, but also a broad range of conduct that could lead to shareholder fraud.

2) A Reasonable but Mistaken Belief is Protected

Employers have achieved some headway in weakening Section 806 by persuading courts to require SOX retaliation plaintiffs to demonstrate that they had an objectively reasonable belief that the conduct about which they complained violated one of the six enumerated categories of protected conduct.

SOX plaintiffs, however, need not demonstrate that they raised a concern about an actual violation. A reasonable but mistaken belief is protected.[15]

Moreover, a layperson will not be expected to know the intricacies of securities law in forming a reasonable belief that the employer is violating an SEC rule.

Instead, objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[16]

3) Duty Speech Doctrine Does Not Apply to SOX

In the wake of the Supreme Court's decision in Garcetti v. Ceballos,[17] employers have tried to apply the "duty speech" doctrine to SOX, excluding from the ambit of SOX protected conduct disclosures made in the course of an employee performing her ordinary job duties.

Applying the plain meaning of SOX and case precedent construing analogous whistleblower protection statutes, U.S. Department of Labor administrative law judges have held that SOX "specifically protect[s] reports employees make to their supervisors."[18]

As an ALJ explained, "one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results" and "[t]herefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to congressional intent."[19]

The Senate report on SOX notes that Sherron Watkins, Enron's vice president for corporate development, blew the whistle on accounting irregularities in the course of performing her job duties.[20]

As the “duty speech” defense cannot be reconciled with the plain meaning and legislative history of Section 806, it is a very weak defense in SOX retaliation cases.

4) The Burden of Proof is Very Favorable to Employees

The burden-shifting framework in Section 806 is favorable to employees. To establish liability, an employee need only show that her protected conduct was a “contributing factor” in the decision to take an adverse action.

A “contributing factor” is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[21] This is a lower burden than the “motivating factor” causation standard in Title VII.

Indeed, as the Ninth Circuit held in Van Asdale, “causation [in a SOX retaliation action] can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.”[22]

As described by a management-side attorney who has litigated SOX whistleblower retaliation claims, “even a legitimate business reason will not save a corporate defendant from major liability and injunction penalties if the judge concludes that retaliation against the whistleblower played any role in the decision to take the challenged employment action.”[23]

Once the employee proves the elements of a Section 806 claim by a preponderance of the evidence, the employer can avoid liability only if it proves by “clear and convincing” evidence that it “would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.”[24]

Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”[25]

The “clear and convincing evidence” standard is “an extremely difficult burden, at a minimum requiring proof of documented poor performance and disciplinary intent that predates the protected activity.”[26]

5) SOX Prohibits a Broad Range of Retaliatory Conduct

The text of Section 806 prohibits a broad range of retaliatory adverse actions, including discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower.

About one year ago, the ARB clarified that the Burlington Northern[27] deterrence standard applies to SOX whistleblower claims.[28]

Therefore, in addition to the enumerated adverse actions in the statutory text, SOX also prohibits an employer action that could dissuade a reasonable worker from engaging in protected activity.

6) Whistleblower's Motive is Irrelevant

Faced with a whistleblower retaliation lawsuit, some employers have a knee-jerk reaction to attack the plaintiff's motive for blowing the whistle.

This tactic typically backfires in that it highlights the lengths to which the employer will go to "shoot the messenger." Moreover, as a matter of law, the whistleblower's motive is irrelevant.

In a recent ARB decision construing the analogous whistleblower protection provision of the Safe Drinking Water Act, the ARB rejected the employer's argument that the complainant should not be deemed to have engaged in protected conduct because his disclosure was motivated by personal animus against his supervisors.[29]

The ARB expressly rejected this argument, concluding that "even if [a complainant] were motivated by a retaliatory intent in making [a disclosure] ... a complainant's motivation in making a safety complaint has no bearing on whether the complaint is protected."[30]

7) "Definitively and Specifically" Does Not Require an Employee to Cite Securities Law Chapter and Verse

In one of its early decisions construing SOX's whistleblower provision, the ARB held that in order to constitute protected conduct, a complainant's protected communications "must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded."[31]

The terms "definitively and specifically," however, do not appear in Section 806, and this heightened burden to establish protected conduct finds no support in the legislative history.

Although the ARB's amendment of Section 806 has been widely adopted by federal courts, the "definitively and specifically" requirement does not require an employee to cite securities law chapter and verse.[32] Moreover, an employee need not use the words "SOX," "fraud," "fraud on shareholders" or "stock fraud."[33]

8) Objective Reasonableness is a Mixed Question of Fact and Law

In an effort to prevent SOX whistleblower claims from proceeding to trial, employers have asserted that the objective reasonableness of an employee's alleged protected disclosure is always a question of law.

