

Sarbanes-Oxley Act of 2002—Whistleblower Protections

By Michael J. Sciotti

Late in the summer of 2002 and in response to the Enron and WorldCom situations, Congress enacted the Sarbanes-Oxley Act of 2002. As one commentator observed, “[t]he Act might be more appropriately referred to as the Enron/WorldCom Response Act.”¹ It was Enron that “triggered the initiative, but it took the WorldCom collapse to bring it to fruition.”² While on its face the Sarbanes-Oxley Act addresses corporate fraud and accountability, it also contains a whistleblower provision and enacts criminal penalties for retaliation. Labor and employment practitioners should become familiar with the statute in order to properly identify and advise clients on the civil and criminal implications of this new law. This article highlights the general areas of the Act which address the civil and criminal retaliation provisions.

The Sarbanes-Oxley Act became effective July 30, 2002.³ The Act added 18 U.S.C. § 1514A, which provides protections from retaliation for employees of publicly traded companies. More specifically, it applies to publicly traded companies “with a class of securities registered under . . . 15 U.S.C. § 781,”⁴ or a publicly traded company which is “required to file reports under . . . 15 U.S.C. § 780(d).”⁵ The Act prohibits illegal conduct not only by the company, but also by any “officer, employee, contractor, subcontractor, or agent of such company.”⁶ The Act protects an employee from being discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment.⁷ The term “retaliation” as used in the title of 18 U.S.C. § 1514A is therefore somewhat deceptive in that on its face, as the Act protects employees from being threatened and harassed, and implies that a plaintiff may not need to suffer economic damages in order to state a claim.

The Act protects employees who “provide information, cause information to be provided or otherwise assist in an investigation”⁸ or who “file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed.”⁹ It does not on its face protect employees who know of illegal conduct and who are terminated because of such knowledge, but have never engaged in the type of activity the Act protects. Further, in order for an employee’s actions to be protected by the Act the following conditions must also be met: (1) the employee’s actions must be lawful;¹⁰ (2) the employee must provide the information to a federal regulatory agency, a federal law enforcement agency,¹¹ any member of Congress, any committee of Congress¹² or a person with supervisory authority over the employ-

ee (or such other person working for the employer who has the authority to investigate, discover or terminate [the] misconduct);¹³ and (3) the employee must reasonably believe that the information he or she is providing “constitutes a violation of [18 U.S.C.] section 1341,¹⁴ 1343,¹⁵ 1344,¹⁶ 1348,¹⁷ or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.”¹⁸

An individual who claims a violation of the Act may file a complaint with the United States Secretary of Labor.¹⁹ If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the plaintiff, the plaintiff may bring an action at law or equity for *de novo* review in the appropriate district court of the United States.²⁰ The Act grants the district courts jurisdiction over such actions without regard to the amount in controversy.²¹

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Interestingly, the complaint procedure which plaintiffs need to follow for filing complaints with the Secretary of Labor is adopted from 49 U.S.C. § 4212(b), which deals with whistleblower protections of employees in the airline industry who are discriminated against for providing certain types of air safety information.

Section 4212(b)(1) of 49 U.S.C. , in conjunction with 18 U.S.C. § 1514A(b)(2)(B), sets forth the filing and notification requirements for complaints filed under the Act. Specifically, the complaint must be filed with the Secretary of State within ninety (90) days after the date on which such violation occurs.²² The Secretary of Labor will then notify the person named in the complaint, and the employer²³ of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the investigation procedure.²⁴

The Secretary of Labor is required to dismiss any complaint, without investigation, if the employee fails to make a *prima facie* showing of a violation.²⁵ Further, even if the Secretary of Labor determines that the behavior described in the complaint was a contributing factor in the unfavorable personnel action alleged in the complaint,²⁶ no investigation will be conducted “if the

employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."²⁷ Once the employer is notified of the existence of the complaint it may submit a written response to the complaint and have an opportunity to meet with a representative of the Secretary to present statements from witnesses.²⁸ If at this point the employer is successful in making its showing, no investigation will occur.

Within sixty (60) days of receiving the complaint, and allowing the employer the opportunity to respond—assuming the employer was not successful in making its showing—the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit.²⁹ The Secretary must notify both the employee and the employer of the findings, in writing.³⁰ If there is reasonable cause to believe that a violation has occurred, the findings shall also include a preliminary order.³¹ The preliminary findings shall indicate the proposed remedies.³²

The employee or employer, within thirty (30) days after the date of notification of findings,³³ may file written objections to the findings or preliminary order, or both, and request a hearing on the record.³⁴ If no hearing is requested, the "preliminary order shall be deemed a final order that is not subject to judicial review."³⁵ Assuming the preliminary findings indicate that reinstatement must occur, the employer's request for a hearing does not stay the preliminary order of reinstatement.³⁶

In order for an employee to be successful, he or she need not show that the illegal action was the only factor upon which the employer acted. Rather, the employee need only show it that was a contributing factor in the unfavorable personnel action alleged in the complaint.³⁷ An employer can avoid relief being ordered, even if a violation of the Act occurred, if it "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."³⁸

If a hearing is requested, within one hundred and twenty (120) days from the conclusion of same, the Secretary of Labor shall issue a final order either stating the relief or denying the complaint.³⁹ This order can be appealed to the appropriate United States Court of Appeals. The parties are, of course, free to resolve the matter by entering into a settlement agreement before issuance of a final order. The settlement is entered into by the Secretary of Labor, the complainant, and the employer.⁴⁰

An employee who prevails is entitled to a wide variety of relief, including: (1) all relief necessary to make

the employee whole;⁴¹ and (2) compensatory damages which shall include: (a) reinstatement with the same seniority status that the employee would have had, but for the discrimination;⁴² (b) back pay, with interest;⁴³ and (c) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees.⁴⁴ The Act also does not diminish any other claims the plaintiff may have as a result of any federal or state law, or under any collective bargaining agreement.⁴⁵

In addition to civil liability, the Act also imposes criminal liability on employers for any retaliatory conduct. One of the more frightening provisions of the Act is § 1107—retaliation against informants. This section of the Act adds a new provision to 18 U.S.C. § 1513. It specifically states:

Whoever knowingly, with the intent to retaliate, takes an action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this Title and imprisoned not more than ten years, or both.

