Focus On

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For Corporate Fraud Whistleblowers: Timing Is Everything Under Section 806 of the Sarbanes-Oxley Act

Five years after the passage of legislation dealing with corporate fraud, the impact of the law continues to reverberate. The business community, regulators, and legislators on Capitol Hill alike still debate lingering effects (financial and otherwise) of the law; its continuing vitality; and whether it should be modified, amended, restricted, or even retracted.

On July 30, 2002, in the wake of a series of corporate scandals involving financial and accounting misconduct at Enron, Worldcom, and Tyco and associated concerns about the costs of corporate fraud on shareholders, Congress passed the Corporate and Criminal Fraud Accountability Act of 2002, more popularly known as the Sarbanes-Oxley Act (SOX). With this critical piece of legislation, Congress imposed a number of controls and requirements on corporations designed to ensure that public companies behave as good corporate citizens. At the same time, consistent with its concerns about corporate fraud, Congress included new statutory protection for employees who report corporate fraud.

Blowing the Whistle on Corporate Fraud

Along with its imposition of requirements pertaining to internal controls, auditing, reporting, and the like, the Sarbanes-Oxley Act created a new class of whistleblower—the corporate fraud whistleblower—and penalizes companies and their individual officers for retaliating against those who report a corporation's misconduct. Specifically, § 806 of the act (18 U.S.C. § 1514A) provides the following:

(a) Whistlebower Protection for Employees of Publicly Traded Companies—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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 any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
   (A) a Federal regulatory or law enforcement agency;
   (B) any Member of Congress or any committee of Congress; or
   (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Thus, § 806 protects whistleblowers who report corporate fraud "from retaliatory or discriminatory actions by their employer because the employee provided information to their employer or a federal agency or Congress" relating to alleged violations of certain laws, primarily those "relating to fraud against shareholders."[1]

After five years of § 806 litigation before Department of Labor administrative law judges and in federal courts, attorneys have learned a number of lessons regarding the law's parameters and the protection afforded. Perhaps the most important lesson from this early litigation is that for corporate fraud whistleblowers, timing is everything. It is not enough to blow the whistle on corporate fraud and suffer retaliation for doing so; the whistleblower must also file a formal complaint about that retaliation in a timely manner or risk being barred forever from obtaining any relief.

Gone in 90 Days

Like other federal laws dealing with employment discrimination and retaliation (such as Title VII), SOX requires whistleblowing employees to first turn to administrative procedures before filing a private lawsuit against their employers. Specifically, an employee invoking § 806 must file a whistleblower retaliation complaint with either the secretary of labor or, more appropriately, with the area director of the Occupational Safety and Health Administration (OSHA)[2] within 90 days of the alleged retaliation.[3] If the corporate fraud whistleblower fails to file the complaint within 90 days, he or she has no recourse under § 806. The individual's failure to file in a timely manner precludes the department from awarding any relief under the statute and likewise deprives federal district courts of any "jurisdiction over a suit brought under Section 806 of the Sarbanes-Oxley Act."[4]

More than four years of litigation before Department of Labor judges and federal district courts has proven that the 90-day deadline for filing a § 806 claim is strictly enforced. There is no leeway and, consequently, no margin for error. In *Walker v. Aramark Corp.*, for example, Walker's § 806 complaint was dismissed "[b]ecause [his] first contact with OSHA was 105 days after his termination."[5] Regardless of whatever merit his § 806 complaint might otherwise have had, Walker lost any opportunity to obtain relief because he filed his complaint 15 days late. Even more strictly, in *Flood v. Cedant Corporation*, OSHA dismissed Flood's § 806 complaint, which was filed 84 days after his termination, because, according to OSHA, the clock starts ticking when the employee becomes "aware" of the retaliation, and therefore, the complaint was filed at least 95 days after Cedant Corporation informed Flood that he would be fired.[6] In other words, Cedant started the 90-day clock by giving Flood two weeks' notice of his termination. Critically, as Flood learned, missing the 90-day deadline by as few as five days completely precludes a corporate fraud whistleblower from pursuing any retaliation claim under § 806 and, concomitantly, affords employers a potent—and dispositive—procedural defense to such litigation.

