



Annual Meeting 2011
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Session Number: 506
Whistle While You Work 3.0
New Tunes for Whistle Blower Protections and Employment
Retaliation Claims

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Introduction

- SOX whistleblower litigation is on the rise and the risks are higher
 - Coverage expanded to private subsidiaries of public companies
 - Defenses to “protected activity” severely compromised
 - Sylvester v. Parexel (ARB May 25)
- Dodd-Frank Wall Street Reform and Consumer Protection Act
 - Bounties
 - SEC’s employee-friendly regulations issued on May 25
 - Expanded protections for whistleblowers under SOX whistleblower provisions
- How employers can pare the risks



Section 806 Of SOX

- Enacted July 30, 2002, in reaction to accounting and other corporate scandals (e.g., Enron)
- Government's use of whistleblowers reflects a shift from "oversight to insight"
 - Dodd-Frank makes this more pronounced by "deputizing" employees
- Spectrum of whistleblowers
private attorney general →→→→ opportunistic / ulterior motive



Dodd-Frank's Impact On Section 806 Of SOX

- Dodd-Frank enacted on July 21, 2010, and amended SOX:
 - Expanded to cover private subsidiaries or affiliates of public companies (whose financial information is included in the consolidated financial statements of such companies), and covering nationally recognized statistical rating organizations (e.g., Moody's and Standard & Poor's);
 - Retroactive: Johnson v. Siemens Building Tech., ARB Case No. 08-032
 - Doubled statute of limitations (now 180 days)
 - Guarantees right to a jury trial in SOX actions removed to federal district court
 - Prohibits pre-dispute arbitration agreements and any other “agreement, policy, form, or condition of employment” that requires a waiver of rights under SOX
 - Applied retroactively in Pezza v. Investors Capital Corp., No. 10-cv-10113 (D. Mass. Mar. 1, 2011)



Procedure

- Employee must file complaint with OSHA within 180 days of violation
- Employee can “kick out” claim to federal district court if DOL does not issue a final order within 180 days
- Or, employee can pursue claim through DOL



Burden-Shifting Structure

- **Employee's Burden:**
 - Must show the following by a preponderance of the evidence that (i) protected activity; (ii) employer knew or suspected, actually or constructively; (iii) unfavorable personnel action; and (iv) circumstances are sufficient to raise inference that protected activity was a *contributing factor*.
 - Protected activity: employee engages in “protected activity” by providing information he or she reasonably believes constitutes a violation of federal mail, wire, bank or securities fraud; federal law relating to fraud against shareholders; or any rule or regulation of the SEC.
- **Employer's Burden:**
 - **Must show by clear and convincing evidence that** it would have taken the same unfavorable personnel action in the absence of the protected activity.



Damages / Risks

- Reinstatement
- Back-pay with interest
- Attorneys' fees and costs
- "Other affirmative relief" (OSHA)
- Other concerns:
 - Individual liability
 - Reputational risks



Key Defenses Post-May 25, 2011

- Statute of Limitations
- No Adverse Employment Action (*Burlington* standard)
- Failure to Exhaust Administrative Remedies
- Lack of Reasonable Belief
 - subjective
 - objective
- Internal Guidelines/Procedures
- No Causation
 - “No contribution”
 - Adverse employment action would have been taken regardless of the protected activity



Sylvester v. Parexel Int'l LLC (ARB No. 07-123)

- Compromises Defenses To Protected Activity
 - Communicating the alleged fraud
 - Actual vs. future/potential violation
 - “Definitively and specifically” relating to fraud
 - “Fraud on shareholders”
 - Criminal fraud standard (materiality)
- Impact On Pleading Standards (*Twombly / Iqbal*)



Dodd-Frank

- Enacted on July 21, 2010
- SEC regulations issued on May 25, 2011
- Key feature – bounties
- Key consideration – impact on internal compliance programs



Bounties & Incentives

- Potential Awards
 - Requires SEC to provide a monetary award to individuals who provide “original information” to the SEC that results in sanctions exceeding \$1M
 - SEC has discretion to award between 10% and 30% of the total amount of the sanctions
- Regulations Provide 3 “Incentives” To Report Internally
 - SEC will consider internal reports in fashioning award
 - 120-day look-back period
 - employee credited with employer-reported information following internal complaint



Eligibility For Bounty

- “Original information”
- “Independent Knowledge”
- Whistleblower misconduct
- “Voluntary” submissions
- Aggregation of actions
- *Egan v. TradingScreen, Inc.*, No. 10-cv-8202 (S.D.N.Y. May 4, 2011) (plaintiff need not “personally” make disclosure to the SEC)



Anti-Retaliation

- SEC added “reasonable belief” standard:
 - “Employee must hold a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess.”
- SEC will consider:
 - Whether the information provided to the SEC is specific, credible and timely;
 - Whether it is related to a matter that is already under investigation by the SEC but significantly contributes to the investigation; and
 - Whether it was reported internally and then disclosed by the company (and satisfies either of the foregoing considerations)
- Query whether and to what extent SEC will pursue retaliation claims



Steps To Minimize The Risks

- Creating a “culture of compliance”
 - what does this mean for your specific company?
 - your unique identity and values
 - transparency
 - tone at the top
 - embracing good-faith whistleblowers as assets
- Policies & Documents
 - Code Of Conduct
 - Whistleblower Protection Policy
 - Wide dissemination – on-line and handbook
- Training
 - Focus on perceived as well as actual retaliation
- Anonymous help-line and multiple channels for lodging complaints
- Certifications
 - annual?
 - at exit interview?



Steps To Minimize The Risks (Cont'd)

- Compliance Committee
 - Developing a structure that provides subject matter expertise and accounts for personnel / HR issues
 - Legal, compliance and HR
 - Protocol for communicating with the whistleblower
- Internal Rewards
 - monetary (e.g., bonus)
 - non-monetary (e.g., recognition, letter to personnel file from executive)
- Include “fostering a culture of ethics and accountability” in managers’ performance evaluations
- Independent, outside audit and opinion on your program



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For further SoX materials, see <http://www.seyfarth.com/SoX/>

Further ACC Materials:

- [SEC Chairman Shapiro's Opening Statement at SEC Open Meeting, 5-25-11](#)
- [SEC Rule on Dodd-Frank Whistleblowing Provisions](#)
- [ACC Comments to House Financial Services Committee, 5-11-11](#)



Further ACC Resources

- [ACC Comments Letter to SEC, 12-15-2010](#)
- [ACC Followup Comments to SEC, 12-17-2010](#)
- [SEC Whistleblower Regulations Proposal](#)
- [Dodd-Frank WhistleBlower Bounty Program - ACC 1 pager](#)
- [Dodd-Frank and the New Enforcement Environment](#), ACC Docket article, June 2011 (needs member login and password)
- [Responding to the Dodd-Frank Whistleblower Program, ACC Webcast, June 30, 2011](#) (needs member login and password)
- [Understanding and Responding to Whistleblower Reports, ACC Webcast, May 3, 2011](#) (needs member login and password)