With the potential for criminal prosecution now available, employment attorneys must carefully guide employers that wish to discharge, demote, reprimand, suspend, or even write up an employee who may be engaging in activity protected by the Act.

In summary, employees have another set of rights and remedies which counsel must be aware of in order to properly guide their clients, due to the very real potential for criminal and civil prosecution against employers.

Endnotes

1. Bloomenthal, Harold S., *Sarbanes-Oxley Act in Perspective*, p. 1 (2002).
2. *Id.*
3. Added Pub. L. 107-204, July 30, 2002, 116 Stat. 802.
4. 18 U.S.C. § 1514A(a) (West 2002).
5. *Id.*
6. 18 U.S.C. § 1514A(a).
7. *Id.*
8. 18 U.S.C. § 1514A(a)(1).
9. 18 U.S.C. § 1514A(a)(2).
10. 18 U.S.C. § 1514A(a).
11. 18 U.S.C. § 1514A(a)(1)(A).
12. 18 U.S.C. § 1514A(a)(1)(B).
13. 18 U.S.C. § 1514A(a)(1)(C).

14. 18 U.S.C. § 1341. Frauds and swindles—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000, or imprisoned not more than 30 years, or both.
15. 18 U.S.C. § 1343. Fraud by wire, radio, or television—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.
16. 18 U.S.C. § 1344. Bank fraud—Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.
17. 18 U.S.C. § 1348. Securities fraud—Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section

12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.

18. 18 U.S.C. § 1514A(a)(1) & (2).
19. 18 U.S.C. § 1514A(b)(1).
20. 18 U.S.C. § 1514A(b)(2).
21. *Id.*
22. 49 U.S.C. § 42121(b)(1).
23. 18 U.S.C. § 1514A(b)(2)(B).
24. 49 U.S.C. § 42121(b)(2).
25. 49 U.S.C. § 42121(b)(2)(B).
26. 49 U.S.C. § 42121(b)(2)(B)(i).
27. 49 U.S.C. § 42121(b)(2)(B)(ii).
28. 49 U.S.C. § 42121(b)(2)(A).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. 49 U.S.C. § 42121(b)(2)(B)(iii).
38. 49 U.S.C. § 42121(b)(2)(B)(iv).
39. 49 U.S.C. § 42121(b)(3)(A).
40. *Id.*
41. 18 U.S.C. § 1514A(c)(1).
42. 18 U.S.C. § 1514A(c)(2)(A).
43. 18 U.S.C. § 1514A(c)(2)(B).
44. 18 U.S.C. § 1514A(c)(2)(C).
45. 18 U.S.C. § 1514A(d).

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A Message from the Chair

The Section's Annual Meeting took place on January 24 in New York City. Two hundred and forty-five attorneys registered for a three-hour program which included HIPAA privacy rules and new *Weingarten* and whistleblower rights of employees in public and private sector workplaces, followed by an ethics segment on dealing with difficult adversaries, litigants and clients. Attendees received three MCLE credit hours, including one hour in ethics. Thanks to Program Chair Richard Zuckerman and all of the participants responsible for this timely and meaningful program.



At the Annual Meeting of Section members immediately following the MCLE program, the membership elected Pearl Zuchlewski to be the new Chair Elect effective June 1, 2003, and the following district representatives for three-year terms beginning June 1, 2003: Fifth District—Mairead Connor; Sixth District—Todd Kilpatrick; Seventh District—Peter Nelson; and Eighth District—Anne Simet. The prior evening at the Section's Executive Committee Meeting, Jim Sandner was elected as the new Alternate Delegate to the NYSBA House of Delegates. Jim will assume that role on June 1 when current Alternate Delegate Bruce Millman becomes the Section's Delegate to the House of Delegates upon the expiration of Michael Harren's two-year term. Also, Mark Leeds was elected to join the Executive Committee as Twelfth District Representative to complete a term which expires May 31, 2004, which became vacant upon the resignation of Jim Brady. We thank Jim for his contribution to the Section. Congratulations, all.

The Annual Meeting was followed by the Section luncheon. It was my pleasure to recognize immediate

past chair Linda Bartlett for her considerable service to the Section. Luncheon attendees heard guest speaker Eugene Scalia, immediate past Solicitor of the U.S. Department of Labor, who discussed D.O.L. initiatives and answered a number of questions, including enforcement of the whistleblower provision of Sarbanes-Oxley, which was a subject of the morning's MCLE program.

At the L&E Section's Executive Committee Meeting we discussed a report from the NYSBA's Committee on Women in the Law entitled *Gender Equity in the Legal Profession*. The report was adopted by the NYSBA House of Delegates at its June 2002 meeting and contains a number of recommendations. NYSBA formed a Task Force on Gender Equity and I will be nominating a representative from our Section for appointment to the Task Force. Sec-

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