The Clock Is Ticking

Because an employee's failure to file a complaint within 90 days is fatal to that employee's ability to recover under § 806, it obviously becomes important for employees and employers alike to identify what triggers the 90-day clock. The statute, the natural starting point for such an examination, simply requires an aggrieved employee to file "not later than 90 days after the date on which the violation occurs."[7] Similarly, the implementing regulation is phrased in terms of filing a complaint "within 90 days after an alleged violation of the [a]ct occurs."[8] What is important, however, is that the regulation provides parenthetical clarification, noting that an alleged violation occurs "when the discriminatory decision has been both made and communicated to the complainant."[9] This clarification is consistent with the Department of Labor's commentary on the regulation: "[T]he alleged violation is considered to be when the discriminatory decision has been both made and communicated to the complainant. … In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision."[10] Practitioners on both sides of the docket should keenly appreciate the fact that, as in *Flood* above, the 90-day clock may start running before the adverse personnel action goes into effect.[11]

What happens, then, to an employee who is told that his or her contract will not be renewed when it expires at the end of the year? Must the employee file a § 806 complaint before he or she is actually terminated? If the end of the year is more than 90 days away, this is apparently the case. Indeed, to that end, one administrative law judge concluded that the 90-day clock "begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided."[12] Hence, the event triggering the statute of limitations is not the unfavorable personnel action itself; rather, "the acts or events that trigger the running of the statute of limitations are a decision of the employer to discharge the employee, or otherwise adversely affect the employee's employment, and communication of that decision to the employee."[13] The result of this standard is clear: "The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him. It has been established that the date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences."[14] Therefore, providing employees with advance notice of prospective adverse employment action makes sense from a business perspective (that is, it triggers the 90-day deadline) and is more than a matter of professional courtesy.

Is There a Pause Button?

Because § 806 decisions over the last four-plus years instruct both that the 90-day filing deadline is strictly enforced and that it starts to run when the company informs the employee of its decision, employees and employers alike naturally question whether the 90-day deadline is absolute or can be stayed for any reason. Even though a pause button exists, it is not readily accessible. The department's Administrative Review Board recognized the possibility—albeit slight—of equitably tolling the 90-day

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for the Northern District of Florida, Sherrill headed the civil litigation section of the Florida Department of Legal Affairs, served as the department's chief trial counsel, spent five years in private practice, and presided over hearings at the Florida Division of Administrative Hearings. Today Magistrate Judge Sherrill conducts preliminary hearings in criminal cases, trials and dispositions of misdemeanor cases, various pretrial matters and evidentiary hearings on delegation from the district judge as well as civil cases upon the consent of litigants.

Like many modern judges, Judge Sherrill does not use a gavel. He says the traditional courtroom tool should not be necessary in an effort to maintain order. Rather, he believes that it is his responsibility to be attentive and to resolve problems immediately. Judge Sherrill also sees his job as a position that gives him the authority to bring quick focus to bear on the particular problem before him. If, for example, practitioners appear to be manipulating discovery as a way to wage a collateral attack, "the case comes to the top of [his] list," he says. Sherrill's practice pointer: "Think haiku, not harangue."

When not presiding over cases, the judge serves the legal community and local students. He was president of, and is now a pupilage team leader for, the William H. Stafford Inn of Court, an amalgam of judges, lawyers, and law students named for the former senior district judge with whom Judge Sherrill sat on the district court. Judge Sherrill takes part in the activities of the Inn of Court in order to get acquainted with state judges and practitioners to whom he would otherwise not be exposed. Magistrate Judge Sherrill also devotes time to judge mock trial and moot court competitions and conducts naturalization ceremonies each year at local elementary schools. TFL

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deadline in limited instances.[15] Such equitable modification, however, is the exception rather than the rule. Merely showing, for example, a lack of prejudice is not enough.[16] Nor is the employee's or his or her attorney's lack of familiarity with the act and its requirements usually sufficient to justify extension of the filing deadline: "[I]gnorance of the law will generally not support a finding of entitlement to equitable modification."[17] Instead, the Administrative Review Board has identified three instances in which equitable tolling may be appropriate:

1. when the employer has actively misled the employee respecting the cause of action;
2. the employee has in some extraordinary way been prevented from asserting his or her rights; or
3. the employee has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum.[18]

In all cases, the employee bears the burden of demonstrating that he or she is entitled to equitable tolling under this standard.[19]

Specifically addressing this issue last year, the department's Administrative Review Board provided valuable insight into the limited availability of equitable tolling in *Carter v. Champion Bus Lines Inc.*[20] After he was fired, Carter filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) stating that he had undergone various forms of discrimination with the company and that he was terminated "for opposing several prohibited practices."[21] The EEOC rejected his claim, however. Thereafter, Carter filed a complaint with the Department of Labor and, after being informed that OSHA administers whistleblowers' complaints, he filed with OSHA 140 days after his termination. Concluding that Carter had not filed his complaint in time, the administrative law judge dismissed the complaint, a decision that Carter appealed.