The Fourth Circuit categorically rejected this position, holding in Welch that "objective reasonableness is a mixed question of law and fact."[34]

Similarly, the Fifth Circuit held in Allen that while the objective reasonableness of an employee's belief can be decided as a matter of law in some cases, "the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of

material fact ... [and if] reasonable minds could disagree on the issue, the objective reasonableness of an employee's belief should not be decided as a matter of law."[35]

Accordingly, the "objective reasonableness" of an employee's protected disclosure will seldom result in summary dismissal of the claim.

Conclusion

In sum, the Ninth Circuit's recent Van Asdale decision and other leading decisions on Section 806 of SOX from both federal Circuit Court of Appeals and the DOL's ARB clarify that SOX can afford robust protection to whistleblowers and attempts to create loopholes in SOX have generally failed.

--By Jason M. Zuckerman (pictured) and R. Scott Oswald, The Employment Law Group

Jason Zuckerman and R. Scott Oswald are both principals at The Employment Law Group in the firm's Washington, D.C., office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] See 18 U.S.C. § 1514A.

[2] 2009 WL 2461906 (9th Cir. 2009).

[3] Id. at *1.

[4] Id. at *1.

[5] Id. at *12.

[6] Id. at *12.

[7] Id. at *11; see also Jayaraj v. Pro-Pharmaceuticals Inc., 2003-S0X-32 at 16-17 (Feb. 11, 2005) ("The statute is clear that the complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that she reasonably believed that the employer violated one of the enumerated statutes or regulations ...").

[8] Van Asdale, at *11 ("although [plaintiff] acknowledged that she 'hadn't reached a conclusion' as to whether fraud had occurred, the context of this statement was [plaintiff's] discussion of the need for an investigation.").

[9] Id. at *5.

[10] Id.

[11] Grant v. Dominion E. Ohio Gas, 2004-S0X-63 (Mar. 10, 2005) (employer alleged that complainant did not engage in protected conduct because none of his expressed concerns "contained any reference to fraud or implication that the company had acted intentionally to mislead shareholders or misstate the company's bottom line.").

[12] Klopfenstein v. PCC Flow Techs Holdings Inc., ARB No. 04-149, ALJ No. 2004-SOX-11, at 17 (ARB May 31, 2006).

[13] See Van Asdale, 2009 WL 2461906; Day v. Staples Inc., 555 F.3d 42 (1st Cir. 2009); Harp v. Charters Comms., 558 F.3d 722 (7th Cir. 2009); Welch v. Chao, 536 F.3d 269 (4th Cir. 2008); Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008).

[14] Welch, 536 F.3d at 269.

[15] See Van Asdale, at *11 ("to encourage disclosure, Congress chose statutory language which ensures that an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected."); Kalkunte v. DVI Fin. Serv. Inc., ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009) (clarifying that a reasonable but mistaken belief is protected under SOX); Allen, 514 F.3d at 477 ("Importantly, an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.").

[16] Allen, 514 F.3d at 477.

[17] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[18] See Leznik v. Nektar Therapeutics, 2006-SOX-93, at 7 (ALJ Nov. 16, 2007). The Employment Law Group PC was counsel for complainant in this action.

[19] Deremer v. Gulfmark Offshore Inc., 2006-SOX-2, at 59-60 (ALJ June 29, 2007).

[20] Id. (citing Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002 (The Sarbanes-Oxley Act of 2002), S. Rep. No. 146, 107th Cong., 2nd Sess., 2002 WL 863249 (May 6, 2002)).

[21] Kalkunte, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009). The Employment Law Group PC represented Kalkunte.

[22] Van Asdale, at *13.

[23] Mary E. Pivec, "Whistleblower Protection Pitfalls," Legal Times, Vol. XXVIII, No. 16 (April 18, 2005).

[24] 29 C.F.R. § 1980.109(a).

[25] Peck v. Safe Air Int'l Inc., ARB No. 02-028 at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

[26] Pivec, "Whistleblower Protection Pitfalls."

[27] See Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[28] Melton v. Yellow Transp. Inc., ARB No. 06-052, ALJ No. 2005-STA-02 (ARB Sept. 30, 2008).

[29] Collins v. Vill. of Lynchburg, Ohio, ARB No. 07-079, ALJ No. 2006-SDW-03 (ARB March 30, 2009).

[30] Id.

[31] Platone v. FLYi Inc., ARB No, 04-154, ALJ No. 2003-50X-27, at 17 (ARB Sept, 29, 2006).

[32] See Welch, 514 F.3d at 276.

[33] Van Asdale, at *7.

[34] Welch, 536 F.3d at 278.

[35] Allen, 514 F.3d at 477.

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New Protections for Consumer Safety Whistle-blowers

By R. Scott Oswald and Jason Zuckerman

Prompted by consumer complaints of lead-laden children's toys and insufficient regulation of consumer product safety, Congress enacted the Consumer Product Safety Commission (CPSC) Reform Act on August 14, 2008.

