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Timelines For Sarbanes-Oxley Whistleblower Enforcement: Does The Administrative Procedure Arithmetic Work?

By Allen B. Roberts

In crisp detail, the Sarbanes-Oxley Act[1] arrays a path from start to finish for processing civil whistleblower complaints alleging retaliatory unfavorable personnel action. As a practical matter, an employer named in a Sarbanes-Oxley whistleblower complaint has no useful alternative to defending against the allegations as fully as possible. Persuasive and timely response to a complaint is necessary to avoid an adverse determination and an immediately effective preliminary order of reinstatement in favor of a complainant.[2]

An employer charged with such violations could arguably take comfort in the elaborate and quick-paced procedural scheme intended to yield a conclusive administrative resolution and avert a full-blown federal court litigation on the merits. Nevertheless, the adoption of ambitious timelines for completion of the administrative process means that many will incur substantial expense and diversion of resources only to start over again in a *de novo* litigation after their full participation in the administrative forum. That is because a Sarbanes-Oxley whistleblower complainant has a general right to start a lawsuit in a United States district court 180 days after the filing of an administrative complaint if the administrative process has not concluded.[3]

With some experience since the May 28, 2003 adoption of a Department of Labor rule for the administrative processing of Sarbanes-Oxley whistleblower complaints,[4] it may be appropriate to assess whether the promise of administrative resolution is overly optimistic.

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The Scope Of Sarbanes-Oxley Whistleblower Complaints

Sarbanes-Oxley provides certain whistleblower protections for employees of companies having publicly traded debt or equity securities who suffer unfavorable personnel actions for making disclosures of unlawful activity relating to mail frauds and swindles, fraud by wire, radio or television, bank fraud or securities fraud or relating to violation of any rule or regulation of the Securities and Exchange Commission ("SEC") or any provision of federal law relating to fraud against shareholders.[5] To be protected, the employee must act on a reasonable belief that there has been a prohibited violation and make the disclosure to one of three classes of recipients: (i) a federal regulatory or law enforcement agency, (ii) any member of Congress or any committee of Congress or (iii) a person with supervisory authority over the employee.[6] An employee will be protected also for the activity of filing, causing to be filed or testifying, participating in or otherwise assisting in a proceeding filed or about to be filed regarding any conduct within the specified classes of frauds or unlawful activity when the employer has "any knowledge" of the proceeding.[7]

The Department Of Labor's Interim Final Rule

Responsive to the statutory procedure for administrative resolution of civil whistleblower complaints and provision for a *de novo* lawsuit if the administrative process has not concluded within 180 days from the filing of a complaint, the Department of Labor published its Interim Final Rule on May 28, 2003.

To be timely, a complaint is subject to a short statute of limitations – 90 days after the date on which the alleged violation occurred.[8]

The administrative process laid out for the Department of Labor is rigorous in its tasks and pace. Within 60 days after receipt of a Sarbanes-Oxley complaint, the Secretary of Labor is charged with responsibility to:

(i) afford the person named in the complaint an opportunity to submit a written response to the complaint and an opportunity to meet with a representative of the Secretary of Labor to present statements from witnesses;

(ii) conduct an investigation;

(iii) determine whether there is "reasonable cause;" and

(iv) issue findings accompanied by a preliminary order providing for relief.[9]

Administrative enforcement is delegated to the Occupational Safety and Health Administration ("OSHA").[10] Upon receipt of a complaint in the investigating office, OSHA is to notify the person(s) named in the complaint of the filing of the complaint, its allegations and the substance of evidence supporting it.[11] No investigation is to proceed unless the complaint, supplemented as appropriate by interviews of the complainant, makes a *prima facie* showing of facts and evidence giving rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected behavior or conduct was a contributing fac-

tor in the unfavorable personnel action alleged.[12] However, even if there is a *prima facie* showing, an investigation is not to be conducted if the named person produces within 20 days of receipt of notice of the filing of the complaint affidavits or documents demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.[13] During this same 20-day period, the named person may request a meeting to present its position.[14] The administrative investigation will continue if the named person fails to make the required demonstration by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior.[15]

The filtering of a complaint to determine the depth of inquiry is laudable, but it consumes precious time. A significant portion of the 60-day period allotted for administrative investigation is likely to be consumed by the initial activity of administrative receipt and processing of the complaint, the named person's receipt of the complaint and filing of its 20-day response and OSHA's assessment of that position. The investigation will continue if the Assistant Secretary for Occupational Safety and Health ("Assistant Secretary") determines from those initial submissions that there is reasonable cause to believe there has been a violation.[16] In that event, the named person is to be provided with relevant evidence supporting the allegations and an opportunity to submit within 10 business days a written response and to meet with the investigators and present witnesses and legal and factual arguments.[17]

Whatever the outcome following the administrative investigation, a complainant or named person desiring review (or a named person seeking an award of attorney's fees for a complaint that is frivolous or brought in bad faith) may file objections and request a hearing within 30 days after receipt of the Assistant Secretary's findings and preliminary order.[18] The entitlement to a hearing before an administrative law judge is unqualified. A complainant may obtain a hearing before an administrative law judge as a matter of right — notwithstanding a determination dismissing the complaint.[19]

