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Minimizing the Risk of Whistleblower Retaliation Claims

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In the four years since Congress enacted significant new protections for whistleblowers in the airline industry, more than 210 claims have been filed, many of which have resulted in significant recoveries in favor of employees. More recently, air carriers have become subject to the whistleblower protection provisions contained in the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which imposes criminal penalties for retaliation against whistleblowers. In light of these developments, air carriers should become familiar with whistleblower protections and should take measures to minimize their exposure to retaliation claims.

Overview of Whistleblower Protections for Employees in the Airline Industry

Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) provides that employees who believe they have suffered adverse action for reporting air safety violations can file a complaint with the Occupational Safety and Health Administration (OSHA) within 90 days of the date on which the discriminatory decision has been made and communicated to the complainant. A prevailing plaintiff is entitled to reinstatement, back pay, compensatory damages, and attorney's fees and costs.

Covered Employers

AIR-21's prohibition against retaliation applies broadly. It applies to air carriers, which includes any "citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation," 49 U.S.C. § 40102(a)(2), and to contractors and subcontractors of air carriers. A "contractor" is defined as any "company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e).

Protected Conduct

Employees who report air safety violations in the following manners are engaging in conduct which is protected by AIR-21: (1) providing information to the employer or the federal government relating to any violation or alleged violation of any federal air safety statute or regulation; (2) filing a proceeding relating to a violation or alleged violation of air safety rules; (3) testifying in such a proceeding; or (4) assisting or participating in such a proceeding. Generally, it is not difficult for a complainant to establish that he or she engaged in protected conduct. For example, Department of Labor (DOL) decisions have held that the following activities are protected: (1) alerting the Federal Aviation Administration (FAA) that an aircraft was being flown past its maintenance threshold; (2) reporting to a supervisor that some aircraft parts in warehouse bins did not contain the FAA-required serviceable tag; and (3) alleging to management that maintenance records were falsified.

Adverse Action

Almost any action taken by an employer which has a negative effect on the employee's terms, conditions, or privileges of employment amounts to adverse action. This includes intimidating, threatening, restraining, coercing, blacklisting, or discharging an employee. DOL authority construing similar whistleblower protection statutes indicates that adverse action also includes demotion, reduction in salary, failure to hire, harassment, transfer to a less desirable position, and even a change of office location.

OSHA Investigation

Within 60 days of the filing of a complaint, OSHA must investigate the complaint and determine whether the employer violated § 519. The employer has 20 days to submit to OSHA a response to the complaint. If OSHA finds that the complaint has merit, the secretary will issue a preliminary order requiring the employer to: (1) take affirmative action to abate the violation; (2) reinstate the plaintiff to his or her former position; (3) provide the plaintiff with backpay; and (4) provide compensatory damages to the plaintiff.

The employer can appeal the preliminary order by requesting a hearing before an administrative law judge (ALJ) within 30 days of the issuance of the preliminary order. Requesting a hearing will stay enforcement of the preliminary order, except for reinstatement of the plaintiff. Therefore, where OSHA finds that an air carrier violated § 519, the air carrier will be placed in the difficult position of rehiring the plaintiff while he or she pursues a lawsuit against the carrier.

Hearing Before an ALJ

Hearings are held before DOL ALJs and are conducted *de novo*, *i.e.*, the ALJ

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disregards OSHA's findings. The rules of evidence applied in hearings before ALJs are somewhat more liberal than are the federal rules of evidence. ALJs apply a broad scope of relevance, and hearsay evidence is not automatically excluded. In addition to reinstatement, backpay, and compensatory damages, a prevailing party is entitled to attorney's fees and costs.

Within 60 days of the issuance of the ALJ's decision, either party can file a petition for review before the DOL's Administrative Review Board (ARB). The ARB is authorized to award the same type of relief that an ALJ may award. Either party may appeal the ARB's decision by filing a petition for review with the United States Court of Appeals in which the alleged violation occurred or in which the plaintiff resided on the date of the alleged violation.

Settlements

The DOL will not automatically dismiss a claim that has been settled by the parties. Instead, the settlement will be reviewed to ensure that it is fair, adequate, and reasonable. The DOL is concerned primarily with "gag provisions," *i.e.* provisions that might hinder a plaintiff from raising concerns.

FAA Enforcement

Section 519 of AIR-21 is administered by both the DOL and the FAA. In addition to the remedies that the DOL is authorized to provide to a prevailing plaintiff, a carrier who violates § 519 of AIR-21 may also be subject to an FAA civil penalty. When a complaint is filed under AIR-21, OSHA will provide the FAA with a copy of the complaint and the FAA will investigate safety issues related to the complaint. A memorandum of understanding between the FAA and the DOL provides that the two agencies will share all information they obtain relating to complaints of discrimination and will keep each other informed of the status of any administrative or judicial proceeding associated with the complaint. In sum, retaliation against a whistleblower can result not only in a lawsuit before the DOL, but also in an investigation by the FAA.

