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Six Steps to Limiting Sarbanes-Oxley Whistleblower Liability

Lora Bentley spoke with attorney **Jason Zuckerman**, who represents whistleblowers under the Sarbanes-Oxley Act and other whistleblower protection statutes before federal administrative agencies and courts.

Bentley: From what we've seen, the number of Sarbanes-Oxley whistleblower cases is increasing. Is that the case? Why?
Zuckerman: Four and a half years after Congress enacted Sarbox, employees have become more aware of their right to blow the whistle on fraud and securities law violations without suffering retaliation. There has also been a radical transformation of the popular image of whistleblowers. Prior to the corporate scandals that prompted Congress to enact Sarbox, whistleblowers were generally viewed as disloyal tattletales. Due to the critical role of whistleblowers such as Cynthia Cooper of Worldcom and Sherron Watkins of Enron in exposing corporate fraud, the term "whistleblower" is no longer pejorative, and instead connotes integrity and a willingness to heroically stand up for what is right.

Another reason that Sarbox cases may be increasing is that the burden of proof under Sarbox is favorable to employees. If an employee can demonstrate by a preponderance of the evidence that her protected disclosure was a contributing factor (not the sole factor) in the employer's decision to take an adverse employment action (termination, suspension, harassment, blacklisting, etc), the employer must then demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of complainant's protected conduct.

Bentley: Such cases are often viewed from the perspective or the employee claiming protection under Sarbox. What does a whistleblower case mean for employers? Who is held responsible - the supervisor or the corporation as a whole?
Zuckerman: Sarbox whistleblower cases are more challenging for employers than a typical employment discrimination or harassment claim. Judges typically permit very broad discovery concerning the whistleblower's disclosures both to assess the whistleblower's reasonable belief in the validity of the disclosures and the employer's motive to retaliate against the employee for making such disclosures. In essence, there is a case within a case, and the employee is entitled to obtain documents and depose witnesses concerning the misconduct about which she raised concerns to management. This can sometimes put employers in the difficult position of having to admit to violations of securities laws or other unlawful conduct. Whistleblower cases can also be challenging for employers because they can result in negative publicity and investigations by regulatory agencies.

Under Section 806 (the civil retaliation provision), an employee can bring a retaliation claim against both the employer and the supervisor or manager who retaliated against the employee. If an employee prevails in a civil Sarbox retaliation lawsuit, the employee is entitled to reinstatement, back pay (lost wages and benefits), and special damages, including attorney fees and costs. Oftentimes, it is difficult for a whistleblower to be reinstated, so judges typically award front pay in lieu of reinstatement.
Section 1107, the criminal prohibition against retaliation, applies to any person who interferes with the lawful employment or livelihood of any person in retaliation for the person providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense. ... [P]enalties include a fine and/or imprisonment for up to 10 years. This provision is extraordinary because a manager can literally go to prison for retaliating against a whistleblower. It sends a strong signal to employers about the importance of avoiding retaliation against whistleblowers.

Bentley: Generally, what would you recommend employers do to avoid or limit Sarbox whistleblower liability?
Zuckerman: I have six recommendations. First, conduct prompt and thorough investigations of employee concerns regarding fraud or securities law violations, and take appropriate corrective actions. In my experience litigating whistleblower retaliation cases, sham investigations designed to cover up wrongdoing or to "shoot the messenger" damage the employer and strengthen the whistleblower's case. Concerned employees who suspect that their concerns are not being taken seriously will go outside the organization and report misconduct to someone who they believe will take the concerns seriously, such as the media, a regulatory agency, or law enforcement. Accordingly, it is critical to conduct an independent, credible investigation, and if the concern prompting the investigation was not raised anonymously, the concerned employee should be consulted during the investigation and informed of the results.

Second, adopt a policy prohibiting retaliation. Third, train managers and supervisors about the rights of employees to blow the whistle without fear of reprisal and about the criminal prohibition against retaliation. Fourth, provide several options for employees to raise concerns, including the option of raising a concern anonymously. Fifth, take disciplinary action against employees who violate the company's policy prohibiting retaliation.

Sixth, senior management should continually strive to foster a corporate culture of ethics and compliance, which entails more than just adopting a code of ethics. Enron had a code of ethics, but management obviously ignored it. Unfortunately, four and a half years after Sarbox was enacted, some publicly traded companies still just "don't get it." For example, several companies recently disclosed improper backdating of options, and some companies are still restating earnings due to accounting improprieties. Fortunately, it is becoming more apparent to corporate leaders that an ethical corporate culture makes business sense. Creating such a culture, however, takes sustained efforts, including training and workplace assessments.