By the statutory and administrative scheme, at least 90 days of the 180-day administrative process are likely to have elapsed from the filing of the complaint to a complainant's request for a hearing *de novo*. The hearing is then to commence "expeditiously," except upon a showing of good cause or unless otherwise agreed to by the parties.[20] There is the further possibility that time will be consumed by discovery. The administrative law judge is charged with responsibility to exercise discretion with respect to pre-hearing discovery requests and to limit discovery in order to expedite the hearing.[21] With such preliminary matters concluded, the administrative law judge is then to hear the case on the merits *de novo*, without review of the Assistant Secretary's investigation or determination.[22] Following the hearing the administrative law judge is to issue a decision containing appropriate findings, conclusions and an order providing for any appropriate remedy.[23]

The decision of an administrative law judge will become the final order of the Secretary of Labor unless a petition for review is timely filed with the Administrative Review Board within 10 business days after the date of the decision of the administrative law judge.[24] Unlike the right to a hearing before the administrative law judge, further administrative review is discretionary. The Administrative Review Board has 30 days from the filing of a petition for review to determine whether it will accept a case for review.[25] The Administrative Review Board may specify terms under which any briefs are to be filed.[26] Applying a "substantial evidence" standard,[27] the Administrative Review Board is to issue its final decision within 120 days after the conclusion of the hearing before the administrative law judge.[28]

If the Administrative Review Board has not issued a final decision within 180 days of the filing of the whistleblower's administrative complaint and there is no showing that the delay is due to the whistleblower's bad faith, the whistleblower may bring an action at law or in equity in a United States district court and obtain *de novo* review.[29] However, the Interim Final Rule may extend the 180-day period with a requirement that a complainant file with the administrative law judge or the Administrative Review Board (depending upon where the proceeding is pending) a notice of intention to start a lawsuit in federal court 15 days in advance of any such filing.[30]

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Sarbanes-Oxley creates a detailed administrative process to resolve civil whistleblower complaints and serve as a jurisdictional prerequisite to federal court litigation. With the filing of an administrative complaint, a race against the clock begins, with potentially conflicting agendas in managing the process. A named employer, required to respond to the administrative complaint, is likely to prefer final resolution by completion of the administrative process. A complainant may find advantage in participation, knowing that whatever the outcome, *de novo* litigation is available once 180 days have passed following the initial filing. For the complainant, the administrative process may be preferred for its efficiency and available preliminary relief. But complainants and their attorneys are likely to know, also, that the administrative proceeding may be merely a dress rehearsal for a lawsuit that may be filed once 180 days have elapsed — and even an unhelpful administrative record will not be a barrier to the litigation.

Notwithstanding employer cooperation and diligence by the OSHA investigator, administrative law judge and Administrative Review Board, cumulatively the sequence of necessary activities may be so time consuming as to foreclose completion within 180 days. There is an arithmetic reality that litigation may become an inevitable byproduct of an administrative process that could not be squeezed into the Sarbanes-Oxley timeframe.

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[1] *Corporate and Criminal Fraud Accountability Act of 2002, Title VIII, Pub. L. No. 107-204, 116 Stat. 745 (2002).*
[2] *See 29 C.F.R. § 1980.105(c); 29 C.F.R. §1980.106(b)(1); 29 C.F.R. § 1980.109(c); 29 C.F.R.§ 1980.110(b).*
[3] *18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. §1980.114(a).*
[4] *Procedures for Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Final Rule. 68 Fed. Reg. 31859, May 28, 2003.*
[5] *18 U.S.C. § 1514A(a).*
[6] *18 U.S.C. § 1514A(a)(1).*
[7] *18 U.S.C. § 1514A(a)(2).*
[8] *49 U.S.C. § 42121(b)(1); 29 C.F.R. §1980.103(d).*
[9] *49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. §1980.105.*
[10] *29 C.F.R. § 1980.103(c).*
[11] *29 C.F.R. § 1980.104(a).*
[12] *29 C.F.R. § 1980.104(b)(2).*
[13] *29 C.F.R. § 1980.104(c).*
[14] *29 C.F.R. § 1980.104(c).*
[15] *29 C.F.R. § 1980.104(d).*
[16] *29 C.F.R. § 1980.104(e).*
[17] *29 C.F.R. § 1980.104(e).*
[18] *29 C.F.R. § 1980.106(a).*
[19] *29 C.F.R. § 1980.107(b).*
[20] *29 C.F.R. § 1980.107(b).*
[21] *29 C.F.R. § 1980.107(b).*
[22] *29 C.F.R. § 1980.109(a).*
[23] *29 C.F.R. § 1980.109(a).*
[24] *29 C.F.R. § 1980.110(a).*
[25] *29 C.F.R. § 1980.110(b).*
[26] *29 C.F.R. § 1980.110(b).*
[27] *29 C.F.R. § 1980.110(b).*
[28] *29 C.F.R. § 1980.110(c); 49 U.S.C. §42121(b)(3)(A).*
[29] *18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. §1980.114(a).*
[30] *29 C.F.R. § 1980.114(b). This 15-day notice appears in the Interim Final Rule without a counterpart in the statute.*