Whistleblower Protection Provisions of Sarbanes-Oxley

In addition to the whistleblower protection provisions of AIR-21, many carriers are subject to the whistleblower protection provisions in Sarbanes-Oxley. Section 806 of Sarbanes-Oxley creates a new federal civil right of action on behalf of any employee of a publicly traded company who is subject to discrimination in retaliation for reporting corporate fraud or accounting abuses. A prevailing plaintiff is entitled to substantial remedies, including back pay with interest, compensatory damages, special reinstatement and attorney's fees and litigation costs. Since its enactment, more than 200 retaliation claims have been filed under Sarbanes-Oxley. This civil protection is available to employees of publicly traded air carriers.

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In contrast to the civil remedies created by § 806, the criminal provisions of § 1107 are not limited to the actions of publicly traded companies, nor are they restricted in scope to matters involving corporate fraud or accounting abuses. Section 1107 of Sarbanes-Oxley imposes criminal penalties on any individual who "knowingly, with the intent to retaliate, takes any 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." The penalties include a fine and/or imprisonment for up to 10 years. These criminal penalties could be imposed in addition to any recovery under AIR-21.

Avoiding Retaliation Claims

At a time when air carriers are already confronted with myriad regulatory and economic challenges, carriers can ill afford whistleblower claims. Due to the low burden for establishing a *prima facie* case under AIR-21 and the broad relief afforded by the statute, including reinstatement and attorney's fees, AIR-21 provides a strong incentive for employees to challenge unfavorable personnel actions. Moreover, in the current post-Enron climate, whistleblower claims generate increased negative publicity and invite regulatory scrutiny. The following are some steps carriers can take to avoid retaliation claims:

Establish an Employee Concerns Program or Ombudsperson Program. Establishing a forum in which employees can raise concerns and have assurance that their concerns will be investigated is an effective means of resolving an employee's grievance before the employee brings his or her concern to a regulatory agency or files a complaint. In addition, an employee concerns program or ombudsperson program can

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help alert management of alleged violations early on, thereby providing an opportunity to intervene and prevent further damage. To be successful, such a program must be perceived by employees as credible. Accordingly, the ombudsperson or employee concerns manager should promptly investigate concerns and should keep the concerned employee apprised of the status and results of the investigation.

Preferably, the ombudsperson or employee concerns manager should report directly to senior management. This ensures adequate independence and strengthens the credibility of the program, thereby increasing the likelihood that employees will raise their concerns internally before they raise them with regulatory agencies or the media. In addition, the program may provide options for employees to raise concerns anonymously. If an investigation substantiates an employee's concern, the company should take prompt correction action, which in some cases may mitigate a civil penalty resulting from enforcement action.

Train Managers and Supervisors.

Managers and supervisors should be trained on how to handle employee concerns and how to instill a corporate culture in which employees raise concerns without fear of reprisal.

Take Disciplinary Action Against Those Who Engage in Retaliation.

All employees should be put on notice (*e.g.*, through training and the employee handbook) that, if they harass or discriminate against another employee for raising a concern, they will be subject to disciplinary action.

Document Performance Issues.

AIR-21 provides that relief may not be awarded if the employer demonstrates by "clear and convincing" evidence that the employer would have taken the same unfavorable personnel action in the absence of the plaintiff's protected conduct. To meet this "clear and convincing" standard, it is critical to have thorough, unambiguous evidence demonstrating that the same unfavorable personnel action would have been taken in the absence of the plaintiff's protected conduct. Accordingly, managers should thoroughly document performance issues on a routine basis.

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Promptly Investigate Claims of Retaliation.

The regulations implementing § 519 provide that OSHA shall not conduct an investigation where the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the plaintiff's protected behavior or conduct, notwithstanding the *prima facie* showing of the complainant. In order to be in a position to present strong evidence to OSHA to rebut the plaintiff's allegations, management should investigate allegations of retaliation promptly.

Manage Contractors. The DOL construes employee status broadly. Therefore, an employee of a contractor can sometimes bring a retaliation claim against both the contractor (his or her direct employer) and the carrier. While carriers should avoid managing contractors in a manner that could give rise to co-employment liability, they should also take measures to ensure that their contractors maintain a work environment in which workers feel comfortable raising safety concerns. These measures include: (1) requiring contractors to train their managers concerning whistleblower protections; (2) requiring contractors to investigate claims of retaliation; and (3) requiring contractors to adopt a policy prohibiting retaliation.

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