The act, which is the most comprehensive consumer product safety law enacted since the creation of the CPSC in 1972, strengthens the authority of the commission, expands the scope of prohibited activities under the Consumer Product Safety Act (CPSA), and imposes new certification requirements on manufacturers and distributors.

To ensure that employees can blow the whistle on consumer product safety issues, Congress included in the CPSC Reform Act a whistle-blower protection provision that prohibits manufacturers, private labelers, distributors, and retailers from retaliating against an employee because the employee provided information to an employer, a regulatory agency, or a state attorney general about a reasonably perceived violation of the CPSC Reform Act or any other act enforced by the CPSC.

Elements of a CPSC Whistle-blower Retaliation Claim

Similar to the retaliation provision of the Sarbanes-Oxley Act (SOX), CPSC whistle-blower retaliation plaintiffs must prove that (1) they engaged in protected conduct, (2) the employer knew that they engaged in protected conduct, (3) the employer took adverse action against them, and (4) the protected conduct contributed to the employer's decision to take an adverse action.

Protected conduct. The whistle-blower provision of the CPSC Reform Act prohibits an employer from discharging or otherwise discriminating against an employee because the employee (1) provided information relating to a violation of the CPSC Reform Act or any act enforced by the commission to the employer, the federal government, or the state attorney general, (2) testified or assisted in a proceeding concerning a violation of the CPSC Reform Act or any act enforced by the commission, or (3) refused to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSC Reform Act or any act enforced by the commission.

Specific examples of protected conduct include the following:

1. Reporting violations of the standard for the flammability of children's sleepwear;
2. Disclosing information about the use of consumer patching compounds containing free-form asbestos;
3. Reporting an employer's violation of a safety standard for creating architectural glazing materials;
4. Reporting choking incidents involving marbles, small balls, latex balloons, and other small parts.

Recognizing that the "duty speech" doctrine limits state and local government employees from bringing 1st Amendment whistle-blower retaliation claims based on their work-related speech, the CPSC Reform Act, like SOX, explicitly provides protection for those employees who blow the whistle in the ordinary course of their job duties or who act on their own initiative.

Employer knowledge of protected conduct. Demonstrating knowledge of protected conduct is generally not difficult because the Department of Labor (DOL) recognizes the doctrine of constructive knowledge. DOL administrative law judges (ALJs) will often impute knowledge of protected conduct to a supervisor who has knowledge of the protected conduct and had some influence on the decision to take adverse action.

Prohibited acts of retaliation. The CPSC Reform Act prohibits a broad range of adverse employment action, including discharge or discrimination with respect to employees' compensation, terms, conditions, or privileges of employment. The Supreme Court's *Burlington* standard will apply to the whistle-blower provision of the CPSC Reform Act, thereby prohibiting any conduct that would dissuade a reasonable employee from engaging in protected conduct.

Congress adds anti-retaliation provisions to Consumer Product Safety Act reform bill.

Causation. To prevail in a CPSC whistle-blower action, employees must prove by a preponderance of the evidence that their protected activity was a contributing factor in the unfavorable action. A CPSC whistle-blower need not show that the protected conduct was a significant or motivating factor in the adverse action.

Remedies. A prevailing employee is entitled to "make-whole" relief, which may include (1) reinstatement, (2) backpay, (3) compensatory damages, and (4) attorney fees and litigation costs, including expert witness fees.

Procedures Governing CPSC Whistle-blower Actions

Actions brought under the whistle-blower provisions of the CPSC Reform Act are governed by the same rules and procedures that govern analogous whistle-blower protection statutes, including the whistle-blower provisions of the Federal Rail Safety Act, Surface Transportation Assistance Act, and National Transit Systems Security Act provided by the 9/11 bill for employees in the rail, bus, and public transportation industries, which are at 49 U.S.C. § 20109; 49 U.S.C. § 31105; and 6 U.S.C. § 1142, respectively.

The complaint must be filed with the DOL within 180 days of the employee becoming aware of the retaliatory adverse action. The Occupational Safety and Health Administration (OSHA) will investigate the claim and can order preliminary relief, including reinstatement. Either party can appeal OSHA's determination by requesting a *de novo* hearing before a DOL ALJ. Discovery before an ALJ typically proceeds at a faster pace than discovery in state or federal court, and the hearings are less formal than federal court trials. For example, ALJs are not required to apply the Federal Rules of Evidence.

Either party can appeal an ALJ's decision to the DOL Administrative Review Board (ARB) and can appeal an ARB decision to the circuit court of appeals in which the adverse action took place. If the DOL does not issue a final decision within 210 days of the employee filing the complaint, the employee can remove the claim to federal court and is entitled to a trial by jury. Employers do not have an option to remove a CPSC retaliation claim to federal court.

The whistle-blower provision of the CPSC Reform Act provides a robust remedy for whistle-blowers in the manufacturing, private labeling, distribution, and retail industries, which is intended to encourage employees to identify and report consumer product safety issues, thereby preventing unsafe products from reaching consumers. ■

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