On appeal, the Administrative Review Board agreed that Carter's complaint had been properly dismissed as untimely. The fact that Carter did not file his complaint with OSHA within 90 days of his termination is undisputed. Instead, Carter argued that the clock should be equitably tolled, because he had simply filed his complaint in the wrong forum. Carter's argument failed. The Administrative Review Board found that he had not filed "the precise complaint in the wrong forum," because the EEOC charge of discrimination did not raise an issue involving § 806 of the Sarbanes-Oxley Act. The Administrative Review Board explained that "the EEOC complaint must demonstrate that Carter engaged in SOX-protected activity prior to his discharge."[22] In the end,

> since Carter's EEOC complaint does not demonstrate that Champion retaliated against him because his complaints to Champion's management provided information regarding Champion's conduct that Carter reasonably believed was defrauding shareholders or violating security regulations, Carter has not established, as a matter of law, that he filed the precise

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statutory complaint in the wrong forum.[23]

Taking a narrow view of equitable tolling, the *Carter* decision emphasizes that a complaint filed in the wrong forum must specifically raise SOX whistleblower issues in order to be potentially eligible for equitable tolling.

Watch the Clock

Putting this together, the decisions rendered to date in cases involving § 806 of the Sarbanes-Oxley Act reveal that the 90-day filing deadline will be strictly enforced and it is likely that equitable exceptions to its applicability will be few and far between. Employees raising complaints and employers defending such claims should be aware of this trend, recognizing that in almost all cases "[t]he complaint alleging retaliation must be filed within 90 days of the alleged violation; i.e., when the discriminatory act has been both made and communicated to the complainant."[24] Missing the deadline by a single day may completely bar any relief under § 806.[25] Counsel for employees as well as employers should remain cognizant of the fatal, dispositive impact of an employee's failure to file a § 806 complaint in a timely manner. **TFL**

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Endnotes

[1]*Getman v. Southwest Sec. Inc.*, 2003-SOX-8 at 1 (Feb. 2, 2004); *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 at 1 (Nov. 14, 2003). *See also Flood v. Cedant Corp.*, 2004-SOX-16 (Feb. 23, 2004). "The recently enacted Sarbanes-Oxley Act of 2002 prohibits companies from discriminating against employees because of any lawful act by the employee to assist in an investigation of securities fraud." *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002) (ruling that employees' confidentiality agreements with their employers do not preclude or limit the employees' ability to discuss securities fraud issues).

[2]By statute, § 806 complaints must be filed with the secretary of labor within 90 days of the alleged violation. 18 U.S.C. § 1514A(b)(1). The Sarbanes-Oxley Act's implementing regulations, however, provide that such complaints should be filed with the OSHA area director responsible for enforcement activities in the geographical area where the complainant employee resides or was employed or with any OSHA officer or employee. 29 C.F.R. § 1980.103(c). Though more appropriately submitted to OSHA, an employee's filing of a § 806 complaint directly with the secretary of labor will nonetheless satisfy the act's filing requirements, despite the ostensible procedural impropriety. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 804 (N.D. Tex. 2003). *See also Harvey v. Home Depot USA Inc.*, ARB Case No. 04-114 slip op. at 13 (ARB, June 2, 2006).

[3]18 U.S.C. § 1514A(b)(2)(D) ("An action … shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d). ("Time for filing. Within 90 days after an alleged violation of the [a]ct occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.")

[4]*Murray v. TXU Corp.* at 802.

[5]2003-SOX-22 (Aug. 26, 2003). OSHA is charged with responsibility for investigating § 806 complaints. 29 C.F.R. § 1980.104.

[6]2004-SOX-16 (Feb. 23, 2004).

[7]18 U.S.C. § 1514A(b)(2)(D).

[8]29 C.F.R. § 1980.103.

[9]*Id.*

[10]69 Fed. Reg. 163 at 52106 (Aug. 24, 2004).

[11]*See Lawrence v. AT&T Labs*, 2004-SOX-65 slip op. at 5–6 (ALJ, Sept. 9, 2004).

[12]*Id.* at 6.

[13]*Id.*; *see also Guy v. SBC Global Servs.*, 2005-SOX-113 slip op. at 3 (ALJ, Dec. 14, 2005).

[14]*Richardson v. JPMorgan Chase & Co.*, 2006-SOX-82 slip op. at 4 (ALJ, July 7, 2006).

[15]*Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-022 slip op. at 5 (ARB, Dec. 30, 2005).

[16]*Id.*

[17]*Id.* at 6.

[18]*Harvey* at 16–17 (citing *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18–20 (3d Cir. 1981)); *Moldauer*, ARB Case No. 04-022 slip op. at 5.

[19]*Harvey* at 17; *Carter v. Champion Bus Lines Inc.*, ARB Case No. 05-076 slip op. at 7 (Sept. 29, 2006).

[20]*Carter*, ARB Case No. 05-076.

[21]*Id.* at 3.

[22]*Id.* at 8.

[23]*Id.*

[24]*Harvey* at 10; *see also* 29 C.F.R. § 1980.103(d).

[25]If an employee fails to file a complaint with the Department of Labor within 90 days, beyond precluding administrative relief, federal district courts are without jurisdiction over any such suit filed under § 806. *Murray v. TXU Corp.* 799, 802.